This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

TFA
D
1916
v. 5

UNITED STATES COMPILED STATUTES

ANNOTATED

1916

EMBRACING THE STATUTES OF THE UNITED STATES OF A GENERAL AND PERMANENT NATURE IN FORCE AT THE CLOSE OF THE FIRST SESSION OF THE 64TH CONGRESS

AND

DECISIONS CONSTRUING AND APPLYING SAME TO APRIL 1, 1916

INCORPORATING UNDER THE HEADINGS OF THE REVISED STATUTES THE SUBSEQUENT LAWS, TOGETHER WITH EXPLANATORY AND HISTORICAL NOTES

TEXT OF THE STATUTES COMPILED BY

JOHN A. MALLORY

ASSISTED BY EDITORIAL STAFF

ANNOTATIONS BY MEMBERS OF THE PUBLISHERS' EDITORIAL STAFF

IN 12 VOLUMES

VOLUME 5

ST. PAUL

WEST PUBLISHING CO.

1916

234593

COPYRIGHT, 1916
BY
WEST PUBLISHING COMPANY

(5 U.S.COMP.'16)

STANFORD LIBRARY

TABLE OF TITLES AND CHAPTERS

CONTAINED IN THIS VOLUME

TITLE XXVIII

INDIANS

Chap.		Sec.
1.	Officers of Indian affairs, their duties and compensation	3960
2.	Performance of engagements between the United States and Indians	4034
3.	Government and protection of Indians	4095
4.	Government of Indian country	4127
4A.	Education of Indians	4161
4B.	Rights of way through Indian lands	4181
4C.	Allotment of Indian lands	4195

TITLE XXIX

IMMIGRATION

A.	Regulation and restriction of immigration in general	4241
B.	Exclusion of Chinese	4290
C.	The cooly-trade	4342

TITLE XXX

NATURALIZATION 4351

TITLE XXXI

THE CENSUS 4385

TITLE XXXII

THE PUBLIC LANDS

1.	Surveyors and deputy surveyors	4435
2.	Registers and receivers	4469
3.	Land-districts—Provisions respecting particular districts	4504
3A.	Withdrawal from settlement, location, sale, or entry	4523
4.	Pre-emptions	——
5.	Homesteads	4530
6.	Mineral lands and mining resources	4613
6A.	Timber and stone lands	4671
6B.	Desert and arid lands, and irrigation and reclamation	4674
7.	Sale and disposal of the public lands	4751
8.	Reservation and sale of town-sites on the public lands	4784
9.	Survey of the public lands	4803
10.	Bounty-lands	4826
10A.	Reservations and grants to states for public purposes	4860
10B.	Grants in aid of railroads and wagon roads	4882
10C.	Rights of way and other easements in public lands	4918
10D.	Grants of swamp and overflowed lands	4958
10E.	Drainage under state laws	4970
10F.	Protection of timber and depredations	4977
10G.	Unlawful inclosures or occupancy; obstructing settlement or transit	4997
10H.	Abandoned military reservations	5003
10I.	Ceded Indian reservations	5013
10J.	Public lands in Oklahoma	5020
10K.	Public lands in Alaska	5045
11.	Miscellaneous provisions relating to the public lands	5097

TITLE XXXII A

Sec.
THE NATIONAL FORESTS..... 5121

TITLE XXXII B

THE NATIONAL PARKS, RESERVATIONS, AND MONUMENTS..... 5188

TITLE XXXII C

THE NATIONAL MILITARY PARKS..... 5282

†

UNITED STATES COMPILED STATUTES ANNOTATED

1916

VOLUME 5

TITLE XXVIII

INDIANS

Chap.		Sec.
1.	Officers of Indian affairs; their duties and compensation	3980
2.	Performance of engagements between the United States and Indians	4034
3.	Government and protection of Indians	4095
4.	Government of Indian country	4127
4A.	Education of Indians	4161
4B.	Rights of way through Indian lands	4181
4C.	Allotment of Indian lands	4195

CHAPTER ONE

Officers of Indian Affairs; Their Duties and Compensation

Sec.

3980. Board of Indian commissioners.
3981. Employment of secretary authorized; payment of salary.
3982. Commissioners' duties.
3983. Power to investigate contracts.
3984. Appointment of Indian inspectors; term of office.
3985. Indian inspectors; number.
3986. Indian inspectors; two to be engineers skilled in irrigation work.
3987. Indian inspectors; six to be termed inspectors, in office of Secretary of Interior, and included in classified service.
3988. Indian inspectors; salary and expenses.
3989. Inspectors; powers and duties.
3990. Repeal in part of requirement that agencies be visited by inspectors.
3990a. Superintendent for Five Civilized Tribes; location of office; salary; authority and duties.
3991. Indian agents; appointment.
3992. Services of certain agents to be dispensed with.
3993. Duties of agent at Cherokee Agency, N. C., to be performed by superintendent of training school; office of agent abolished.
3994. Duties of Indian agency may be devolved on superintendent of Indian school; bond of superintendent; increase of pay.
3995. Indian agents; salary.
3996. Indian agents; repeal in part of provisions fixing compensation.
3997. Indian agents; appropriations for salaries not available when duties are performed by active officer of Army.
3998. Indian agents; term of office.
3999. Indian agents; bonds.
4000. Indian agents; duties.
4001. Indian agents to keep books of expenditures, etc.; reports of material not required; making false entry, etc., a misdemeanor; punishment thereof.
4002. Indian agents to account for all funds; liability under bonds.
4003. Discontinuance and transfer of agencies.
4004. Consolidation of agencies.
4005. Residence of Indian agents.
4006. Limitation on visits to Washington by agents for Indians in California.
4007. Detail of officers of Army to act as Indian agents.
4008. No compensation for extra services performed by agents and sub-agents.
4009. Indian agents authorized to take acknowledgments of deeds, etc., and administer oaths in investigations.
4010. Superintendents, etc., in charge of reservations, schools, etc., authorized to administer oath of office to employés.
4011. Appointment of sub-Indian agents.
4012. Limits of superintendencies, agencies, and sub-agencies.
4013. Special agents and commissioners; appointment.
4014. Interpreters to the agencies.
4014a. Interpreters; persons paid for other services not to be paid for interpreting.
4015. Preference to Indians for interpreters.
4016. When tribes may direct employment of blacksmiths, etc.
4017. Discontinuance of offices of agents, sub-agents, interpreters, etc.
4018. No person to hold two offices; leave of absence.
4019. Additional security from persons charged with disbursement, etc., of money, goods, etc.

Sec.
4020. New bonds of disbursing officers.
4021. Special bond of disbursing officer making large per capita payments to Indians.
4022. Compensation prescribed to be in full.
4023. Allowances for traveling expenses.
4024. Allowances for expenses of clerks, etc., detailed on special duty.
4025. Allowance of heat and light for employés' quarters.
4026. Persons employed in Indian affairs not to trade with the Indians.
4027. Special agents and other officers authorized to administer oaths.
4028. Farmers and stockmen to be employed to superintend farming and stock raising; additional farmers at Indian schools.
4029. Matrons to be employed to teach housekeeping, etc.
4030. Indians to be employed on reservations and about agencies.
4031. Indians to be employed in connection with agencies and Indian service.
4032. Limitation of expenditure for compensation of employés at agencies.
4033. Transfer of funds for payment of employés; detail of employés for other service.

§ 3980. (R. S. § 2039.) Board of Indian commissioners.

There shall be a board of Indian commissioners, composed of not more than ten persons, appointed by the President solely, from men eminent for intelligence and philanthropy, and who shall serve without pecuniary compensation.

Act April 10, 1869, c. 16, § 4, 16 Stat. 40. Act July 15, 1870, c. 296, § 3, 16 Stat. 360.

Notes of Decisions

Status of Indian nations or tribes.—See Const. art. 1, § 8, cl. 3, and notes thereunder.

Applicability of laws of Congress to Indians.—While Indians are not commonly understood to be embraced by laws of Congress, yet they may be and often are, and whether they are or not is a question of intent. (1897) 21 Op. Atty. Gen. 466.

Authority of President to make regulations.—The President may make such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs. Adams v. Freeman (Okl. 1897) 50 Pac. 135. See Ryan v. U. S. (1872) 8 Ct. Cl. 265, as to power of President.

(R. S. § 2040. Superseded.)

This section authorized the board of commissioners to appoint one of their own number as Secretary, and to designate his compensation, payable from any moneys appropriated for the expenses of the board. It was superseded by a provision for the employment of a Secretary, not a member of the board, of Act Aug. 24, 1912, c. 388, post, § 3981.

§ 3981. (Act Aug. 24, 1912, c. 388.) Employment of secretary authorized; payment of salary.

Hereafter the Board of Indian Commissioners is authorized to employ a secretary, not a member of said board, and pay his salary out of the appropriation herein made or which shall hereafter be made for said board. (37 Stat. 521.)

This was a provision of the Indian appropriation act for the fiscal year 1913, cited above.

Before this act, the board of commissioners was authorized to appoint one of their own number as Secretary, by R. S. § 2040.

(R. S. § 2041. Superseded.)

This section provided that the board of commissioners mentioned in R. S. § 2039, ante, § 3980, should supervise all expenditures of money appropriated for the benefit of Indians within the limits of the United States, and should inspect all goods purchased for Indians, in connection with the Commissioner of Indian Affairs, whose duty it should be to consult the commission in making purchases of such goods. Subsequent provisions relating to the duties of said commissioners were made by Act June 22, 1874, c. 389, § 2, 18 Stat. 176. All these provisions were superseded by those of Act May 17, 1882, c. 163, post, § 3982.

§ 3982. (Act May 17, 1882, c. 163, § 1.) Commissioners' duties.

Hereafter the commission shall only have power to visit and inspect agencies and other branches of the Indian service, and to in-

spect goods purchased for said service, and the Commissioner of Indian Affairs shall consult with the commission in the purchase of supplies. The commission shall report their doings to the Secretary of the Interior. (22 Stat. 70.)

This was a provision, accompanying an appropriation for expenses of the commission, in the Indian appropriation act for the fiscal year 1883, cited above.

This provision superseded R. S. § 2041, prescribing the duties of the commissioners, and authorizing them to supervise all expenditures of money appropriated for the benefit of Indians, as well as to inspect goods purchased, etc.

An inquiry into conditions in the Indian service, with a view to ascertaining any and all facts relating to the conduct and management of the Bureau of Indian Affairs, and of recommending such changes in the administration of Indian affairs as would promote the betterment of the service and the well-being of Indians, by commission to be known as the Joint Commission to Investigate Indian Affairs, to be composed of three Members of the Senate, and three Members of the House of Representatives, which was authorized to examine into the conduct and management of the Bureau of Indian Affairs and all its branches and agencies, their organization and administration, the findings, conclusions, and recommendations of such commission to be reported to Congress during the Sixty-Third Congress, was provided for by Act June 30, 1913, c. 4, § 1, 38 Stat. 81.

§ 3983. (R. S. § 2042.) Power to investigate contracts.

Any member of the board of Indian commissioners is empowered to investigate all contracts, expenditures, and accounts in connection with the Indian service, and shall have access to all books and papers relating thereto in any Government office; but the examination of vouchers and accounts by the executive committee of said board shall not be a prerequisite of payment.

Act May 29, 1872, c. 233, § 1, 17 Stat. 186.

Cited without definite application, Corralitos Co. v. U. S. (1900) 20 Sup. Ct. 941, 942, 178 U. S. 280, 44 L. Ed. 1069; Nesbitt v. U. S. (1902) 22 Sup. Ct. 805, 186 U. S. 153, 46 L. Ed. 1100.

§ 3984. (R. S. § 2043.) Appointment of Indian inspectors; term of office.

There shall be appointed by the President, by and with the advice and consent of the Senate, a sufficient number of Indian inspectors, [not exceeding five in number,] to perform the duties required of such inspectors by the provisions of this Title. Each inspector shall hold his office for four years, unless sooner removed by the President.

Act Feb. 14, 1873, c. 138, § 6, 17 Stat. 463.

The words of this section inclosed in brackets, "not exceeding five in number," were superseded by the reduction of the number to three, by a provision of Act March 3, 1875, c. 132, post, § 3985.

Subsequent appropriations provided for greater numbers, increasing to eight inspectors, for the particular year. The provision for the fiscal year 1906, requiring that two of them should be engineers, Act March 3, 1905, c. 1479, § 1, is set forth post, § 3986.

Thereafter appropriations were made in the Indian appropriation acts for eight inspectors until 1909, when the appropriation by Act March 3, 1909, c. 263, 35 Stat. 785, for the fiscal year 1910, was for the two, to be engineers, who were provided for by said Act March 3, 1905, c. 1479, § 1, post, § 3986. The six inspectors not required to be engineers were provided for in the office of the Secretary of the Interior, and were included in the classified service, by a provision of the legislative, executive, and judicial appropriation act for said fiscal year 1910, Act March 4, 1909, c. 297, § 1, post, § 3987. Appropriations for the six inspectors are continued in the similar subsequent acts. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat. A provision for two irrigation inspectors and seven irrigation superintendents, six of whom should be skilled irrigation engineers and one competent to pass upon water rights, was made by Act Aug. 1, 1914, c. 222, § 1, post, § 4125b, and for the fiscal year 1917 was made by Act May 18, 1916, c. 125, § 1, 39 Stat.

A provision authorizing the Secretary of the Interior to locate one Indian inspector in Indian Territory, who might, under his authority and direction, perform any duties required of said Secretary by law, relating to affairs therein, made by Act June 28, 1898, c. 517, § 27, 30 Stat. 504, was superseded

by the admission of the Territory of Oklahoma and Indian Territory to the Union as the State of Oklahoma, pursuant to Act June 16, 1906, c. 3335, 34 Stat. 267.

Notes of Decisions

Appointment of inspectors.—While inspectors were not appointed or designated in the manner indicated by statute, the approval by proper officials of their recommendations was a ratification of their appointment. (1882) 17 Op. Atty. Gen. 384.

Special duties and obligations of inspectors.—Though the general functions and duties of Indian inspectors do not include specifically the disbursement of public money, and these officers are not required by statute to give bond, yet the Secretary of the Interior may lawfully assign to them duties relating to business concerning the Indians other than and in addition to those prescribed whenever the exigencies of the public service require it. Where the particular duty thus assigned involves the receipt or disbursement of public money, it is competent for the Secretary to take a bond for the protection of the government against loss, although such bond may not be required by statute; and the bond would be valid and binding upon both principal and sureties if voluntarily given by the officer. (1882) 17 Op. Atty. Gen. 391.

Cited without definite application, Smith v. U. S. (1902) 37 Ct. Cl. 119.

§ 3985. (Act March 3, 1875, c. 132.) Indian inspectors; number.

After the commencement of the next fiscal year there shall be but three inspectors. (18 Stat. 422.)

This was part of a proviso annexed to an appropriation for pay of three Indian inspectors in the Indian appropriation act for the fiscal year 1876, cited above.

See notes to R. S. § 2043, ante, § 3984.

§ 3986. (Act March 3, 1905, c. 1479, § 1.) Indian inspectors; two to be engineers skilled in irrigation work.

For pay of eight Indian inspectors, two of whom shall be engineers, one to be designated as chief, competent in the location, construction, and maintenance of irrigation works, at two thousand five hundred dollars per annum each, except the chief engineer, who shall receive three thousand five hundred dollars, * * Provided, that the requirement of two engineers skilled in irrigation shall become immediately operative. (33 Stat. 1049.)

These were provisions of the Indian appropriation act for the fiscal year 1906, cited above.

See notes to R. S. § 2043, ante, § 3984.

§ 3987. (Act March 4, 1909, c. 297, § 1.) Indian inspectors; six to be termed inspectors, in office of Secretary of Interior, and included in classified service.

Six Indian inspectors, not required to be engineers, now employed and appropriated for in the Indian Department, at two thousand five hundred dollars each, and said Indian inspectors shall hereafter be termed inspectors, and shall be included in the classified service. (35 Stat. 887.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1910, cited above.

See notes to R. S. § 2043, ante, § 3984.

§ 3988. (R. S. § 2044.) Indian inspectors; salary and expenses.

Each inspector shall receive an annual salary of three thousand dollars and his necessary traveling expenses, not exceeding ten cents a mile for actual travel while in the discharge of his duty, a statement of which expenses as to each inspector shall accompany the annual report of the Secretary of the Interior.

Act Feb. 14, 1873, c. 138, § 6, 17 Stat. 463.

Provisions for salaries and expenses of inspectors, differing as to amount or rate from those of this section, were made in subsequent appropriation acts. See acts referred to in notes to R. S. § 2043, ante, § 3984.

Notes of Decisions

Salary of inspectors.—Indian inspectors appointed under appropriation acts and their successors are entitled only to the salary therein named. Smith v. U. S. (1902) 37 Ct. Cl. 119.

§ 3989. (R. S. § 2045.) Inspectors; powers and duties.

Each Indian [superintendency and] agency shall be visited and examined [as often as twice a year] by one or more of the inspectors. Such examination shall extend to a full investigation of all matters pertaining to the business of the [superintendency or] agency, including an examination of accounts, the manner of expending money, the number of Indians provided for, contracts of all kinds connected with the business, the condition of the Indians, their advancement in civilization, the extent of the reservations, and what use is made of the lands set apart for that purpose, and, generally, all matters pertaining to the Indian service. For the purpose of making such investigations, each inspector shall have power to examine all books, papers, and vouchers, to administer oaths, and to examine on oath all officers and persons employed in the [superintendency or] agency, and all such other persons as he may deem necessary or proper. The inspectors, or any of them, shall have power to suspend any [superintendent or] agent or employé, and to designate some person in his place temporarily, subject to the approval of the President, making immediate report of such suspension and designation; and upon the conclusion of each examination a report shall be forwarded to the President without delay. The inspectors, in the discharge of their duties, jointly and individually, shall have power, by proper legal proceedings, which it shall be the duty of the district attorney of the United States for the appropriate district duly to effectuate, to enforce the laws, and to prevent the violation of law in the administration of affairs in the several agencies [and superintendencies]. So far as practicable, the examinations of the agencies [and superintendencies] shall be made alternately by different inspectors, so that the same agency [or superintendency] may not be examined twice in succession by the same inspector or inspectors.

Act Feb. 14, 1873, c. 138, § 6, 17 Stat. 463.

The words of this section inclosed in brackets, "superintendency and," and other words making the provisions of the section applicable to superintendents and superintendencies, have become inoperative; no appropriation for any superintendent of Indian affairs having been made since the provisions of Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

The further words of this section inclosed in brackets, "as often as twice a year," were superseded by a repealing provision of Act March 3, 1875, c. 132, § 1, post, § 3990.

Notes of Decisions

Abolishing Indian superintendencies.—Construction of Act Feb. 18, 1873, § 6, abolishing Indian superintendencies. U. S. v. Wirt (D. C. 1874) Fed. Cas. No. 16,745.

Bond of Indian inspectors.—Though the general functions and duties of Indian inspectors defined in this section do not include specifically the disbursement of public money, and they are not required by statute to give bond, the Secretary of the Interior may assign them additional duties, including the receipt or disbursement of public money or the custody of public property, and the Secretary may take bond to protect the United States against loss. (1882) 17 Op. Atty. Gen. 391.

Power to suspend Indian agent.—An Indian agent may, at any time, be suspended, and the place temporarily filled in the mode there provided. The power given by this section is not controlled by the fact that the Senate is in session. (1877) 15 Op. Atty. Gen. 405.

Liabilities of officers for torts of Indians.—The Indian superintendent is not personally liable for the torts of the Indians unless he has directed or sanctioned their acts. Huebschman v. Baker (1859) 7 Wis. 542.

Duties and liabilities of Indian inspectors.—See § 3984 and notes thereunder.

The secretary of the interior and his subordinates, the Indian inspector and Indian agent, may lawfully close the business of noncitizens of the Creek nation who refuse to pay their permit taxes fixed by its law. Buster v. Wright (1905) 135 Fed. 947, 957, 68 C. C. A. 505.

§ 3990. (Act March 3, 1875, c. 132, § 1.) Repeal in part of requirement that agencies be visited by inspectors.

The provision of law requiring that each agency shall be visited and examined by one or more of the inspectors at least twice in each year is hereby repealed. (18 Stat. 422.)

This was a proviso annexed to an appropriation for pay of Indian inspectors in the Indian appropriation act for the fiscal year 1876, cited above.

§ 3990a. (Act Aug. 1, 1914, c. 222, § 17.) Superintendent for Five Civilized Tribes; location of office; salary; authority and duties.

That, effective September first, nineteen hundred and fourteen, the offices of the Commissioner of the Five Civilized Tribes and superintendent of Union Agency, in Oklahoma, be, and the same are hereby, abolished and in lieu thereof there shall be appointed by the President, by and with the advice and consent of the Senate, a superintendent for the Five Civilized Tribes, with his office located in the State of Oklahoma, at a salary of $5,000 per annum, and said superintendent shall exercise the authority and perform the duties now exercised by the Commissioner to the Five Civilized Tribes and the superintendent of the Union Agency, with authority to reorganize the department and to eliminate all unnecessary clerks, subject to the approval of the Secretary of the Interior. 38 Stat. 598.

This was a provision of the Indian appropriation act for the fiscal year 1915, cited above.

(R. S. §§ 2046–2051. Obsolete.)

These sections authorized the appointment of superintendents of Indian affairs, prescribed their numbers, salaries, term of office, and duties, and provided for the employment by them of temporary clerks. These provisions have become inoperative, no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 3991. (R. S. § 2052.) Indian agents; appointment.

The President is authorized to appoint from time to time, by and with the advice and consent of the senate, [the following] Indian agents:

* *

Act Feb. 14, 1873, c. 138, § 1, 17 Stat. 437.

The words of this section inclosed in brackets, "the following," and the further provisions, omitted here, enumerating the agents authorized to be appointed for specified tribes, and fixing their salaries, were practically superseded by the appropriations for the then current fiscal year and subsequent years, which provided for such agents in numbers and at salaries different from those authorized by this section, varying from year to year, and the number diminishing greatly in the recent appropriation acts; the duties of the office, in many cases, having been devolved upon other offices, pursuant to a provision of Act March 1, 1907, c. 2285, post, § 3994.

Notes of Decisions

Indian agents as officers.—Indian agents are officers of the United States. U. S. v. Mullin (D. C. 1895) 71 Fed. 682.

Salary of Indian agents.—See R. S. § 2055, as amended, post, § 3995, and notes thereunder.

The provision of this section fixing the salary of an Indian agent as enacted in the Revised Statutes is repealed by subsequent appropriation acts setting apart a less sum, when they show that the amount appropriated is all the compensation intended to be given; and this construction is especially applicable when it appears that the claimant was notified on receiving his commission that the less amount was to be his salary, and that he had receipted for such amounts as in full. Belknap v. U. S. (1893) 14 Sup. Ct. 183, 184, 150 U. S. 588, 37 L. Ed. 1191, distinguishing U. S. v. Langston (1886) 6 Sup. Ct. 1185, 118 U. S. 389, 30 L. Ed. 164. See Belknap v. U. S. (1883) 18 Ct. Cl. 281, as to right of Indian agent to salary and effect of repeal of provision fixing salary on accrued rights. See, also, Dyer v. U. S. (1885) 20 Ct. Cl. 166, holding that the provision in the Revised Statutes fixing salary of Indian agents was repealed by Appropriation Acts May 11, 1880, and March 31, 1881, and agents appointed under

such acts are entitled only to the compensation therein provided for.

This section as set forth in the Revised Statutes authorized the appointment of a specified member of agents at specified salaries. But Congress in subsequent annual appropriation acts made provision for pay of Indian agents without regard to this section. Belknap v. U. S. (1889) 24 Ct. Cl. 433.

Cited without definite application, U. S. v. Barnhart (C. C. 1883) 17 Fed. 579, 580.

§ 3992. (R. S. § 2053.) Services of certain agents to be dispensed with.

It shall be the duty of the President to dispense with the services of such Indian agents [and superintendents] as may be practicable; and where it is practicable he shall require the same person to perform the duties of two agencies [or superintendencies] for one salary.

Act Feb. 14, 1873, c. 138, § 1, 17 Stat. 438.

The words of this section inclosed in brackets, "and superintendents," "or superintendencies," have become inoperative. See note to R. S. § 2045, ante, § 3989.

Notes of Decisions

Power to dispense with services of Indian agents.—The power conferred by this section is not controlled by the fact that the Senate is in session. (1877) 15 Op. Atty. Gen. 405.

The President may, subject to the restrictions imposed by section 1995, ante, direct the military commandant in Alaska to execute the duties of an Indian agent there. (1875) 14 Op. Atty. Gen. 573.

Under this section the President may dispense with the services of any Indian agent; and, under section 1995, ante, he may assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties; or he may devolve the duties of such agent on an agent who has been appointed for another agency. (1877) 15 Op. Atty. Gen. 405.

§ 3993. (Act March 3, 1893, c. 209.) Duties of agent at Cherokee Agency, N. C., to be performed by superintendent of training school; office of agent abolished.

The superintendent of the Indian Training School at Cherokee, North Carolina, shall, in addition to his duties as superintendent, perform the duties heretofore required of the agent at said Cherokee Agency, and receive in addition to his salary as superintendent two hundred dollars per annum, and shall give bond as other Indian agents, and that the office of agent be, and the same is hereby abolished at that place. (27 Stat. 614.)

This was a provision of the Indian appropriation act for the fiscal year 1894, cited.

A preceding provision of this act, authorizing the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, to devolve the duties of any Indian agency upon the superintendent of the Indian training school located at such agency, was repeated in subsequent similar acts, with further provisions added thereto from time to time, all of which were finally re-enacted in provisions of Act March 1, 1907, c. 2285, post, § 3994.

§ 3994. (Act March 1, 1907, c. 2285.) Duties of Indian agency may be devolved on superintendent of Indian school; bond of superintendent; increase of pay.

The Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may devolve the duties of any Indian agency or part thereof upon the superintendent of the Indian school located at such agency or part thereof whenever in his judgment such superintendent can properly perform the duties of such agency. And the superintendent upon whom such duties devolve shall give bond as other Indian agents.

The pay of any superintendent who performs agency duties in addition to those of his superintendency may be increased by the

Commissioner of Indian Affairs, in his discretion, to an extent not exceeding three hundred dollars per annum. (34 Stat. 1020.)

These were provisions of the Indian appropriation act for the fiscal year 1908, cited above.

Provisions more or less similar were made by previous Indian appropriation acts. See note to Act March 3, 1893, c. 209, ante, § 2993.

(R. S. § 2054. Obsolete.)

This section provided that, whenever one of the superintendencies should be abolished by law or discontinued by the President, the Indian agents therein should report directly to the Commissioner of Indian Affairs. It has become inoperative, no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 3995. (R. S. § 2055, as amended, Act Feb. 27, 1877, c. 69, § 1.) Indian agents; salary.

Each Indian agent shall be entitled to receive a salary at the rate of fifteen hundred dollars a year except as herein otherwise provided for.

Act Feb. 14, 1873, c. 138, § 1, 17 Stat. 438. Act Feb. 27, 1877, c. 69, 19 Stat. 244.

This section, as enacted in the Revised Statutes, did not contain the words at the end thereof, "except as herein otherwise provided for."

Subsequent appropriations for pay of Indian agents at specified rates for the agents at particular agencies named, accompanied by a provision repealing all provisions fixing compensation for them in excess of that therein provided, were made by Act July 4, 1884, c. 180, § 1, 23 Stat. 77, Act March 3, 1885, c. 341, § 1, 23 Stat. 362, and Act March 3, 1903, c. 209, post, § 3996. Similar specific appropriations were made thereafter in the annual Indian appropriation acts.

Notes of Decisions

Salary and allowance of Indian agents.—The salary of an Indian agent commences at the time he actually goes to work for the government. U. S. v. Roberts (C. C. 1882) 10 Fed. 540. He has a right to an allowance in addition to a salary as fixed by Act April 20, 1818, for such services or expenditures as are authorized by a general usage of the war department. But expenditures for benefit of Indians, and on a tract of land reserved and held by themselves, are not to be charged to the United States. U. S. v. Duval (D. C. 1833) Fed. Cas. No. 15,015. Where he continued to pay $500 for the services of an interpreter after the law, without his knowledge, had been changed reducing the salary to $400, he was entitled to credit therefor in his accounts. U. S. v. Roberts (C. C. 1882) 10 Fed. 540.

§ 3996. (Act March 3, 1893, c. 209.) Indian agents; repeal in part of provisions fixing compensation.

All provisions of law fixing compensation for Indian agents in excess of that herein provided are hereby repealed. (27 Stat. 614.)

This was a provision of the Indian appropriation act for the fiscal year 1894, following the provision thereof set forth ante, § 3993.

Similar previous provisions of Act July 4, 1884, c. 180, § 1, 23 Stat. 77, and Act March 3, 1885, c. 341, § 1, 33 Stat. 362, were superseded by this provision.

§ 3997. (Act March 1, 1907, c. 2285.) Indian agents; appropriations for salaries not available when duties are performed by active officer of Army.

The appropriations herein or hereafter made for the salaries of Indian agents shall not take effect nor become available in any case for or during the time in which any active officer of the Army of the United States shall be engaged in the performance of the duties of Indian agent at any of the agencies hereafter named. (34 Stat. 1020.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

Similar provisions, without the word "hereafter," were made by previous Indian appropriation acts.

The "agencies hereafter named" in this act, included all the agencies for which appropriations were made for pay of agents.

§ 3998. (R. S. § 2056, as amended, Act May 17, 1882, c. 163, § 1.) Indian agents; term of office.

Each Indian agent shall hold his office for the term of four years, and until his successor is duly appointed and qualified. (22 Stat. 87.)

Act Feb. 27, 1851, c. 14, § 6, 9 Stat. 587. Act April 8, 1864, c. 48, § 4, 13 Stat. 40. Act May 17, 1882, c. 163, § 1, 22 Stat. 87.

This section, as enacted in the Revised Statutes, did not contain the words at the end thereof "and until his successor is duly appointed and qualified." That clause was added by amendment by Act May 17, 1882, c. 163, § 1, last cited above.

Notes of Decisions

Appointment and confirmation.—This section does not extend to one appointed during a recess of the Senate, and never confirmed, and he has no title to the office subsequent to adjournment. Romero v. U S. (1889) 24 Ct. Cl. 331.

§ 3999. (R. S. § 2057.) Indian agents; bonds.

Each Indian agent, before entering upon the duties of his office, shall give bond in such penalties and with such security as the President or the Secretary of the Interior may require.

Act Feb. 27, 1851, c. 14, § 6, 9 Stat. 587.

Sureties on bonds required by this section were required to file statements as to their property, by a provision of Act March 30, 1875, c. 132, § 10, 18 Stat. 450, as follows:

"Hereafter the security or securities, upon the bond required by the act of February twenty-seventh, eighteen hundred and fifty-one, to be given by each Indian agent before entering upon the duties of his office, shall file a sworn statement with the Secretary of the Interior, setting forth the nature and kind of property owned by such security or securities, the value of the same, and where situated; and that no money appropriated by this act shall be paid to any Indian agent hereafter appointed until the security or securities shall have filed such statement."

But said section 10 of Act March 3, 1875, c. 132, which also contained further provisions requiring the keeping of books, etc., by Indian agents, was amended by Act March 3, 1909, c. 263, 35 Stat. 784, to read as therein set forth, the section as so amended omitting the provisions quoted above, and changing said further provisions to read as set forth post, § 4001.

Provisions for acceptance of surety companies as sureties on bonds required by laws of the United States were made by Act Aug. 13, 1894, c. 282, ante, §§ 3293–3300.

The expense of procuring the official bond of any agent, etc., of the Indian service was to be paid by the United States, by a provision of Act April 30, 1908, c. 153, § 1, 35 Stat. 75. But this provision was superseded by a general provision that the United States should not pay any part of the premium or other cost of furnishing a bond required of any officer, etc., made by Act Aug. 5, 1909, c. 7, ante, § 3301.

The President was authorized to require additional security from all persons charged or trusted with disbursement or application of money, goods, etc., on account of Indian affairs by R. S. § 2075, post, § 4019.

Notes of Decisions

Duty to give additional bonds.—See R. S. § 2075, post, § 4019, and notes thereunder.

Validity of bonds.—That a bond contained provisions not required by statute, does not affect its validity where its conditions were not in violation of law, and it was entered into voluntarily by both principal and surety. United States Fidelity & Guaranty Co. v. U. S. (1907) 150 Fed. 550, 553, 80 C. C. A. 446. But see U. S. v. Humason (C. C. 1879) Fed. Cas. No. 15,421, holding that, when an officer is required by his superior to give a bond with provisions and conditions not required by statute, the bond is void in toto.

Liability on bonds.—See post, §§ 4002, 4091, and notes thereunder.

Actions on bonds.—See post, § 4002.

§ 4000. (R. S. § 2058.) Indian agents; duties.

Each Indian agent shall, within his agency, manage and superintend the intercourse with the Indians, agreeably to law; and execute and perform such regulations and duties, not inconsistent with law, as may be prescribed by the President, the Secretary of

the Interior, the Commissioner of Indian Affairs, [or the superintendent of Indian affairs.]

Act June 30, 1834, c. 162, § 7, 4 Stat. 736. Act June 5, 1850, c. 16, § 4, 9 Stat. 437. Act Feb. 27, 1851, c. 14, § 5, 9 Stat. 587.

The words of this section inclosed in brackets, "or the superintendent of Indian affairs," have become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

Notes of Decisions

Indians under charge of agent of reservation.—An Indian boy in Oregon, who left the locality of his tribe and lived with a white family until his tribe had entered into treaty relations with the United States, and gone upon a reservation in pursuance of such treaty, and until he was 23 years of age, and then went to live upon such reservation as a member of his tribe, could not thereafter, by simply absenting himself from the reservation, dissolve his tribal relation or cease to be under the charge of the agent of such reservation. U. S. v. Earl (C. C. 1883)17 Fed. 75.

Action by United States for wrongful taking from Indians of personal property.—The United States can sue for wrongful taking from an Indian of his personal property held subject to control of agent. U. S. v. Fitzgerald (1912) 201 Fed. 295, 119 C. C. A. 533.

Powers, duties, and liabilities of Indian agents.—An Indian agent appointed for Oregon under Act June 5, 1850, § 4, being also a person charged or intrusted with the disbursement of money and property, might be required to give bond for more than $2,000. Act June 30, 1834, §§ 4, 8. U. S. v. Humason (C. C. 1879) Fed. Cas. No. 15,420.

An agent must execute the orders of the commissioner of Indian affairs, and there is no liability on his bond for expenses thereby incurred, such as payment of compensation to an interpreter. U. S. v. Stowe (D. C. 1884) 19 Fed. 807.

Where the government fails to furnish the agent a clerk, he is responsible for the performance of the clerical duties of the agency in the best way practicable for him alone. U. S. v. Young (C. C. 1890) 44 Fed. 168.

Where, because the members of one of two bands of Indians had committed certain depredations, the federal authorities withheld from them the greater portion of the annuity to which they would otherwise have been entitled, and the Indian agent was instructed to disburse to each member of the offending band $1.93, and to each member of the other band $11.20, such agent had no authority to divide all of the money equally between the members of both bands, because of their threatening attitude, with the consent of the members of the unoffending band, and his act in so doing rendered him and his sureties liable as for a diversion of the funds. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390.

The President may, in his discretion, devolve the disbursement of funds for the Indian agencies within a superintendency upon the superintendent thereof or upon the several Indian agents within the same superintendency. (1875) 15 Op. Atty. Gen. 66. See Romero v. U. S. (1889) 24 Ct. Cl. 331, holding that many of the services required of an agent are of a higher order than the mere custody of property and maintaining possession until a successor is appointed.

—— **Duty to keep books.**—See post, § 4001.

—— **Judicial notice of rules and regulations.**—Rules and regulations of the Indian Department promulgated under authority of law have the force of statutes of which the court will take judicial notice. Bridgeman v. U. S. (1905) 140 Fed. 577, 72 C. C. A. 145.

—— **Competency of Indian agents to testify as to authority.**—Where the authority of an Indian agent over a certain Indian was a conclusion of law deducible from the constitution, statutes, and the situation and relations of the Indian, the agent was incompetent to testify what his authority was. Farrell v. U. S. (1901) 110 Fed. 942, 49 C. C. A. 183.

—— **Collection of occupation tax on attorneys practicing within reservations.**—Indian agent, when directed by the Secretary of the Interior, may collect an occupation tax imposed on attorneys practicing within the reservations. Maxey v. Wright (1900) 54 S. W. 807, 3 Ind. T. 243.

—— **Refusal to pay permit taxes.**—The secretary of the interior and his subordinates, the Indian inspector and Indian agent, may lawfully close the business of noncitizens of the Creek nation who refuse to pay permit taxes fixed by its laws. Buster v. Wright (1905) 135 Fed. 947, 957, 68 C. C. A. 505.

—— **Ousting persons from agency.**—A licensed trader, who had sold out his business and abandoned his post, and was avoiding his creditors, was properly ousted from the agency, with his property. Echols v. Tate (1890) 53 Ark. 12, 13 S. W. 253.

—— **Arrest and imprisonment.**—While keeping the peace and disobeying no law, the person of an Indian cannot be the subject of arrest or imprisonment

by any one, except at the peril of the offender. Thus, where an Indian agent arrested an Indian and detained him from proceeding to Washington, as he desired to do, held that, in the absence of any authority of law, the agent was liable for the arrest and false imprisonment. Wiley v. Keokuk (1870) 6 Kan. 94; Wiley v. Manatowah, Id. 111.

The duty of an Indian policeman in executing an order of the Indian agent and Indian farmer to keep people back from railway car entrances while persons were getting on and off cars is limited to keeping at a reasonable distance therefrom curiosity seekers and loafers, so that they would not interfere with the proper transaction of business between carriers and their patrons, and does not extend to an interference with a person going in a proper way to a car entrance to meet and assist his family in alighting therefrom. Deragon v. Sero (1908) 118 N. W. 839.

—— Receiving bribe by Indian agents.—An Indian agent, in the execution and completion of leases of land not needed for farming or agricultural purposes was charged with such an official trust that his receiving a bribe to influence his official action thereon rendered him subject to punishment under section 10287. Sharp v. U. S. (1905) 138 Fed. 878, 71 C. C. A. 258, reversing judgment (1904) 76 Pac. 177, 13 Okl. 522.

Conclusiveness of decisions of Indian agents.—The executive department is not so bound by the conduct of Indian agents that it cannot repudiate their frauds, and decline to follow their false decisions. Raymond v. Shawboose (1876) 34 Mich. 142.

Reimbursement for expenditures by Indian agents.—An agent is entitled to reimbursement for expenditures for services performed under authorization by the commissioner of Indian affairs. The statutes do not forbid payment of freight by an agent when supplies are demanded at once by a sudden emergency, and an agent paying such charges is entitled to reimbursement. U. S. v. Stowe (D. C. 1884) 19 Fed. 807.

Cited without definite application, U. S. v. Birdsall (1914) 34 Sup. Ct. 512, 515, 233 U. S. 223, 58 L. Ed. 930; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912, reversed (1890) 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295.

§ 4001. (Act March 3, 1875, c. 132, § 10, as amended, Act March 3, 1909, c. 263.) Indian agents to keep books of expenditures, etc.; reports of material not required; making false entry, etc., a misdemeanor; punishment thereof.

Each Indian agent shall keep a book of itemized expenditures of every kind, with a record of all contracts, together with the receipts of moneys from all sources, and the books thus kept shall always be open to inspection; and the said books shall remain in the office at the respective reservations, not to be removed from said reservation by said agent, but shall be safely kept and handed over to his successor and he shall report annually to the Commissioner of Indian Affairs all material on hand and not required for his use: Provided, That should any agent knowingly make any false entry in said books, or shall knowingly fail to keep a perfect entry in said books as herein prescribed, he shall be deemed guilty of a misdemeanor and, on conviction before any United States court having jurisdiction of such offense, shall be fined in a sum not less than five hundred nor more than one thousand dollars, at the discretion of the court, and shall be rendered incompetent to hold said office of Indian agent after conviction under said Act. (18 Stat. 450. 35 Stat. 784.)

This section was part of the Indian appropriation act for the fiscal year 1876, cited above.

The section, as originally enacted, contained provisions that the security or securities upon the bond required, by Act Feb. 27, 1851, c. 14, § 6, incorporated into R. S. § 2057, to be given by each Indian agent before entering upon the duties of his office, should file a sworn statement with the Secretary of the Interior, setting forth the nature and kind of property owned by said security or securities, the value of the same, and where situated, and that no money appropriated by the act should be paid to any Indian agent thereafter appointed until the security or securities should have filed such statement. These provisions were entirely omitted from the section as amended by Act March 3, 1909, c. 263, last cited above.

The remainder of the section, as originally enacted, contained, after the words "shall be safely kept and handed over to his successor," a provision, "and true transcripts of all entries of every character in said books shall be forwarded quarterly by each agent to the Commissioner of Indian Affairs," and,

after the words of the proviso, "should any agent knowingly make any false entry in said books," the further clause "or in the transcripts directed to be forwarded to the Commissioner of Indian Affairs." Both said clauses, relating to transcripts of entries in the books, were omitted, and in place of the first of them was inserted a provision, "and he shall report annually to the Commissioner of Indian Affairs all material on hand and not required for his use," making the section read as set forth here, by said amendment by Act March 3, 1909, c. 263, last cited above.

§ 4002. (Act July 1, 1898, c. 545, § 1.) Indian agents to account for all funds; liability under bonds.

Hereafter Indian agents shall account for all funds coming into their hands as custodians from any source whatever, and be responsible therefor under their official bonds. (30 Stat. 595.)

This was a provision of the Indian appropriation act for the fiscal year 1899, cited above.

Notes of Decisions

Duty to give and validity of bonds.—See R. S. § 2057, ante, § 3999, and R. S. § 2075, post, § 4019, and notes thereunder.

Liability on bonds.—The failure of an Indian agent, through clerical errors, to include in his accounts property which, in fact, remains at the agency, and which is not lost to the government, does not entitle the United States to recover the value thereof in a suit on his bond; and he may show these facts in defense. The technical failure to account would authorize a recovery of no more than nominal damages. A government agent is not to be held liable for property still in the possession of the agency, and which has never been lost, merely because a careless clerk, appointed by the government itself to keep the accounts of the agent, has omitted it from a return, which he is required to make. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 Sup. Ct. 949, 42 L. Ed. 1216.

If an officer, in sending a telegraph message, paid in good faith the price demanded by the company, he is entitled to credit therefor in his account, even though he paid more than the rate agreed on between the government and the company. U. S. v. Roberts (C. C. 1882) 10 Fed. 540.

The parties to an official bond for the safekeeping or accounting for public money are not liable for a loss caused by act of God or public enemy. U. S. v. Humason (C. C. 1879) Fed. Cas. No. 15,421. Nor liable for agent's mistake of fact or law, or error of judgment, or misconstruction of authority, in disbursing money in good faith for the benefit of the government, though the payment has been disallowed in his accounts. U. S. v. McClane (C. C. 1896) 74 Fed. 153. Nor responsible for negligence, error, or breaches of duty of doctors and clerks furnished by the government, unless by reasonable diligence he could have prevented such negligence, errors, or breaches of duty. U. S. v. Young (C. C. 1890) 44 Fed. 168. Mere failure of agent to file a receipt with his accounts, for money actually disbursed for the benefit of the government, is not enough to charge his bondsmen for such money. U. S. v. McClane (C. C. 1896) 74 Fed. 153. But the sureties are liable for salary paid by agent to "a superintendent of farms and mills" after that office had been ordered discontinued by the commissioner of Indian affairs. U. S. v. Sinnott (C. C. 1886) 26 Fed. 84, 89.

Where a balance is left in the hands of a public officer at the expiration of his first term, its illegal appropriation by him will not be presumed in favor of a surety on his second bond. U. S. v. Earhart (C. C. 1877) Fed. Cas. No. 15,018; Bruce v. U. S. (1854) 17 How. 437, 15 L. Ed. 129.

A bond of an agent of the Indians in Washington Territory did not apply to money or property not received by the obligator as agent in Washington Territory; and hence he was not liable on bond for money received by him while acting as agent to the Indians on the Umatilla reservation. U. S. v. Barnhart (1883) 17 Fed. 579.

Section 4091, post, was in the nature of a penalty and was unenforceable against sureties of an Indian agent on a bond conditioned to secure his faithful disbursement of all public moneys and to honestly account without fraud or delay for all public funds and property. But where, because the members of one of two bands of Indians had committed certain depredations, the federal authorities withheld from them the greater portion of the annuity to which they would otherwise have been entitled, and the Indian agent was instructed to disburse to each member of the offending band $1.93, and to each member of the other band $11.20, such agent had no authority to divide all of the money equally between the members of both bands, because of their threatening attitude, with the consent of the members of the unoffending band, and his act in so doing rendered him and his sureties liable as for a diversion of the funds. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390.

Where the secretary of the interior had authority to employ physicians at

an Indian agency, and his subordinate, the Indian agent, did employ them, and the secretary approved their bills, and directed the agent to pay them out of the public funds in his hands, the United States and the secretary were bound by the agent's acts, both because of the ratification thereof, and because, by their action, they induced him to expend money which he would not otherwise have disbursed. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 Sup. Ct. 949, 42 L. Ed. 1216.

Actions on bonds—Pleadings.—There can be no recovery, in an action against bondsmen for specific articles or goods not accounted for, upon allegations that such agent has failed to account for moneys received by him. U. S. v. McClane (C. C. 1896) 74 Fed. 153.

Where money was recoverable on a bond by the United States for the benefit of Indians, the fact that such money was not due to the United States as alleged in the complaint, or that it was not properly chargeable in agent's account so as to render the statement competent evidence of its receipt, did not preclude its recovery in an action, where the defendants, advised by the bill of particulars of the exact nature of the claim, in their answer admitted the receipt of the money, and alleged as a defense that it was properly paid out, which defense was not sustained by the evidence. U. S. v. Fidelity Trust Co. (1903) 121 Fed. 766, 58 C. C. A. 42.

—— **Presumptions and burden of proof.**—That certain articles have been omitted from agent's quarterly report is only prima facie proof that they have been lost to the government, and may be overcome by proof that they were at the agency at that time. U. S. v. Young (C. C. 1890) 44 Fed. 168.

The burden of proving the amount of loss is on the government. It need not show that the agent has converted the property or proceeds thereof to his own use, but it may recover whatever loss it has sustained by his failure to account as required by bond. U. S. v. Young (C. C. 1890) 44 Fed. 168.

—— **Evidence, admissibility, and sufficiency.**—A transcript of the books and proceedings of the Treasury Department is not evidence of the receipt by agent of moneys that did not come to his hands through the ordinary channels of the department. A transcript is not conclusive of the claims of the government; the court being authorized to allow disallowed items on facts either appearing on the face of the transcript or established by extraneous evidence. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390.

Mere failure of an agent's return to show the disposition of a large quantity of clothing and provisions is not sufficient, without other evidence to authorize an inference that such property has been misapplied. U. S. v. McClane (C. C. 1896) 74 Fed. 153.

—— **Defenses.**—It is no defense that vouchers rejected under section 4091, post, for material misrepresentations of facts in regard to the amount due and paid, contained correct items of expenditures; the agent having the right on their rejection to furnish true vouchers for all items for which he was entitled to credit. Conviction and imprisonment of agent for malfeasance in office is not a bar to a subsequent suit by United States on his bond for the public money misappropriated or unaccounted for by him. United States Fidelity & Guaranty Co. v. U. S. (1907) 150 Fed. 550, 554, 80 C. C. A. 446.

That defendants pleading that all the moneys with which the agent had been charged had been properly expended by him did not plead a claim for credit of a sum paid to a physician for services to Indians did not render proof thereof inadmissible; it appearing that the United States were already correctly informed of the amount and character of the claim, by reason of its officers having examined and disallowed the same, and that these facts were proved by a transcript from the books of the treasury department, in the hands of the United States attorney, who had not moved to make the answer more specific. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 Sup. Ct. 949, 42 L. Ed. 1216.

—— **Amount of recovery.**—Where the government has lost nothing by the failure of an Indian agent to account, it can recover nominal damages only. U. S. v. Young (C. C. 1890) 44 Fed. 168.

Questions for court and jury.—It is the duty of the court, and not of the jury, to determine whether or not such a claim has been presented and disallowed, so as to authorize it to be admitted on the trial. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 Sup. Ct. 949, 42 L. Ed. 1216.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4003. (R. S. § 2059.) Discontinuance and transfer of agencies.

The President shall, whenever he may judge it expedient, discontinue any Indian agency, or transfer the same, from the place

or tribe designated by law, to such other place or tribe as the public service may require.

Act June 30, 1834, c. 162, § 4, 4 Stat. 735.

Notes of Decisions

Authority of President in general.—The power given by this section is not controlled by the fact that the Senate is in session. (1877) 15 Op. Atty. Gen. 405.

Discontinuance and transfer of agencies.—The President can discontinue any agency, whereupon the functions of the agent would cease. He can also transfer the agency to another place; for instance, to the vicinity of a military post, should it be contemplated to require a military officer to perform the duties of agent. (1877) 15 Op. Atty. Gen. 405.

See R. S. § 2053, ante, § 3992, and post, § 4007.

§ 4004. (Act May 17, 1882, c. 163, § 6.) Consolidation of agencies.

The President may, in his discretion, consolidate two or more agencies into one, and where Indians are located on reservations created by executive order he may, with the consent of the tribes to be affected thereby, expressed in the usual manner, consolidate one or more tribes, and abolish such agencies as are thereby rendered unnecessary. (22 Stat. 88.)

This section was part of the Indian appropriation act for the fiscal year 1884, cited above.

A further provision of this section, for giving preference to Indians in employment on reservations and about agencies, is set forth post, § 4031.

§ 4005. (R. S. § 2060.) Residence of Indian agents.

Every Indian agent shall reside and keep his agency within or near the territory of the tribe for which he may be agent, and at such place as the President may designate, and shall not depart from the limits of his agency without permission.

Act June 30, 1834, c. 162, § 4, 4 Stat. 735.

§ 4006. (R. S. § 2061.) Limitation on visits to Washington by agents for Indians in California.

All Indian agents appointed for California shall reside at their respective agencies, and shall in no case be permitted to visit the city of Washington except when ordered to do so by the Commissioner of Indian Affairs. The Commissioner shall report all cases of the violation of this section to the President, with the request that the agents offending be at once removed from office.

Act April 8, 1864, c. 48, § 7, 13 Stat. 41.

(R. S. § 2062. Superseded.)

This section provided that the President might require any military officer to execute the duties of an Indian agent, such duties, when required, to be performed without other compensation than actual traveling expenses. It was superseded by subsequent provisions for the detail of officers of the Army to act as Indian agents, of Act July 13, 1892, c. 164, § 1, 27 Stat. 120, and Act July 1, 1898, c. 545, § 1, post, § 4007.

§ 4007. (Act July 1, 1898, c. 545, § 1.) Detail of officers of Army to act as Indian agents.

Hereafter the President may detail officers of the United States Army to act as Indian agents at such agencies as in the opinion of the President may require the presence of an army officer, and while acting as Indian agents such officers shall be under the orders and direction of the Secretary of the Interior. (30 Stat. 573.)

This was a proviso annexed to appropriations for pay of Indian agents at specified agencies, in the Indian appropriation act for the fiscal year 1899, cited above.

This provision superseded a somewhat similar proviso of Act July 13, 1892, c. 164, § 1, 27 Stat. 120, and R. S. § 2062, authorizing the President to require any military officer to execute the duties of an Indian agent.

Notes of Decisions

Authority of President while Senate is in session.—The power conferred by R. S. § 2062, is not controlled by the fact that the Senate is in session. (1877) 15 Op. Atty. Gen. 405.

Officers of army to act as Indian agents.—Under R. S. § 2053, ante, § 3992, the President has discretionary power to dispense with the services of any Indian agent; and, under R. S. § 1224 (ante, § 1995), and section 2062, he is authorized to assign a military officer to execute the duties of such agent, if this can be done without separating the officer from his company, regiment, or corps, or otherwise interfering with the performance of his military duties; or, under section 2053, he may devolve the duties of such agent upon an agent who has been appointed for another agency. (1877) 15 Op. Atty. Gen. 405.

See Minis v. U. S. (1841) 15 Pet. 423, 448, 10 L. Ed. 791, holding that, under the act of 1834 incorporated into R. S. § 2062, military officers, when detached on special service, were entitled only to their ordinary military pay. See, also (1835) 2 Op. Atty. Gen. 701, as to payment to military officers of actual traveling expenses. See, also (1875) 14 Op. Atty. Gen. 573, deciding that R. S. § 2062, should be construed with R. S. § 1222, ante, § 1993.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4008. (R. S. § 2063.) No compensation for extra services performed by agents and sub-agents.

No compensation beyond their actual expenses for extra services shall be allowed any Indian agent or sub-agent for services when doing duty under the order of the Government, detached from their agency and the boundary of the tribe to which they are agents or sub-agents.

Act May 31, 1832, c. 109, § 2, 4 Stat. 520.

§ 4009. (R. S. § 2064.) Indian agents authorized to take acknowledgments of deeds, etc., and administer oaths in investigations.

Indian agents are authorized to take acknowledgments of deeds, and other instruments of writing, and to administer oaths in investigations committed to them in Indian country, pursuant to such rules and regulations as may be prescribed for that purpose, by the Secretary of the Interior; and acknowledgments so taken shall have the same effect as if taken before a justice of the peace.

Act March 3, 1855, c. 204, § 10, 10 Stat. 701.

Special agents, school supervisors, and certain other officials were empowered to administer oaths to persons in the Indian Service, by Act March 1, 1899, c. 324, § 1, post, § 4027.

Superintendents, agents, and sub-agents were empowered to administer oaths when taking depositions within their respective districts, by R. S. § 2157, post, § 4160.

Notes of Decisions

Indian country.—Indian country is that portion of the public domain which is set apart as an Indian reservation. Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4010. (Act June 30, 1913, c. 4, § 1.) Superintendents, etc., in charge of reservations, schools, etc., authorized to administer oath of office to employés.

Superintendents and acting superintendents in charge of Indian reservations, schools, irrigation and allotment projects are hereby authorized and empowered to administer the oath of office required of employees placed under their jurisdiction. (38 Stat. 80.)

This was a provision of the Indian appropriation act for the fiscal year 1914, cited above.

The application of this provision to superintendents of Indian affairs has become inoperative, no appropriation for any such superintendent having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 4011. (R. S. § 2065.) Appointment of sub-Indian agents.

A competent number of sub-Indian agents shall be appointed by the President, with a salary of one thousand dollars a year each, to be employed, and to reside wherever the President may direct, and who shall give bonds, with one or more sureties, in the penal sum of one thousand dollars, for the faithful execution of their duties. But no sub-agent shall be appointed who shall reside within the limits of any agency where there is an agent appointed.

Act June 30, 1834, c. 162, § 5, 4 Stat. 736.

§ 4012. (R. S. § 2066.) Limits of superintendencies, agencies, and sub-agencies.

The limits of each [superintendency,] agency, and sub-agency shall be established by the Secretary of the Interior, either by tribes or geographical boundaries.

Act June 30, 1834, c. 162, § 7, 4 Stat. 736. Act March 3, 1847, c. 66, § 1, 9 Stat. 203.

The word "superintendency," inclosed in brackets in this section, has become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 4013. (R. S. § 2067.) Special agents and commissioners; appointment.

All special agents and commissioners not appointed by the President shall be appointed by the Secretary of the Interior.

Act March 3, 1863, c. 99, § 1, 12 Stat. 792.

The Indian appropriation act for the fiscal year 1917, Act May 18, 1916, c. 125, 39 Stat., provides for the pay of special agents, at $21,000 per annum.

§ 4014. (R. S. § 2068.) Interpreters to the agencies.

An interpreter shall be allowed to each agency. Where there are different tribes in the same agency, speaking different languages, one interpreter may be allowed, at the discretion of the Secretary of the Interior, for each of such tribes. Interpreters shall be nominated, by the proper agents, to the Department of the Interior for approval, and may be suspended by the agent from pay and duty, and the circumstances reported to the Department of the Interior for final action.

Act June 30, 1834, c. 162, § 9, 4 Stat. 737.

Notes of Decisions

Compensation to interpreters.—An interpreter can recover only at the rate fixed by appropriation acts. U. S. v. Mitchell (1883) 3 Sup. Ct. 151, 153, 109 U. S. 146, 27 L. Ed. 887; distinguished in U. S. v. Langston (1886) 118 U. S. 389, 6 Sup. Ct. 1185, 30 L. Ed. 164. See U. S. v. Fisher (1883) 109 U. S. 143, 3 Sup. Ct. 154, 27 L. Ed. 885. See, also, Collins v. State (1892) 51 N. W. 776, 3 S. D. 18.

Reimbursement for payments to interpreters.—Where an Indian agent continued to pay $500 for the services of an interpreter after the law, without his knowledge, had been changed reducing the salary to $400, he was entitled to credit therefor in his accounts. U. S. v. Roberts (C. C. 1882) 10 Fed. 540.

§ 4014a. (Act April 4, 1910, c. 140, § 2.) Interpreters; persons paid for other services not to be paid for interpreting.

Hereafter no person employed by the United States and paid for any other service shall be paid for interpreting. (36 Stat. 272.)

This was a provision of section 2 of the Indian appropriation act for the fiscal year 1911, cited above.

The preceding portion of said section was an appropriation for Indian interpreters.

§ 4015. (R. S. § 2069.) Preference to Indians for interpreters.

In all cases of the appointments of interpreters or other persons employed for the benefit of the Indians, a preference shall

be given to persons of Indian descent, if such can be found, who are properly qualified for the execution of the duties.

Act June 30, 1834, c. 162, § 9, 4 Stat. 737.

Preference to Indians in employment on reservations and about agencies was provided for by Act May 17, 1882, c. 163, § 6, post, § 4030.

Indians are to be employed as herders, teamsters, and laborers, and, where practicable, in all other employments in the Indian Service, by Act Aug. 15, 1894, c. 290, § 10, post, § 4031.

Preference to Indians in employments and the purchase of supplies was provided for by Act April 30, 1908, c. 153, § 1, post, § 4040.

Goods are to be purchased from Indian manual and training schools when it can be done advantageously, under Act May 11, 1880, c. 85, § 1, post, § 4041.

Whenever practicable wagon transportation may be performed by Indian labor, under Act March 3, 1877, c. 101, § 1, post, § 4048, and Indian goods and supplies must be so transported, or in open market by common carriers, according to Act July 7, 1898, c. 571, § 1, post, § 4049.

Indians are to be employed as assistant matrons, farmers, and industrial teachers in all Indian Schools where practicable, by Act June 7, 1897, c. 3, § 1, post, § 4168.

(R. S. § 2070. Repealed.)

This section fixed the salaries of interpreters employed in Oregon, Utah, and New Mexico at $500 a year each, and of all employed elsewhere $400 a year each. It was repealed by Act May 17, 1882, c. 163, § 1, 22 Stat. 70.

(R. S. § 2071. Transferred to Chapter 4 A.)

This section authorized the President to employ capable persons to instruct Indians in agriculture, and for teaching their children, etc. It is placed under Chapter 4 A of this Title, "Education," § 4161.

§ 4016. (R. S. § 2072.) When tribes may direct the employment of blacksmiths, etc.

Where any of the tribes are, in the opinion of the Secretary of the Interior, competent to direct the employment of their blacksmiths, mechanics, teachers, farmers, or other persons engaged for them, the direction of such persons may be given to the proper authority of the tribe.

Act June 30, 1834, c. 162, § 9, 4 Stat. 737.

§ 4017. (R. S. § 2073, as amended, Act Feb. 27, 1877, c. 69, § 1.) Discontinuance of offices of agents, sub-agents, interpreters, etc.

The Secretary of the Interior shall, under the direction of the President, cause to be discontinued the services of such agents, sub-agents, interpreters, and mechanics, as may from time to time become unnecessary, in consequence of the Emigration of the Indians, or other causes.

Act July 9, 1832, c. 174, § 5, 4 Stat. 564. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 244.

This section, as enacted in the Revised Statutes, did not contain the word "agents," and had, after the words "in consequence of the," the word "immigration." The word "agents" was inserted, and "immigration" was changed to "emigration," by amendment by Act Feb. 27, 1877, c. 69, § 1, last cited above.

§ 4018. (R. S. § 2074.) No person to hold two offices; leave of absence.

No person shall hold more than one office at the same time under this Title, nor shall any agent, sub-agent, interpreter, or person employed under this Title, receive his salary while absent from his agency or employment, without leave of [the superintendent, or] Secretary of the Interior; but such absence shall at no time exceed sixty days.

Act June 30, 1834, c. 162, § 10, 4 Stat. 737.

The words "the superintendent, or," inclosed in brackets in this section,

have become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

Notes of Decisions

Right to hold offices of Indian agent and deputy marshal.—No statute prohibits a person from acting as an Indian agent and a deputy marshal at the same time. (1892) 20 Op. Atty. Gen. 494.

Additional compensation.—Officers and agents of the government are not forbidden to receive extra compensation for services rendered entirely apart from their official functions. U. S. v. Stowe (D. C. 1884) 19 Fed. 807.

§ 4019. (R. S. § 2075.) Additional security from persons charged with disbursement, etc., of money, goods, etc.

The President may, from time to time, require additional security, and in larger amounts, from all persons charged or trusted, under the laws of the United States, with the disbursement or application of money, goods, or effects of any kind, on account of Indian affairs.

Act June 30, 1834, c. 162, § 8, 4 Stat. 737.

Notes of Decisions

Bond of Indian agents.—See R. S. § 2057, ante, § 3999, and notes thereunder.

Additional security.—An Indian agent appointed for Oregon under Act June 5, 1850, § 4, being also a person charged or trusted with the disbursement of money and property, might be required to give bond for more than $2,000. Act June 30, 1834, §§ 4, 8. U. S. v. Humason (C. C. 1879) Fed. Cas. No. 15,420.

§ 4020. (Act April 30, 1908, c. 153.) New bonds of disbursing officers.

Hereafter when the Secretary of the Interior deems a new bond necessary he may, in his discretion, require any disbursing officer under the jurisdiction of the Commissioner of Indian Affairs to execute a new bond, with approved sureties, in such amount as he may deem necessary, and when accepted and approved by the Secretary of the Interior the new bond shall be valid and the surety or sureties of the prior bond shall be released from liability for all acts or defaults of the principal which may be done or committed from and after the day on which the new bond was approved. (35 Stat. 71.)

This was a provision of the Indian appropriation act for the fiscal year 1909, cited above.

§ 4021. (Act April 21, 1904, c. 1402, § 1.) Special bond of disbursing officer making large per capita payments to Indians.

Hereafter when it becomes necessary to make large per capita payments to Indians, the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, is hereby authorized to require any disbursing officer of the Indian Department to file a special bond in such amount as may be necessary to make such payment in one installment, the expenses incurred in procuring such special bond to be paid by the United States from this appropriation. (33 Stat. 191.)

This was a proviso annexed to an appropriation for contingencies of the Indian service, including traveling and incidental expenses of Indian agents and of their offices, etc., in the Indian appropriation act for the fiscal year 1905, cited above.

A subsequent general provision that the United States should not pay any part of the premium or other cost of furnishing a bond required of any officer, etc., was made by Act Aug. 5, 1909, c. 7, ante, § 3301.

§ 4022. (R. S. § 2076.) Compensation prescribed to be in full.

The several compensations prescribed by this Title shall be in full of all emoluments or allowances whatsoever. But where neces-

sary, a reasonable allowance or provision may be made for offices and office contingencies.

Act June 30, 1834, c. 162, § 10, 4 Stat. 737.

Notes of Decisions

Additional compensation.—An interpreter is not forbidden to receive extra compensation for services entirely apart from his official duties. U. S. v. Stowe (D. C. 1884) 19 Fed. 807.

Reimbursement for freight for supplies.—An agent is entitled to reimbursement for freight paid on supplies demanded by an emergency. U. S. v. Stowe (D. C. 1884) 19 Fed. 807.

Cited without definite application, U. S. v. Mitchell (1883) 3 Sup. Ct. 151, 109 U. S. 146, 27 L. Ed. 887; U. S. v. Langston (1886) 6 Sup. Ct. 1185, 1186, 118 U. S. 389, 30 L. Ed. 164.

§ 4023. (R. S. § 2077.) Allowance for traveling expenses.

Where persons are required, in the performance of their duties, under this Title, to travel from one place to another, their actual expenses, or a reasonable sum in lieu thereof, may be allowed them, except that no allowance shall be made to any person for travel or expenses in coming to the seat of Government to settle his accounts, unless thereto required by the Secretary of the Interior.

Act June 30, 1834, c. 162, § 10, 4 Stat. 737.

Appropriations for traveling and incidental expenses of special agents and others, in accordance with the provisions of this section, are made in the annual Indian appropriation acts. The provision for the fiscal year 1917 was by Act May 18, 1916, c. 125, § 1, 39 Stat., which limits the subsistence allowance of special agents and inspectors to $3 per day.

The allowance for clerks and other employés performing certain specified duties is limited by Act May 17, 1882, c. 163, § 1, post, § 4024.

A general limitation on subsistence allowances, or money in lieu thereof, was made by §§ 3236a, 3236b, ante.

Notes of Decisions

Allowance for traveling expenses.—The allowance for traveling expenses includes board while actually in transit, but not for board while engaged in inspecting a station. U. S. v. Smith (C. C. 1888) 35 Fed. 490, 493.

§ 4024. (Act May 17, 1882, c. 163, § 1.) Allowances for expenses of clerks, etc., detailed on special duty.

When it becomes necessary to detail clerks and other employees of the Indian service outside of Washington to assist in the opening of bids, making contracts, and shipping goods, they may be allowed a per diem of not exceeding four dollars per day for hotel and other expenses, which per diem shall be in lieu of all expenses now authorized by law, exclusive of railway transportation and sleeping car fare. (22 Stat. 86.)

This was a provision of the Indian appropriation act for the fiscal year 1883, cited above.

For the general provision relative to travel allowances, see R. S. § 2077, ante, § 4023, and note thereunder.

A general limitation on subsistence allowances, or money in lieu thereof, was made by §§ 3236a, 3236b, ante.

§ 4025. (Act May 18, 1916, c. 125, § 1.) Allowance of heat and light for employés' quarters.

The Secretary of the Interior is authorized to allow employees in the Indian Service, who are furnished quarters, necessary heat and light for such quarters without charge, such heat and light to be paid for out of the fund chargeable with the cost of heating and lighting other buildings at the same place: Provided further, That the amount so expended for agency purposes shall not be included in the maximum amounts for compensation of employees prescribed by section one, act of August twenty-fourth, nineteen hundred and twelve. (39 Stat.)

This was part of the Indian appropriation act for the fiscal year 1917, cited above.

The Indian appropriation act for the fiscal year 1914, Act June 30, 1913, c.

4, § 1, 38 Stat. 79, contained a similar provision, except that authority to grant the allowance was conferred upon the Commissioner of Indian Affairs. The Indian appropriation act for the following year, Act Aug. 1, 1914, c. 222, § 1, 38 Stat. 584, substituted the Secretary of Interior for the Commissioner of Indian Affairs, and such change has since persisted.

The provision as to maximum amounts for compensation of employés of Act Aug. 24, 1912, c. 388, § 1, mentioned in this provision, increased the amounts previously limited by Act June 7, 1897, c. 3, § 1, by amendment of the provision of that act, and is incorporated in said provision as set forth post, § 4032.

§ 4026. (R. S. § 2078.) Persons employed in Indian affairs not to trade with the Indians.

No person employed in Indian affairs shall have any interest or concern in any trade with the Indians, except for, and on account of, the United States; and any person offending herein, shall be liable to a penalty of five thousand dollars, and shall be removed from his office.

Act June 30, 1834, c. 162, § 14, 4 Stat. 738.

Notes of Decisions

Construction in general.—This section is penal in nature and should be strictly construed. U. S. v. Douglas (1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

Definition of "trade."—"Trade" means the act or business of exchanging commodities either by barter or by buying and selling for money, commerce, traffic, or barter, and prohibits a female industrial school teacher, while employed by the government, from purchasing from Indians cattle furnished by the United States and issued to them. U. S. v. Douglas (1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

§ 4027. (Act March 1, 1899, c. 324, § 1.) Special agents and other officers authorized to administer oaths.

Hereafter each special agent, supervisor of schools, or other official charged with the investigation of Indian agencies and schools, in the pursuit of his official duties shall have power to administer oaths and to examine on oath all officers and persons employed in the Indian service, and all such other persons as may be deemed necessary and proper. (30 Stat. 927.)

This was a proviso annexed to appropriations for the Indian service in the Indian appropriation act for the fiscal year 1900, cited above.

Indian agents were empowered to take acknowledgments and administer oaths in investigations committed to them by R. S. § 2064, ante, § 4009.

Superintendents, agents, and sub-agents were empowered to administer oaths when taking depositions within their respective districts by R. S. § 2157, post, § 4160.

§ 4028. (Act April 30, 1908, c. 153.) Farmers and stockmen to be employed to superintend farming and stock raising; additional farmers at Indian schools.

To enable the Commissioner of Indian Affairs to employ practical farmers and practical stockmen, subject only to such examination as to qualifications as the Secretary of the Interior may prescribe, in addition to the agency farmers now employed, at wages not exceeding seventy-five dollars each per month, to superintend and direct farming and stock raising among such Indians as are making effort for self-support, one hundred and twenty-five thousand dollars: Provided, That the amounts paid such farmers and stockmen shall not come within the limit for employees fixed by the Act of June seventh, eighteen hundred and ninety-seven: Provided further, That the Commissioner of Indian Affairs may employ additional farmers at any Indian school at not exceeding sixty dollars per month, subject only to such examination as to qualifications as the Secretary of the Interior may prescribe, said farmers to be in addition to the school farmers now employed. (35 Stat. 75.)

These were provisions of the Indian appropriation act for the fiscal year 1909, cited above.

Provisions, similar to some extent to those of this act, were made by Act March 1, 1899, c. 324, § 1, 30 Stat. 927, and other Indian appropriation acts thereafter, preceding this act.

The provision of Act June 7, 1897, c. 3, § 1, mentioned in this act limiting the amounts to be paid to employés at agencies was amended by Act Aug. 24, 1912, c. 388, and as so amended is set forth post, § 4032.

Subsequent appropriations, to conduct experiments on Indian school or agency farms designed to test the possibilities of soil and climate in the cultivation of trees, grains, vegetables, and fruits, for the purposes of preserving living and growing timber on Indian reservations and allotments, and to advise the Indians as to the proper care of forests, for the employment of suitable persons as matrons to teach Indian women housekeeping and other household duties, and for furnishing necessary equipments and supplies and renting quarters for them where necessary; for the employment of practical farmers and stockmen, in addition to the agency and school farmers now employed, and to superintend and direct farming and stock raising among Indians, accompanied by a proviso similar to the first proviso in this act, as to the limitation of the amount to be paid to matrons, farmers, and stockmen, therein provided for, are made by the Indian appropriation acts for each year. The provisions for the fiscal year 1917 were by Act May 18, 1916, c. 125, § 1, 39 Stat.

§ 4029. (Act March 1, 1907, c. 2285.) Matrons to be employed to teach housekeeping, etc.

To enable the Secretary of the Interior to employ suitable persons as matrons to teach Indian girls in housekeeping and other household duties, at a rate not to exceed sixty dollars per month, and for furnishing necessary equipments, and renting quarters where necessary, twenty-five thousand dollars: Provided, That the amount paid said matrons shall not come within the limit for employees fixed by the Act of June seventh, eighteen hundred and ninety-seven. (34 Stat. 1019.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

A previous provision similar to this was made by Act March 3, 1905, c. 1479, § 1, 33 Stat. 1050. And a former provision, similar to some extent, was made by Act May 27, 1902, c. 888, § 1, 32 Stat. 248.

The provision of Act June 7, 1897, c. 3, § 1, mentioned in this act, limiting the amounts to be paid to employés at agencies, was amended by Act Aug. 24, 1912, c. 388, and, as so amended, is set forth post, § 4032.

Subsequent appropriations for employment of matrons, and for furnishing necessary equipments and supplies and renting quarters for them are made by the Indian appropriation acts for each year. The provisions for the fiscal year 1917 were by Act May 18, 1916, c. 125, § 1, 39 Stat.

See notes to provisions of Act April 30, 1908, c. 153, ante, § 4028.

§ 4030. (Act May 17, 1882, c. 163, § 6.) Indians to be employed on reservations and about agencies.

Preference shall at all times, as far as practicable, be given to Indians in the employment of clerical, mechanical, and other help on reservations and about agencies. (22 Stat. 88.)

This provision was part of section 6 of the Indian appropriation act for the fiscal year 1883, cited above.

The preceding provision of the section, authorizing the President to consolidate agencies and tribes, and to abolish agencies thereby rendered unnecessary, is set forth ante, § 4004.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

§ 4031. (Act Aug. 15, 1894, c. 290, § 10.) Indians to be employed in connection with agencies and Indian service.

In the Indian service Indians shall be employed as herders, teamsters, and laborers, and where practicable in all other employments in connection with the agencies and the Indian service. And it shall be the duty of the Secretary of the Interior and the Commissioner of Indian Affairs to enforce this provision. (28 Stat. 312.)

This section was part of the Indian appropriation act for the fiscal year 1895, cited above.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

§ 4032. (Act June 7, 1897, c. 3, § 1, as amended, Act Aug. 24, 1912, c. 388.) Limitation of expenditure for compensation of employés at agencies.

Hereafter not more than fifteen thousand dollars shall be paid in any one year for salaries or compensation of employees regularly employed at any one agency, for its conduct and management, and the number and kind of employees at each agency shall be prescribed by the Secretary of the Interior and none other shall be employed: Provided, That where two or more Indian agencies have been or may hereafter be consolidated, the expenditure of such consolidated agencies for regular employees shall not exceed twenty thousand dollars: Provided further, That salaries or compensation of agents, Indians, school employees of every description, and persons temporarily employed, in case of emergency, to prevent loss of life and property, in the erection of buildings, the work of irrigation, and making other permanent improvements, shall not be construed as coming within the limitations fixed by the foregoing paragraphs. (30 Stat. 90. 37 Stat. 521.)

This was a provision of the Indian appropriation act for the fiscal year 1898, cited above.

This provision, as originally enacted, limited the amount to be paid for salaries or compensation to employés regularly employed, at any one agency to $10,000, and at a consolidated agency to $15,000. It was amended, by increasing said amounts to $15,000 and $20,000, respectively, by Act Aug. 24, 1912, c. 388, last cited above.

A previous provision limiting the aggregate amount to be paid in any one year for salaries or compensation of employés at any one agency, was made by Act March 3, 1875, c. 132, § 5, 18 Stat. 449. But teachers and Indians employed at agencies in any capacity were not to be construed as part of the agency employés named in that section, by a provision of Act May 11, 1880, c. 85, § 1, 21 Stat. 131.

Notes of Decisions

Authority to prescribe number of employés.—The provision in the appropriation act of March 3, 1875 (chapter 132, § 5, 18 Stat. 449), that the number and kind of employés at each Indian agency shall be prescribed by the secretary of the interior, gives him authority to employ physicians to attend Indians; and the fact that during 11 years the secretary had approved vouchers and directed payment of bills rendered by a particular physician employed at various times by an Indian agent is a sufficient determination by the secretary that one of the employés of such agency shall be a physician, to be called by the agent from time to time, to render medical services as the Indians require. U. S. v. Patrick (1896) 73 Fed. 800, 20 C. C. A. 11, writ of error dismissed (1898) 18 S. Ct. 949, 42 L. Ed. 1216.

§ 4033. (Act March 1, 1907, c. 2285.) Transfer of funds for payment of employés; detail of employés for other service.

Hereafter when not required for the purpose for which appropriated, the funds provided for the pay of specified employees at any Indian agency may be used by the Secretary of the Interior for the pay of other employees at such agency, but no deficiency shall be thereby created; and, when necessary, specified employees may be detailed for other service when not required for the duty for which they were engaged. (34 Stat. 1016.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

Previous similar provisions, without the word "hereafter," were made by the Indian appropriation acts for previous years.

CHAPTER TWO

Performance of Engagements between the United States and Indians

Sec.
4034. No future treaties with Indian tribes.
4035. Abrogation of treaties.
4036. Payment of certain annuities in coin.
4037. Payment of annuities in goods.
4038. Purchase of goods for the Indians.
4039. Manner of purchase of goods; written requisition; public bids.
4040. Purchase of supplies; advertisement, when required; supplies for irrigation works; employment of and purchases from Indians.
4041. Purchase of articles manufactured at Indian schools.
4042. Bids under advertisements for goods, supplies, transportation, etc., exceeding $5,000, to be accompanied by certified check; forfeiture on failure to execute contract, if awarded.
4043. Copies of contracts to be furnished to Auditor before payment thereon.
4044. Proposals or bids for contracts to be preserved; abstract of bids, etc., to be filed with contract in Treasury Department.
4045. Purchase of supplies without authority of law.
4046. Contracts for supplies in advance of appropriations.
4047. Appropriations for supplies available immediately; time for distribution.
4048. Transportation of supplies by wagon; performance by Indian labor; advertisement for bids.
4049. Transportation of supplies under contract or by common carriers.
4050. Warehouses for goods at certain places.
4051. (Transferred.)
4052. Payment for wagon transportation of supplies from point of delivery by common carrier, etc.
4053. Modes of paying annuities and distributing goods.
4054. Payments per capita to individual Indians.
4055. Payments from appropriations in satisfaction of judgments.
4056. Withholding of annuities on account of intoxicating liquors.
4057. Persons to be present at delivery of annuities.
4058. Mode of disbursements.
4059. Indians 18 years of age to have the right to receipt for annuity money.
4060. Mode of distribution of goods.
4061. Commutation of rations, etc., and other supplies; payment per capita.
4062. Supplies to be distributed to able-bodied male Indians on condition of performance of services equal in value; exceptions authorized.
4063. Rolls of Indians entitled to supplies to be made at commencement of fiscal year; times for giving out supplies.
4064. Supplies to be so distributed as to prevent deficiencies; no expenditure beyond appropriations.
4065. Appropriations for subsistence; use of surplus to supply deficiency; purchase of stock cattle; report to Congress of diversions, etc.; appropriations to fulfill treaty obligations not to be used.
4066. Appropriations for employés and supplies; diversion to other uses; report to Congress thereof.
4067. Restriction on advances to agents or other disbursing officers.
4068. Deposit in bank of moneys in hands of disbursing agents; bond of bank.
4069. Disposal of proceeds of sales of Indian lands.
4070. Appropriation of moneys to carry out Indian treaties.
4071. Proceeds of sales of Indian lands not subject to deductions for expenses of public land service.
4072. Disposal of proceeds of pasturage and sales of timber, coal or other products of reservations.
4073. Investments of stock required by treaties.
4074. Investment of proceeds of lands.
4075. Custody of stocks, bonds, etc., held in trust for Indian tribes.
4076. Deposit in Treasury, in lieu of investment, of Indian trust funds.
4077. Contracts with Indians relating to tribal funds or property in hands of United States not valid without consent of United States.
4077a. Expenditure from tribal funds without specific appropriations prohibited.
4077b. Contracts for compensation for services in relation to enrollment as citizens in Five Civilized Tribes, without consent of United States, void; receipt of money from appli-

Sec.
cants punishable; lands allotted to applicants not affected by prior deed, debt, etc.
4078. Allotment of tribal funds to individual Indians.
4079. Payment of share of tribal funds to helpless, etc., Indians; application and approval.
4080. Statements of accounts between United States and Indian tribes under reimbursable appropriations, and payment of balances.
4081. Misapplication of funds belonging to the Indians prohibited.
4082. Indian depredations, how paid.
4083. Annuities of Indians hostile to United States not to be paid or delivered.
4084. Appropriations not to be paid to Indians at war with United States.
4085. Goods withheld from chiefs who have violated treaty stipulations.
Sec.
4086. Moneys due Indians holding captives other than Indians to be withheld.
4087. Contracts with Indian tribes or Indians.
4088. Payments under contracts restricted.
4089. Receiving moneys under prohibited contracts punishable; prosecution therefor; Indian agents or employés of United States aiding in making prohibited contracts or payments to be dismissed from the service.
4090. Assignments of contracts restricted.
4091. False vouchers, accounts, or claims presented by officers or other persons; effect to prevent payment or credit.
4092. Moneys due incompetent or orphan Indians.
4093. Number of Indians present and receiving food, etc., to be reported.
4094. Rations for Indians.

§ 4034. (R. S. § 2079.) No future treaties with Indian tribes.

No Indian nation or tribe within the territory of the United States shall be acknowledged or recognized as an independent nation, tribe, or power with whom the United States may contract by treaty; but no obligation of any treaty lawfully made and ratified with any such Indian nation or tribe prior to March third, eighteen hundred and seventy-one, shall be hereby invalidated or impaired.

Act March 3, 1871, c. 120, § 1, 16 Stat. 566.

Notes of Decisions

Power of Congress.—Congress has authority to govern Indians by statute instead of by treaty. Leighton v. U. S. (1894) 29 Ct. Cl. 288, citing U. S. v. Kagama (1886) 6 Sup. Ct. 1109, 118 U. S. 375, 30 L. Ed. 228.

Construction and operation of statute.—The utmost possible effect of this section is to require the Indian tribes to be dealt with for the future through the legislative, and not through the treaty-making power. Elk v. Wilkins (1884) 5 Sup. Ct. 41, 48, 112 U. S. 94, 28 L. Ed. 643; State v. Columbia George (1901) 65 Pac. 604, 39 Or. 127. Since its enactment Indian tribes and the individual members thereof have been subject to direct legislation of Congress. In re Heff (1905) 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848.

This section prohibits the making of any contract with the Indians by treaty. Starr v. Long Jim (1913) 33 Sup. Ct. 358, 227 U. S. 613, 57 L. Ed. 670. And Indian tribes have ceased to be treaty-making powers, and have become simply the wards of the nations. Brown v. U. S. (1897) 32 Ct. Cl. 432.

This section is, in effect, only a declaration that thereafter the United States will not contract with the Indian tribes, but will regulate its relations with them and their affairs by act of Congress rather than by the treaty-making power. U. S. v. Osborn (D. C. 1880) 2 Fed. 58, 59.

Until this section the different Indian tribes were treated as domestic, dependent nations with whom the treaty-making power could make treaties, and the relation of the tribes to the United States was not changed, but the method of enacting laws for their government was changed. Ex parte Morgan (D. C. 1883) 20 Fed. 298, 306.

Until the enactment of this section the power to make treaties with Indian tribes residing within a state has never been questioned. U. S. v. Forty-Three Gallons of Whisky (D. C. 1874) Fed. Cas. No. 15,136.

The Indians are entitled, at least until otherwise provided by law, to the rights and privileges of belligerents. Leighton v. U. S. (1894) 29 Ct. Cl. 288.

—— **Recognition of treaties.**—The political departments of the government have recognized the Eastern Band of Cherokee Indians as constituting a tribe; at least, as that word is used in the United States constitution. U. S. v. Boyd (1897) 83 Fed. 547, 27 C. C. A. 592.

Congress by enacting this section has recognized the obligation of all treaties made and ratified prior to March 3,

1871. U. S. v. Berry (D. C. 1880) 4 Fed. 779.

—— **Status of Alaska Indians.**—Under Act March 3, 1885, post, § 10502, making all Indians amenable to the criminal laws of the United States for the offenses therein designated, and Act March 3, 1871, prohibiting future recognition of tribal independence among the Indians, the Alaska Indians are amenable to the penal laws of the United States; they being dependent subjects, though not citizens within the full meaning of the term. In re Sah Quah (D. C. 1886) 31 Fed. 327.

Cited without definite application, Ex parte Kan-gi-shun-ca (1883) 3 Sup. Ct. 396, 401, 109 U. S. 556, 27 L. Ed. 1030; Choctaw Nation v. U. S. (1886) 7 S. Ct. 75, 90, 119 U. S. 1, 30 L. Ed. 306; Cherokee Nation v. Southern Kan. R. Co. (1890) 10 Sup. Ct. 965, 970, 135 U. S. 641, 34 L. Ed. 295; Stephens v. Cherokee Nation (1899) 19 Sup. Ct. 722, 736, 174 U. S. 445, 43 L. Ed. 1041; Cherokee Nation v. Hitchcock (1902) 23 Sup. Ct. 115, 119, 187 U. S. 294, 47 L. Ed. 183; Truscott v. Hurlbut Land & Cattle Co. (1896) 73 Fed. 60, 62, 19 C. C. A. 374 (appeal dismissed [1897] 17 Sup. Ct. 994, 165 U. S. 719, 41 L. Ed. 1185); Nagle v. U. S. (1911) 191 Fed. 141, 111 C. C. A. 621; U. S. v. Moore (C. C. 1907) 154 Fed. 712, 716 (reversed [1908] 161 Fed. 513, 88 C. C. A. 455); In re Sah Quah (D. C. 1886) 31 Fed. 327, 331; U. S. v. Cardish (D. C. 1906) 145 Fed. 242; U. S. v. Hall (D. C. 1909) 171 Fed. 214; Jaeger v. U. S. (1892) 27 Ct. Cl. 278; Lowe v. U. S. (1902) 37 Ct. Cl. 413; Muskrat v. U. S. (1909) 44 Ct. Cl. 137.

§ 4035. (R. S. § 2080.) Abrogation of treaties.

Whenever the tribal organization of any Indian tribe is in actual hostility to the United States, the President is authorized, by proclamation, to declare all treaties with such tribe abrogated by such tribe if in his opinion the same can be done consistently with good faith and legal and national obligations.

Act July 5, 1862, c. 135, § 1, 12 Stat. 528.

Notes of Decisions

Power to abrogate treaties.—The power exists to abrogate the provision of an Indian treaty. Lone Wolf v. Hitchcock (1903) 23 Sup. Ct. 216, 221, 187 U. S. 553, 47 L. Ed. 299.

Effect of continuance of treaty.—Where the political departments of the government have not abrogated a treaty, but continue to recognize it, the presumption that the tribe is in amity with the United States is conclusive in the absence of affirmative proof to the contrary. Leighton v. U. S. (1894) 29 Ct. Cl. 288.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

§ 4036. (R. S. § 2081.) Payment of certain annuities in coin.

The Secretary of the Treasury is authorized to pay in coin such of the annuities as by the terms of any treaty of the United States with any Indian tribe are required to be paid in coin.

Act March 3, 1865, c. 127, § 3, 13 Stat. 561.

Notes of Decisions

Recognition of treaties.—Congress by this section has recognized all treaties with Indians lawfully made and ratified prior to March 3, 1871, carried into R. S. § 2079, ante, § 4034, as having the force of law. U. S. v. Berry (D. C. 1880) 4 Fed. 779, 786.

§ 4037. (R. S. § 2082.) Payment of annuities in goods.

The President may, at the request of any Indian tribe, to which an annuity is payable in money, cause the same to be paid in goods, purchased as provided in the next section.

Act June 30, 1834, c. 162, § 12, 4 Stat. 737.

§ 4038. (R. S. § 2083.) Purchase of goods for the Indians.

All merchandise required by any Indian treaty for the Indians, payable after making of such treaty, shall be purchased under the direction of the Secretary of the Interior, upon proposals to be received, to be based on notices previously to be given; and all merchandise required at the making of any Indian treaty shall be purchased under the order of the Commissioner of Indian Affairs by such person as he shall appoint. All other purchases on account

of the Indians, and all payments to them of money or goods, shall be made by such person as the President shall designate for that purpose.

Act June 30, 1834, c. 162, § 13, 4 Stat. 737.

Notes of Decisions

Authority to make contracts for supplies.—Congress did not invest the President or the head of a department or any officer of the government with unrestricted authority in the making of treaties with Indians, or in regulating intercourse with them, to purchase merchandise for them, or to make payments of money or goods to them. To the extent of appropriations only could purchases of merchandise or payments of money or goods be made. U. S. v. McDougall's Adm'r (1887) 7 Sup. Ct. 850, 121 U. S. 89, 30 L. Ed. 861.

Indians within statute.—Half-breed Indians emigrating to the United States from Canada are not precluded by existing legislation from retaining the bounty of the United States in addition to that of the Dominion of Canada. (1886) 18 Op. Atty. Gen. 423.

Whether the Sioux half-breed or quarter blood is an Indian within Act March 2, 1889 (25 Stat. 888), is to be determined not by the common law, but by the laws or usages of the tribe. (1894) 20 Op. Atty. Gen. 711.

Acceptance of scrip under Sioux Half-Breed Scrip Act July 17, 1854 (10 Stat. 304), is no estoppel to a claim of being a Sioux Indian. (1894) 20 Op. Atty. Gen. 742.

Presumptively, a person apparently of mixed blood residing upon a reservation and claiming to be an Indian is in fact an Indian. (1894) 20 Op. Atty. Gen. 711, 742.

See Jeffries v. Ankeny (1842) 11 Ohio, 372, holding that a person the off-spring of a white man and a half-breed Indian woman is a white. And see Lane v. Baker (1843) 12 Ohio, 237, holding that youths of Indian and white blood, but of more than one-half white blood, are whites.

See post, § 4222, and notes thereunder.

§ 4039. (R. S. § 2084.) Manner of purchase of goods; written requisition; public bids.

No goods shall be purchased by the Office of Indian Affairs, or its agents, for any tribe, except upon the written requisition of the [superintendent] in charge of the tribe, and only upon public bids in the mode prescribed by the preceding section.

Act July 5, 1862, c. 135, § 5, 12 Stat. 529.

The word "superintendent," inclosed in brackets in this section, has become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271. The section may be regarded as applicable to any agent or other officer in charge of a tribe.

Subsequent more specific provisions regarding the purchase of supplies for the Indian service upon public notice by advertisement, with some exceptions, were made by Act April 30, 1908, c. 153, § 1, post, § 4040.

§ 4040. (Act April 30, 1908, c. 153, § 1.) Purchase of supplies; advertisement, when required; supplies for irrigation works; employment of and purchases from Indians.

No purchase of supplies for which appropriations are herein or hereinafter made for the Indian service, exceeding in the aggregate five hundred dollars in value at any one time, shall be made without first giving at least three weeks' public notice by advertisement, except in case of exigency, when, in the discretion of the Secretary of the Interior, who shall make official record of the facts constituting the exigency, and shall report the same to Congress at its next session, he may direct that purchases may be made in open market in amount not exceeding three thousand dollars at any one purchase: Provided, That hereafter supplies may be purchased, contracts let, and labor employed for the construction of artesian wells, ditches, and other works for irrigation, not to exceed the sum of five thousand dollars in any one purchase or contract, in the discretion of the Secretary of the Interior, without advertising as hereinbefore provided: Provided further, That as far as practicable Indian labor shall be employed and purchase in

the open market made from Indians, under the direction of the Secretary of the Interior. (35 Stat. 71.)

These were provisions of the Indian appropriation act for the fiscal year 1909, cited above.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

Notes of Decisions

Construction of prior acts.—(1888) 19 Op. Atty. Gen. 95.

§ 4041. (Act May 11, 1880, c. 85, § 1.) Purchase of articles manufactured at Indian schools.

That the Secretary of the Interior be, and he is hereby, authorized, whenever it can be done advantageously, to purchase for use in the Indian service, from Indian manual and training schools, in the manner customary among individuals such articles as may be manufactured at such schools, and which are used in the Indian service. Accounts of such transactions shall be kept in the Indian Bureau and in the training schools, and reports thereof made from time to time. (21 Stat. 131.)

This was a proviso annexed to an appropriation for purchase of Indian supplies in the Indian appropriation act for the fiscal year 1881, cited above.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

Notes of Decisions

Proceeds of articles manufactured in manual and training schools.—The proceeds of sales of articles manufactured in Indian manual and training schools should not be turned into the Treasury, but be received by the Indian Bureau and used for the benefit of the Indian children in the schools. (1883) 17 Op. Atty. Gen. 531.

§ 4042. (Act March 3, 1875, c. 132, § 9, as amended, Act May 18, 1916, c. 125, § 1.) Bids under advertisements for goods, supplies, transportation, etc., exceeding $5,000, to be accompanied by certified check; forfeiture on failure to execute contract, if awarded.

Hereafter all bidders under any advertisement published by the Commissioner of Indian Affairs for proposals for goods, supplies, transportation, and so forth, for and on account of the Indian Service, whenever the value of the goods, supplies, and so forth, to be furnished, or the transportation to be performed, shall exceed the sum of $5,000, shall accompany their bids with a certified check, draft, or cashier's check, payable to the order of the Commissioner of Indian Affairs, upon some United States depository or some one of such solvent national banks as the Secretary of the Interior may designate, or by an acceptable bond in favor of the United States, which check, draft, or bond shall be for five per centum of the amount of the goods, supplies, transportation, and so forth, as aforesaid; and in case any such bidder, on being awarded a contract, shall fail to execute the same with good and sufficient sureties according to the terms on which such bid was made and accepted, such bidder, or the sureties on his bond, shall forfeit the amount so deposited or guaranteed to the United States, and the same shall forthwith be paid into the Treasury of the United States; but if such contract shall be duly executed, as aforesaid, such draft, check, or bond so deposited shall be returned to the bidder. (39 Stat.)

This provision as originally enacted, and the amendment thereto, were contained in the Indian appropriation acts for the fiscal years 1876 and 1917, respectively, cited above.

As originally enacted, the bidder was required to furnish a certified check or

draft, but, as amended, he has the additional option of a cashier's check or acceptable bond.

The Indian appropriation act for the fiscal year 1875, Act June 22, 1874, c. 389, § 6, 18 Stat. 176, contained a provision similar to the above section, as originally enacted.

Notes of Decisions

Construction of contracts.—Where a contract for delivery of supplies at an Indian agency provides, in case an emergency demands it, for acceptance of goods inferior in quality to the sample, held, that the time and place of delivery before the goods were distributed are the time and place to determine their relative value. Whether necessities compelled acceptance of articles offered was a question determinable only by the Commissioner of Indian Affairs or his agents, under the direction of the Secretary of the Interior. (1882) 17 Op. Atty. Gen. 384, and cases cited.

§ 4043. (Act March 3, 1875, c. 132, § 7.) Copies of contracts to be furnished to auditor before payment thereon.

Copies of all contracts made by the Commissioner of Indian Affairs, or any other officer of the Government, for the Indian service, shall be furnished to the [Second Auditor of the Treasury] before any payment shall be made thereon. (18 Stat. 450.)

This was a proviso annexed to section 7 of the Indian appropriation act for the fiscal year 1876, cited above.

The words of this provision, "Second Auditor of the Treasury," inclosed in brackets, were superseded by the change of the designation of the Second Auditor to "Auditor for the War Department," and by the provisions for examination by the Auditor for the Interior Department of all accounts relating to Indians, etc., of the Dockery Act of July 31, 1894, c. 174, §§ 3, 7, ante, §§ 417, 420.

A subsequent requirement that an abstract of all bids, etc., for supplies or services, embraced in any contract, be filed with the contract, was made by a provision of Act Aug. 15, 1876, c. 289, § 3, post, § 4044.

§ 4044. (Act Aug. 15, 1876, c. 289, § 3.) Proposals or bids for contracts to be preserved; abstract of bids, etc., to be filed with contract in Treasury Department.

That in all lettings of contracts in connection with the Indian service, the proposals or bids received shall be filed and preserved; * * and an abstract of all bids or proposals received for the supplies or services embraced in any contract shall be attached to, and filed with, the said contract when the same is filed in the office of [the Second Comptroller of the Treasury]. (19 Stat. 199.)

This section was part of the Indian appropriation act for the fiscal year 1877, cited above.

The portion of this section omitted here, requiring that in the annual report of the Commissioner of Indian Affairs, there should be embodied a statement of all bids and proposals received for any services, supplies, etc., for the Indian service, with a statement of all awards of contracts for such services, supplies, etc., was repealed by Act June 21, 1906, c. 3504, 34 Stat. 328.

The words of this section, "the Second Comptroller of the Treasury," inclosed in brackets, were superseded by the abolition of the office of Second Comptroller, and the provisions for examination by the Auditor for the Interior Department of all accounts relating to Indians, etc., by the Dockery Act of July 31, 1894, c. 174, §§ 4, 7, ante, §§ 402, 420.

§ 4045. (R. S. § 2085.) Purchase of supplies without authority of law.

No claims for supplies for Indians, purchased without authority of law, shall be paid out of any appropriation for expenses of the Office of Indian Affairs, or for Indians.

Act July 15, 1870, c. 296, § 2, 16 Stat. 360.

§ 4046. (Act Aug. 15, 1894, c. 290, § 4.) Contracts for supplies in advance of appropriations.

Hereafter the Commissioner of Indian Affairs is authorized to advertise in the spring of each year for bids, and enter into contracts, subject to the approval of the Secretary of the Interior, for goods and supplies for the Indian service required for the ensuing fiscal year, notwithstanding the fact that the appropriations for

such fiscal year have not been made, and the contracts so made shall be on the basis of the appropriations for the preceding fiscal year, and shall contain a clause that no deliveries shall be made under the same and no liability attach to the United States in consequence of such execution if Congress fails to make an appropriation for such contract for the fiscal year for which those supplies are required. (28 Stat. 312.)

This section was part of the Indian appropriation act for the fiscal year 1895, cited above.

Further provisions of this section, of a temporary nature merely, are omitted.

Provisions similar to those set forth here were made by previous appropriation acts.

§ 4047. (Act March 1, 1907, c. 2285.) Appropriations for supplies available immediately; time for distribution.

So much of the appropriations of any annual Indian appropriation Act as may be required to pay for goods and supplies, for expenses incident to their purchase, and for transportation of the same, for the fiscal year for which such appropriations are made, shall be immediately available, upon the approval of such Act, but no such goods or supplies shall be distributed or delivered to any of said Indians prior to the beginning of such fiscal year. (34 Stat. 1016.)

This was a proviso annexed to provisions relating to the use of appropriations for employés, etc., in the Indian appropriation act for the fiscal year 1908, cited above.

§ 4048. (Act March 3, 1877, c. 101, § 1.) Transportation of supplies by wagon; performance by Indian labor; advertisement for bids.

Whenever practicable wagon transportation may be performed by Indian labor; and whenever it is so performed the Commissioner of Indian Affairs is hereby authorized to hire a storehouse at any railroad whenever necessary, and to employ a storekeeper therefor, and to furnish in advance the Indians who will do the transportation with wagons and harness, all the expenses incurred under this provision, to be paid out of this appropriation: Provided, That hereafter contracts involving an expenditure of more than two thousand dollars shall be advertised and let to the lowest responsible bidder. (19 Stat. 291.)

These were provisions accompanying appropriations for expenses of transportation of goods, etc., for Indians, in the Indian appropriation act for the fiscal year 1878, cited above.

Provisions similar to these, to some extent, were made by previous Indian appropriation acts.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

Notes of Decisions

Operation of stipulation for contracts to lowest bidder after advertisement.— The provision of this section requiring contracts for transportation of goods for Indian tribes, etc., to be let to lowest bidder after advertisement does not supersede or repeal section 10060, 10065, post. Wherever it is practicable to obtain for the government the benefit of this section without yielding the benefits secured to it by the other legislation, this should be done. (1884) 18 Op. Atty. Gen. 41.

§ 4049. (Act July 7, 1898, c. 571, § 1.) Transportation of supplies under contract or by common carriers.

From and after the passage of this Act, Indian goods and supplies shall be transported under contract as provided in the Act of March third, eighteen hundred and seventy-seven, or in open

market by common carriers, as the Secretary of the Interior in his discretion shall determine. (30 Stat. 676.)

This was a provision of the deficiency appropriation act for the fiscal year 1898, cited above.

The provision of Act March 3, 1877, c. 101, § 1, mentioned in this provision, is set forth ante, § 4048.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

§ 4050. (Act April 30, 1908, c. 153.) Warehouses for goods at certain places.

Hereafter warehouses for the receipt, storage, and shipment of goods for the Indian Service shall be maintained at the following places: New York, Chicago, Omaha, Saint Louis, and San Francisco. (35 Stat. 73.)

This was a proviso annexed to an appropriation for expenses of purchasing goods, etc., in the Indian appropriation act for the fiscal year 1909, cited above.

Recent Indian appropriation acts make appropriations for the purchase of goods, etc., for the Indian Service, with provisos that no part of the sum so appropriated shall be used for the maintenance of to exceed three permanent warehouses in the Indian Service. The provision for the fiscal year 1917 was by Act May 18, 1916, c. 125, § 1, 39 Stat.

§ 4051. (Transferred.)

This section, which was a provision of Act April 30, 1908, c. 153, provided for the payment for transportation of Indian goods, particularly on government aided railroads. It is set forth post, § 10067.

§ 4052. (Act June 30, 1913, c. 4, § 1.) Payment for wagon transportation of supplies from point of delivery by common carrier, etc.

All wagon transportation from the point where delivery is made by the last common carrier to the agency, school, or elsewhere, and between points on the reservation or elsewhere, shall hereafter be paid from the funds appropriated or otherwise available for the support of the school, agency, or other project for which the supplies to be transported are purchased. (38 Stat. 79.)

This was a proviso annexed to an appropriation for purchase of supplies, etc., and transportation thereof, in the Indian appropriation act for the fiscal year 1914, cited above.

§ 4053. (R. S. § 2086.) Modes of paying annuities and distributing goods.

The payment of all moneys and the distribution of all goods stipulated to be furnished to any Indians, or tribe of Indians, shall be made in one of the following ways, as the President or the Secretary of the Interior may direct:

First. To the chiefs of a tribe, for the tribe.

Second. In cases where the imperious interest of the tribe or the individuals intended to be benefited, or any treaty stipulation, requires the intervention of an agency, then to such person as the tribe shall appoint to receive such moneys or goods; or if several persons be appointed, then upon the joint order or receipt of such persons.

Third. To the heads of the families and to the individuals entitled to participate in the moneys or goods.

Fourth. By consent of the tribe, such monevs or goods may be applied directly, under such regulations, not inconsistent with treaty stipulations, as may be prescribed by the Secretary of the Interior, to such purposes as will best promote the happiness and prosperity of the members of the tribe, and will encourage able-bodied Indians in the habits of industry and peace.

Act June 30, 1834, c. 162, § 11, 4 Stat. 737. Act March 3, 1847, c. 66, § 3, 9 Stat. 203. Act Aug. 30, 1852, c. 103, § 3, 10 Stat. 56. Act July 15, 1870, c. 296, §§ 2, 3, 16 Stat. 360.

Special provisions as to payments per capita to individuals, and payments in satisfaction of judgments, made by Act June 10, 1896, c. 398, § 1, and Act March 3, 1911, c. 210, § 28, are set forth post, §§ 4054, 4055.

Notes of Decisions

Construction, operation, and validity of statute.—Indians absent from their reservation without permission from the United States had no individual rights to the annuities promised to their tribes by treaty, and paid at the tribal agency conformably to Act Aug. 30, 1852, § 3 (incorporated in part in this section). Sac and Fox Indians of the Mississippi in Iowa v. Sac and Fox Indians of the Mississippi in Oklahoma (1911) 31 Sup. Ct. 473, 220 U. S. 481, 55 L. Ed. 552, affirming judgment (1910) 45 Ct. Cl. 287.

Under Act March 3, 1847, § 3 (incorporated into this section), it is in the discretion of the President whether, and at what time, if at all, engagements of indebtedness made by tribes of Indians to citizens of the United States shall be allowed and paid by the government. (1854) 6 Op. Atty. Gen. 462. And he will examine into all such contracts, and confirm them, or not, according to what appears the legality and sufficiency of their consideration and of their relation to the interests of the Indians. (1853) 6 Op. Atty. Gen. 49.

The court may not, in the absence of statute, divert the funds in possession of the agent appointed by the tribe to the payment of a claim for services in procuring the treaty under which the appropriations were made. Hanks v. Hendricks (1900) 58 S. W. 669, 3 Ind. T. 415.

Act March 3, 1847, § 3, providing that all executory contracts made with any Indian for the payment of money or goods shall be void, forming a part of the section incorporated into this section, is unconstitutional as interfering with transactions within a sovereign state. Hicks v. Ewhartonah (1860) 21 Ark. 106.

Assignability of annuities.—It is doubtful whether Indian annuities granted by the government ought to be regarded as legally assignable, unless made so by law. (1851) 5 Op. Atty. Gen. 285.

Cited without definite application, Pam-to-Pee v. U. S. (1902) 23 Sup. Ct. 142, 153, 187 U. S. 371, 47 L. Ed. 221 (dissenting opinion).

§ 4054. (Act June 10, 1896, c. 398, § 1.) Payments per capita to individual Indians.

Any sums of money hereafter to be paid per capita to individual Indians shall be paid to said Indians by an officer of the Government designated by the Secretary of the Interior. (29 Stat. 336.)

This was a provision of the deficiency appropriation act for the fiscal year 1897, cited above.

A previous provision authorizing the Secretary of the Interior to detail an officer from his department or appoint a special agent to make or to superintend payments or disbursements of money to Indians individually, was made by Act March 2, 1895, c. 188, § 11, 28 Stat. 910.

A similar provision regarding payments to members of certain tribes in the Indian Territory was made by Act June 28, 1898, c. 517, § 19, 30 Stat. 502.

§ 4055. (Act March 3, 1911, c. 210, § 28.) Payments from appropriations in satisfaction of judgments.

Hereafter payments to Indians made from moneys appropriated by Congress in satisfaction of the judgment of any court shall be made under the direction of the officers of the Interior Department charged by law with the supervision of Indian affairs, and all such payments shall be accounted for to the Treasury in conformity with law. (36 Stat. 1077.)

This section was part of the Indian appropriation act for the fiscal year 1912, cited above.

§ 4056. (R. S. § 2087.) Withholding of annuities on account of intoxicating liquors.

No annuities, or moneys, or goods, shall be paid or distributed to Indians while they are under the influence of any description of intoxicating liquor, nor while there are good and sufficient reasons leading the officers or agents, whose duty it may be to make such payments or distribution, to believe that there is any species of intoxicating liquor within convenient reach of the Indians, nor until the chiefs and headmen of the tribe shall have pledged themselves to use all their

influence and to make all proper exertions to prevent the introduction and sale of such liquor in their country.

Act March 3, 1847, c. 66, § 3, 9 Stat. 203.

Notes of Decisions

Effect of provisions for withholding annuities.—A provision of the treaty with the Yakima Indians that any Indian of the tribes who should bring liquor onto the reservation or drink liquor might have his annuities withheld did not have the effect of reserving to the United States exclusive jurisdiction of lands which were subsequently allotted in severalty to members of the tribes. U. S. v. Sutton (1908) 165 Fed. 253, judgment reversed (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200.

Cited without definite application, United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219.

§ 4057. (R. S. § 2088.) Persons to be present at delivery of annuities.

The [superintendent,] agent, or sub-agent, together with such military officer as the President may direct, shall be present, and certify to the delivery of all goods and money required to be paid or delivered to the Indians.

Act June 30, 1834, c. 162, § 13, 4 Stat. 737.

The word "superintendent," inclosed in brackets in this section, has become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 4058. (R. S. § 2089.) Mode of disbursements.

At the discretion of the President all disbursements of moneys, whether for annuities or otherwise, to fulfill treaty stipulations with individual Indians or Indian tribes, shall be made [in person by the superintendents of Indian affairs, where superintendencies exist, to all Indians or tribes within the limits of their respective superintendencies,] in the presence of the local agents and interpreters, who shall witness the same, under such regulations as the Secretary of the Interior may direct.

Act March 3, 1857, c. 90, § 1, 11 Stat. 169.

Indians 18 years of age were given the right to receive and receipt for annuity money due them, by Act March 1, 1899, c. 324, § 8, post, § 4059.

Notes of Decisions

Mode of disbursement of funds for Indians.—The President may, in his discretion, devolve the disbursement of funds for the Indian agencies within a superintendency on the superintendent thereof or on the several Indian agents within the same superintendency. (1875) 15 Op. Atty. Gen. 66.

§ 4059. (Act March 1, 1899, c. 324, § 8.) Indians 18 years of age to have the right to receipt for annuity money.

Hereafter all Indians, when they shall arrive at the age of eighteen years, shall have the right to receive and receipt for all annuity money that may be due or become due to them, if not otherwise incapacitated under the regulations of the Indian Office. (30 Stat. 947.)

This section was part of the Indian appropriation act for the fiscal year 1900, cited above.

§ 4060. (R. S. § 2090.) Mode of distribution of goods.

Whenever goods and merchandise are delivered to the chiefs of a tribe, for the tribe, such goods and merchandise shall be turned over by the agent or superintendent of such tribe to the chiefs in bulk, and in the original package, as nearly as practicable, and in the presence of the head-men of the tribe, if practicable, to be distributed to the tribe by the chiefs in such manner as the chiefs may deem best, in the presence of the agent or superintendent.

Act April 10, 1869, c. 16, § 2, 16 Stat. 39.

§ 4061. (Act July 1, 1898, c. 545, § 7.) Commutation of rations, etc., and other supplies; payment per capita.

Hereafter when, in the judgment of the Secretary of the Interior,

any Indian tribe, or part thereof, who are receiving rations and clothing and other supplies under this Act, are sufficiently advanced in civilization to purchase such rations and clothing and other supplies judiciously, they may commute the same and pay the value thereof in money per capita to such tribe or part thereof, the manner of such payment to be prescribed by the Secretary of the Interior. (30 Stat. 596.)

This section was part of the Indian appropriation act for the fiscal year 1899, cited above.

Cited without definite application,
U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4062. (Act March 3, 1875, c. 132, § 3.) Supplies to be distributed to able-bodied male Indians on condition of performance of services equal in value; exceptions authorized.

For the purpose of inducing Indians to labor and become self-supporting, it is provided that hereafter, in distributing the supplies and annuities to the Indians for whom the same are appropriated, the agent distributing the same shall require all able bodied male Indians between the ages of eighteen and forty-five to perform service upon the reservation, for the benefit of themselves or of the tribe, at a reasonable rate, to be fixed by the agent in charge, and to an amount equal in value to the supplies to be delivered; and the allowances provided for such Indians shall be distributed to them only upon condition of the performance of such labor, under such rules and regulations as the agent may prescribe: Provided, That the Secretary of the Interior may, by written order, except any particular tribe, or portion of tribe, from the operation of this provision where he deems it proper and expedient. (18 Stat. 449.)

This section and the two sections next following were sections 3, 4, and 6 of the Indian appropriation act for the fiscal year 1876, cited above.

§ 4063. (Act March 3, 1875, c. 132, § 4.) Rolls of Indians entitled to supplies to be made at commencement of fiscal year; times for giving out supplies.

Hereafter, for the purpose of properly distributing the supplies appropriated for the Indian service, it is hereby made the duty of each agent in charge of Indians and having supplies to distribute, to make out, at the commencement of each fiscal year, rolls of the Indians entitled to supplies at the agency, with the names of the Indians and of the heads of families or lodges, with the number in each family or lodge, and to give out supplies to the heads of families, and not to the heads of tribes or bands, and not to give out supplies for a greater length of time than one week in advance: (18 Stat. 449.)

See note to section 3 of this act, ante, § 4062.

A provision similar to this section, but only "for the purpose of properly distributing the supplies appropriated for" in the similar appropriation act for the fiscal year 1878, was made by section 2 of said act, Act March 3, 1877, c. 101, § 2, 19 Stat. 293.

§ 4064. (Act March 3, 1875, c. 132, § 6.) Supplies to be so distributed as to prevent deficiencies; no expenditure beyond appropriations.

Hereafter, it shall be the duty of the Secretary of the Interior, and the officers charged by law with the distribution of supplies to the Indians, under appropriations made by law, to distribute them and pay them out to the Indians entitled to them, in such proper proportions as that the amount of appropriation made for the current year shall not be expended before the end of such current year, so as to prevent deficiencies; and no expenditure shall be made or liability incurred on the part of the Government on account of the Indian service for any fiscal year (unless in compliance with existing

law) beyond the amount of money previously appropriated for said service during such year. (18 Stat. 450.)

See note to section 3 of this act, ante, § 4062.

A subsequent provision, "That hereafter, where funds appropriated in specific terms for a particular object are not sufficient for the object named, any other appropriation, general in its terms, which otherwise would be available may, in the discretion of the Secretary of the Interior, be used to accomplish the object for which the specific appropriation was made," of Act June 7, 1897, c. 3, § 11, 30 Stat. 93, was repealed by Act March 3, 1911, c. 210, § 1, 36 Stat. 1062.

§ 4065. (Act March 1, 1907, c. 2285.) Appropriations for subsistence; use of surplus to supply deficiency; purchase of stock cattle; report to Congress of diversions, etc.; appropriations to fulfill treaty obligations not to be used.

Hereafter the Secretary of the Interior, under the direction of the President, may use any surplus that may remain in any of the said appropriations for the purchase of subsistence for the several Indian tribes, to an amount not exceeding twenty-five thousand dollars in the aggregate, to supply any subsistence deficiency that may occur: Provided, That any diversions which shall be made under authority of this section shall be reported in detail, and the reason therefor, to Congress, at the session of Congress next succeeding such diversion: Provided, further, That the Secretary of the Interior, under direction of the President, may use any sums appropriated in this Act for subsistence, and not absolutely necessary for that purpose, for the purchase of stock cattle for the benefit of the tribe for which such appropriation is made, and shall report to Congress, at its next session thereafter, an account of his action under this provision: Provided further, That funds appropriated to fulfill treaty obligations shall not be used. (34 Stat. 1016.)

These were provisions of the Indian appropriation act for the fiscal year 1908, cited above.

Provisions similar to these, to a great extent, but without the word "hereafter," accompanied the appropriations for like purposes in the Indian appropriation acts for previous years.

Further provisions of this act, for diversion of appropriations for certain purposes to other uses, are set forth post, § 4066.

Indian tribe funds cannot be diverted to objects not authorized by treaty, unless it is expressly so provided by law, under R. S. § 2097, post, § 4081.

§ 4066. (Act March 1, 1907, c. 2285.) Appropriations for employés and supplies; diversion to other uses; report to Congress thereof.

That the several appropriations made for millers, blacksmiths, engineers, carpenters, physicians, and other persons, and for various articles provided for by treaty stipulation for the several Indian tribes, may be diverted to other uses for the benefit of said tribes, respectively, within the discretion of the President, and with the consent of said tribes, expressed in the usual manner; and that he cause report to be made to Congress, at its next session thereafter, of his action under this provision. (34 Stat. 1016.)

These were further provisions of the Indian appropriation act for the fiscal year 1908, cited above.

These provisions followed immediately and in the same paragraph with provisions, beginning with the word "hereafter," for the transfer of funds provided for pay of specified employés and for detail of such employés for other service, which are set forth ante, § 4065.

See notes to said preceding paragraph.

(R. S. § 2091. Repealed.)

This section required that all persons, charged or trusted with the disbursement or application of money, goods, etc., for the benefit of the Indians, should settle their accounts, annually, at the Department of the Interior on the first day of October, and that copies of the same should be laid before Congress at the commencement of the ensuing session, by the proper accounting officers, together with a list of the names of all persons to whom

money, goods, or effects had been delivered within the preceding year, for the benefit of the Indians, specifying the amount and object for which they were intended, and showing who are delinquents, if any, in forwarding their accounts, and also with a list of the names of all persons appointed or employed under this Title, with the dates of their appointment or employment, and the salary and pay of each.

It was superseded, as to the time of settlement of accounts, by a provision that all disbursing officers should render their accounts quarterly, of Act Aug. 30, 1890, c. 837, § 4, post, § 6617. And it was repealed by Act June 25, 1910, c. 431, § 19, 36 Stat. 860.

§ 4067. (R. S. § 2092.) Restriction on advances to agents or other disbursing officers.

No [superintendent of Indian affairs, or] Indian agent, or other disbursing officer in such service, shall have advanced to him, on Indian or public account, any money to be disbursed in future, until such [superintendent,] agent, or officer in such service has settled his accounts of the preceding year, and has satisfactorily shown that all balances in favor of the Government, which may appear to be in his hands, are ready to be paid over on the order of the Secretary of the Interior.

Act June 27, 1846, c. 34, § 1, 9 Stat. 20.

The words "superintendent of Indian affairs, or," and "superintendent," inclosed in brackets in this section, have become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 4068. (Act April 30, 1908, c. 153.) Deposit in bank of moneys in hands of disbursing agents; bond of bank.

Hereafter any United States Indian agent, [superintendent,] or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such national bank or banks as he may select: Provided, That the bank or banks so selected by him shall first execute to said disbursing agent a bond, with approved surety, in such an amount as will properly safeguard the funds to be deposited. Such bond shall be subject to the approval of the Secretary of the Interior. (35 Stat. 73.)

This was a provision of the Indian appropriation act for the fiscal year 1909, cited above.

The word "superintendent," inclosed in brackets in this section, has become inoperative; no appropriation for any superintendent of Indian affairs having been made since Act March 3, 1877, c. 101, § 1, 19 Stat. 271.

§ 4069. (R. S. § 2093.) Disposal of proceeds of sales of Indian lands.

All moneys received from the sales of lands that have been, or may be hereafter, ceded to the United States by Indian tribes, by treaties providing for the investment or payment to the Indians, parties thereto, of the proceeds of the lands ceded by them, respectively, after deducting the expenses of survey and sale, any sums stipulated to be advanced, and the expenses of fulfilling any engagements contained therein, shall be paid into the Treasury in the same manner that moneys received from the sales of public lands are paid into the Treasury.

Act Jan. 9, 1837, c. 1, § 1, 5 Stat. 135.

Notes of Decisions

Liability of United States.—Under the Shawnee treaty of May 10, 1854, the tribe became entitled to a certain sum, payable in installments to them individually, the portions of orphan children to be appropriated by the president as he should deem best for them. The president decided to pay them in severalty, and the Shawnee council created guardians, to whom a part of the money was paid. This never reached the orphans, and another part was embezzled by a United States officer. Held that, even if the tribe had any claim on the fund, it could not hold the United States liable for the embezzlements of its own appointed "guardians"; and, in the absence of a finding what part of the whole shortage these constituted, there was no basis for a

decree against the government. The treaty of Aug. 8, 1831, with the Ohio Shawnees, by article 7 obliged the United States to expose the lands ceded "to public sale to the highest bidder, in the manner of selling the public lands." A part of the lands was so sold at a price above $2 an acre. The rest was sold at private sale at $1.25. Held that, though the government failed in its trust by selling at private sale, yet in view of Act April 24, 1820, then in force, which required the public lands to be offered for sale at $1.25, and made those remaining unsold subject to private sale at that price, and on the assumption that the government acted as it deemed best for the tribe, the proof was against any claim for actual damages. U. S. v. Blackfeather (1894) 15 Sup. Ct. 64, 68, 69, 155 U. S. 180, 39 L. Ed. 114.

United States having disposed under the general land laws of lands of the Mille Lac Indian Reservation not filed on instead of selling them as pine or agricultural lands and holding the proceeds for the Indians as contemplated by Act Jan. 14, 1889, under which they were ceded to the United States, is liable to the Indians for the resulting loss, though such disposal was under directions given in joint resolutions December 19, 1893. U. S. v. Mille Lac Band of Chippewa Indians (1913) 33 Sup. Ct. 811, 229 U. S. 498, 57 L. Ed. 1299, reversing judgment Mille Lac Band of Chippewas v. U. S. (1912) 47 Ct. Cl. 415, distinguishing Cherokee Nation v. Hitchcock (1902) 23 Sup. Ct. 115, 187 U. S. 294, 47 L. Ed. 183, and Lone Wolf v. Hitchcock (1903) 23 Sup. Ct. 216, 187 U. S. 553, 47 L. Ed. 299.

The moneys received from the sale of reservations located for Creek orphans under treaty were properly brought into the treasury, and may be drawn out for investment or payment when the President directs. (1837) 3 Op. Atty. Gen. 238.

Where, in a treaty with the United States, an Indian tribe released their pre-emption right to certain lands, and agreed to give possession on payment of the purchase and improvement money, such payment to be made to the secretary of war of the United States, held, that the United States acted simply as the agent of the Indians, and were not equitably bound to allow interest on such payments during the time that the Indians refused to deliver possession, according to the treaty. McKeon v. Tillotson (N. Y. 1864) 3 Abb. Dec. 110.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

§ 4070. (R. S. § 2094.) Appropriation of moneys to carry out Indian treaties.

All sums that are or may be required to be paid, and all moneys that are or may be required to be invested by the treaties mentioned in the preceding section, are appropriated in conformity to them, and shall be drawn from the Treasury as other public moneys are drawn therefrom, under such instructions as may from time to time be given by the President.

Act Jan. 9, 1837, c. 1, § 2, 5 Stat. 135.

Notes of Decisions

Interference by judiciary.—The judiciary cannot arrest the execution of a treaty by stopping the money designed to be paid under it in the hands of the agents of the Executive. (1839) 3 Op. Atty. Gen. 471.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

§ 4071. (Act July 4, 1884, c. 180, § 10.) Proceeds of sales of Indian lands not subject to deductions for expenses of public land service.

No part of the expenses of the public lands service shall be deducted from the proceeds of Indian lands sold through the General Land Office, except as authorized by the treaty or agreement providing for the disposition of the lands. (23 Stat. 98.)

This section was part of the deficiency appropriation act for the fiscal year 1884, cited above.

§ 4072. (Act March 3, 1883, c. 141, § 1.) Disposal of proceeds of pasturage and sales of timber, coal or other products of reservations.

The proceeds of all pasturage and sales of timber, coal, or other product of any Indian reservation, except those of the five civilized tribes, and not the result of the labor of any member of such tribe, shall be covered into the Treasury for the benefit of such tribe un-

der such regulations as the Secretary of the Interior shall prescribe; and the Secretary shall report his action in detail to Congress at its next session. (22 Stat. 590.)

This was a provision of the deficiency appropriation act for the fiscal year 1884, cited above.

The President may authorize Indians to sell dead timber for their sole benefit under Act Feb. 16, 1889, c. 172, post, § 4122.

The Secretary of the Interior was given somewhat similar power as to Indians on reservations in Minnesota under Act June 7, 1897, c. 3, § 1, post, § 4123.

The Secretary of the Interior may regulate the sale of mature living and dead and down timber on unallotted lands of any Indian reservation except in Minnesota and Wisconsin, under Act June 25, 1910, c. 431, § 7, post, § 4230.

The timber on Indian allotments held under trust or other restrictive patent may be sold by the allottee with consent of the Secretary of the Interior, under Act June 25, 1910, c. 431, § 8, post, § 4231.

§ 4073. (R. S. § 2095.) Investments of stock required by treaties.

All investments of stock, that are or may be required by treaties with the Indians, shall be made under the direction of the President; and special accounts of the funds under such treaties shall be kept at the Treasury, and statements thereof be annually laid before Congress.

Act Jan. 9, 1837, c. 1, § 3, 5 Stat. 135.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786; U. S. v. Blackfeather (1894) 15 Sup. Ct. 64, 69, 155 U. S. 180, 39 L. Ed. 114.

§ 4074. (R. S. § 2096.) Investment of proceeds of lands.

The Secretary of the Interior shall invest in a manner which shall be in his judgment most safe, and beneficial for the fund, all moneys that may be received under treaties containing stipulations for the payment to the Indians, annually, of interest upon the proceeds of the lands ceded by them; and he shall make no investment of such moneys, or of any portion, at a lower rate of interest than five per centum per annum.

Act Jan. 9, 1837, c. 1, § 4, 5 Stat. 135.

Subsequent provisions for the custody, etc., of Indian trust funds, made by Act June 10, 1876, c. 122, and Act April 1, 1880, c. 41, are set forth post, §§ 4075, 4076.

Cited without definite application, U. S. v. Berry (D. C. 1880) 4 Fed. 779, 786.

§ 4075. (Act June 10, 1876, c. 122.) Custody of stocks, bonds, etc., held in trust for Indian tribes.

All stocks, bonds, or other securities or evidences of indebtedness now held by the Secretary of the Interior in trust for the benefit of certain Indian tribes shall, within thirty days from the passage of this act, be transferred to the Treasurer of the United States, who shall become the custodian thereof; and it shall be the duty of said Treasurer to collect all interest falling due on said bonds, stocks, &c., and deposit the same in the Treasury of the United States, and to issue certificates of deposit therefor, in favor of the Secretary of the Interior, as trustees for various Indian tribes. And the Treasurer of the United States shall also become the custodian of all bonds and stocks which may be purchased for the benefit of any Indian tribe or tribes after the transfer of funds herein authorized, and shall make all purchases and sales of bonds and stocks authorized by treaty-stipulations or by acts of Congress when requested so to do by the Secretary of the Interior: Provided, That nothing in this act shall in any manner impair or affect the supervisory and appellate powers and duties in regard to Indian affairs which may now be vested in the Secretary of the Interior as trustee for various Indian tribes, except as to the

custody of said bonds and the collection of interest thereon as hereinbefore mentioned. (19 Stat. 58.)

This was an act entitled "An act transferring the custody of certain Indian trust funds."

§ 4076. (Act April 1, 1880, c. 41.) Deposit in Treasury, in lieu of investment, of Indian trust funds.

That the Secretary of the Interior be, and he is hereby, authorized to deposit, in the Treasury of the United States, any and all sums now held by him, or which may hereafter be received by him, as Secretary of the Interior and trustee of various Indian tribes, on account of the redemption of United States bonds, or other stocks and securities belonging to the Indian trust-fund, and all sums received on account of sales of Indian trust lands, and the sales of stocks lately purchased for temporary investment, whenever he is of the opinion that the best interests of the Indians will be promoted by such deposits, in lieu of investments; and the United States shall pay interest semi-annually, from the date of deposit of any and all such sums in the United States Treasury, at the rate per annum stipulated by treaties or prescribed by law, and such payments shall be made in the usual manner, as each may become due, without further appropriation by Congress. (21 Stat. 70.)

This was an act entitled "An act to authorize the Secretary of the Interior to deposit certain funds in the United States Treasury in lieu of investment."

Notes of Decisions

Authority of Secretary of the Interior to sell bonds held in trust.—The Secretary of the Interior has authority as trustee for Indian tribes to sell United States called bonds held in trust for the tribes in order that the fund may receive the premium. (1881) 7 Op. Atty. Gen. 104.

Payment of interest on trust funds deposited in treasury.—Congress intended by this section to permit the deposit in the treasury of moneys held in trust for Indian tribes, and to allow interest thereon at a rate stipulated by treaty or law, and the interest is payable without further appropriation. (1893) 20 Op. Atty. Gen. 517. See Blackfeather v. U. S. (1893) 28 Ct. Cl. 447, holding that under Indian treaties a fund drew interest.

§ 4077. (Act June 30, 1913, c. 4, § 18.) Contracts with Indians relating to tribal funds or property in hands of United States not valid without consent of United States.

No contract made with any Indian, where such contract relates to the tribal funds or property in the hands of the United States, shall be valid, nor shall any payment for services rendered in relation thereto be made unless the consent of the United States has previously been given. (38 Stat. 97.)

This was a paragraph, following provisions relating to the Five Civilized Tribes, in section 18 of the Indian appropriation act for the fiscal year 1914, cited above.

For general provisions regarding contracts with Indians, see R. S. § 2103, post, § 4087.

Contracts with persons seeking enrollment as citizens of the Five Civilized Tribes were declared void, unless the consent of the United States had previously been given, by Act Aug. 1, 1914, c. 222, § 17, post, § 4077b.

§ 4077a. (Act May 18, 1916, c. 125, § 27.) Expenditure from tribal funds without specific appropriations prohibited.

Thereafter no money shall be expended from Indian tribal funds without specific appropriation by Congress except as follows: Equalization of allotments, education of Indian children in accordance with existing law, per capita and other payments, all of which are hereby continued in full force and effect: Provided further, That this shall not change existing law with reference to the Five Civilized Tribes. (39 Stat.)

This section was part of § 27 of the Indian appropriation act for the fiscal year 1917, cited above. The remaining portion of said section required the

Secretary of the Treasury to annually transmit to the Speaker of the House of Representatives estimates of the amounts of the receipts to, and expenditures which the Secretary of the Interior recommends to be made for the benefit of Indians from, all tribal funds of Indians for the ensuing year, and is set forth ante, § 398a. The word "thereafter" in this section refers to said estimates above referred to.

Further, as to appropriations for the Indian Service, see post, § 6789, and notes thereunder.

§ 4077b. (Act Aug. 1, 1914, c. 222, § 17.) Contracts for compensation for services in relation to enrollment as citizens in Five Civilized Tribes, without consent of United States, void; receipt of money from applicants punishable; lands allotted to applicants not affected by prior deed, debt, etc.

Unless the consent of the United States shall have previously been given, all contracts made with any person, or persons, now or hereafter applicants for enrollment as citizens in the Five Civilized Tribes for compensation for services in relation thereto, are hereby declared to be void and of no effect, and the collection or receipt of any moneys from any such applicants for citizenship shall constitute an offense against the laws of the United States, punishable by a fine of not exceeding $500 or imprisonment for not exceeding six months, or both, and lands allotted to such applicants whether Indians or freedmen shall not be affected or encumbered by any deed, debt, or obligation of any character contracted prior to the time at which said land may be alienated under the laws of the United States. (38 Stat. 598.)

This was part of the Indian appropriation act for the fiscal year 1915, cited above.

For other provisions relative to contracts with Indians, see Act June 30, 1913, c. 4, § 18, ante, § 4077; R. S. § 2103, post, § 4087; R. S. § 2104, post, § 4088; R. S. § 2105, post, § 4089.

§ 4078. (Act March 2, 1907, c. 2523, § 1.) Allotment of tribal funds to individual Indians.

The Secretary of the Interior is hereby authorized, in his discretion, from time to time, to designate any individual Indian belonging to any tribe or tribes whom he may deem to be capable of managing his or her affairs, and he may cause to be apportioned and allotted to any such Indian his or her pro rata share of any tribal or trust funds on deposit in the Treasury of the United States to the credit of the tribe or tribes of which said Indian is a member, and the amount so apportioned and allotted shall be placed to the credit of such Indian upon the books of the Treasury, and the same shall thereupon be subject to the order of such Indian: Provided, That no apportionment or allotment shall be made to any Indian until such Indian has first made an application therefor: Provided further, That the Secretaries of the Interior and of the Treasury are hereby directed to withhold from such apportionment and allotment a sufficient sum of the said Indian funds as may be necessary or required to pay any existing claims against said Indians that may be pending for settlement by judicial determination in the Court of Claims or in the Executive Departments of the Government, at time of such apportionment and allotment. (34 Stat. 1221.)

This and the section next following were an act entitled "An act providing for the allotment and distribution of Indian tribal funds."

§ 4079. (Act March 2, 1907, c. 2523, § 2, as amended, Act May 18, 1916, c. 125, § 1.) Payment of share of tribal funds to helpless, etc., Indians; application and approval.

The pro rata share of any Indian who is mentally or physically incapable of managing his or her own affairs may be withdrawn from the Treasury in the discretion of the Secretary of the Interior and expended for the benefit of such Indian under such rules, regu-

lations, and conditions as the said Secretary may prescribe: Provided, That said funds of any Indian shall not be withdrawn from the Treasury until needed by the Indian and upon his application and when approved by the Secretary of the Interior. (34 Stat. 1221. 39 Stat.)

The original enactment first cited above which was part of an act providing for the allotment and distribution of Indian tribal funds, read as follows:

"The Secretary of the Interior is hereby authorized to pay any Indian who is blind, crippled, decrepit, or helpless from old age, disease, or accident, his or her share, or any portion thereof, of the tribal trust funds in the United States Treasury belonging to the tribe of which such Indian is a member, and of any other money which may hereafter be placed in the Treasury for the credit of such tribe and susceptible of division among its members, under such rules, regulations, and conditions as he may prescribe."

It was amended by the Indian appropriation act for the fiscal year 1917, cited above, to read as set forth above.

§ 4080. (Act April 4, 1910, c. 140, § 1.) Statements of accounts between United States and Indian tribes under reimbursable appropriations, and payment of balances.

Hereafter the Secretary of the Interior shall cause to be stated annual accounts between the United States and each tribe of Indians arising under appropriations heretofore, herein, or hereafter to be made, which by law are required to be reimbursed to the United States, crediting in said accounts the sums so reimbursed, if any; and the Secretary of the Interior shall pay, out of any fund or funds belonging to such tribe or tribes of Indians applicable thereto and held by the United States in trust or otherwise, all balances of accounts due to the United States and not already reimbursed to the Treasury, and deposit such sums in the Treasury as miscellaneous receipts; and such accounts shall be received and examined by the proper auditor of the Treasury Department and the balances arising thereon certified to the Secretary of the Treasury. (36 Stat. 270.)

These were provisions of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4081. (R. S. § 2097.) Misapplication of funds belonging to the Indians prohibited.

No funds belonging to any Indian tribe with which treaty relations exist shall be applied in any manner not authorized by such treaty, or by express provisions of law; nor shall money appropriated to execute a treaty be transferred or applied to any other purpose, unless expressly authorized by law.

Act July 26, 1866, c. 266, § 2, 4 Stat. 280.

Diversion of Indian tribe funds, with consent of the interested Indian tribes, was authorized by Act March 1, 1907, c. 2285, ante, § 4066.

Notes of Decisions

Application of funds of Indians.—The court had no authority, in the absence of statute, to divert the funds in possession of the agent of an Indian tribe to the payment of a claim for services in procuring the treaty under which the appropriations were made. Hanks v. Hendricks (1900) 58 S. W. 669, 3 Ind. T. 415.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786; Leighton v. U. S. (1894) 29 Ct. Cl. 288.

§ 4082. (R. S. § 2098.) Indian depredations, how paid.

No part of the moneys which may be appropriated in any general act or deficiency bill making appropriations for the current and contingent expenses incurred in Indian affairs, to pay annuities due to or to be used and expended for the care and benefit of any tribe or tribes of Indians, shall be applied to the payment of any claim for depredations that may have been or may be committed by such tribe or tribes, or any member or members there-

of. No claims for Indian depredations shall be paid until Congress shall make special appropriation therefor.

Act July 15, 1870, c. 296, § 4, 16 Stat. 360.

Notes of Decisions

Repeal of statute.—See (1895) 21 Op. Atty. Gen. 131, deciding that the presumption is against repeal of this section by Act June 15, 1880.

Set-offs against annuities.—Payments made by the United States on account of depredations by the Sisseton and Wahpeton bands of Sioux Indians, sums paid to their chiefs for removal and subsistence, and for manual labor schools under the treaty of July 23, 1851 (10 Stat. 949), and expenditures for their support made because of the destitution produced by the forfeiture of their annuities, which was declared by Act Feb. 16, 1863, c. 37, 12 Stat. 652, are properly set off against their annuities by the Court of Claims, in the exercise of its jurisdiction under Act June 21, 1906, c. 3504, 34 Stat. 372, to adjudicate and award the balance, if any, due such Indians, for annuities under the treaty, as if the act of forfeiture had not been passed, and to ascertain and set off all payments or other provisions made to or for such bands or any members thereof since the act of forfeiture "which are properly chargeable against unpaid annuities." U. S. v. Sisseton and Wahpeton Bands of Sioux Indians (1908) 28 Sup. Ct. 352, 208 U. S. 561, 52 L. Ed. 621, affirming judgment (1907) 42 Ct. Cl. 416.

Cited without definite application, Leighton v. U. S. (1894) 29 Ct. Cl. 288; Thurston v. U. S. (1914) 34 Sup. Ct. 394, 396, 232 U. S. 469, 58 L. Ed. 688.

(R. S. § 2099. Superseded.)

This section provided that moneys appropriated for purposes of education among the Indian tribes should not be expended elsewhere than in Indian country, excepting certain expenditures authorized by treaty to be under direction either of the President or of the Indian tribes. It is transferred to Chapter 4 A of this Title, "Education of Indians." But its provisions were superseded by a proviso annexed to Act July 31, 1882, c. 363, post, § 4163, that moneys appropriated for general purposes of education among the Indians might be expended for education of Indian youth at such posts, institutions, and schools as the Secretary of the Interior might consider advantageous, or as Congress from time to time might authorize and provide.

§ 4083. (R. S. § 2100.) Annuities of Indians hostile to United States not to be paid or delivered.

No moneys or annuities stipulated by any treaty with an Indian tribe for which appropriations are made shall be expended for, or paid, or delivered to any tribe which, since the next preceding payment under such treaty, has engaged in hostilities against the United States, or against its citizens peacefully or lawfully sojourning or traveling within its jurisdiction at the time of such hostilities; nor in such case shall such stipulated payments or deliveries be resumed until new appropriations shall have been made therefor by Congress. And the Commissioner of Indian Affairs shall report to Congress, at each session, any case of hostilities, by any tribe with which the United States has treaty stipulations, which has occurred since his next preceding report.

Act March 2, 1867, c. 173, § 2, 14 Stat. 515.

Payment of appropriations to Indians at war with the United States was prohibited by Act March 3, 1875, c. 132, § 2, post, § 4084.

Notes of Decisions

Annuities of hostile Indians.—The annuity due the Canadian branch of the Cayuga Indians under various treaties with the state of New York, though not having been paid to them since the War of 1812, because of their having taken part therein against the United States, never having been confiscated, is still theirs; nor are their rights affected by treaties made with other portions of the tribe, to which treaties the Canadian branch were not parties. People v. Commissioners of Land Office of State (N. Y. 1885) 34 Hun, 588.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

§ 4084. (Act March 3, 1875, c. 132, § 2.) Appropriations not to be paid to Indians at war with United States.

None of the appropriations herein made, or of any appropria-

tions made for the Indian service, shall be paid to any band of Indians or any portion of any band while at war with the United States or with the white citizens of any of the States or Territories. (18 Stat. 449.)

This section was part of the Indian appropriation act for the fiscal year 1876, cited above.

§ 4085. (R. S. § 2101.) Goods withheld from chiefs who have violated treaty stipulations.

No delivery of goods or merchandise shall be made to the chiefs of any tribe, by authority of any treaty, if such chiefs have violated the stipulations contained in such treaty upon their part.

Act April 10, 1869, c. 16, § 2, 16 Stat. 39.

Cited without definite application,
U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

(R. S. § 2102. Superseded.)

This section provided for withholding from any tribe of Indians holding American captives any moneys due them, until such captives should have been surrendered. It was superseded by a similar provision of Act March 3, 1875, c. 132, § 1, post, § 4086.

§ 4086. (Act March 3, 1875, c. 132, § 1.) Moneys due Indians holding captives other than Indians to be withheld.

That the Secretary of the Interior be authorized to withhold, from any tribe of Indians who may hold any captives other than Indians, any moneys due them from the United States until said captives shall be surrendered to the lawful authorities of the United States. (18 Stat. 424.)

This was a provision of the Indian appropriation act for the fiscal year 1876, cited above.

§ 4087. (R. S. § 2103.) Contracts with Indian tribes or Indians.

No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:

First. Such agreement shall be in writing, and a duplicate of it delivered to each party.

Second. It shall be executed before a judge of a court of record, and bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.

Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.

Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.

Sixth. The judge before whom such contract or agreement is executed shall certify officially the time when and place where such contract or agreement was executed, and that it was in his presence, and who are the interested parties thereto, as stated to him at the time; the parties present making the same; the source and extent of authority claimed at the time by the contracting parties to make the contract or agreement, and whether made in person or by agent or attorney of either party or parties.

All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

Act March 3, 1871, c. 120, § 3, 16 Stat. 570. Act May 21, 1872, c. 177, §§ 1, 2, 17 Stat. 136.

Provisions of the same nature as those of this section, relating to private contracts or agreements with Indian tribes or Indians, made prior to the date of Act May 21, 1872, c. 177, cited above, which was incorporated into this section of the Revised Statutes, were made by Act April 29, 1874, c. 135, 18 Stat. 35. That act is omitted, as temporary merely.

Contracts regarding tribal funds or property in the hands of the United States are invalid, unless the consent of the United States has previously been given, by Act June 30, 1913, c. 4, § 18, ante, § 4077.

Contracts with persons seeking enrollment as citizens of the Five Civilized Tribes were declared void, unless the consent of the United States had previously been given, by Act Aug. 1, 1914, c. 222, § 17, ante, § 4077b.

Notes of Decisions

Construction and operation in general.—This section and sections 4088, 4089, post, are only intended to protect the Indians from improvident contracts, and do not create a legal obligation on the part of the United States to see that the Indians perform their part of the contracts. In re Sanborn (1893) 13 Sup. Ct. 577, 579, 148 U. S. 222, 37 L. Ed. 429.

A licensed Indian trader may not make unlawful contracts. Green v. Menominee Tribe of Indians in Wisconsin (1914) 34 Sup. Ct. 706, 233 U. S. 558, 58 L. Ed. 1093.

The act of 1872 (incorporated into this section) relieved the President of the duty of considering Indian contracts for the payment of money, etc., and vested that duty elsewhere. (1884) 18 Op. Atty. Gen. 11.

Contracts with Indians not citizens of the United States can only be made under statutory restrictions and regulations which are designed for the protection of such Indians in dealings with other persons, and have, it appears, no application to transactions with the government. (1885) 18 Op. Atty. Gen. 183.

This section must be literally complied with, and nothing can be taken by intendment, nor can the Secretary of the Interior dispense with any of its requirements. (1886) 18 Op. Atty. Gen. 498.

See Clark v. Crosland (1856) 17 Ark. 43, holding that Act March 3, 1847, c. 66, § 3, 9 Stat. 203, declaring that "all executory contracts made by any Indian for the payment of money or goods shall be deemed and held to be null and void," is not confined to contracts to pay for spirituous liquors, though section 2 prohibits the sale of such liquors, and said section 3 (first part) prohibits the distribution of property to them while they are intoxicated. See also Hanks v. Hendricks (1900) 58 S. W. 669, 3 Ind. T. 415, holding that, under Act April 29, 1874, prohibiting officers of the United States, or other persons under its employ or control, from recognizing the legality of a contract with Indians for services in procuring treaties or grants from the United States which had been entered into prior to 1872, unless such contract was in writing, and then not until it had been presented, passed on, and indorsed by the secretary of the interior and commissioner of Indian affairs, a claim for such services rendered prior to 1874, against a fund received from the United States by an Indian, as agent of the Old-Settler

Cherokees, cannot be enforced, where such claim has never been presented to, nor examined by, the secretary of the interior and commissioner of Indian affairs.

—— **Modification by subsequent acts.**—Act March 1, 1889, authorizing and directing the secretary of the treasury to make certain payments to the Muskogee or Creek Nation, or to such persons as shall be duly authorized to receive the same, as directed and required by the national council of the said nation, was intended as a substitute for this section and section 4088, post, only as to the particular cases embraced in the act. And hence the attorney who acted for the Creek Nation in the cession of their lands, and to whom the council appropriated a specified sum for his services, is entitled to the money, though this section was not complied with. U. S. v. Crawford (C. C. 1891) 47 Fed. 561.

—— **Approval of contracts.**—The approval of a contract operates by relation to the date of the contract. (1876) 15 Op. Atty. Gen. 585.

Where an agreement is severable the Secretary of the Interior may approve one provision and reject the others. Rollins v. U. S. (1888) 23 Ct. Cl. 106; (1876) 15 Op. Atty. Gen. 585.

A contract must be approved as made. (1876) 15 Op. Atty. Gen. 585.

The Secretary of the Interior held without power to approve a contract where the signature of a party thereto was added after services had been performed. (1886) 18 Op. Atty. Gen. 447, 497, 518.

A contract should be valid from the beginning, and a subsequent approval of a defective contract by a committee of Indians is without effect where it does not appear what authority the committee had. (1886) 18 Op. Atty. Gen. 497.

—— **Contracts within statute.**—A contractual agreement of an Indian tribe or its individual members to pay for supplies furnished for logging operations out of the proceeds from sale of the logs is governed by this section. The requirement that contracts with Indians shall be void unless in writing and formally executed and approved, is applicable to an agreement by a tribe or individual members to pay for supplies for logging operations out of proceeds received by Indian agent from the sale of the logs, though the other contracting party was a licensed Indian trader. Green v. Menominee Tribe of Indians in Wisconsin (1914) 34 S. Ct. 706, 233 U. S. 558, 58 L. Ed. 1093, affirming judgment (1912) 47 Ct. Cl. 281.

The mere circumstance that a contract at the time of its presentation for approval in 1874 had been executed did not except it from the operation of this section. (1884) 18 Op. Atty. Gen. 5.

A contract with an Indian, not a citizen, for payment of money for services to be rendered to the Indian as to lands of his tribe which he proposes to enter as allotments, falls within this section, and, where not executed and proved as required by said section, is void. Smith & Steele v. Martin (1911) 115 P. 866, 28 Okl. 836.

The fees of the attorney of record for the Eastern Cherokees were provided for by law, within a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, upon collection thereof, provided that, "in the contingency of the fees not being provided for by legislation * * * but upon proof of services," each party should look out for himself, where his fees were allowed in full by the court of claims, under the subsequent act (Act March 3, 1903, c. 994, 32 Stat. 996), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof, before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties. Owen v. Dudley (1910) 30 Sup. Ct. 602, 217 U. S. 488, 54 L. Ed. 851, affirming judgment Dudley v. Owen (1908) 31 App. D. C. 177.

The action of the Commissioner of Indian Affairs in sending a special agent to make some arrangement whereby destitute Indians could obtain equipment and supplies which would enable them to cut and sell timber cannot be construed as authority to create a liability against the tribal funds. Green v. Menominee Tribe of Indians of Wis. (1912) 47 Ct. Cl. 281.

This section does not include contracts of the character described in R. S. § 2116, post, § 4100. (1885) 18 Op. Atty. Gen. 235.

Under Act May 28, 1830, granting land to the Cherokee Nation, and providing that it shall revert to the United States if the nation becomes extinct, the nation takes a qualified fee, with a possibility of reversion; and this section does not apply to a lease of such land by the nation. Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co. (1897) 40 S. W. 107, 138 Mo. 394.

—— **Implied contracts.**—An Indian tribe and its members should not, on theory of an implied contract, be held liable for supplies furnished to certain members of the tribe for logging operations under an express agreement void under this section, because not in writing, where the Indian agent failed as agreed to apply the proceeds in his hands from the sale of the logs in payment of the supplies so furnished. Green v. Menominee Tribe of Indians

in Wisconsin (1914) 34 S. Ct. 706, 233 U. S. 558, 58 L. Ed. 1093, affirming judgment (1912) 47 Ct. Cl. 281.

Validity and enforcement of contracts.—Where a contract between an Indian tribe or nation and an attorney was not sanctioned by the Secretary of the Interior, no judgment can be recovered thereon. Bailey v. U. S. (1908) 43 Ct. Cl. 353.

An agreement which does not comply with the conditions of the statute cannot be enforced. Green v. Menominee Tribe of Indians in Wis. (1912) 47 Ct. Cl. 281.

A note made by an Indian, a member of a tribe residing on a reservation, and maintaining its tribal relations, in favor of another member of the tribe, is valid, when not given under a contract prohibited by this section. Ketuc-e-mun-guah v. McClure (1890) 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

One in possession of land in the "Cherokee Outlet" may recover as upon a quantum meruit for pasturing thereon cattle delivered to him for that purpose, if there is no showing that he held the land without consent of the Indians, regardless of the question whether his lease, if he had one, was valid as against the Indians or the government. Kansas & N. M. Land & Cattle Co. v. Thompson (1897) 48 P. 34, 57 Kan. 792.

A bond voluntarily executed to the United States, conditioned on the faithful performance of a contract with a number of tribal Indians, whereby the Indians were temporarily employed by the obligors, who contracted, among other things, to pay them monthly salaries, to provide them with proper food and raiment, and to return them to the government agency within a specified time without expense to the United States, is a valid obligation, although not authorized by statute. U. S. v. Pumphrey (1897) 11 App. D. C. 44.

A tribal Indian placed upon a reservation under a government treaty is not incapacitated from suing to enforce a contract entered into off the reservation and while in this state. Whirlwind v. Von der Ahe (1896) 67 Mo. App. 628.

The members of an Indian tribe cannot sue as such to recover possession of Indian lands held by white men under a void improvement contract, and which they desire to take as their allotment, such right of action being in the sovereign. Casteel v. McNeeley (1901) 64 S. W. 594, 4 Ind. T. 1.

See Taylor v. Drew (1860) 21 Ark. 485; Rogers' Ex'rs v. Duval (1861) 23 Ark. 77; Jones v. Eisler (1865) 3 Kan. 134; Murch v. Tomer (1842) 21 Me. (8 Shep.) 535.

Assignments.—An agreement by attorneys having a contract for a contingent fee with Indians, approved by the Secretary of the Interior and the Commissioner of Indian Affairs, as required by this section, to pay other attorneys, who had assisted in its procurement, a part of the fee, and creating an equitable lien therefor upon the fee when received, is not an assignment of the contract within the meaning of section 4096, post. Gordon v. Gwydir (1910) 34 App. D. C. 508.

Where a party to whom an annuity, to which a Miami Indian was entitled from the United States was, by her verbal order, paid in satisfaction of a debt, was garnished in an attachment suit against said Indian, the order would not be presumed to be void under this section and section 4090, post. Godfroy v. Scott (1880) 70 Ind. 259.

An assignment by an Indian nation of a part interest in a claim held by it against the United States made in accordance with this section and a subassignment made in accordance with post, § 4090, are not invalid under post, § 6383. Dexter v. Meigs (1890) 47 N. J. Eq. 488, 21 Atl. 114.

See Missouri P. Ry. Co. v. Cullers (1891) 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542, holding that this section does not prohibit an Indian from assigning a claim for the value of property illegally destroyed.

Jurisdiction of courts.—In view of Act March 3, 1887, § 1 (incorporated into section 1033, ante), which provides that no civil suit involving a federal question shall be brought in the federal courts against any person in any other district than that whereof he is an inhabitant, the provision in this section that suits to recover moneys paid by Indians on contracts made in violation of the statute may be brought "in any court of the United States" must be construed as meaning any court of the United States within the territorial jurisdiction of which defendant is an inhabitant. U. S. v. Crawford (C. C. 1891) 47 Fed. 561.

A statute conferring jurisdiction upon a court to hear and determine the claims of attorneys for services is not controlled by this section. Butler v. U. S. (1908) 43 Ct. Cl. 497.

The plaintiff, a resident of Kansas, cultivated land in the Cherokee Nation, under a lease from the defendant, which was not approved by the secretary of the interior. After plaintiff's corn had ripened, the defendant turned his cattle on it, and it was eaten up and destroyed. The treaty of Aug. 11, 1866 (article 7), between the United States and the Cherokee Nation (14 Stat. 800), provides that the United States district court nearest to the Cherokee Nation shall have exclusive jurisdiction of all civil and criminal cases. Held, that the courts of Kansas have no jurisdiction, though the plaintiff waived the tort and sought to recover the value of his property on a promise implied by law. Holderman v. Pond (1891) 45 Kan. 410, 25 Pac. 872.

The Cherokee Indians have been

placed upon the same footing with other tribes by an act of congress passed in pursuance of the power granted by the constitution in reference to "regulating commerce with foreign nations among the several states, and with the Indian tribes"; and their contracts made with the plaintiff to prosecute and collect claims alleged to be due them cannot be enforced against them in a state court without the consent of congress. The jurisdiction to determine such matters is lodged in the interior department. Rollins v. Cherokee Indians (1882) 87 N. C. 229.

Cited without definite application, U. S. v. Cherokee Nation (1906) 26 Sup. Ct. 588, 596, 202 U. S. 101, 50 L. Ed. 949; Eastern Cherokees v. U. S. (1912) 32 Sup. Ct. 707, 708, 225 U. S. 572, 56 L. Ed. 1212; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295); Green v. Menominee Tribe of Indians (1911) 46 Ct. Cl. 68.

§ 4088. (R. S. § 2104.) Payments under contracts restricted.

No money shall be paid to any agent or attorney by an officer of the United States under any such contract or agreement, other than the fees due him for services rendered thereunder; but the moneys due the tribe, Indian, or Indians, as the case may be, shall be paid by the United States, through its own officers or agents, to the party or parties entitled thereto; and no money or thing shall be paid to any person for services under such contract or agreement, until such person shall have first filed with the Commissioner of Indian Affairs a sworn statement, showing each particular act of service under the contract, giving date and fact in detail, and the Secretary of the Interior and Commissioner of Indian Affairs shall determine therefrom whether, in their judgment, such contract or agreement has been complied with or fulfilled; if so, the same may be paid, and, if not, it shall be paid in proportion to the services rendered under the contract.

Act May 21, 1872, c. 177, § 2, 17 Stat. 136.

Notes of Decisions

Construction and operation of statute.—This section and section 4087, ante, and section 4089, post, are only intended to protect the Indians from improvident contracts, and do not create a legal obligation on the part of the United States to see that the Indians perform their part of the contracts. In re Sanborn (1893) 13 Sup. Ct. 577, 579, 148 U. S. 222, 37 L. Ed. 429.

The fees of the attorney of record for the Eastern Cherokees were provided for by law, within a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, on collection thereof, provided that, "in the contingency of the fees not being provided for by legislation, but upon proof of services," each party should look out for himself, where his fees were allowed in full by the court of claims, under the subsequent act (Act March 3, 1903, c. 994, 32 Stat. 996), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof, before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties. Owen v. Dudley (1910) 30 Sup. Ct. 602, 604, 217 U. S. 488, 54 L. Ed. 851.

Act March 1, 1889, authorizing and directing the secretary of the treasury to make certain payments to the Muskogee or Creek nation, or to such persons as shall be duly authorized to receive the same, as directed and required by the national council of the said nation, was intended as a substitute for this section and section 4087, ante, only as to the particular cases embraced in the act. U. S. v. Crawford (C. C. 1891) 47 Fed. 561, 567–571.

Since the approval of a contract operates by relation to the date of the contract, a claimant thereunder is not confined to acts of service done subsequently to date of the approval, but may show acts done at any time after the date of the contract. (1876) 15 Op. Atty. Gen. 585.

Cited without definite application, Eastern Cherokees v. U. S. (1912) 32 Sup. Ct. 707, 708, 225 U. S. 572, 56 L. Ed. 1212.

§ 4089. (R. S. § 2105.) Receiving moneys under prohibited contracts punishable; prosecution therefor; Indian agents or employés of United States aiding in making prohibited contracts or payments to be dismissed from the service.

The person so receiving such money contrary to the provisions

of the two preceding sections, and his aiders and abettors, shall, in addition to the forfeiture of such sum, be punishable by imprisonment for not less than six months, and by a fine of not less than one thousand dollars. And it shall be the duty of all district attorneys to prosecute such cases when applied to do so, and their failure and refusal shall be ground for their removal from office. Any Indian agent, or other person in the employment of the United States, who shall, in violation of the provisions of the preceding section, advise, sanction, or in any way aid in the making of such contracts or agreements, or in making such payments as are here prohibited, shall, in addition to the punishment herein imposed on the person making such contract, or receiving such money, be, on conviction, dismissed from the service of the United States, and be forever disqualified from holding any office of profit or trust under the same.

Act March 3, 1871, c. 120, § 3, 16 Stat. 570.

Notes of Decisions

Construction and operation of statute.—This section and sections 4087, 4088, ante, are only intended to protect the Indians from improvident contracts, and do not create a legal obligation on the part of the United States to see that the Indians perform their part of the contracts. In re Sanborn (1893) 13 Sup. Ct. 577, 579, 148 U. S. 222, 37 L. Ed. 429.

The fees of the attorney of record for the Eastern Cherokees were provided for by law, within the meaning of a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, upon collection thereof, provided that, "in the contingency of the fees not being provided for by legislation, but upon proof of services," each party should look out for himself, where his fees were allowed in full by the court of claims, under the authority of the subsequent act (Act March 3, 1903, c. 994, 32 Stat. 996), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties. Owen v. Dudley (1910) 30 Sup. Ct. 602, 604, 217 U. S. 488, 54 L. Ed. 851.

Cited without definite application, U. S. v. Cherokee Nation (1906) 26 Sup. Ct. 588, 596, 202 U. S. 101, 50 L. Ed. 949; Eastern Cherokees v. U. S. (1912) 32 Sup. Ct. 707, 708, 225 U. S. 572, 56 L. Ed. 1212; U. S. v. Crawford (C. C. 1891) 47 Fed. 561, 567; In re Wolf (D. C. 1886) 27 Fed. 606, 607.

§ 4090. (R. S. § 2106.) Assignments of contracts restricted.

No assignment of any contracts embraced by section twenty-one hundred and three, or of any part of one shall be valid, unless the names of the assignees and their residences and occupations be entered in writing upon the contract, and the consent of the Secretary of the Interior and the Commissioner of Indian Affairs to such assignment be also indorsed thereon.

Act May 21, 1872, c. 177, § 2, 17 Stat. 136.

R. S. § 2103, mentioned in this section, is set forth ante, § 4087.

Notes of Decisions

Application of statute.—The fees of the attorney of record for the Eastern Cherokees were provided for by law, within the meaning of a contract between him and his associate counsel, by which he was to pay his associates a specified sum for their services out of his stipulated fees, upon collection thereof, provided that, "in the contingency of the fees not being provided for by legislation, but upon proof of services," each party should look out for himself, where his fees were allowed in full by the court of claims, under the authority of the subsequent act (Act March 3, 1903, c. 994, 32 Stat. 996), since such statute, though not directly fixing the fees, dispensed with the necessity of making proof before the Commissioner of Indian Affairs and the Secretary of the Interior, which must have been the "proof of services" contemplated by the parties. Owen v. Dudley (1910) 30 Sup. Ct. 602, 604, 217 U. S. 488, 54 L. Ed. 851.

Assignments.—An agreement by attorneys having a contract for a contingent fee with Indians, approved by the Secretary of the Interior and the Commissioner of Indian Affairs, as required by section 4084, ante, to pay other attorneys, who had assisted in its

procurement, a part of the fee, and creating an equitable lien therefor upon the fee when received, is not an assignment of the contract. Gordon v. Gwydir (1910) 34 App. D. C. 508.

Where a party to whom an annuity, to which a Miami Indian was entitled from the United States, was, by her verbal order, paid in satisfaction of a debt, was garnished in an attachment suit against said Indian, the order would not be presumed to be void, under this section and section 4087, ante. Godfroy v. Scott (1880) 70 Ind. 259.

An assignment by an Indian nation of a part interest in a claim held by it against the United States, made in accordance with ante, § 4087, and a subassignment made in accordance with this section, are not prohibited or rendered invalid by section 6383, post. Dexter v. Meigs (1890) 47 N. J. Eq. (2 Dick.) 488, 21 Atl. 114.

An Indian whose property has been destroyed by fire may assign to a white man his right of action against the person whose negligence caused the fire. Missouri Pac. Ry. Co. v. Cullers (1891) 81 Tex. 382, 17 S. W. 19, 13 L. R. A. 542.

Cited without definite application, U. S. v. Cherokee Nation (1906) 26 Sup. Ct. 588, 596, 202 U. S. 101, 50 L. Ed. 949; Eastern Cherokees v. U. S. (1912) 32 Sup. Ct. 707, 708, 225 U. S. 572, 56 L. Ed. 1212; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295); Green v. Menominee Tribe of Indians (1911) 46 Ct. Cl. 68.

(R. S. § 2107. Superseded.)

This section provided that no payments should be made to contractors for goods or supplies furnished to Indians, or for transportation thereof, or for buildings or machinery erected or placed on their reservations, under any contract with the Department of the Interior, on receipts or certificates of Indian agents, etc., for such supplies, etc., for more than 50 per cent. of the amount due, until the accounts and vouchers should have been submitted to the executive committee of the Board of Indian Commissioners, for examination, revisal, and approval; that such Board should forward the accounts and vouchers submitted to them to the Secretary of the Interior, with the reasons for their approval or disapproval of the same; and that the Secretary should have power to sustain, set aside, or modify the action of the Board, and cause payment to be made or withheld, as he should determine.

These provisions contemplated the exercise, by the Board, of the duty "to supervise all expenditures of money appropriated for the benefit of Indians," under R. S. § 2041; but they were superseded by the subsequent provision that "the Commission shall only have power to visit and inspect agencies and other branches of the Indian service, and to inspect goods purchased for said service," etc., of Act May 17, 1882, c. 163, § 1, ante, § 3982.

§ 4091. (Act July 4, 1884, c. 180, § 8.) False vouchers, accounts, or claims presented by officers or other persons; effect to prevent payment or credit.

Any disbursing or other officer of the United States, or other person, who shall knowingly present, or cause to be presented, any voucher, account, or claim to any officer of the United States, for approval or payment, or for the purpose of securing a credit in any account with the United States, relating to any matter pertaining to the Indian service, which shall contain any material misrepresentation of fact in regard to the amount due or paid, the name or character of the article furnished or received; or of the service rendered, or to the date of purchase, delivery, or performance of service, or in any other particular, shall not be entitled to payment or credit for any part of said voucher, account, or claim; and if any such credit shall be given or received, or payment made, the United States may recharge the same to the officer or person receiving the credit or payment, and recover the amount from either or from both, in the same manner as other debts due the United States are collected: Provided, That where an account contains more than one voucher the foregoing shall apply only to such vouchers as contain the misrepresentation: And provided further, That the officers and persons by and between whom the business is transacted shall, in all civil actions in settlement of accounts, be presumed to know the facts in relation to the matter set forth in the voucher, account, or claim: And provided further,

That the foregoing shall be in addition to the penalties now prescribed by law, and in no way affect proceedings under existing law for like offenses. That where practicable this section shall be printed on the blank forms of vouchers provided for general use. (23 Stat. 97.)

This section was part of the Indian appropriation act for the fiscal year 1885, cited above.

Notes of Decisions

Construction and operation in general.—This section was in the nature of a penalty and was unenforceable against sureties of an Indian agent on a bond conditioned to secure his faithful disbursement of all public moneys and to honestly account without fraud or delay for all public funds and property. U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390. It does not impose a penalty, nor render an action to recover the indebtedness, resulting from the rejection of such accounts, one for the recovery of a penalty, but merely prescribes a statutory rule of accounting which becomes a part of the contract of a surety for an Indian agent, to which his obligation is subject, and it is no defense to such an action on an agent's bond that vouchers so rejected contained correct and true items of expenditure; the agent having the right on their rejection to furnish true vouchers for all items for which he was entitled to credit. United States Fidelity & Guaranty Co. of Baltimore, Md., v. U. S. (1907) 150 Fed. 550, 80 C. C. A. 446.

Where an agent's account consists of a receipt roll, not the original paper, but merely the abstract of several vouchers accompanying it, one of which contains but one item that is false that bears no relation to the other items in the account, the penalty of this section reaches no further than to take away the agent's right to credit for any part of that item. (1893) 20 Op. Atty. Gen. 561.

—— **Separate and distinct vouchers.**—Where an agent's account contains a receipt roll which is but an abstract of several subvouchers which accompany it, and when the voucher on which one false item rests is confined to that item, the penalty merely takes away the agent's right to credit for any part of that item. Where the false item occurs in the printed form entitled "Pay roll of regular employees," and is signed by twelve persons, each stating opposite his name the kind of work done by him, the receipts thus taken are so many separate and distinct vouchers. (1893) 20 Op. Atty. Gen. 561.

—— **Certificate constituting material misrepresentation.**—Where an agent who paid a specified sum to a third person, who immediately paid back a part thereof to be held as security that the third person would perform certain work, while the agent certified that the work had been completed, while as a matter of fact it was not, his certificate to the government was a material misrepresentation authorizing a recovery on the bond. Ewing v. U. S. (Ariz. 1907) 89 P. 593.

Liability on bonds.—See § 4002 and notes thereunder.

The government, in an action on a bond conditioned on accounting for the public funds, and on not presenting any fraudulent claim, showed that the balance due from him was occasioned in part by the presentation of a voucher for which the agent had once been credited, and on investigation such credit had been disallowed, and the amount recharged, on finding that it was within this section. The defendants in their answers admitted that the agent presented for payment a claim of the character mentioned in the statute, but that the claim did not contain any material misrepresentation in regard to the amount due or paid. Held to authorize a judgment for the government. The agent presented a voucher payable to a third person for a specified sum which was paid. The agent, without authority from the government, received for himself a specified part of the money paid on the voucher, though he certified to the government that he had paid the third person the full amount. Held, that the fact that the agent thereafter used the sum received from the third person for the benefit of the government did not relieve him from liability on his official bond. Ewing v. U. S. (Ariz. 1907) 89 P. 593.

Actions on bonds—Pleadings.—A complaint which alleged that the officer was on a specified date indebted to the government in a specified sum for public moneys in his hands as officer, and that the government demanded from him and his sureties payment thereof, and that they refused to pay the same, sufficiently alleged wherein the government suffered damage and a breach of the bond. Ewing v. U. S. (Ariz. 1907) 89 P. 593.

—— **Defenses.**—It is no defense that vouchers rejected under this section for material misrepresentations of facts in regard to the amount due and paid contains correct and true items of expenditures; the agent having the right on their rejection to furnish true vouchers for all items for which he was entitled to credit. United States Fidelity & Guaranty Co. v. U. S. (1907) 150 Fed. 550, 554, 80 C. C. A. 446.

—— **Evidence.**—The government, in an action on the bond of a disbursing

agent, conditioned on his accounting for public moneys coming into his hands, and on his not presenting any fraudulent claim within this section, based on the failure of the officer to account for public moneys in his hands, and not based on the fact that he made material misrepresentations as to claims presented for payment, need only prove that there were public funds in the agent's hands in the amount alleged, and that he had failed to pay them over to the government, which fact might be established by the certified transcript of his account with the government, as shown by the books of the Treasury Department, made legal evidence by section 1498, ante. Ewing v. U. S. (Ariz. 1907) 89 P. 593.

See U. S. v. Pierson (1906) 145 Fed. 814, 76 C. C. A. 390, as to admissibility and effect of transcript of the books and proceedings of the treasury department.

Cited without definite application, Bridgeman v. U. S. (1905) 140 Fed. 577, 72 C. C. A. 145.

§ 4092. (R. S. § 2108.) Moneys due incompetent or orphan Indians.

The Secretary of the Interior is directed to cause settlements to be made with all persons appointed by Indian councils to receive moneys due to incompetent or orphan Indians, and to require all moneys found due to such incompetent or orphan Indians to be returned to the Treasury; and all moneys so returned shall bear interest at the rate of six per centum per annum, until paid by order of the Secretary of the Interior to those entitled to the same. No money shall be paid to any person appointed by any Indian council to receive moneys due to incompetent or orphan Indians, but the same shall remain in the Treasury of the United States until ordered to be paid by the Secretary to those entitled to receive the same, and shall bear six per centum interest until so paid.

Act July 5, 1862, c. 135, § 6, 12 Stat. 529.

Notes of Decisions

Liability of United States for embezzlement by guardian appointed by Indian tribe.—It will be assumed that payments made under the Shawnee Indian Treaty of May 10, 1854, to guardians of orphan children appointed by the Shawnee Indian Council were made before Act July 5, 1862, the sixth section of which is embodied in this section, and the United States is not liable for embezzlement by such guardians. U. S. v. Blackfeather (1894) 15 Sup. Ct. 64, 70, 155 U. S. 180, 39 L. Ed. 114.

§ 4093. (R. S. § 2109.) Number of Indians present and receiving food, etc., to be reported.

Whenever the issue of food, clothing, or supplies of any kind to Indians is provided for, it shall be the duty of the agent or commissioner issuing the same, at such issue thereof, whether it be both of food and clothing, or either of them, or of any kind of supplies, to report to the Commissioner of Indian Affairs the number of Indians present and actually receiving the same.

Act Feb. 14, 1873, c. 138, § 7, 17 Stat. 463, 464.

§ 4094. (R. S. § 2110.) Rations for Indians.

The President is authorized to cause such rations as he deems proper, and as can be spared from the Army provisions without injury to the service, to be issued, under such regulations as he shall think fit to establish, to Indians who may visit the military posts or agencies of the United States on the frontiers, or in their respective nations; and a special account of these issues shall be kept and rendered.

Act June 30, 1834, c. 162, § 16, 4 Stat. 738.

CHAPTER THREE

Government and Protection of Indians

Sec.
4095. Sending seditious messages; penalty.
4096. Carrying seditious messages; penalty.
4097. Correspondence with foreign nations, to excite Indians to war; penalty.
4098. General superintendence by the President over tribes removed west of the Mississippi.
4099. Survey of Indian reservations.
4100. Purchases or grants of lands from Indians.
4101. Fees payable on behalf of Indian parties in contests under public land laws; amount and payment thereof.
4102. District attorneys to represent Indians in all suits in certain States, etc.
4103. White men marrying Indian women, not to acquire any right to tribal property, etc.
4104. Indian women marrying white men to become citizens of United States; right to tribal property, etc., not affected thereby.
4105. Evidence of marriage of white man with Indian woman.
4106. Children of marriages previous to act between white men and Indian women to have same rights, etc., as mother, to property, etc., of tribe.
4107. Driving stock to feed on Indian lands.
4108. Settling on or surveying lands belonging to Indians by treaty.
4109. Protection of Indians desiring civilized life.
4110 Indians trespassing upon lands of civilized Indians.
4111. Suspension of chief for trespass.
4112. Sale of buildings belonging to the United States.
4113. Sale of lands with buildings.
4114. Government of property at Indian reservation or school, not required for use; removal authorized.
4115. Government property at Indian reservation, not required for use; transfer or sale authorized; disposition of proceeds of sale.
4116. Penalties under this Title; how recovered.
4117. Proceedings against goods seized for violation of this Title.
4118. Burden of proof in trials of right of property between Indians and white persons.
4119. (Repealed.)
4120. Sale by agents of cattle, horses, etc., of Indians not required for their use, authorized.
4121. Sale of cattle of Indians purchased by Government to persons not members of the tribe, etc., forbidden, except with written consent of agent; purchase in violation of provision punishable.
4122. Sale or other disposition of dead timber, by Indians on reservations, authorized.
4123. Sale or other disposition of dead timber, by Indians on reservations, etc., in Minnesota, authorized.
4124. Fund for encouraging agricultural industry among Indians; conditions for repayments; disposition of repayments; report of use of fund.
4125. Additional fund for encouraging agricultural industry among Indians; conditions for repayments; disposition of repayments; report of use of fund.
4125a. Additional fund for encouraging agricultural industry among Indians; conditions for repayment; report of moneys appropriated for encouraging industry among Indians; restrictions on expenditure.
4125b. Prevention and treatment of contagious and infectious diseases among Indians; erection and equipment of hospitals; isolation or quarantine of Indians afflicted with such diseases.
4126. Access to records of Five Civilized Tribes by Secretary of Interior.
4126a. Report or record of offense or case of Indian incarcerated in agency jail, etc.

§ 4095. (R. S. § 2111.) Sending seditious messages; penalty.

Every person who sends any talk, message, or letter to any Indian nation, tribe, chief, or individual, with an intent to produce a contravention or infraction of any treaty or law of the United States, or to disturb the peace and tranquility of the United States, is liable to a penalty of two thousand dollars.

Act June 30, 1834, c. 161, § 13, 4 Stat. 731.

§ 4096. (R. S. § 2112.) Carrying seditious messages; penalty.

Every person who carries or delivers any talk, message, speech, or letter, intended to produce a contravention or infraction of any treaty or law of the United States, or to disturb the peace or tranquility of the United States, knowing the contents thereof, to or from any Indian nation, tribe, chief, or individual, from or to any person or persons whatever, residing within the United States, or from or to any subject, citizen, or agent of any foreign power or state, is liable to a penalty of one thousand dollars.

Act June 30, 1834, c. 161, § 14, 4 Stat. 731.

§ 4097. (R. S. § 2113.) Correspondence with foreign nations, to excite Indians to war; penalty.

Every person who carries on a correspondence, by letter or otherwise, with any foreign nation or power, with an intent to induce such foreign nation or power to excite any Indian nation, tribe, chief, or individual, to war against the United States, or to the violation of any existing treaty; or who alienates, or attempts to alienate, the confidence of any Indian or Indians from the Government of the United States, is liable to a penalty of one thousand dollars.

Act June 30, 1834, c. 161, § 15, 4 Stat. 731.

Notes of Decisions

Acts within statute.—All efforts without just cause to interfere in the conduct of an Indian agency or school and thereby cause ill feeling on part of the Indians towards the government may come within this section. In re Lelah-Puc-Ka-Chee (D. C. 1899) 98 Fed. 429.

§ 4098. (R. S. § 2114.) General superintendence by the President over tribes removed west of the Mississippi.

The President is authorized to exercise general superintendence and care over any tribe or nation which was removed upon an exchange of territory under authority of the act of May twenty-eighth, eighteen hundred and thirty, "to provide for an exchange of lands with the Indians residing in any of the States or Territories, and for their removal west of the Mississippi;" and to cause such tribe or nation to be protected, at their new residence, against all interruption or disturbance from any other tribe or nation of Indians, or from any other person or persons whatever.

Act May 28, 1830, c. 148, §§ 7, 8, 4 Stat. 412.

Notes of Decisions

Power of President.—The President is authorized by the treaty of June 9, 1855 (12 Stat. 948), and sections 681, 716, 723, ante, to make rules for the government of the Indians on the Umatilla reservation, including the establishment of an Indian court and police, and the definition of "Indian offenses" and the measure of punishment therefor. U. S. v. Clapox (D. C. 1888) 35 Fed. 575.

The President has power to make a reservation for the occupation of Indians, from public domain lying within the limits of a State. (1882) 17 Op. Atty. Gen. 258.

But the power does not include the case of a reservation for Indians not born or commorant in the United States. (1887) 18 Op. Atty. Gen. 557.

Applicability of laws.—The Cherokee tribe or nation was removed from its home east of the Mississippi river to its present home by authority of Act May 28, 1830 (incorporated in part into this section). The Cherokees are still under the control of an Indian agent and general laws governing Indians are applicable. Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, reversed (1890) 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295.

Where Indians on a reservation made by order of the President are organized tribes or bands, and placed under the charge of an agent appointed by the Government, the laws applicable to Indian reservations must be regarded as applicable to them. (1887) 18 Op. Atty. Gen. 563.

Cited without definite application, Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505.

§ 4099. (R. S. § 2115.) Survey of Indian reservations.

Whenever it becomes necessary to survey any Indian or other reservations, or any lands, the same shall be surveyed under the direction and control of the General Land-Office, and as nearly as may be in conformity to the rules and regulations under which other public lands are surveyed.

Act April 8, 1864, c. 48, § 6, 13 Stat. 41.

Notes of Decisions

Surveys.—The power to make correct surveys of the public lands belongs exclusively to the political department of the government. Cragin v. Powell (1888) 9 Sup. Ct. 203, 128 U. S. 691, 32 L. Ed. 566; Knight v. Land Association (1891) 12 Sup. Ct. 258, 142 U. S. 161, 35 L. Ed. 974; Stonerood v. Stonerood (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; French v. U. S. (1914) 49 Ct. Cl. 337.

See U. S. v. Mackey (D. C. 1913) 214 Fed. 137, holding that to accomplish the purpose of dividing lands among the members of Indian tribes it was necessary to survey tracts as public lands are divided.

See, also, McKee v. U. S. (1865) 1 Ct. Cl. 336.

—— **Boundaries.**—The grant of lands in Indian Territory to the Creek Tribe of Indians by patent of August 11, 1852, did not vest the tribe with any right or title to the bed of the Arkansas river between high-water marks, but the same remained in the United States and passed to the state of Oklahoma on its admission, subject to such rights as were given by its laws to owners of lands bordering on the stream. U. S. v. Mackey (D. C. 1913) 214 Fed. 137, appeal of certain parties dismissed Gladys Belle Oil Co. v. Same (1914) 216 Fed. 129, 132 C. C. A. 373, and decree reversed U. S. v. Same (1914) 216 Fed. 126, 132 C. C. A. 370.

A survey of an Indian reservation, made under authority of the General Land Office, fixes the lines which will control the court when a question arises as to whether a claimant was within or without the particular reservation at the time of alleged depredation. French v. U. S. (1914) 49 Ct. Cl. 337.

The executive order of the President in 1857, setting apart lands bordering Commencement Bay in Oregon Territory for the Puyallup Tribe of Indians, did not grant right or title to shore lands, which could only be done by Congress for some national purpose; and in any event, under the provision of the treaty of Dec. 26, 1854, 10 Stat. 1132, vesting in the President power to change and relocate the reservation, the subsequent allotment and conveyance in severalty of lands therein in accordance with a survey made under Act May 29, 1872, c. 233, 17 Stat. 186, in which the shore line was meandered and the lands allotted extended only to line of ordinary high tide, had the effect of extinguishing rights of the tribe as a community to tide lands, if any such previously existed. U. S. v. Ashton (C. C. 1909) 170 Fed. 509, appeal dismissed Bird v. Same (1911) 31 S. Ct. 718, 220 U. S. 604, 55 L. Ed. 605.

§ 4100. (R. S. § 2116.) Purchases or grants of lands from Indians.

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. Every person who, not being employed under the authority of the United States, attempts to negotiate such treaty or convention, directly or indirectly, or to treat with any such nation or tribe of Indians for the title or purchase of any lands by them held or claimed, is liable to a penalty of one thousand dollars. The agent of any State who may be present at any treaty held with Indians under the authority of the United States, in the presence and with the approbation of the commissioner of the United States appointed to hold the same, may, however, propose to, and adjust with, the Indians the compensation to be made for their claim to lands within such State, which shall be extinguished by treaty.

Act June 30, 1834, c. 161, § 12, 4 Stat. 730.

In any suit in the Supreme Court to determine the right of a State to school lands within any Indian reservation or Indian cession, where an Indian tribe claims any right to or interest in the lands, etc., the right of such State may be fully tested and determined without making the Indian tribe

a party to the suit, if the Secretary of the Interior is made a party thereto, and the duty of representing and defending the right or interest of the Indian tribe shall devolve upon the Attorney-General, on request of the Secretary, by Act March 2, 1901, c. 808, post, § 4881.

Notes of Decisions

Construction in general.—This section declares that no conveyance from an Indian tribe shall be of any validity unless authorized by treaty. Where a tribe could not sell, individual members could not; for they had neither an undivided interest in the tribal land nor any vendible interest in any particular tract. Franklin v. Lynch (1914) 34 Sup. Ct. 505, 233 U. S. 269, 58 L. Ed. 954.

The omission of the words "any Indian" from the prohibition of purchases and leases "from any nation or tribe of Indians," while former statutes extended the prohibition to purchases or leases from "any Indian," shows an intention to remove the general restriction on alienation by individual Indians of sections of land reserved to them respectively by a treaty with the United States. Jones v. Meehan (1899) 20 Sup. Ct. 1, 6, 175 U. S. 1, 44 L. Ed. 49. See (1886) 18 Op. Atty. Gen. 486, deciding that the inhibition has the same application to individual Indians that it has to Indian nations and tribes.

The expression "under the authority of the United States" means the constitutional authority of the United States. (1796) 1 Op. Atty. Gen. 65.

This statute is broad enough to include a tribe holding lands by patent from the United States. (1857) 9 Op. Atty. Gen. 24.

The operation of this section does not depend on the nature or extent of the title of the tribe or nation, and it applies whether the title is fee simple or merely a right of occupancy. R. S. § 2103, ante, § 4087, does not include contracts of the character described in this section. (1885) 18 Op. Atty. Gen. 235.

See U. S. v. Crook (D. C. 1875) 179 Fed. 391. See, also (1851) 5 Op. Atty. Gen. 305.

Title acquired by purchases, grants, or deeds.—A conveyance of Indian lands by a citizen of the Chickasaw Nation to a white man held void. Sunol v. Hepburn (1850) 1 Cal. 254; Hicks v. Coleman (1864) 25 Cal. 122, 85 Am. Dec. 103; Hockett v. Alston (1900) 58 S. W. 675, 3 Ind. T. 432; Rogers v. Hill (1901) 64 S. W. 536, 3 Ind. T. 562; Lee v. Glover (N. Y. 1828) 8 Cow. 189.

A title to land under grant to private individuals made by Indian tribes or nations northwest of the Ohio river in 1773 and 1775, is void as against the title of a grantee from the United States. Johnson v. McIntosh (1823) 8 Wheat. 543, 572, 5 L. Ed. 681.

The seisin of lands of Indian tribes is in the sovereign, and a purchaser from the Indians can only acquire the Indian title. Jackson v. Porter (C. C. 1825) Fed. Cas. No. 7,143.

The fee in unsold lands is either in the federal or state governments. The Indians have only a right of use, which, however, cannot be devested, except by purchase or war. Godfrey v. Beardsley (C. C. 1841) Fed. Cas. No. 5,497; Goodfellow v. Muckey (C. C.) Fed. Cas. No. 5,537.

Sales by the Creeks, where purchasers, either by force or fraud, abstract from them the purchase money, are fraudulent and void. So are sales approved by President where the reservee was personated by other Indians, and patents may be withheld. (1837) 3 Op. Atty. Gen. 259.

Purchasers take with notice of treaties and with knowledge that they can only occupy by permission from the Indians. (1900) 23 Op. Atty. Gen. 214.

The rights of the Indians of Alaska to possess their lands cannot be disturbed by force or contract, and any contract affecting such right, made by any Indian of the native Alaska tribes, is void. U. S. v. Berrigan (1905) 2 Alaska, 442.

The purchase of an improved farm from a Choctaw Indian by one not a citizen of the Choctaw Nation does not give the grantee the right of possession and occupancy as against a citizen of the Choctaw Nation who subsequently purchased the land from the grantor. Rogers v. Hill (1901) 64 S. W. 536, 3 Ind. T. 562.

Under the treaties with the Creek Nation, lands were conveyed to the nation as a tribe, and not to the individual members thereof, or to them in common, and the nation has no power of alienation, and an individual can acquire no vested interest in any specific tract. Tuttle v. Moore (1901) 64 S. W. 585, 3 Ind. T. 712.

As a white man acquires by purchase no title to land held by an Indian in the Choctaw or Chickasaw Nation, he cannot convey any title thereto. Turner v. Gilliland (1903) 76 S. W. 253, 4 Ind. T. 606.

A Sioux half-breed, and beneficiary under the treaties and acts of congress setting apart the half-breed reservation near Lake Pepin, being in possession of certain lands within the reservation, quitclaimed, with covenant of further assurance, and surrendered possession, to defendant, who quitclaimed to A., with covenants of further assurance when he should thereafter acquire title of the United States. Held, that the deed from defendant to A. was not void as against public policy, nor in con-

travention of this section. Hope v. Stone (1865) 10 Minn. 141 (Gil. 114).

Where property on a reservation was vested by law in an Indian tribe as a community, transfers thereof by individual Indians being invalidated, it is no defense to an action by the tribe for conversion of such property that defendant had acted as agent for another, or had in good faith and without notice, purchased it from one who had purchased it from an individual Indian. Seneca Nation of Indians v. Hammond (N. Y. 1874) 3 Thomp. & C. 347.

A lease of Indian lands to a white man without the consent of the Indian agent and the Commissioner of Indian affairs, and without authorization by act of Congress or treaty obligation, was void. Coey v. Law (1904) 77 Pac. 1077, 36 Wash. 10.

Title acquired under leases.—One who takes leases of Indian lands, knowing them to be illegal, and relying on the difficulties in the way of the government's enforcing its rights, is not entitled to the aid of equity to restrain any action the government may see fit to take to oust him. Beck v. Flournoy Live-Stock & Real-Estate Co. (1894) 65 Fed. 30, 12 C. C. A. 497, appeal dismissed Flournoy Live Stock & Real Estate Co. v. Beck (1895) 16 Sup. Ct. 1201, 163 U. S. 686, 41 L. Ed. 305.

Under this section and Act March 1, 1889, c. 333, 25 Stat. 784, repealing all laws previously existing intended to prevent the Chickasaw Nation from lawfully making leases for mining coal for a period not exceeding 10 years, leases executed by the national secretary of the Chickasaw Nation, in October, 1890, for the mining of coal and other minerals, were valid, so far as they authorized the mining of coal for a period not exceeding 10 years. McBride v. Farrington (1906) 149 Fed. 114, 79 C. C. A. 56, affirming judgment (C. C. 1904) 131 Fed. 797.

A lease of land for grazing is within the statute, and the duration of the term is immaterial. Neither the President nor the Secretary of the Interior has authority to make a lease, for grazing purposes, of any part of an Indian reservation; nor will their approval of any lease made by Indians render it valid. (1885) 18 Op. Atty. Gen. 235.

A nation of Indians held without power to make a lease without the consent of the government. Id.; (1890) 19 Op. Atty. Gen. 499.

Mining leases made by citizens of the Choctaw Nation of Indians, in the Indian Territory, and the Osage Coal and Mining Company, a Missouri corporation, for the mining of coal, etc., in said territory, are not such as may properly receive the approval of the Secretary of the Interior under existing laws. (1886) 18 Op. Atty. Gen. 486.

A lease of land in Indian Territory by the Cherokee Nation, in violation of this section, is void. Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co. (1897) 40 S. W. 107, 138 Mo. 394.

A written or parol lease entered into between the plaintiff and the defendants, without the consent and approval of the Indian agent and the commissioner of Indian affairs, for the pasturage of cattle located upon the Kiowa, Comanche, and Apache Indian reservations, is void. Light v. Conover (1901) 63 P. 966, 10 Okl. 732.

Where a party holds a lease of Indian lands approved by the Interior Department and providing that he will not at any time sublet or transfer any of his interest to any person without the consent of the lessor and the approval of the Secretary of the Interior, a subletting without the consent of such Secretary conveys no interest. Reeves & Co. v. Sheets (1905) 82 P. 487, 16 Okl. 342.

See (1904) 25 Op. Atty. Gen. 168.

—— Recovery of rent.—A lessee of lands in Indian Territory cannot avoid payment of rent because the lessor obtained the land under a lease by the Cherokee Nation, which was void, because not executed as required by this section, where such lessee took possession and enjoyed the benefits of the lease. Cherokee Strip Live-Stock Ass'n v. Cass Land & Cattle Co. (1897) 138 Mo. 394, 40 S. W. 107. But see Mayes v. Cherokee Strip Live Stock Ass'n (1897) 51 P. 215, 58 Kan. 712, holding that an action for rent on behalf of the Cherokee Nation cannot be maintained on a lease of lands, made by such nation in violation of this section.

—— Recovery on quantum meruit.—One in possession of land in the "Cherokee Outlet" may recover as upon a quantum meruit for pasturing thereon cattle delivered to him for that purpose, if there is no showing that he held the land without consent of the Indians, regardless of the question whether his lease, if he had one, was valid as against the Indians or the government. Kansas & N. M. Land & Cattle Co. v. Thompson (1897) 48 P. 34, 57 Kan. 792.

Title acquired by adverse possession.—A deed by an Indian in contravention of a legislative grant, which withholds or restricts the power of alienation, is not color of title. Smythe v. Henry (C. C. 1890) 41 Fed. 705; Sunol v. Hepburn (1850) 1 Cal. 254; Taylor v. Brown (1888) 5 Dak. 335, 40 N. W. 525.

Lands in the "Indian country" cannot be held adversely until the Indians' right of occupancy thereof has been terminated by the United States. Kreuger v. Schultz (1896) 70 N. W. 269, 6 N. D. 310.

Compensation of commissioner to negotiate Indian treaties.—Under an ap-

pointment of defendant by the Secretary of the Interior as an Indian commissioner to study the needs of and negotiate treaties with certain Indian tribes as directed, at a salary of $8 per day and actual traveling expenses, the salary to begin when defendant left his home and to be paid while "actually engaged" in the performance of his duties, he was entitled to salary so long as he remained away from home at the places to which he was assigned, performing such duties as directed and reporting regularly, and not merely for the days on which he was actively engaged in the performance of some duty, and especially where that was the practical construction placed upon the contract by both parties. U. S. v. Hoyt (1909) 167 Fed. 301, 93 C. C. A. 53, affirming judgment (C. C. 1907) 158 Fed. 162.

Liability for penalty.—Negotiating a lease of grazing lands with an Indian tribe does not make one liable to the penalty, though the lease be void. U. S. v. Hunter (C. C. 1884) 21 Fed. 615.

No private person can procure a conveyance from the Delawares or negotiate for that purpose in view of the treaty with the Delawares of May 6, 1854, without becoming an offender under this section. (1857) 9 Op. Atty. Gen. 25.

Validity of state statutes.—Laws N. Y. 1902, c. 296, entitled "An act to amend the Indian law in relation to the erection of poles and wires on the Tonawanda reservation," is not unconstitutional and void, as conflicting with this section. Jemison v. Bell Telephone Co. of Buffalo (1906) 79 N. E. 728, 186 N. Y. 493, affirming judgment (1905) 95 N. Y. S. 1137, 109 App. Div. 911.

Cited without definite application, Southwestern Coal & Imp. Co. v. McBride (1902) 22 Sup. Ct. 763, 765, 185 U. S. 499, 46 L. Ed. 1010; U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912, reversed (1890) 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295.

§ 4101. (Act March 3, 1893, c. 209, § 1.) Fees payable on behalf of Indian parties in contests under public land laws; amount and payment thereof.

To enable the Secretary of the Interior, in his discretion, to pay the legal costs incurred by Indians in contests initiated by or against them, to an entry, filing or other claims, under the laws of Congress relating to public lands for any sufficient cause affecting the legality or validity of the entry, filing or claim, five thousand dollars: Provided, That the fees to be paid by and on behalf of the Indian party in any case shall be one-half of the fees provided by law in such cases, and said fees shall be paid by the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, on an account stated by the proper land officers through the Commissioner of the General Land Office. (27 Stat. 631.)

This was a provision of the Indian appropriation act for the fiscal year 1894, cited above.

Appropriations for legal expenses in various suits, etc., on behalf of or against Indians, including hearings by local land officers to determine rights of Indians to public lands, are made by the annual Indian appropriation acts. The provision for the fiscal year 1917 was by Act May 18, 1916, c. 125, § 1, 39 Stat., and provided that no part of the money appropriated should be used for attorney's fees.

§ 4102. (Act March 3, 1893, c. 209, § 1.) District attorneys to represent Indians in all suits in certain States, etc.

In all States and Territories where there are reservations or allotted Indians the United States District Attorney shall represent them in all suits at law and in equity. (27 Stat. 631.)

This was a further provision of the Indian appropriation act for the fiscal year 1894, cited above.

Notes of Decisions

Duty of district attorneys to represent Indians.—District attorneys are not required to represent Indians in suits brought by them in states where they do not reside, founded on claims of inheritance from white persons not members of their tribes. (1893) 20 Op. Atty. Gen. 620.

§ 4103. (Act Aug. 9, 1888, c. 818, § 1.) White men marrying Indian women not to acquire any right to tribal property, etc.

No white man, not otherwise a member of any tribe of Indians, who may hereafter marry, an Indian woman, member of any In-

dian tribe in the United States, or any of its Territories except the five civilized tribes in the Indian Territory, shall by such marriage hereafter acquire any right to any tribal property, privilege, or interest whatever to which any member of such tribe is entitled. (25 Stat. 392.)

This section and the two sections next following were an act entitled "An act in relation to marriage between white men and Indian women."

Notes of Decisions

Status of white men marrying Indian women.—A white citizen who by intermarriage with an Indian becomes by adoption a member of the Cherokee Nation does not cease to be a citizen of the United States. Raymond v. Raymond (1897) 83 Fed. 721, 28 C. C. A. 38.

One not an Indian acquires no tribal relations by marriage with an Indian woman and residence on a reservation. That a man is permitted by the United States authorities to reside on a reservation with his Indian wife does not raise a presumption that the government intended that he should acquire the status of a tribal Indian. Stiff v. McLaughlin (1897) 48 P. 232, 19 Mont. 300.

Property rights of white men marrying Indian women.—White persons residing in the Cherokee Nation who became citizens under Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, have per capita rights with Cherokee Indians by blood in the public domain of the nation. No rights, interest, or share in any funds belonging to the Cherokee Nation, except where such funds were derived by lease, sale, or otherwise from the lands by the Cherokee Nation conveyed to it by the United States by the patent of December, 1838, were acquired by white persons residing in the Cherokee Nation who became Cherokee citizens under the Cherokee laws by intermarriage with Cherokees by blood prior to November 1, 1875, when a Cherokee law became effective which declared that such persons by intermarriage acquired the rights of soil or interest in the vested funds of the Nation. Red Bird v. U. S. (1906) 27 Sup. Ct. 29, 31, 203 U. S. 76, 51 L. Ed. 96, affirming decree In re Persons Claiming Rights in Cherokee Nation (1905) 40 Ct. Cl. 411. White persons who intermarried with Cherokees after November 1, 1875, are not entitled to share in the allotment of the lands or in the distribution of any of the funds belonging to such nation, and are not entitled to be enrolled for that purpose. Id.; Boudinot v. Morris (1910) 110 P. 894, 26 Okl. 768.

White persons who have intermarried with Delaware or Shawnee citizens of the Cherokee Nation, not thereby becoming citizens themselves under the Cherokee laws, have no part or share in the Cherokee property, and are not entitled to participate in the allotment of the lands or in the distribution of the funds belonging to such nation, and are not entitled to be enrolled for that purpose. White persons who intermarried with Cherokees by blood, and, after the death of the Cherokee wife or husband, intermarried with persons not of Cherokee blood, and white men who, having married Cherokee women, abandoned them, have no part or share in the Cherokee property, and are not entitled to share in the allotments of the lands or in the distribution of any of the funds belonging to the Cherokee nation, or to be enrolled for that purpose, though the proceedings in the nature of office found authorized by the Cherokee laws have not been instituted to deprive them of the rights and privileges acquired by intermarriage. Red Bird v. U. S. (1906) 27 Sup. Ct. 29, 36, 203 U. S. 76, 51 L. Ed. 96.

A white citizen of the United States, who, by intermarriage with an Indian, becomes by adoption a member of the Cherokee Nation, does not cease to be a citizen of the United States, but such adoption ousts the jurisdiction of the federal court over suits between him and other members of his tribe, and confers exclusive jurisdiction thereof on the tribal courts; and a subsequent unauthorized naturalization of such person does not affect his legal status. Raymond v. Raymond (1897) 83 Fed. 721, 28 C. C. A. 38.

A white man without any Indian blood who marries a full-blooded Indian woman is not entitled to the benefits of Act March 2, 1889, relating to suits concerning allotments. Drapeau v. U. S. (C. C. 1912) 195 Fed. 130.

A citizen of the United States who, after marrying a woman of the Delaware tribe, settled upon their reservation in Kansas, but who was never adopted into the tribe, has no right to claim the guaranties contained in the treaty of 1860 made with said tribe. Grinter v. Kansas Pac. Ry. Co. (1880) 23 Kan. 642, 659.

A patent to a Shawnee Indian woman provided that the land should never be conveyed by the grantee or her heirs without the approval of the secretary of the interior. The Indian woman was married to a white man, who survived her. Held, that the restriction on alienation prevented him from acquiring title by adverse possession as against those to whom the land de-

scended under the laws and decisions of the Shawnee Indians. O'Brien v. Bugbee (1891) 46 Kan. 1, 26 Pac. 428.

By the customs of the Chickasaws, the husband acquired no right to the property of the wife which she possessed at the time of marriage, no community of interest was produced by the marriage contract with respect either to the original property of the parties or to the acquêts and gains during its continuance, and property belonging to the wife was not liable for the husband's debts. Held, that the act of 1830, abolishing the tribal customs of the Chickasaw Indians, and extending the laws of the state over their territory, and providing that all marriages entered into by virtue of any custom or usage of the Indians, and by them deemed valid, should be held valid and obligatory, cannot be so construed as to alter the condition of those whose marriages were validated, or to extend the marital rights of the husband. Fisher v. Allen (1837) 3 Miss. (2 How.) 611.

—— Sales of improvements as consideration for notes in payment.—Since a white person intermarrying with a Cherokee Indian after November 1, 1875, acquires no right of soil or interest in the vested funds of the Cherokee Nation, a sale of improvements consisting of cleared land in the Cherokee Nation and putting the same in cultivation by a white person so marrying a Cherokee Indian to a person entitled to take the lands by allotment is not a consideration to support a note executed in payment thereof. Boudinot v. Morris (1910) 110 P. 894, 26 Okl. 768.

—— Enforcement of rights.—A United States citizen who has become a citizen of an Indian nation by marriage with one on whom citizenship in the nation has been conferred by the Legislature of the nation, but who has ceased to be such owing to a withdrawal by the Legislature of all rights of citizenship possessed by his wife, may enforce his claim against one of that nation in the federal courts. Roff v. Burney (1897) 18 Sup. Ct. 60, 61, 168 U. S. 218, 42 L. Ed. 442.

§ 4104. (Act Aug. 9, 1888, c. 818, § 2.) Indian women marrying white men to become citizens of United States; right to tribal property, etc., not affected thereby.

Every Indian woman, member of any such tribe of Indians, who may hereafter be married to any citizen of the United States, is hereby declared to become by such marriage a citizen of the United States, with all the rights, privileges, and immunities of any such citizen, being a married woman: Provided, That nothing in this act contained shall impair or in any way affect the right or title of such married woman to any tribal property or any interest therein. (25 Stat. 392.)

Notes of Decisions

Property rights of Indian women marrying white men.—See notes under § 4103.

Under the act of Congress ratifying agreements made with Indian tribes in Montana, including the Blackfeet, which provide, inter alia, for the issuance of cattle to such Indians for stockraising purposes, and that all such cattle and their increase shall bear the brand of the Indian Department, and shall not be sold, exchanged, or slaughtered, except by consent of the agent in charge, an Indian to whom such cattle are issued acquires only a conditional ownership for the purposes stated in the act, and it is the right and duty of the United States to protect such ownership, for which purpose it may maintain an action in a federal court in behalf of an Indian from whom cattle so issued have been unlawfully taken; and such right is not affected by the fact that an Indian in whose behalf such an action is brought is a woman who is married to a white man, and has thereby become a citizen of the United States, but who remains on the reservation with her tribe. McKnight v. United States (1904) 130 Fed. 659, 65 C. C. A. 37.

An Indian woman who marries a citizen of the United States, voluntarily takes up a residence apart from her tribe, and adopts the habits of civilized life, becomes a citizen of the United States and of the state in which she resides, and may maintain a suit in the federal courts against citizens of other states. Hatch v. Ferguson (C. C. 1893) 57 Fed. 959.

A half-blood Indian woman, who had lived with and been recognized as a member of the Sioux tribe for many years, though having subsequently married a white man and adopted the customs, habits, and manners of civilized life, held entitled to share in the property of her tribe; but children born to her after she had abandoned her tribal relations were not so entitled. Reynolds v. U. S. (D. C. 1913) 205 Fed. 685.

Cited without definite application, Oakes v. U. S. (1909) 172 Fed. 305, 97 C. C. A. 139.

§ 4105. (Act Aug. 9, 1888, c. 818, § 3.) Evidence of marriage of white man with Indian woman.

Whenever the marriage of any white man with any Indian woman, a member of any such tribe of Indians, is required or offered to be proved in any judicial proceeding, evidence of the admission of such fact by the party against whom the proceeding is had, or evidence of general repute, or of cohabitation as married persons, or any other circumstantial or presumptive evidence from which the fact may be inferred, shall be competent. (25 Stat. 392.)

§ 4106. (Act June 7, 1897, c. 3, § 1.) Children of marriages previous to act between white men and Indian women to have same rights, etc., as mother, to property, etc., of tribe.

All children born of a marriage heretofore solemnized between a white man and an Indian woman by blood and not by adoption, where said Indian woman is at this time, or was at the time of her death, recognized by the tribe shall have the same rights and privileges to the property of the tribe to which the mother belongs, or belonged at the time of her death, by blood, as any other member of the tribe, and no prior Act of Congress shall be construed as to debar such child of such right. (30 Stat. 90.)

This was a provision of section 1 of the Indian appropriation act for the fiscal year 1898, cited above.

Notes of Decisions

Construction in general.—The right of inheritance in land of a member of an Indian tribe whose tribal organization is still recognized by the government is controlled by the laws, usages, and customs of the tribe, and not by the law of the state in which the land is situated, nor by any action of the secretary of the interior. Jones v. Meehan (1899) 20 Sup. Ct. 1, 13, 175 U. S. 1, 44 L. Ed. 49.

This section does not embrace children of a mother who was living at the time of its passage and was not then recognized as a member of the tribe. Oakes v. U. S. (1909) 172 Fed. 305, 97 C. C. A. 139.

Children of polygamous marriage, by members of Indian tribe whose customs permitted polygamy, held lawful heirs of their father; the laws of the state regulating marriage having no application. Hallowell v. Commons (1914) 210 Fed. 793, 801, 127 C. C. A. 343.

A half-blood Indian woman, who had lived with and been recognized as a member of the Sioux Tribe for many years, though having subsequently married a white man and adopted the customs, habits, and manners of civilized life, held entitled to share in the property of her tribe, but children born to her after she had abandoned her tribal relations were not so entitled. Reynolds v. U. S. (D. C. 1913) 205 Fed. 685.

Whether a Sioux half-breed or quarter blood is an Indian is to be determined, not by the common law, but by the laws and usages of the tribe. (1894) 20 Op. Atty. Gen. 711.

Where, in an action by an heir to recover Indian lands, the complaint alleged that plaintiff was a Quapaw Indian, and the answer contained no allegation that the laws of descent of such nation were different from those of the forum in which the trial was had, it would be presumed that they were the same. Ricknor v. Clabber (1903) 76 S. W. 271, 4 Ind. T. 660.

Rights of children of white persons and Indians.—The child must partake of the condition of the mother, and where the mother is a white woman, and the father an Indian, the child will be deemed of the white race. U. S. v. Sanders (C. C. 1847) Fed. Cas. No. 16,-220.

One born of a white father and an Indian mother, and who is a recognized member of the tribe of Indians to which his mother belongs, is an Indian, and not subject to taxation under the laws of the state in which he resides. U. S. v. Higgins (C. C. 1900) 103 Fed. 848.

Cited without definite application, Waldron v. U. S. (C. C. 1905) 143 Fed. 413.

§ 4107. (R. S. § 2117.) Driving stock to feed on Indian lands.

Every person who drives or otherwise conveys any stock of horses, mules, or cattle, to range and feed on any land belonging to

any Indian or Indian tribe, without the consent of such tribe, is liable to a penalty of one dollar for each animal of such stock.

Act June 30, 1834, c. 161, § 9, 4 Stat. 730.

Notes of Decisions

Construction and application of statute in general.—This section imposes a penalty on any one who without the consent of an Indian tribe drives his stock to range and feed on lands of such tribe, and implies that an Indian tribe may consent to the use of their lands for grazing purposes. U. S. v. Hunter (C. C. 1884) 21 Fed. 615. The penalty is recoverable when cattle are driven and permitted to graze on Indian lands a single day without permission. One who makes a trail across Indian lands to the nearest accessible point of a permitted trail incurs the penalty, though prevented by natural obstructions from entering the lands by the permitted trail. U. S. v. Loving (D. C. 1888) 34 Fed. 715, 716. An occupation of Indian lands for grazing purposes only, with the consent of the Indians and in recognition of their title, is not forbidden. U. S. v. Hunter (D. C. 1885) 4 Mackey, 531.

To incur a penalty it is not necessary that the stock be actually driven on the Indian lands, and it is sufficient that they are so driven as to range and feed thereon. One driving any stock of horses, mules, or cattle so near to Indian lands that from the nature and habit of the animals they will probably go upon such lands is liable to the penalty, especially where the circumstances show an intent to have them go there and are found on the lands without the consent of the tribe. (1880) 16 Op. Atty. Gen. 569.

This section does not prohibit the driving of cattle into the Indian country for delivery to one of the citizens under a contract by him to purchase the same. Morris v. Cohn (1891) 55 Ark. 401, 17 S. W. 342, 18 S. W. 384. It is in force in the Creek Nation. Forsythe v. U. S. (1901) 64 S. W. 548, 3 Ind. T. 599.

"Because the Creek law gives to its citizens consent to inclose one mile square pastures, and for the exclusive benefit of the same for keeping and grazing live stock, would not give these citizens the right to lease such pastures for grazing stock unlawfully brought into the Creek Nation." Forsythe v. U. S. (1901) 64 S. W. 548, 3 Ind. T. 599.

One entering with cattle or other live stock on an Indian reservation under a lease made in violation of this statute is an intruder and may be removed, but such consent may exempt him from the penalty imposed by this section. (1885) 18 Op. Atty. Gen. 235.

—— **"Cattle" within statute.**—This section is not applicable to sheep. U. S. v. Ash Sheep Co. (D. C. 1916) 229 Fed. 479. CONTRA, Same v. Mattock (D. C. 1872) Fed. Cas. No. 15,744; (1884) 18 Op. Atty. Gen. 91.

—— **Land within statute.**—This section applies only to lands so far in Indian occupancy and control that grazing will injure the Indians, and to which they might consent. U. S. v. Ash Sheep Co. (D. C. 1916) 229 Fed. 479.

Protection of grazing rights.—A party having the right of possession of certain lands ceded by the Kansas Indians to the United States in trust by the treaty of November 17, 1860, held entitled to an injunction restraining an insolvent trespasser from interfering with his flocks while grazing on said lands. Webster v. Cooke (1880) 23 Kan. 637.

Action for penalty—Parties.—An action to enforce the penalty, brought against a person bringing cattle into the Creek Nation without its consent, may be commenced in the name of the United States by any member of the tribe. Forsythe v. U. S. (1901) 64 S. W. 548, 3 Ind. T. 599.

—— **Burden of proof.**—The burden is on defendant to show the consent of the tribe, failing which the court may properly direct a verdict against him. Forsythe v. U. S. (1901) 64 S. W. 548, 3 Ind. T. 599.

—— **Appearance by United States attorney.**—It is not necessary that the United States attorney appear in an action. Forsythe v. U. S. (1901) 64 S. W. 548, 3 Ind. T. 599.

Cited without definite application, Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912, reversed (1890) 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295.

§ 4108. (R. S. § 2118.) Settling on or surveying lands belonging to Indians by treaty.

Every person who makes a settlement on any lands belonging, secured, or granted by treaty with the United States to any Indian tribe, or surveys or attempts to survey such lands, or to designate any of the boundaries by marking trees, or otherwise, is liable to a penalty of one thousand dollars. The President may,

moreover, take such measures and employ such military force as he may judge necessary to remove any such person from the lands.

Act June 30, 1834, c. 161, § 11, 4 Stat. 730.

Notes of Decisions

Prohibited settlements or occupations.—A settlement on lands of Pueblo Indians in New Mexico is not within this statute or of Act July 27, 1851, § 7, extending laws regulating trade and intercourse with Indian tribes over the Indian tribes in the territory of New Mexico. U. S. v. Joseph (1876) 94 U. S. 614, 615, 24 L. Ed. 295; Same v. Santistevan (1874) 1 N. M. 583.

This section did not prohibit settlement on lands in the Indian country outside of any reservation, and in which the only Indian right was the original right of occupancy at the will of the government. Caldwell v. Robinson (C. C. 1894) 59 Fed. 653, decree affirmed Robinson v. Caldwell (1895) 67 Fed. 391, 14 C. C. A. 448.

The title of the American Board of Commissioners for Foreign Missions to the missionary station within the limits of the Nez Percé Indian Reservation, derived under Act Aug. 14, 1848 (9 Stat. 323), and Act March 2, 1853 (10 Stat. 172), assuming that a title passed to said board by virtue of those acts, was then, and has continued to be, subject to Indian right of occupancy in the Nez Percé tribe of Indians, and until this Indian right is extinguished, the present holder of that title has no right, merely by virtue of such title, to enter upon and take possession of the premises. One entering under a judgment held an intruder, and may be summarily removed in the mode provided by this section. (1875) 14 Op. Atty. Gen. 569.

An occupation of Indian lands for grazing purposes only, with the consent of the Indians and in recognition of their title, is not forbidden. U. S. v. Hunter (D. C. 1885) 4 Mackey, 531. As this section was intended to prevent white men from settling Indian lands, and as the provision of the Curtis Act June 28, 1898, c. 517, § 16, 30 Stat. 501, in regard to laying off towns applies only to the laying off and incorporation of a legal subdivision, a Chickasaw Indian in possession of his prospective allotment has a right to lay out a town and rent lots on such allotment, no political or legal subdivision being created. U. S. v. Lewis (1903) 76 S. W. 299, 5 Ind. T. 1.

This section does not prohibit settlement on lands in the Indian country, except those belonging, secured, or granted by treaty to any Indian tribe. McCracken v. Todd (1862) 1 Kan. 148.

Law governing settlers on Indian reservations.—Settlers on Indian reservations are subject to the same laws governing the possession and right to the possession of property as settlers on the public domain, where it appears that they occupy lands as homes within such reservation by sufferance only. Francis v. Green (1901) 65 P. 362, 7 Idaho, 668.

Protection of Indians in use and occupancy.—The federal government, by the terms of the treaty of March 8, 1865, with the Winnebago Indians, and this section and sections 4109, 4152, post, is charged with the duty of protecting the Indians in the use and occupancy of the reservation lands, whether allotted in severalty or not, and the executive department, acting through the Indian agents on the reservation, has full power to do whatever may be necessary for the proper performance of this duty. U. S. v. Mullin (D. C. 1895) 71 Fed. 682, 684.

A written order of an Indian agent, acting in pursuance of instructions from the Interior Department, for the purpose of fulfilling the duty of the government to protect the Indians in the use and occupancy of their reservations, is a legal writ or process, within section 10310, post. Id.

One held an intruder, and may be summarily removed. (1875) 14 Op. Atty. Gen. 568; (1882) 17 Op. Atty. Gen. 306.

The Commissioner of Indian Affairs and his subordinate, the Indian agent, have full discretion to remove from the Puyallup Indian reservation, Wash., any person not of the tribe of Indians entitled to remain there, and in so doing may, by direction of the President, use any military force necessary for the purpose. (1891) 20 Op. Atty. Gen. 245.

The executive branch of the government is bound to protect Indians residing on a reservation in the possession and occupancy of their land; but this affords no remedy to the Indian for an injury to his personal or property rights, and for such remedy he must go to some court of competent jurisdiction. An occupant of land, the title to which is in the government may maintain trespass against one. who wrongfully interferes with his possession to his injury; and so, though the government by Act March 3, 1885, c. 319, 23 Stat. 341, and section 4201, post, and Act Feb. 28, 1891, c. 383, 26 Stat. 795, reenacted with modifications by Act May 31, 1900, § 1, post, § 4217, holds in trust the legal title to land allotted in severalty to an Indian, the latter, who is in the rightful possession of the land and has the beneficial use therein, may recover damages for an unlawful tres-

pass upon it. Smith v. Mosgrove (Or. 1908) 94 P. 970.

The business of renting unoccupied lots in a town in the Indian Territory is not against public policy, though the title to the lots was in the Indians. Tye v. Chickasha Town Co. (1899) 48 S. W. 1021, 2 Ind. T. 113.

—— **Authority to impose terms or require permits.**—In absence of treaty or statutory provision to the contrary, the Choctaw and Chickasaw Nations have power to require that citizens of the United States desiring to reside in their territory shall secure permits, and may lay a pecuniary exaction therefor. This power is not subject to revision by any officer or department of the United States. (1884) 18 Op. Atty. Gen. 34.

Under treaties with the Five Civilized Tribes, no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted. (1900) 23 Op. Atty. Gen. 214.

Liability to penalty.—The penalty is not recoverable against one settling on land belonging to a pueblo, and particularly to the pueblo of Cochiti, that being a body corporate, and having a complete title to its lands, which it can assert and protect in the courts in the same way as other landowners. U. S. v. Lucero (1869) 1 N. M. 422.

Where trespass has been committed on land held by an Indian through allotment from the government, the trial of an action by the Indian against the trespasser will not interfere with any of the rights given to the Secretary of the Interior or the federal court over the Indian or his land, the action of trespass not necessarily involving the question of title. Smith v. Mosgrove (Or. 1908) 94 P. 970.

Procedure for recovery of penalty in general.—A conspiracy to make settlement on Indian lands and to return to the Indian country, after being removed therefrom, is not an indictable offense, or one that may be prosecuted by criminal proceedings; the proper proceeding in such a case being by action under section 4116, post, to recover the penalty prescribed. U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427.

Jurisdiction of courts.—An order of a state court restraining an Indian agent from removing from an Indian reservation any person not of the tribe of Indians entitled to remain thereon is beyond its jurisdiction and void, and should be disregarded. (1891) 20 Op. Atty. Gen. 245.

Under Const. Or. art. 1, § 10, which declares that "every man shall have remedy by due course of law for injury done him in person, property, or reputation," an Indian has as much right to resort to the state courts having jurisdiction of the subject-matter to recover for a tort against his person or property as any other suitor, and it is not material that the wrong was committed against the possession of land allotted to him under the acts of Congress providing for allotments of land in severalty to Indians. Smith v. Mosgrove (Or. 1908) 94 P. 970.

—— **Pleadings.**—In an action for a penalty, a misdescription of the land with respect to the parties to whom it is alleged to belong is fatal. U. S. v. Lucas (1869) 1 N. M. 422.

A declaration failing to aver that the land settled on belonged to the Indians "by treaty with the United States" is demurrable. Id.

An action for the penalty is maintainable only respecting land belonging, secured, or granted to an Indian tribe "by treaty with the United States," and a petition not showing that fact, but alleging that the land settled on belonged to a pueblo of Indians, and was secured to them "by patent from the United States," is bad on demurrer. U. S. v. Santistevan (1874) 1 N. M. 583; Same v. Varela, Id. 593. It should be averred that the settlement was "unlawful" or "wrongful." U. S. v. Lucas (1869) 1 N. M. 422.

Cited without definite application, Walker v. McLoud (1907) 27 Sup. Ct. 293, 294, 204 U. S. 302, 51 L. Ed. 495; Franklin v. Lynch (1914) 34 Sup. Ct. 505, 506, 233 U. S. 269, 58 L. Ed. 954; Buchanan v. Drovers' Nat. Bank (1893) 55 Fed. 223, 225, 5 C. C. A. 83; Eells v. Ross (1894) 64 Fed. 417, 419, 12 C. C. A. 205 (appeal dismissed [1896] 16 Sup. Ct. 1205, 163 U. S. 702, 41 L. Ed. 320); U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

§ 4109. (R. S. § 2119.) Protection of Indians desiring civilized life.

Whenever any Indian, being a member of any band or tribe with whom the Government has or shall have entered into treaty stipulations, being desirous to adopt the habits of civilized life, has had a portion of the lands belonging to his tribe allotted to him in severalty, in pursuance of such treaty stipulations, the agent and superintendent of such tribe shall take such measures, not incon-

sistent with law, as may be necessary to protect such Indian in the quiet enjoyment of the lands so allotted to him.

Act June 14, 1862, c. 101, § 1, 12 Stat. 427.

Notes of Decisions

Construction and operation.—The federal government, by the terms of the treaty of March 8, 1865, with the Winnebago Indians, and this section and section 4108, ante, and section 4152, post, is charged with the duty of protecting the Indians in the use and occupancy of the reservation lands, whether allotted in severalty or not, and the executive department, acting through the Indian agents on the reservation, has full power to do whatever may be necessary for the proper performance of this duty. U. S. v. Mullin (D. C. 1895) 71 Fed. 682.

A written order of an Indian agent, acting in pursuance of instructions from the interior department, for the purpose of fulfilling the duty of the government to protect the Indians in the use and occupancy of their reservations, is a legal writ or process, within section 10310, post. Id.

The executive branch of the government is bound to protect Indians residing on a reservation in the possession and occupancy of their land; but this affords no remedy to the Indian for an injury to his personal or property rights, and for such remedy he must go to some court of competent jurisdiction. Smith v. Mosgrove (Or. 1908) 94 P. 970.

Jurisdiction of courts.—So long as the United States recognizes the national character of Indians and they are under the protection of treaties and laws of Congress, their property is outside the operation of state laws, and the state courts have no jurisdiction over controversies concerning the titles to Indian allotments while the same are held in trust by the United States. Where trespass has been committed on land held by an Indian through allotment from the government, the trial of an action by the Indian against the trespasser will not interfere with any of the rights given to the Secretary of the Interior or the federal court over the Indian or his land, the action of trespass not necessarily involving the question of title. The law is that an occupant of land, the title to which is in the government may maintain trespass against one who wrongfully interferes with his possession to his injury; and so, though the government by Act March 3, 1885, c. 319, 23 Stat. 341, and section 4201, post, and Act Feb. 28, 1891, c. 383, 26 Stat. 795, substantially re-enacted in Act May 31, 1900, § 1, post, § 4217, holds in trust the legal title to land allotted in severalty to an Indian, the latter, who is in the rightful possession of the land and has the beneficial use therein, may recover damages for an unlawful trespass upon it. Under Const. Or. art. 1, § 10, which declares that "every man shall have remedy by due course of law for injury done him in person, property, or reputation," an Indian has as much right to resort to the state courts having jurisdiction of the subject-matter to recover for a tort against his person or property as any other suitor, and it is not material that the wrong was committed against the possession of land allotted to him under the acts of Congress providing for allotments of land in severalty to Indians. Smith v. Mosgrove (Or. 1908) 94 P. 970.

§ 4110. (R. S. § 2120.) Indians trespassing upon lands of civilized Indians.

Whenever any person of Indian blood belonging to a band or tribe which receives or is entitled to receive annuities from the United States, and who has not adopted the habits and customs of civilized life, and received his lands in severalty by allotment, as mentioned in the preceding section, commits any trespass upon the lands or premises of any Indian who has so received his lands by allotment, the superintendent and agent of such band or tribe shall ascertain the damages resulting from such trespass, and the sum so ascertained shall be withheld from the payment next thereafter to be made, either to the band or tribe to which the party committing such trespass shall belong, as in the discretion of the superintendent he shall deem proper; and the sum so withheld shall, if the Secretary of the Interior approves, be paid over by the agent or superintendent to the party injured.

Act June 14, 1862, c. 101, § 2, 12 Stat. 427.

§ 4111. (R. S. § 2121.) Suspension of chief for trespass.

Whenever such trespasser as is mentioned in the preceding section is the chief or head-man of a band or tribe, the superintend-

ent of Indian affairs in his district shall also suspend the trespasser from his office for three months, and shall during that time deprive him of all the benefits and emoluments connected therewith; but the chief or head-man may be sooner restored to his former standing if the superintendent shall so direct.

Act June 14, 1862, c. 101, § 3, 12 Stat. 427.

§ 4112. (R. S. § 2122.) Sale of buildings belonging to the United States.

The Secretary of the Interior is authorized to cause all such buildings belonging to the United States, as have been, or hereafter shall be, erected for the use of their agents, teachers, farmers, mechanics, and other persons employed amongst the Indians, to be sold whenever the lands on which the same are erected have become the property of the United States, and are no longer necessary for such purposes.

Act March 3, 1843, c. 78, § 1, 5 Stat. 611.

For the provisions regarding the disposition of government property at Indian reservations, see R. S. § 2123, post, § 4113; Act March 1, 1907, c. 2285, post, § 4114; Act July 1, 1898, c. 545, § 6, as amended by Act June 25, 1910, c. 431, § 22, post, § 4115; Act April 21, 1904, c. 1402, § 1, post, § 4171.

§ 4113. (R. S. § 2123.) Sale of lands with buildings.

The Secretary of the Interior is authorized to cause to be sold, at his discretion, with each of such buildings as are mentioned in the preceding section, a quantity of land not exceeding one section; and on the payment of the consideration agreed for into the Treasury of the United States by the purchaser, the Secretary shall make, execute, and deliver to the purchaser a title in fee-simple for such lands and tenements.

Act March 3, 1843, c. 78, § 2, 5 Stat. 611.

For other provisions regarding the disposition of government property at Indian reservations, see R. S. § 2122, ante, § 4112, and notes thereunder.

§ 4114. (Act March 1, 1907, c. 2285.) Government property at Indian reservation or school, not required for use; removal authorized.

Hereafter where there is Government property on hand at any of the Indian reservations or schools not required for the use or benefit of the Indians of said reservations or schools, the Secretary of the Interior is hereby authorized to move such property to other Indian reservations or schools where it may be required. (34 Stat. 1016.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

For other provisions regarding the disposition of government property at Indian reservations, see R. S. § 2122, ante, § 4112, and notes thereunder.

§ 4115. (Act July 1, 1898, c. 545, § 6, as amended, Act June 25, 1910, c. 431, § 22.) Government property at Indian reservation, not required for use; transfer or sale authorized; disposition of proceeds of sale.

Whenever there is on hand at any of the Indian reservations government property not required for the use and benefit of the Indians on such reservations, the Secretary of the Interior is authorized to cause any such property to be transferred to any other Indian reservation where it may be used advantageously, or to cause it to be sold and the proceeds thereof deposited and covered into the Treasury in conformity with section thirty-six hundred and eighteen of the Revised Statutes of the United States. (30 Stat. 596. 36 Stat. 861.)

This section was part of the Indian appropriation act for the fiscal year 1899, first cited above.

The section, as originally enacted, authorized the Secretary of the Interior "to move such property to other Indian reservations where it may be re-

quired, or to sell it and apply the proceeds of same in the purchase of such articles as may be needed for the use of the Indians for whom said property was purchased," and required him to make report of his action to the next session of Congress thereafter. It was amended to read as set forth here, by Act June 25, 1910, c. 431, § 22, which section was part of an act to provide for determining heirs of deceased Indians, etc., last cited above.

For other provisions regarding the disposition of government property at Indian reservations, see R. S. § 2122, ante, § 4112, and notes thereunder.

Cited without definite application,
U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4116. (R. S. § 2124.) Penalties under this Title; how recovered.

All penalties which shall accrue under this Title shall be sued for and recovered in an action in the nature of an action of debt, in the name of the United States, before any court having jurisdiction of the same, in any State or Territory in which the defendant shall be arrested or found, the one-half to the use of the informer and the other half to the use of the United States, except when the prosecution shall be first instituted on behalf of the United States, in which case the whole shall be to their use.

Act June 30, 1834, c. 161, § 27, 4 Stat. 733.

The provisions of this Title, mentioned in this section, were the preceding sections 2111–2123 of the Revised Statutes, ante, §§ 4095–4100, 4107–4113.

Notes of Decisions

Construction and application in general.—This section was not intended to limit the United States to an action of debt to collect the penalties imposed on persons returning to the Indian country after being once removed, but prescribed the procedure in cases where the penalty was sought to be collected by an informer. U. S. v. Stocking (D. C. 1898) 87 Fed. 857. It ought to be construed as only applicable to penalties prescribed by Act June 30, 1834 (4 Stat. 729), of which it is a part. If applicable to section 4151, post, it is not exclusive of the common-law remedy by indictment or information, but only cumulative. U. S. v. Howard (C. C. 1883) 17 Fed. 638.

The executive branch of the government is bound to protect Indians residing on a reservation in the possession and occupancy of their land; but this affords no remedy to the Indian for an injury to his personal or property rights, and for such remedy he must go to some court of competent jurisdiction. Smith v. Mosgrove (Or. 1908) 94 P. 970.

Procedure to recover penalties.—The proper proceeding against persons who have conspired to return to and settle in the Indian country after removal therefrom is by qui tam action. An action under this section to recover the penalty for conspiring to make settlement on Indian lands, and to return to the Indian country after being removed therefrom, is within the purview of section 1712, ante. U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427.

This section did not apply to section 4151, post. U. S. v. Stocking (D. C. 1898) 87 Fed. 857. But see In re Seagraves (1896) 48 Pac. 272, 4 Okl. 422, holding that section 4151, post, is not a criminal statute, but only renders the intruder liable to the penalty therein named, recoverable "in an action in the nature of an action of debt, in the name of the United States," and cannot be enforced by a criminal proceeding.

When a statute creating a forfeiture does not prescribe the mode of collecting it, either debt, information, or indictment will lie. U. S. v. Stocking (D. C. 1898) 87 Fed. 857.

Cited without definite application,
U. S. v. Crook (D. C. 1875) 179 Fed. 391.

§ 4117. (R. S. § 2125.) Proceedings against goods seized for violation of this Title.

When goods or other property shall be seized for any violation of this Title, it shall be lawful for the person prosecuting on behalf of the United States to proceed against such goods, or other property, in the manner directed to be observed in the case of goods, wares, or merchandise brought into the United States in violation of the revenue laws.

Act June 30, 1834, c. 161, § 28, 4 Stat. 734.

Notes of Decisions

Custody of seized property.—Where property is seized by military authorities in Indian country for violation of the laws relating to the Indians, on or

as soon as practicable after report is made to the United States attorney it should be placed in the custody of the proper civil officers. Section 5789, post, is not embraced in the proceedings contemplated in this section. (1887) 18 Op. Atty. Gen. 544.

Cited without definite application, U. S. v. Crook (D. C. 1875) 179 Fed. 391.

§ 4118. (R. S. § 2126.) Burden of proof in trials of right of property between Indians and white persons.

In all trials about the right of property in which an Indian may be a party on one side, and a white person on the other, the burden of proof shall rest upon the white person, whenever the Indian shall make out a presumption of title in himself from the fact of previous possession or ownership.

Act June 30, 1834, c. 161, § 22, 4 Stat. 733.

Notes of Decisions

Right to sue and limitations.—Under Bill of Rights Neb. § 13, providing that all courts shall be open, and every person, for any injury done him in his lands, goods, person, or reputation, shall have a remedy, and under this section, an Indian may come into the courts and litigate his title to land, and, where he is not shown to be uneducated or unfamiliar with the laws, the statute of limitations will run against him. Felix v. Patrick (C. C. 1888) 36 Fed. 457, decree affirmed (1892) 12 Sup. Ct. 862, 145 U. S. 317, 36 L. Ed. 719.

§ 4119. (Repealed.)

This section, which was a provision of Act May 11, 1880, c. 85, § 4, 21 Stat. 132, read as follows:

"All officers and agents of the Army and Indian bureaus are prohibited, except in a case specially directed by the President, from granting permission in writing or otherwise to any Indian or Indians on any reservation to go into the State of Texas under any pretext whatever; and any officer or agent of the Army or Indian Bureau who shall violate this provision shall be dismissed from the public service. And the Secretary of the Interior is hereby directed and required to take at once such other reasonable measures as may be necessary in connection with said prohibition to prevent said Indians from entering said State."

It was repealed by a provision of the Indian appropriation act for the fiscal year 1917, Act May 18, 1916, c. 125, § 1, 39 Stat. Said repealing provision read as follows:

"That so much of section four of the Act of May eleventh, eighteen hundred and eighty (Twenty-first Statutes at Large, page one hundred and thirty-two), as prohibits granting permission in writing or otherwise to any Indian or Indians on any Indian reservation to go into the State of Texas, under any pretext whatever, be, and the same is hereby, repealed."

§ 4120. (R. S. § 2127.) Sale by agents of cattle, horses, etc., of Indians not required for their use, authorized.

The agent of each tribe of Indians, lawfully residing in the Indian country, is authorized to sell for the benefit of such Indians any cattle, horses, or other live stock belonging to the Indians, and not required for their use and subsistence, under such regulations as shall be established by the Secretary of the Interior. But no such sale shall be made so as to interfere with the execution of any order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops.

Act March 3, 1865, c. 127, § 9, 13 Stat. 563.

Sale of government purchased cattle by Indians, except to members of their own tribe, is prohibited, unless the agent's written consent be obtained, by Act July 4, 1884, c. 180, § 1, post, § 4121.

Removal of cattle, horses, or other stock from Indian country, except by authority of the Secretary of War, is penalized by R. S. § 2138, post, § 4136.

Notes of Decisions

Construction and applicability in general.—This section is not limited to cattle in possession of Indians at the time of its enactment, and the section is broad enough to cover the increase of such cattle as the government may furnish. Rider v. La Clair (1914) 138 Pac. 3, 77 Wash. 488.

Under this section and section 4121, post, mortgage on cattle received by

Indian from United States government, and in his possession on his allotment of land made without the sanction of the Indian agent, is void. Id.

—— **Indian country.**—See post, § 4127 et seq., and notes.

Cited without definite application, Buchanan v. Drovers' Nat. Bank (1893) 55 Fed. 223, 225, 5 C. C. A. 83; McKnight v. U. S. (1904) 130 Fed. 659, 664, 65 C. C. A. 37; Forty-three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4121. (Act July 4, 1884, c. 180, § 1.) Sale of cattle of Indians purchased by Government to persons not members of the tribe, etc., forbidden, except with written consent of agent; purchase in violation of provision punishable.

Where Indians are in possession or control of cattle or their increase which have been purchased by the Government such cattle shall not be sold to any person not a member of the tribe to which the owners of the cattle belong or to any citizen of the United States whether intermarried with the Indians or not except with the consent in writing of the agent of the tribe to which the owner or possessor of the cattle belongs. And all sales made in violation of this provision shall be void and the offending purchaser on conviction thereof shall be fined not less than five hundred dollars and imprisoned no less than six months. (23 Stat. 94.)

These were provisions of section 1 of the Indian appropriation act for the fiscal year 1885, cited above.

Indian agents may sell cattle, horses, and the stock not needed by the Indians, under R. S. § 2127, ante, § 4120.

Removal of cattle, horses, or other stock from Indian country, except by authority of the Secretary of War, is penalized by R. S. § 2138, post, § 4136.

Notes of Decisions

Construction and operation in general.—This section applies to cattle purchased by the government under it, and is not repealed as to them by Act March 2, 1889, c. 405, § 17. Fisher v. U. S. (1915) 226 Fed. 156, 141 C. C. A. 154.

Cattle purchased with money appropriated by congress are the property of the United States and do not cease to be such because of their delivery to the Indians for a particular purpose and with a limited right of disposal thereof, but cattle bought by an Indian with his own funds are not within this section. U. S. v. Anderson (D. C. 1911) 189 Fed. 262.

—— **Indian country.**—See post, § 4127 et seq., and notes.

—— **Prohibited transactions.**—The prohibition covers sales of cattle bought by the government out of the purchase price of land sold by the Indians to the United States, and issued to the various Indians on the reservations entitled thereto, and cannot be confined to sales of cattle to which the United States had title as owner. U. S. v. Anderson (1913) 33 Sup. Ct. 500, 228 U. S. 52, 57 L. Ed. 727, reversing (D. C. 1911) 189 Fed. 262.

"Trade" means the act or business of exchanging commodities either by barter or by buying and selling for money; commerce; traffic; barter; and a female industrial school teacher may not, while employed by the government, purchase from Indians cattle furnished by the United States and issued to them. U. S. v. Douglas (1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

An Indian driving his cattle from a reservation, being authorized by his tribe's agent to sell, did not violate R. S. § 2138, post, § 4136. Fisher v. U. S. (1915) 226 Fed. 156, 141 C. C. A. 154.

Under this section and section 4120, ante, mortgage on cattle received by Indian from United States government, and in his possession on his allotment of land made without the sanction of the Indian agent is void. Rider v. La Clair (1914) 138 P. 3, 77 Wash. 488, citing Worcester v. Georgia (1832) 6 Pet. 515, 8 L. Ed. 483, and U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195, in support of the holding that doubtful statutes are construed in favor of the Indians.

—— **Guilty knowledge as element of offense.**—In a prosecution for purchasing cattle from an Indian in violation of this section, guilty knowledge was not an element of the offense, and hence an indictment was not objectionable for failure to charge that accused had knowledge that the cattle purchased had been previously purchased by the government and issued to the Indian. U. S. v. Anderson (D. C. 1911) 189 Fed. 262.

—— **Actions by United States.**—In an action by the United States, as guardian of an Indian woman, for the conversion by defendant of cattle issued to her by the government for stockraising

purposes, and which she had no power to dispose of, declarations by her as to the ownership of the cattle are inadmissible against the plaintiff. McKnight v. U. S. (1904) 130 Fed. 659, 65 C. C. A. 37.

§ 4122. (Act Feb. 16, 1889, c. 172.) Sale or other disposition of dead timber, by Indians on reservations, authorized.

The President of the United States may from year to year in his discretion under such regulations as he may prescribe authorize the Indians residing on reservations or allotments, the fee to which remains in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber standing or fallen, on such reservation or allotment for the sole benefit of such Indian or Indians. But whenever there is reasonable cause to believe that such timber has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this act then in that case such authority shall not be granted. (25 Stat. 673.)

This was an act entitled "An act in relation to dead and fallen timber on Indian lands."

For other acts relative to sale of timber from Indian reservations, see Act March 3, 1883, c. 141, § 1, ante, § 4072, and notes thereunder.

Notes of Decisions

Ownership of and right to cut timber.—As to rights of Indian allottees see notes under § 4201, post; and see § 4231, post.

Indians have no power of alienation, except to the United States, and the fee in the land is in the United States, subject to the right of occupancy by the Indians, and timber standing on lands occupied by Indians may not be cut by them for sale alone. U. S. v. Cook (1873) 19 Wall. 591, 592, 22 L. Ed. 210; Northern Pac. R. Co. v. Lewis (1896) 16 Sup. Ct. 831, 162 U. S. 366, 40 L. Ed. 1002; Pine River Logging & Imp. Co. v. U. S. (1902) 22 Sup. Ct. 920, 186 U. S. 279, 46 L. Ed. 1164.

The Indians on the Oneida reservation have the right to cut and use the timber thereon, and to sell sufficient to support themselves and families. U. S. v. Foster (C. C. 1870) Fed. Cas. No. 15,141.

The title to the timber growing or standing on Indian reservations is in the United States, and, in the absence of legislative authority, Indians have no right to cut or dispose of it. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406. Indians occupying reservations have no right to cut and remove dead and fallen timber, not for fuel or for agricultural or other purposes connected with the occupation of the land. Dead and fallen timber on reservations is the property of the United States. (1888) 19 Op. Atty. Gen. 194. The United States have the absolute ownership of timber unlawfully cut by trespassers on the Fond du Lac Indian reservation, in Minnesota, and left lying thereon, though the land from which the timber was cut is held in common by the Indian bands, for whom it was reserved, by the ordinary Indian title. The Indians have no interest therein, and it in no way appertains to the Indian Bureau or its agents to assume charge thereof. The timber may be sold for and on account of the United States, by the Commissioner of the General Land Office, under the supervision of the Secretary of the Interior. (1890) 19 Op. Atty. Gen. 710.

The common-law doctrine that the cutting of standing trees is waste does not apply to the members of a band of Indians in the use of a large tract of wild land within a state, granted to them by the United States. Wheeler v. Me-shing-go-me-sia (1868) 30 Ind. 402.

A person cannot lawfully enter upon land of the Stockbridge Indians, and cut and carry away timber, even with their consent; and a person so entering, who cuts down trees and converts them into shingles acquires no property in the shingles. Chandler v. Edson (N. Y. 1812) 9 Johns. 362.

Construction of statute in general.—This section does not confer general authority to Indians to cut timber on reservations, but contemplates that authority shall be temporary only and that dead timber shall be disposed only for the benefit of the Indians to whom the authority is given. Contracts with individual Indians for the cutting and delivery of a designated quantity of dead and down timber on an Indian reservation will not be construed as authorizing the removal of all timber of that character on the reservation because such construction was put upon the contracts by the parties interested, and was approved by the government agent under whose superintendence the work under the contracts was done, since such a construction would be inconsistent with the regulations prescribed by the president under the authority of this act, the design of which, as interpreted by such regulations, was to permit every de-

serving Indian not otherwise employed to engage in the work. Pine River Logging & Improvement Co. v. U. S. (1902) 22 Sup. Ct. 920, 924, 186 U. S. 279, 46 L. Ed. 1164, affirming judgment (1900) 105 Fed. 1004, 44 C. C. A. 685.

This section includes not only standing trees that are entirely dead, but also those which are so vitally injured that a prudent landowner would cause them to be forthwith cut to preserve their value. It does not include living and uninjured trees merely because they stand among trees a large proportion of which are dead. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406; Same v. Bonness (1903) 125 Fed. 485, 60 C. C. A. 321.

It was not the purpose of this section to permit a few to monopolize the privilege; nor can it be supposed that such has heretofore been the purpose of the president, in granting such authority; and where a contract made by an Indian to cut and deliver to a purchaser a certain quantity of timber, "more or less" or "about," to be taken from the dead timber on a reservation, is approved by the president, the quantity stated limits the amount which can be sold, or to which the purchaser can obtain title thereunder, allowance being made only for small and accidental variation. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406.

Authority of Indian officers.—In the absence of fraud on the part of those representing the department of the interior, its refusal to sanction negotiations by the Eastern Band of Cherokee Indians for the sale of their standing timber is conclusive of the matter. U. S. v. Boyd (1897) 83 Fed. 547, 27 C. C. A. 592.

An agent of the government charged with the duty of superintending the cutting and removal of timber under such contracts cannot, by his acquiescence in the delivery of quantities in excess of those called for by the contracts, bind the government, the provisions of the contract being obligatory upon him, as well as the parties thereto. He is vested with a discretion to determine whether injured trees are so badly hurt that they ought to be classified as dead timber within the statute; and the government is bound by his decision, if made in good faith, while exercising proper care and diligence in the performance of his duties. But the parties to such contracts cannot found rights upon his derelictions of duty, nor obtain a title to living and uninjured trees, the cutting of which was prohibited by law, because he assented to the cutting or was cognizant thereof. The superintendent could not legalize a trespass committed by the cutting of living trees in violation of the statute by agreeing, after they were cut and had thus become "dead timber," that they might pass under the contract; and such agreement cannot estop the government from recovering the value of such trees. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406. Where the United States, through its agents, selected logging superintendents, who were intrusted with supervision of the cutting of timber on an Indian reservation, and the duty of determining the particular trees which came within the definition of "dead and down timber," which duty required the exercise of judgment and discretion, and such judgment and discretion were honestly exercised, the government is bound thereby, and cannot charge one to whom it contracted to sell the logs after they should be cut and banked with liability beyond the contract price, on the ground that some of the logs which were cut and banked, and which the purchaser took possession of under his contract, were cut from living green trees. U. S. v. Bonness (1903) 125 Fed. 485, 60 C. C. A. 321.

Employment of Indians to cut and deliver timber.—It is not unlawful for an Indian having a contract, approved by the president, to cut and deliver a certain quantity of dead timber from a reservation, to employ other Indians to cut and deliver timber thereunder in his name. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406.

—— Of whites.—The fact that a rule of the commissioner of Indian affairs in relation to the cutting of logs on a reservation provides that, with certain exceptions, "no white labor shall be employed in performing the work" of cutting and removing, will not prevent a white man from recovering an agreed compensation for hauling logs cut by Indians in accordance with the regulations, and sold, under a contract approved by the commissioner of Indian affairs, to the men who contracted for such hauling. Citizens' State Bank v. Bonnes (1901) 85 N. W. 718, 83 Minn. 1.

Acquisition of title to timber.—The fact that the purchaser had paid for a large quantity delivered and received in excess of that stated in the contract does not give him title thereto, and is no defense to a suit for its recovery by the government. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406.

Payment of proceeds.—Under regulations established by the President requiring payment of 10 per cent. of the proceeds of timber when sold into the poor fund of the tribe, such a payment made directly into such fund by a purchaser, under the terms of his contract, was not a payment to the United States, for which such purchaser was

entitled to credit on a recovery by the government against him for a wrongful conversion of a part of the timber received and paid for under such contract. U. S. v. Pine River Logging & Improvement Co. (1898) 89 Fed. 907, 32 C. C. A. 406.

Conversion of timber.—The government held entitled to recover for a conversion, and not merely for a trespass on an Indian reservation. U. S. v. Pine River Logging & Improvement Co. (1897) 78 Fed. 319, 24 C. C. A. 101.

§ 4123. (Act June 7, 1897, c. 3, § 1.) Sale or other disposition of dead timber, by Indians on reservations, etc., in Minnesota, authorized.

The Secretary of the Interior may in his discretion, from year to year, under such regulations as he may prescribe, authorize the Indians residing on any Indian reservation in the State of Minnesota, whether the same has been allotted in severalty or is still unallotted, to fell, cut, remove, sell or otherwise dispose of the dead timber, standing or fallen on such reservation or any part thereof, for the sole benefit of such Indians; and he may also in like manner authorize the Chippewa Indians of Minnesota who have any interest or right in the proceeds derived from the sales of ceded Indian lands or the timber growing thereon, whereof the fee is still in the United States, to fell, cut, remove, sell or otherwise dispose of the dead timber, standing or fallen, on such ceded land. But whenever there is reason to believe that such dead timber in either case has been killed, burned, girdled, or otherwise injured for the purpose of securing its sale under this Act, then in that case authority shall not be granted. (30 Stat. 90.)

These were provisions of section 1 of the Indian appropriation act for the fiscal year 1898, cited above.

For other acts relative to sale of timber from Indian reservations, see Act March 3, 1883, c. 141, § 1, ante, § 4072, and notes thereunder.

Notes of Decisions

Sale of dead timber on reservations in Minnesota.—See ante, § 4122, and notes thereunder.

§ 4124. (Act March 3, 1911, c. 210, § 1.) Fund for encouraging agricultural industry among Indians; conditions for repayments; disposition of repayments; report of use of fund.

There is hereby appropriated the sum of thirty thousand dollars, or so much thereof as may be necessary, to be immediately available, for the purpose of encouraging industry among Indians, and to aid them to engage in the culture of fruits, grains, and other crops. The said sum may be used for the purchase of animals, machinery, tools, implements, and other agricultural equipment: Provided, That the sum hereby appropriated shall be expended subject to the conditions to be prescribed by the Secretary of the Interior for its repayment to the United States, on or before June thirtieth, nineteen hundred and eighteen, and all repayments to this fund made on or before June thirtieth, nineteen hundred and seventeen are hereby appropriated for the same purpose as the original fund, and the entire fund, including such repayments, shall remain available until June thirtieth, nineteen hundred and seventeen, and all repayments to the fund hereby created which shall be made subsequent to June thirtieth, nineteen hundred and seventeen, shall be covered into the Treasury and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law: Provided further, That the Secretary of the Interior shall submit to Congress annually on the first Monday in December a detailed report of the use of this fund. (36 Stat. 1061.)

These were provisions of the Indian appropriation act for the fiscal year 1912, cited above.

Subsequent appropriations of larger amounts for similar purposes, with

provisos of the same nature as those of this act, were made by Act June 30, 1913, c. 4, § 1, post, § 4125, and Act Aug. 1, 1914, c. 222, § 1, post, § 4125a.

§ 4125. (Act June 30, 1913, c. 4, § 1.) Additional fund for encouraging agricultural industry among Indians; conditions for repayments; disposition of repayments; report of use of fund.

For the purpose of encouraging industry among the Indians and to aid them in the culture of fruits, grains, and other crops, $100,000, or so much thereof as may be necessary, to be immediately available, which sum may be used for the purchase of animals, machinery, tools, implements, and other equipment necessary to enable Indians to become self-supporting: Provided, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five, and all repayments to this fund made on or before June thirtieth, nineteen hundred and twenty-four, are hereby reappropriated for the same purpose as the original fund, and the entire fund, including such repayments, shall remain available until June thirtieth, nineteen hundred and twenty-four, and all repayments to the fund hereby created which shall be made subsequent to June thirtieth, nineteen hundred and twenty-four, shall be covered into the Treasury and shall not be withdrawn or applied except in consequence of a subsequent appropriation made by law: Provided further, That the Secretary of the Interior shall submit to Congress annually on the first Monday in December a detailed report of the use of this fund. (38 Stat. 80.)

These were provisions of the Indian appropriation act for the fiscal year 1914, cited above.

Previous similar provisions of Act March 3, 1911, c. 210, § 1, are set forth ante, § 4024, and subsequent similar provisions of Act Aug. 1, 1914, c. 222, § 1, are set forth post, § 4125a.

§ 4125a. (Act Aug. 1, 1914, c. 222, § 1.) Additional fund for encouraging agricultural industry among Indians; conditions for repayment; report of moneys appropriated for encouraging industry among Indians; restrictions on expenditure.

For the purpose of encouraging industry and self-support among the Indians and to aid them in the culture of fruits, grains, and other crops, $600,000, or so much thereof as may be necessary, to be immediately available, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary to enable Indians to become self-supporting: Provided, That said sum shall be expended under conditions to be prescribed by the Secretary of the Interior for its repayment to the United States on or before June thirtieth, nineteen hundred and twenty-five: Provided further, That hereafter the Secretary of the Interior shall submit to Congress annually on the first Monday in December a detailed report of all moneys appropriated for the purpose of encouraging industry among Indians: And provided also, That not to exceed $75,000 of the amount herein appropriated shall be expended on any one reservation or for the benefit of any one tribe of Indians. (38 Stat. 586, 587.)

This was a provision of the Indian appropriation act for the fiscal year 1915, cited above.

The Indian appropriation act for the fiscal year 1917, Act May 18, 1916, c. 125, § 1, 39 Stat., made an appropriation as follows:

"For the purpose of encouraging industry and self support among the Indians and to aid them in the culture of fruits, grains, and other crops, $300,000, or so much thereof as may be necessary, to be immediately available, which sum may be used for the purchase of seed, animals, machinery, tools, implements, and other equipment necessary, in the discretion of the Secretary of the Interior, to enable Indians to become self-supporting: Provided, That said sum shall be expended under conditions to be prescribed by the Secretary

of the Interior for its repayment to the United States, on or before June thirtieth, nineteen hundred and twenty-five: Provided further, That not to exceed $50,000 of the amount herein appropriated shall be expended on any one reservation or for the benefit of any one tribe of Indians."

For prior provisions of a similar nature, see ante, §§ 4124, 4125.

§ 4125b. (Act Aug. 1, 1914, c. 222, § 1.) Prevention and treatment of contagious and infectious diseases among Indians; erection and equipment of hospitals; isolation or quarantine of Indians afflicted with such diseases.

To relieve distress among Indians and to provide for their care and for the prevention and treatment of tuberculosis, trachoma, smallpox, and other contagious and infectious diseases, including the purchase of vaccine and expense of vaccination, correction of sanitary defects in Indian homes, $300,000: * * Provided further, That not to exceed $100,000 of the amount herein appropriated may be expended in the erection and equipment of hospitals for the use of Indians; and no hospital shall be constructed at a cost to exceed $15,000, including equipment: Provided further, That hereafter the Secretary of the Interior shall submit to Congress annually a detailed report as to all moneys expended in the erection of hospitals as provided for herein: Provided further, That whenever the Secretary of the Interior shall find any Indian afflicted with tuberculosis, trachoma, or other contagious or infectious diseases, he may, if in his judgment the health of the afflicted Indian or that of other persons require it, isolate, or quarantine such afflicted Indian in a hospital or other place for treatment. The Secretary of the Interior may employ such means as may be necessary in the isolation, or quarantine of such Indian, and it shall be the duty of such Indian so afflicted to obey any order or regulation made by the Secretary of the Interior in carrying out this provision. (38 Stat. 583, 584.)

This was a provision of the Indian appropriation act for the fiscal year 1915, cited above.

The Indian appropriation for the fiscal year 1917, Act May 18, 1916, c. 125, § 1, 39 Stat., appropriated money for similar purposes and also for general medical and surgical attention. It also amended the first proviso, so as to allow the expenditure of an additional $2,500 for the erection and equipment of hospitals.

§ 4126. (Act March 1, 1907, c. 2285.) Access to records of Five Civilized Tribes by Secretary of Interior.

The Secretary of the Interior, or his accredited representative, shall at all times have access to any books and records of the Choctaw, Chickasaw, Cherokee, Creek, and Seminole tribes, whether in possession of any of the officers of either of said tribes or any officer or custodian thereof, of the future State of Oklahoma. (34 Stat. 1027.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

Notes of Decisions

Final rolls of five civilized tribes as evidence of Indian blood.—The final rolls are conclusive of the quantum of Indian blood of any enrolled citizen of any of the tribes for the purpose of fixing the Indian's allotment status and the capacity of the allottee to alienate. Lawless v. Raddis (Okl. 1913) 129 P. 711.

—— **As evidence of age.**—See Campbell v. McSpadden (Okl. 1912) 127 P. 854; Rice v. Anderson (Okl. 1913) 134 P. 1120.

§ 4126a. (Act Aug. 1, 1914, c. 222, § 1.) Report or record of offense or case of Indian incarcerated in agency jail, etc.

Hereafter whenever an Indian shall be incarcerated in an agency jail, or any other place of confinement, on an Indian reservation or at an Indian school, a report or record of the offense or case shall

be immediately submitted to the superintendent of the reservation or such official or officials as he may designate, and such report shall be made a part of the records of the agency office. (38 Stat. 586.)

This was part of the Indian appropriation act for the fiscal year 1915, cited above.

CHAPTER FOUR

Government of Indian Country

Sec.
4127. Traders with Indians; appointment; regulation.
4128. Persons who may be permitted to trade with Indians; regulation.
4129. Prohibition of trade by the President.
4130. Trading with Indians, etc., without license; penalty; employment by traders of white persons as clerks; license and regulation.
4131. Foreigners entering Indian country without passports; penalty.
4132. Prohibited purchases and sales.
4133. Sale of arms, etc., to Indians, prohibited.
4134. Trading or selling arms, etc., in any district occupied by uncivilized or hostile Indians.
4135. Prohibition of hunting on Indian lands.
4136. Penalty for removing cattle from Indian country.
4136a. Selling, etc., intoxicating liquors to Indians, or introducing into Indian country; punishment; defenses.
4137. Selling, etc., intoxicating drinks to Indians, or introducing intoxicating liquors into Indian country, punishable; imprisonment and fine; authority of War Department as defense.
4138. Officers, soldiers, etc., of Army furnishing liquors, etc., to Indians.
4139. Introducing and using wines, within Indian country, for sacramental purposes, not unlawful.
4140. Complaints for violations of provisions prohibiting sale, etc., to Indians, or introduction into Indian country, of intoxicating liquors; arrests and examinations.
4141. Searches for concealed liquors; powers of officers; seizure of and proceedings against liquors found, etc.
4142. Suppression of liquor traffic among Indians; powers of officers conferred also on special agent of Indian Bureau and his deputies.
4143. Suppression of liquor traffic among Indians; powers of marshals and deputy marshals conferred also on chief special officer and his deputies.
4144. Setting up distillery in Indian country.
4144a. Sections 4141, 4144, applicable to liquors mentioned in § 4137; possession prima facie evidence of unlawful introduction.
4145. Assault.
4146. Arson.
4147. Laws defining, etc., forgery and depredations on mails, extended to Indian country.
4148. General laws as to punishment of crimes extended to Indian country.
4149. Exceptions to operation of preceding section.
4150. Removal of persons from Indian country.
4151. Return after removal; penalty.
4152. Removal from reservations.
4153. Employment of the military in apprehending persons violating the law, and for other purposes.
4154. Detention of persons apprehended by the military.
4155. Arrest of absconding Indians guilty of crime.
4156. Employment by marshal of posse comitatus in executing process.
4157. Reparation for injuries to property of Indians.
4158. Payment where the offender is unable.
4159. Injuries to property by Indians.
4160. Agents, etc., authorized to take depositions, touching depredations.

(R. S. § 2127. Transferred to Chapter 3.)

This section provided for the sale, by the agent of each tribe of Indians, for their benefit, of cattle, horses, etc., belonging to them, and not required for their use, etc. It is placed, with other provisions for protection of the Indians, under Chapter 3 of this Title, ante, § 4120.

(R. S. §§ 2128–2131. Superseded.)

R. S. § 2128, provided that any loyal person, a citizen of the United States, of good moral character, should be permitted to trade with any Indian tribe upon giving bond, as prescribed and R. S. §§ 2129–2131, provided for the issue or refusal of licenses so to trade by superintendents of Indian affairs, Indian agents, or sub-agents, and for revocation of such licenses. They were superseded by provisions giving the Commissioner of Indian Affairs sole power to appoint such traders, and to make regulations governing the conduct of their business, of Act Aug. 15, 1876, c. 289, § 5, post, § 4127, and the provisions relating to their appointment, of Act March 3, 1901, c. 832, § 1, as amended by Act March 3, 1903, c. 994, § 10, post, § 4128.

§ 4127. (Act Aug. 15, 1876, c. 289, § 5.) Traders with Indians; appointment; regulation.

Hereafter the Commissioner of Indian Affairs shall have the sole power and authority to appoint Traders to the Indian tribes and to make such rules and regulations as he may deem just and proper specifying the kind and quantity of goods and the prices at which such goods shall be sold to the Indians. (19 Stat. 200.)

This section was part of the Indian appropriation act for the fiscal year 1877, cited above.

Subsequent provisions as to appointment of traders were made by Act March 3, 1901, c. 832, § 1, as amended by Act March 3, 1903, c. 994, § 10, post, § 4128.

Notes of Decisions

Power of congress.—Neither the constitution of a state nor an act of its legislature can prevent the application of an act of congress to the Indian tribes residing in the state, but subject to the control of the general government. U. S. v. Boyd (1897) 83 Fed. 547, 27 C. C. A. 592.

Under the power to regulate commerce with the Indian tribes, congress has power to prohibit all intercourse with them except under license. U. S. v. Cisna (C. C. 1835) Fed. Cas. No. 14,795.

Construction of statute in general.—The Revised Statutes do not require persons to be licensed to trade in Alaska, even with the Indians. Waters v. Campbell (C. C. 1876) Fed. Cas. No. 17,264.

A trader at a military post in the Indian country cannot lawfully maintain a traffic with the Indians unless he be properly licensed for such trade. License to trade with the Indians at the establishments of post traders cannot be given by the military authorities. (1879) 16 Op. Atty. Gen. 403.

This section and section 4130, post, are not applicable to the Pueblo Indians of New Mexico (1891) 20 Op. Atty. Gen. 215, citing U. S. v. Ritchie (1854) 17 How. 531, 15 L. Ed. 236; Same v. Joseph (1876) 94 U. S. 614, 24 L. Ed. 295; Same v. Lucero (1869) 1 N. M. 422.

A contract by the holders of a license to trade with Indians to pay to a third person a half of the net profits of the trade for the consideration of the third person purchasing all merchandise for the trade at his own account and resell the same to the holders and take charge of the business is illegal under R. S. §§ 2129, 2130, and section 2133 (section 4130, post). Gould v. Smith (1884) 19 N. W. 483, 15 Neb. 549.

A person engaged in the business of merchandise at a town on land to which the Indian title had been extinguished was not trading within the Indian country within R. S. § 2129. Rider v. La Clair (1914) 138 Pac. 3, 77 Wash. 488.

Sale or transfer of license.—A. had a license authorizing him to trade with the Pottawatomie Indians upon their reservation. He took a partner, and procured a permit for him to live upon the reservation, and both sold goods. Held, that nothing in the acts of congress prohibited this. Dunn v. Carter (1883) 30 Kan. 294, 1 Pac. 66.

Under section 4130, post, and R. S. § 2129, a sale of a license is void, and does not constitute a valuable consideration for a note. Hobbie v. Zaepffel (1885) 17 Neb. 536, 23 N. W. 514.

Actions by licensed traders on contracts with Indians.—A licensed trader upon the Osage Indian reservation, suing on a note given to him by an Indian, to which a defense is set up based on Act June 21, 1906, c. 3504, making it unlawful for such a trader to give credit to any individual Indian to an amount greater than 75 per cent. of the next quarterly annuity to which such Indian will be entitled, is charged with the burden of proving that the note represented lawful credits. Tinker v. Midland Valley Mercantile Co. (1914) 34 Sup. Ct. 252, 231 U. S. 681, 58 L. Ed. 434.

Permit taxes imposed by Indian nations.—The permit tax of the Creek Nation is the annual price fixed by its laws for the privilege of conducting business within its borders by noncitizens, and the payment of the tax conditions the exercise of the privilege. The legal effect of the permit laws of the Creek Nation prescribing permit taxes

is to prohibit noncitizens from conducting business in that nation without paying them. The Secretary of the Interior and his subordinates, the Indian inspector and the Indian agent, may lawfully close the business of noncitizens within the Creek Nation who refuse to pay their permit taxes, and prevent the continuance of that business until they are paid. Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505.

The power to enforce the terms of a treaty with the Choctaw and Chickasaw Indians that no person shall expose goods for sale without a permit is a duty imposed on the executive department of the government, and in the discharge of that duty it is not within the jurisdiction of the courts to enjoin such action. Weimer v. Zevely (1905) 138 Fed. 1006, 70 C. C. A. 683, affirming decree Zevely v. Weimer (1904) 82 S. W. 941, 5 Ind. T. 646.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 48, 50, citing R. S. §§ 2129–2131; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295).

§ 4128. (Act March 3, 1901, c. 832, § 1, as amended, Act March 3, 1903, c. 994, § 10.) Persons who may be permitted to trade with Indians; regulation.

That portion of the Act of Congress approved March third, nineteen hundred and one (Thirty-first Statutes, page one thousand and sixty-five), entitled "An Act making appropriations for the current and contingent expenses of the Indian Department and for fulfilling treaty stipulations with various Indian tribes for the fiscal year ending June thirtieth, nineteen hundred and two, and for other purposes," which reads as follows: "That on and after July first, nineteen hundred and one, any person desiring to trade with the Indians on said reservation shall, upon establishing the fact, to the satisfaction of the Commissioner of Indian Affairs, that he is a proper person to engage in such trade, be permitted to do so under such rules and regulations as the Commissioner of Indian Affairs may prescribe for the protection of said Indians," is hereby amended and extended so as to apply to all Indian reservations. (31 Stat. 1066. 32 Stat. 1009.)

The portion of Act March 3, 1901, § 1, first cited above, which is quoted in and amended by this section of Act March 3, 1903, c. 994, last cited above, was a proviso annexed to appropriations for and provisions relating to the Osages, and "said reservation," mentioned therein, was the Osage Indian reservation.

Notes of Decisions

Indian reservations.—See notes under §§ 4130, 4137, 4140, 4141, 4152, post.

An Indian reservation is a part of the public domain, set apart by proper authority for the use and occupation by a tribe or tribes of Indians. Forty-Three Cases of Cognac Brandy (C. C. 1882) 14 Fed. 539, and note at end of that case.

Transactions by licensed traders.—Under Act March 3, 1901, c. 832, § 1, 31 Stat. 1065, licensed traders extending in the aggregate credit to an individual Osage Indian or head of a family over 60 per cent. of his next quarterly annuity payment held not entitled to enforce the excess as a legal indebtedness. Tinker v. McLaughlin-Farrar Co. (Okl. 1912) 124 P. 296.

This act affords to Indian traders at the Osage agency a cumulative remedy for the collection of their accounts against the Osage Indians, and does not oust the district court at Pawhuska of jurisdiction of an action on a note executed by an Osage Indian to an Indian trader, instituted March 6, 1907, where the note had not been presented to the Secretary of the Interior for adjustment under such act. De Noya v. Hill Inv. Co. (1912) 127 P. 444, 33 Okl. 663.

Validity of state legislation.—Laws N. Y. 1902, this section, c. 296, entitled "An act to amend the Indian law in relation to the erection of poles and wires on the Tonawanda reservation," is not unconstitutional and void, as conflicting with this section. Jemison v. Bell Telephone Co. of Buffalo (1906) 79 N. E. 728, 186 N. Y. 493, affirming judgment (1905) 95 N. Y. S. 1137, 109 App. Div. 911.

§ 4129. (R. S. § 2132.) Prohibition of trade by the President.

The President is authorized, whenever in his opinion the public interest may require the same, to prohibit the introduction of goods, or of any particular article, into the country belonging to any In-

dian tribe, and to direct all licenses to trade with such tribe to be revoked, and all applications therefor to be rejected. No trader to any other tribe shall, so long as such prohibition may continue, trade with any Indians of or for the tribe against which such prohibition is issued.

Act June 30, 1834, c. 161, § 3, 4 Stat. 729.

Notes of Decisions

Authority of President.—The President has no authority to prohibit the introduction into the territory of Alaska of molasses for manufacturing distilled spirits for sale among the natives, when in his judgment the public interest seems to require that he should do so. In this matter that territory cannot be considered as a country belonging to an Indian tribe. (1878) 16 Op. Atty. Gen. 141.

The President is empowered to make such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs. Adams v. Freeman (Okl. 1897) 50 P. 135.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 48, 50; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295); U. S. v. Sandoval (D. C. 1912) 198 Fed. 539.

§ 4130. (R. S. § 2133, as amended, Act July 31, 1882, c. 360.) Trading with Indians, etc., without license; penalty; employment by traders of white persons as clerks; license and regulation.

Any person other than an Indian of the full blood who shall attempt to reside in the Indian country, or on any Indian reservation, as a trader, or to introduce goods, or to trade therein, without such license, shall forfeit all merchandise offered for sale to the Indians or found in his possession, and shall moreover be liable to a penalty of five hundred dollars: Provided, That this section shall not apply to any person residing among or trading with the Choctaws, Cherokees, Chickasaws, Creeks, or Seminoles, commonly called the five civilized tribes, residing in said Indian country, and belonging to the Union Agency therein: And provided further, That no white person shall be employed as a clerk by any Indian trader, except such as trade with said five civilized tribes, unless first licensed so to do by the Commissioner of Indian Affairs, under and in conformity to regulations to be established by the Secretary of the Interior. (22 Stat. 179.)

Act June 30, 1834, c. 161, § 4, 4 Stat. 729. Act July 31, 1882, c. 360, 22 Stat. 179.

This section, as originally enacted, contained only the provision set forth here preceding the provisos, without the words, "of the full blood," and the words "or on any Indian reservation." It was amended by inserting said words and adding the two provisos, to read as set forth here, by Act July 31, 1882, c. 360, last cited above.

Notes of Decisions

1. Power of congress.
2. Construction of statute in general.
3. —— Criminal intent.
4. "Indian country" within statute.
5. Reservations as Indian country.
6. Particular states and territories as Indian country.
7. Persons requiring license.
8. Ousting licensed traders from agency.
9. Indian licenses or taxes.
10. License as personal privilege.

1. Power of congress.—The power of congress to regulate the intercourse between the inhabitants of the United States and the Indian tribes therein may be exercised and enforced wherever Indian tribes exist. U. S. v. Bridleman (D. C. 1881) 7 Fed. 894.

The Pueblo Indians of New Mexico hold their lands by unconditional patents from the United States, issued in recognition of titles granted them by the government of Spain, and congress could not, in admitting New Mexico as a state, declare such lands Indian country. U. S. v. Sandoval (D. C. 1912) 198 Fed. 540.

2. Construction of statute in general.—This section and section 4127, ante, are not applicable to the Pueblo Indians of New Mexico. (1891) 20 Op. Atty. Gen. 215. See, as to status of the Pueblo Indians, U. S. v. Lucero (1869) 1 N. M. 422; Same v. Joseph (1874) Id. 593, judgment affirmed (1876) 94 U. S. 614, 24 L. Ed. 295; Pueblo Indian Tax Case (1904) 76 Pac. 307, 12 N. M.

139; U. S. v. Mares (1907) 88 Pac. 1128, 14 N. M. 1.

Trading with Indians without a license on lands west of the Mississippi river, to which the Indian title has been extinguished, is not prohibited. U. S. v. Certain Property (1871) 1 Ariz. 31, 25 Pac. 517.

Neither expressly nor by implication did the amendment of March 3, 1847 to Act June 30, 1834, regulating trade and intercourse with the Indian tribes, repeal any portion of the original act. Fowler v. U. S. (1890) 1 Wash. T. 3.

See Jones v. Eisler (1865) 3 Kan. 134, holding that the mere setting up, as a defense to a note given by an Indian to a white man, that the obligor was an Ottawa Indian, living with his tribe on the Ottawa Reserve in Kansas, where the note was executed, does not contain sufficient allegations to bring the case within the prohibitions of Act June 30, 1854, which does not prohibit all contracts between whites and Indians.

3. —— **Criminal intent.**—As the statute makes criminal an act not malum in se or infamous, without requiring the act to be knowingly done, a criminal intent need not be proved. U. S. v. Leathers (D. C. 1879) Fed. Cas. No. 15,581.

4. **"Indian country" within statute.**—See §§ 4137, 4141, 4148, 4149, post, and notes thereunder.

The definition of "Indian country" in Act June 30, 1834, c. 161, § 1, though repealed by the Revised Statutes, may be referred to to determine what is meant by the term when found in sections of the Revised Statutes which are re-enactments of other sections of prior legislation. Ex parte Crow Dog (1883) 3 Sup. Ct. 396, 109 U. S. 556, 27 L. Ed. 1030; U. S. v. Le Bris (1887) 7 Sup. Ct. 894, 121 U. S. 278, 30 L. Ed. 946; Same v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195. See Bates v. Clark (1877) 95 U. S. 204, 24 L. Ed. 471, construing this section, and holding that all country described as "Indian country" remained such so long as the Indians retain their original title, and ceases to be "Indian country" when they lose that title, in the absence of treaty or statute to the contrary.

The term "Indian country" applies to all the country to which the Indian title has not been extinguished within the limits of the United States, whether within an Indian reservation or not, and whether acquired before or since the passage of Act June 30, 1834, c. 161, 4 Stat. 729, defining said term. U. S. v. Forty-Three Gallons of Whisky (1876) 93 U. S. 188, 23 L. Ed. 846; Bates v. Clark (1877) 95 U. S. 204, 205, 24 L. Ed. 471; Ex parte Crow Dog (1883) 109 U. S. 556, 3 S. Ct. 396, 27 L. Ed. 1030; Evans v. Victor (1913) 204 Fed. 361, 122 C. C. A. 531 (reversing order [D. C. 1912] 199 Fed. 504); U. S. v. Myers (1913) 206 Fed. 387, 124 C. C. A. 269; In re Jackson (C. C. 1889) 40 Fed. 372, 373; U. S. v. Payne (D. C. 1881) 8 Fed. 883; (1873) 14 Op. Atty. Gen. 290; (1889) 19 Op. Atty. Gen. 306; U. S. v. Knowlton (1882) 3 Dak. 58, 13 N. W. 573.

See American Fur Co. v. U. S. (1829) 2 Pet. 358, 7 L. Ed. 450. And see In re Wilson (1891) 11 Sup. Ct. 870, 140 U. S. 575, 35 L. Ed. 513.

The only "Indian country" within this chapter is the tracts set apart by the authority of the United States for the exclusive use and occupancy of particular Indian tribes and known as Indian reservations. U. S. v. Martin (D. C. 1883) 14 Fed. 817. See Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47.

Lands ceded to the United States by the Indian occupants cease from that time to be a part of the Indian country, within the nonintercourse act. Clark v. Bates (1874) 1 Dak. 42, 46 N. W. 510.

5. **Reservations as Indian country.**—The word "reservation" is used in the land law to describe any body of land which congress has reserved from sale for any purpose and a reservation is not necessarily "Indian country." U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195.

A particular portion of the public domain upon which an Indian tribe has been suffered long to remain, while other portions have been opened to settlement, or set apart particularly for Indian occupation, does not constitute such tract an Indian reservation. That a tract of country has sometimes been referred to in treaties and official reports as the Red Lake reservation is not sufficient to authorize the court, in a quasi criminal case, to declare it to be such. Forty-Three Cases Cognac Brandy (C. C. 1882) 14 Fed. 539.

Prior to the act of Jan. 6, 1883, the "Cherokee Outlet" was in the jurisdiction of the United States district court for the Western district of Arkansas, but that act did not put it in the jurisdiction of the United States district court of Kansas, as then and now it is Indian country, set apart and occupied by the Cherokees. U. S. v. Rogers (D. C. 1885) 23 Fed. 658. The part of the Cherokee Outlet not included within Oklahoma Territory by Act May 2, 1890, creating the territory, and which, in pursuance of that statute, was attached, for judicial purposes, to a judicial district of the territory, continued to be Indian country; and the offense of horse stealing, within Act Feb. 15, 1888, committed therein, was an offense against the United States, and within the jurisdiction of the district court for such district sitting as a court of the United States. U. S. v. Pridgeon (1894) 14 Sup. Ct. 746, 153 U. S. 48, 38

L. Ed. 631, on certificate from In re Pridgeon (C. C. 1893) 57 Fed. 200.

Klamath reservation was not "Indian country." U. S. v. Forty-Eight Pounds of Rising Star Tea (C. C. 1889) 38 Fed. 400, affirming (D. C. 1888) 35 Fed. 403.

The tract called "Pyramid Lake Indian reservation" has been legally reserved for the use of the Pah Utes and other Indians residing thereon, and is "Indian country," within this section and R. S. § 2139. U. S. v. Leathers (D. C. 1879) Fed. Cas. No. 15,581.

Umatilla reservations in Oregon are Indian country. U. S. v. Bridleman (D. C. 1881) 7 Fed. 894; Same v. Martin (D. C. 1883) 14 Fed. 817.

6. Particular states and territories as Indian country.—Alaska is not "Indian country" within the intercourse act of 1834 and the Revised Statutes. Kie v. U. S. (C. C. 1886) 27 Fed. 351; (1878) 16 Op. Atty. Gen. 141. Act June 30, 1834, defining "Indian country" and regulating trade and intercourse with Indians was not extended, propria vigore, over the territory of Alaska, upon its cession to the United States. Such act, as amended March 15, 1864, was not extended over Alaska by Act July 27, 1868, extending the laws "relating to customs, commerce and navigation" over that territory. U. S. v. Seveloff (D. C. 1872) Fed. Cas. No. 16,252.

Act March 3, 1873, extending to Alaska two sections of the act of June 30, 1834, known as the "Indian Intercourse Laws," and relating principally to the interdiction of the liquor traffic among Indians, made said territory "Indian country" only to the extent of the prohibited commerce, and did not put the Alaska Indians on a general footing with Indians in other parts of the United States. In re Sah Quah (D. C. 1886) 31 Fed. 327. See, also, Waters v. Campbell (C. C. 1876) Fed. Cas. No. 17,264; In re Carr (D. C. 1875) Fed. Cas. No. 2,432.

Intercourse Act March 30, 1802, c. 13, § 19, 2 Stat. 145, provided that the act should not be construed to prevent trade or intercourse with Indians living on lands surrounded by settlements of citizens of the United States. Act June 30, 1834, § 29, provided that the repeal of the act of 1802 should not affect it so far as it related to Indian tribes east of the Mississippi river. The organic act of New Mexico provided that the laws of the United States not locally inapplicable should have the same force and effect in the territory as elsewhere in the United States, and this provision was, by Organic Act Ariz. § 2, made applicable to that territory. Held, that section 19 of the act of 1802 was extended to the territory of Arizona by its organic act. U. S. v. Certain Property (1871) 1 Ariz. 31, 25 Pac. 517.

Act June 30, 1834, regulating trade and intercourse with the Indians, so far as it forbids settlement by foreigners, or any kind of manufacture by or commerce among persons not Indians or belonging to Indian tribes, and not on the lands of Indians tribes, was impliedly repealed by the act organizing the territories of Kansas and Nebraska, since when that act was passed the United States had extinguished the Indian title to more than half the lands in Kansas, and by express provision in that act made them subject to the pre-emption laws, and by establishing a complete system of government for the people and opening the public lands to settlement it invited and encouraged the formation of commercial and agricultural communities in Kansas, which could not have arisen or existed subject to all the rigorous prohibitions and penalties of the nonintercourse laws. McCracken v. Todd (1862) 1 Kan. 148. See, also, U. S. v. Ward (C. C. 1863) Fed. Cas. No. 16,639.

Trade and Intercourse Act June 30, 1834, c. 161, is applicable to the Indian reserved land in Kansas and Nebraska, and ought to be executed for their protection. (1857) 9 Op. Atty. Gen. 110.

Under the treaty of 1855 (11 Stat. 657) between the United States and the Black Foot tribe of Indians, that portion of Montana in which Camp Crook is situated is Indian country. U. S. v. 196 Buffalo Robes (1872) 1 Mont. 489. See U. S. v. Partello (C. C. 1891) 48 Fed. 670.

By Act Feb. 27, 1851, c. 20, § 7, all laws then in force concerning trade with the Indians were extended to New Mexico; and parties arrested or property seized there by the military authorities, for violation of those laws, should be placed in the custody of the marshal of the territory, to be proceeded against according to law. (1871) 13 Op. Atty. Gen. 470.

The statutes extending the laws regulating intercourse with the Indian tribes over the tribes in Utah, Nevada then being a part of Utah, do not make Nevada Indian country. U. S. v. Leathers (D. C. 1870) Fed. Cas. No. 15,581.

The act of June 30, 1834, regulating trade and intercourse with the Indian tribes, was extended to Oregon in 1850 so far as applicable. U. S. v. Tom (1853) 1 Or. 26. But the act of 1850 did not, through the prohibition in the intercourse act of settlement on Indian lands, affect the rights of settlers who had taken actual possession of lands within that territory before the passage of the act of 1850. Robinson v. Caldwell (1895) 67 Fed. 391, 14 C. C. A. 448, affirming decree Caldwell v. Robinson (C. C. 1894) 59 Fed. 653, and appeal dismissed (1897) 17 S. Ct. 343, 165 U. S. 359, 41 L. Ed. 745.

7. Persons requiring license.—Claimant's goods were seized for a violation of the act of 1834. He had a store on land open to settlement near the line

of a reservation, and traded at his store, without a license, with Indians from the reservation and others. Held, that there was no error in refusing a certificate of probable cause under section 1611, ante. U. S. v. Certain Property (1871) 1 Ariz. 31, 25 Pac. 517.

Person doing business at town located within the boundaries of Indian reservation, but upon land to which the Indian title had been extinguished, held not trading within the Indian country, so as to require a license under R. S. § 2129. Rider v. La Clair (1914) 138 P. 3, 77 Wash. 488.

8. Ousting licensed traders from agency.—A licensed trader, who had sold out his business and abandoned his post, and was avoiding his creditors, was properly ousted from the agency, with his property. Echols v. Tate (1890) 53 Ark. 12, 13 S. W. 253.

9. Indian licenses or taxes.—Act June 28, 1898 (30 Stat. 495), providing for organization of cities and towns in Indian country and extinguishment of Indian title therein has not yet been consummated, and does not deprive Indians of power to enact laws with regard to licenses or taxes, nor exempt purchasers of town or city lots from the operation of such legislation. (1900) 23 Op. Atty. Gen. 214.

Act May 27, 1902, c. 888, 32 Stat. 259, which prohibits the deportation of persons in lawful possession of land in any town site in any town or city in the Indian Territory, did not repeal or annul the permit laws of the Creek Nation, nor withdraw from the Secretary of the Interior and his subordinates their authority to close the business of noncitizens who refuse to pay their permit taxes, in order to prevent the continuance of a violation of those laws. Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505. Nor take away from the Choctaw Nation the right to prohibit traders from exposing goods for sale without license, given by the treaties of 1855 and 1866 (11 Stat. 611; 14 Stat. 85), on the ground that the repeal of the penalty against the enforcement of such a statute against intruders repeals the statute. Before injunction can issue, restraining Secretary of the Interior, or those acting under him, from enforcing the right given by treaty to the Choctaw and Chickasaw Nations to compel traders to take out licenses, it must appear that he was not authorized to exercise discretion in the premises. Weimer v. Zevely (1905) 138 Fed. 1006, 70 C. C. A. 683.

10. License as personal privilege.—A license is a personal privilege and cannot be transferred. U. S. v. Buffalo Robes (1872) 1 Mont. 489. A sale of a license is void, and does not constitute a valuable consideration for a note. Hobbie v. Zaepffel (1885) 17 Neb. 536, 23 N. W. 514. A licensee may take a partner, and both may trade under the license. Dunn v. Carter (1883) 1 Pac. 66, 30 Kan. 294.

Cited without definite application, Benson v. U. S. (C. C. 1890) 44 Fed. 178, 179.

§ 4131. (R. S. § 2134.) Foreigners entering Indian country without passports; penalty.

Every foreigner who shall go into the Indian country without a passport from the Department of the Interior, superintendent, agent, or sub-agent of Indian affairs, or officer of the United States commanding the nearest military post on the frontiers, or who shall remain intentionally therein after the expiration of such passport, shall be liable to a penalty of one thousand dollars. Every such passport shall express the object of such person, the time he is allowed to remain, and the route he is to travel.

Act June 30, 1834, c. 161, § 6, 4 Stat. 730.

Notes of Decisions

"Foreigners" within statute.—"Foreigner" is one who is born out of the United States and is not naturalized, or who owes allegiance to any other government than that of the United States. (1887) 18 Op. Atty. Gen. 555.

Indian country.—See § 4130, ante, and notes thereunder.

Repeal by act organizing territories.—Act June 30, 1834, regulating trade and intercourse with the Indians, so far as it forbids settlement by foreigners, or any kind of manufacture by or commerce among persons not Indians or belonging to Indian tribes, and not on the lands of Indian tribes, was impliedly repealed by the act organizing the territories of Kansas and Nebraska. McCracken v. Todd (1862) 1 Kan. 148.

Cited without definite application, Red Bird v. U. S. (1906) 27 Sup. Ct. 29, 31, 203 U. S. 76, 51 L. Ed. 96; Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 48, 50; Benson v. U. S. (C. C. 1890) 44 Fed. 178, 179.

§ 4132. (R. S. § 2135.) Prohibited purchases and sales.

Every person, other than an Indian, who, within the Indian country, purchases or receives of any Indian, in the way of barter, trade,

or pledge, a gun, trap, or other article commonly used in hunting, any instrument of husbandry, or cooking utensils of the kind commonly obtained by the Indians in their intercourse with the white people, or any article of clothing, except skins or furs, shall be liable to a penalty of fifty dollars.

Act June 30, 1834, c. 161, § 7, 4 Stat. 730.

Notes of Decisions

Regulation of commerce with Indian tribe.—This section is an exercise of the power of Congress to regulate commerce with Indian tribes. U. S. v. Douglas (1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

Construction of prior statute.—See U. S. v. Douglas (1911) 190 Fed. 482, 111 C. C. A. 314, 36 L. R. A. (N. S.) 1075.

Cited without definite application, Red Bird v. U. S. (1906) 27 Sup. Ct. 29, 31, 203 U. S. 76, 51 L. Ed. 96; Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4133. (R. S. § 467.) Sale of arms, etc., to Indians, prohibited.

The Secretary of the Interior shall adopt such rules as may be necessary to prohibit the sale of arms or ammunition within any district or country occupied by uncivilized or hostile Indians, and shall enforce the same.

Act Feb. 14, 1873, c. 138, § 1, 17 Stat. 457.

Any trader, etc., selling arms or ammunition within any district or county occupied by uncivilized or hostile Indians, was to forfeit his right to trade with the Indians, and be excluded from such district or country, by R. S. § 2136, post, § 4134.

Notes of Decisions

Court-martial of persons supplying ammunition.—Where persons arrested by the military forces were engaged in supplying ammunition to Indians in open and notorious hostility to the United States, who properly came within the description of public enemies, such persons would seem to be amenable to trial and punishment by court-martial under section 2354. (1871) 13 Op. Atty. Gen. 470.

§ 4134. (R. S. § 2136.) Trading or selling arms, etc., in any district occupied by uncivilized or hostile Indians.

If any trader, his agent, or any person acting for or under him, shall sell any arms or ammunition at his trading-post or other place within any district or country occupied by uncivilized or hostile Indians, contrary to the rules and regulations of the Secretary of the Interior, such trader shall forfeit his right to trade with the Indians, and the Secretary shall exclude such trader, and the agent, or other person so offending, from the district or country so occupied.

Act Feb. 14, 1873, c. 138, § 1, 17 Stat. 459.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4135. (R. S. § 2137.) Prohibition of hunting on Indian lands.

Every person, other than an Indian, who, within the limits of any tribe with whom the United States has existing treaties, hunts, or traps, or takes and destroys any peltries or game, except for subsistence in the Indian country, shall forfeit all the traps, guns, and ammunition in his possession, used or procured to be used for that purpose, and all peltries so taken; and shall be liable in addition to a penalty of five hundred dollars.

Act June 30, 1834, c. 161, § 8, 4 Stat. 730.

Notes of Decisions

Offenses within statute.—Hunting and trapping in Indian country constitute an offense. U. S. v. Sturgeon (D. C. 1879) Fed. Cas. No. 16,413.

Indian country.—See § 4130, ante, and notes thereunder.

Right of Indians to hunt.—A tract of land 30 by 36 miles in extent, within the boundaries of a state, a small portion of which has been surveyed and opened to settlement, the rest being unsurveyed, and upon which a few set-

tlers have located themselves, but the greater part of which is mountainous and wooded, and abounding in wild game, is unoccupied land of the United States, within the meaning of the treaty of 1868 with the Bannack Indians, giving them a right to hunt on such lands. In re Race Horse (C. C. 1895) 70 Fed. 598, judgment reversed Ward v. Race Horse (1896) 16 S. Ct. 1076, 163 U. S. 504, 41 L. Ed. 244.

While the state authorities have a very extensive jurisdiction over the territory included in the White Earth Indian reservation, in this state, the tribal Indians on the reservation have, under their treaties with the United States, and the acquiescence of the state for over 30 years, a license to hunt and fish on the reservation, in their usual and traditional manner, in order to procure food for themselves, notwithstanding that the state laws prohibit such fishing and hunting. State v. Cooney (1899) 80 N. W. 696, 77 Minn. 518.

Seizure of traps, etc., by military.—Property, consisting of hunting traps, etc., seized by the military, should, as soon as practicable, after report of seizure to the United States attorney, be placed in the custody of the proper civil officers. (1887) 18 Op. Atty. Gen. 555.

See post, § 4153, and notes thereunder.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50; U. S. v. Bridleman (D. C. 1881) 7 Fed. 894, 896.

§ 4136. (R. S. § 2138.) Penalty for removing cattle from Indian country.

Every person who drives or removes, except by authority of an order lawfully issued by the Secretary of War, connected with the movement or subsistence of troops, any cattle, horses, or other stock from the Indian country for the purposes of trade or commerce, shall be punishable by imprisonment for not more than three years, or by a fine of not more than five thousand dollars, or both.

Act March 3, 1865, c. 127, § 8, 13 Stat. 563.

Indian agents may sell cattle, horses, and other stock not needed by the Indians, under R. S. § 2127, ante, § 4120.

Sale of government purchased cattle by the Indians, except to members of their own tribe, is prohibited, unless the agent's written consent be obtained, by Act July 4, 1884, c. 180, § 1, ante, § 4121.

Notes of Decisions

Offenses within statute.—Under Act July 4, 1884, ante, § 4121, an Indian driving his cattle from a reservation, being authorized by his tribe's agent to sell, did not violate this section. Fisher v. U. S. (1915) 226 Fed. 156, 141 C. C. A. 154.

Presumptions.—It cannot be assumed on appeal that the cattle accused was charged with driving from an Indian reservation, were issue cattle, whose sale was forbidden by Act March 2, 1889, c. 405, § 17; it appearing that he had the agent's permission. Fisher v. U. S. (1915) 226 Fed. 156, 141 C. C. A. 154.

Cited without definite application, Buchanan v. Drovers' Nat. Bank (1893) 55 Fed. 223, 225, 5 C. C. A. 83; McKnight v. U. S. (1904) 130 Fed. 659, 664, 65 C. C. A. 37; Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 912 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295).

§ 4136a. (R. S. § 2139, as amended, Act Feb. 27, 1877, c. 69, and Act July 23, 1892, c. 234.) Selling, etc., intoxicating liquors to Indians, or introducing into Indian country; punishment; defenses.

No ardent spirits, ale, beer, wine, or intoxicating liquor or liquors of whatever kind shall be introduced, under any pretense, into the Indian country. Every person who sells, exchanges, gives, barters, or disposes of any ardent spirits, ale, beer, wine, or intoxicating liquors of any kind to any Indian under charge of any Indian superintendent or agent, or introduces or attempts to introduce any ardent spirits, ale, wine, beer, or intoxicating liquor of any kind into the Indian country shall be punished by imprisonment for not more than two years, and by fine of not more than three hundred dollars for each offense. But it shall be a sufficient defense to any

charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into the Indian country that the acts charged were done under authority in writing from the War Department, or any officer duly authorized thereunto by the War Department.

Act July 9, 1832, c. 174, § 4, 4 Stat. 564. Act March 15, 1864, c. 33, 13 Stat. 29. Act Feb. 27, 1877, c. 69, 19 Stat. 244. Act July 23, 1892, c. 234, 27 Stat. 260.

This section, as enacted in the Revised Statutes, was as follows:

"No ardent spirits shall be introduced, under any pretense, into the Indian country. Every person, except an Indian, in the Indian country, who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces or attempts to introduce any spirituous liquor or wine into the Indian country, shall be punishable by imprisonment for not more than two years, and by a fine of not more than three hundred dollars. But it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country, that the acts charged were done by order of or under authority from the War Department, or any officer duly authorized thereunto by the War Department."

The words, near the beginning of the second sentence, "except an Indian, in the Indian country," were stricken out by amendment by Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 244.

The section was further amended by Act July 23, 1892, c. 234, 27 Stat. 260. by changing its provisions, as then existing, to read, in part, as set forth here.

The provisions of this portion of the section, as so amended, were further amended by those of Act Jan. 30, 1897, c. 109, § 1, post, § 4137.

Further provisions added at the end of the section by said amendment by Act July 27, 1892, c. 234, relating to complaints for arrest of persons for violation of said act, and to the arrest and examination of such persons, are set forth post, § 4140.

See, also, post, § 4137, and notes thereunder.

Notes of Decisions

Validity, construction, and enforcement.—See notes under § 4137, post.

§ 4137. (Act Jan. 30, 1897, c. 109, § 1.) Selling, etc., intoxicating drinks to Indians, or introducing intoxicating liquors into Indian country, punishable; imprisonment and fine; authority of War Department as defense.

Any person who shall sell, give away, dispose of, exchange, or barter any malt, spirituous, or vinous liquor including beer, ale, and wine, or any ardent or other intoxicating liquor of any kind whatsoever, or any essence, extract, bitters, preparation, compound, composition, or any article whatsoever, under any name, label, or brand, which produces intoxication, to any Indian to whom allotment of land has been made while the title to the same shall be held in trust by the Government, or to any Indian a ward of the Government under charge of any Indian superintendent or agent, or any Indian, including mixed bloods, over whom the Government, through its departments, exercises guardianship, and any person who shall introduce or attempt to introduce any malt, spirituous, or vinous liquor, including beer, ale, and wine, or any ardent or intoxicating liquor of any kind whatsoever into the Indian country, which term shall include any Indian allotment while the title to the same shall be held in trust by the Government, or while the same shall remain inalienable by the allottee without the consent of the United States, shall be punished by imprisonment for not less than sixty days, and by a fine of not less than one hundred dollars for the first offense and not less than two hundred dollars for each offense thereafter: Provided however, That the person convicted shall be committed until fine and costs are paid. But it shall be a sufficient defense to any charge of introducing or attempting to introduce ardent spirits, ale, beer, wine, or intoxicating liquors into

the Indian country that the acts charged were done under authority, in writing, from the War Department or any officer duly authorized thereunto by the War Department. (29 Stat. 506.)

This was an act entitled "An act to prohibit the sale of intoxicating drinks to Indians, providing penalties therefor, and for other purposes."

This section has been held to be an amendment of Act July 23, 1892, c. 234, amendatory of R. S. § 2139, ante, § 4136a (see 224 Fed. 698), and also that the maximum penalty provision of said § 4136a was not inconsistent with the penalty provision of this section. Section 2 of said Act Jan. 30, 1897, c. 109, repealed so much of said Act July 23, 1892, c. 234, as was inconsistent with the provisions of the act.

Provisions added to R. S. § 2139, by amendment by said Act July 23, 1892, c. 234, not inconsistent with the provisions of this act, are set forth post, § 4140.

A provision that no part of R. S. §§ 2139, 2140, should be a bar to the prosecution of any officer, soldier, etc., of the Army who should furnish liquors, etc., to any Indian, which may be regarded as applicable to the provisions of this act similar to those of said section 2139, made by Act July 4, 1884, c. 180, § 1, is set forth post, § 4138.

Introduction and use of wines for sacramental purposes, within the Indian country, was not to be unlawful, by a provision of Act Aug. 24, 1912, c. 388, § 1, post, § 4139.

Notes of Decisions

1. Power of congress in general.
2. Regulation of commerce.
3. Treaty making power.
4. Jurisdiction and control of Indian lands.
5. Privileges and immunities of citizens.
6. Enactment of statute and amendments.
7. Construction and operation of statute in general.
8. —— Effect of other legislation or state constitutions.
9. —— Effect of statute on other legislation.
10. Validity of contract to pay for liquor.
11. Collection of internal revenue taxes.
12. Persons who may be offenders in general.
13. —— Indians as offenders.
14. Indians within protection of statute in general.
15. —— Indian allottees.
16. —— Indian soldiers.
17. —— Students at Carlisle School.
18. "Indian country" within statute in general.
19. —— Reservations as Indian country.
20. —— States and territories as Indian country.
21. —— Mining locations as Indian country.
22. —— School lands as Indian country.
23. Violations of laws of United States and territories.
24. Selling liquor to Indians or introducing liquor into Indian country as offenses.
25. Grade of offense.
26. Intoxicating liquor within the statute.
27. Intent and knowledge as element of offense.
28. Payment of internal revenue tax as defense.
29. Procedure for violations.
30. Jurisdiction of courts.
31. Indictment.
32. Evidence—Admissibility.
33. —— Judicial notice.
34. —— Sufficiency to sustain conviction.
35. —— Insufficiency to sustain conviction.
36. —— Issues, proof, and variance.
37. Instructions.
38. Verdict.
39. Review.
40. Punishment.

1. Power of congress in general.—Act Feb. 12, 1862, making it penal to sell spirituous liquor to an Indian under charge of an Indian agent, though sold outside of any reservation and within the limits of a state, is constitutional. U. S. v. Holliday (1865) 3 Wall. 407, 416, 18 L. Ed. 182.

Congress may prohibit the introduction of liquors into territory in proximity to an Indian reservation as well as into the reservation. U. S. v. Forty-Three Gallons of Whisky (1876) 93 U. S. 188, 194, 23 L. Ed. 846.

The power to protect the government's Indian wards against the evils of intemperance is sufficiently comprehensive to enable congress, when securing the cession of part of an Indian reservation within a state, to prohibit the sale of intoxicants upon the ceded lands if, in its judgment, that is reasonably essential to the protection of the Indians residing on the unceded lands. Perrin v. U. S. (1914) 34 Sup. Ct. 387, 232 U. S. 478, 58 L. Ed. 691.

The police power of the United States can only be exercised where the legislative authority of Congress excludes territorially all state legislation, and where the United States has conveyed under its land laws lands within a state ceded to it by an Indian tribe, and such lands have passed into the ownership of individuals and a municipality of the state which has been formed thereon, they are no longer subject to R. S. § 2139, ante, § 4136a, as amended by this section. Ex parte Dick (1905) 141 Fed. 5, 72 C. C. A. 667, order reversed Whitney v. Dick (1906) 26 Sup. Ct. 584, 202 U. S. 132, 50 L. Ed. 963.

This section is not a revenue statute, but a police regulation. In re Heff (1905) 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848; U. S. v. Boss (D. C. 1906) 160 Fed. 132.

It was within the power of congress to enact this section, making it an offense to sell liquor to any Indian, a ward of the government under charge of any Indian superintendent or agent.

Katzenmeyer v. U. S. (1915) 225 Fed. 523, 140 C. C. A. 507.

It is the duty of congress to regulate the intercourse with the Indians, and to that end they may provide for punishing the giving of spirituous liquors to them on or off a reservation within or without a state. U. S. v. Earl (C. C. 1883) 17 Fed. 75.

Congress has power, not only to prohibit the introduction of liquor into an Indian reservation, or into what is in fact Indian country, but also to prohibit the introduction of liquor into adjoining country, not in the Indian country, within the limits of an organized state. Gearlds v. Johnson (C. C. 1911) 183 Fed. 611.

Congress has the power to prohibit the traffic of spirituous liquors between the Indian tribes, or members thereof, within as well as without the limits of the state. U. S. v. Shaw-Mux (D. C. 1873) Fed. Cas. No. 16,268.

The national power over the subject is derived from the treaty-making power, the power to regulate commerce, the ownership as sovereign of lands to which the Indian title has not been extinguished, and the plenary authority arising out of the guardianship of the Indians as an alien but dependent people. United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219.

Congress may prohibit the introduction of intoxicating liquors on land within the exterior boundaries of an Indian reservation, though title thereto has been extinguished, and may also prohibit intoxicants on lands near a reservation and on railroad rights of way through a reservation. U. S. v. Twelve Bottles of Whisky (D. C. 1912) 201 Fed. 191.

This section embraces Indian country within the limits of a state. Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750; U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; Pronovost v. U. S. (1914) 34 Sup. Ct. 391, 232 U. S. 487, 58 L. Ed. 696.

The prohibition of the sale of malt in the Indian Territory is not an unreasonable exercise of the police power by congress. United States v. Cohn (1899) 52 S. W. 38, 2 Ind. T. 474.

2. Regulation of commerce.—Act Feb. 13, 1862 (12 Stat. 339), by which congress intended to make it penal to sell spirituous liquor to an Indian under charge of an Indian agent, although sold outside of any Indian reservation and within the limits of a state, is constitutional, and is based upon the power of congress to regulate commerce with the Indian tribes. U. S. v. Holliday (1865) 70 U. S. (3 Wall.) 407, 18 L. Ed. 182.

The act is valid under the power to regulate commerce with Indian tribes, and so far as the introduction of liquor from other states is concerned it is valid as a regulation of interstate commerce. United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219.

The power of congress to prohibit the introduction of intoxicating liquors into an Indian reservation, wherever situate, and to prohibit traffic in such liquors with tribal Indians, on or off a reservation, within or without a state, arises in part from the power to regulate commerce. Perrin v. U. S. (1914) 34 Sup. Ct. 387, 232 U. S. 478, 58 L. Ed. 691.

But see In re Heff (1905) 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848.

Congress, in enacting Act Jan. 30, 1897, c. 109, exercised its powers to regulate commerce. Farrell v. U. S. (1901) 110 Fed. 942, 49 C. C. A. 183; U. S. v. Torrey Cedar Co. (C. C. 1904) 154 Fed. 263 (affirmed [1907] 27 Sup. Ct. 697, 206 U. S. 467, 51 L. Ed. 1139); Same v. Twelve Bottles of Whisky (D. C. 1912) 201 Fed. 191.

3. Treaty making power.—This statute may rest on the treaty making power. U. S. v. Twelve Bottles of Whisky (D. C. 1912) 201 Fed. 191.

4. Jurisdiction and control of Indian lands.—The power of congress to prohibit the introduction of intoxicating liquors into an Indian reservation arises in part from the recognized relation of tribal Indians to the federal government. Perrin v. U. S. (1914) 34 Sup. Ct. 387, 232 U. S. 478, 58 L. Ed. 691.

Where jurisdiction and control over Indian lands remained in the United States, Congress could forbid the introduction of liquor into such territory and provide for the punishment of those found guilty thereof. Draper v. U. S. (1896) 17 Sup. Ct. 107, 164 U. S. 240, 41 L. Ed. 419; Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750.

Congress could enact so much of this section as makes criminal the introduction of intoxicating liquor on an allottment within the limits of the Yakima Indian reservation, in Washington, made and patented to the Indian allotee under sections 4195, 4201, post, by which the title is held in trust by the government, and is not alienable by the allottee without the consent of the United States, since jurisdiction and control of Indian lands remain in the United States. U. S. v. Sutton (1909) 30 Sup. Ct. 116, 117, 215 U. S. 291, 54 L. Ed. 200, and cases cited.

Congress may prohibit the introduction of liquor into the Indian country and into an Indian allotment while the title is held in trust by the government. U. S. v. Sutton (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200; Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750.

But see In re Heff (1905) 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848.

5. Privileges and immunities of citizens.—The sale of liquor to an Indian who has an allotment or patent to land which the United States holds in trust for him under Act March 2, 1889, c. 405, § 11, is a public offense under this section; it not being unconstitutional as depriving the Indian of one of the privileges and immunities of citizenship. Mulligan v. U. S. (1903) 120 Fed. 98, 56 C. C. A. 50.

6. Enactment of statute and amendments.—R. S. § 2139, ante, § 4136a, traces its origin to Act June 30, 1834, c. 161, § 20, as amended by Act March 15, 1864, c. 33. The amendment by Act July 23, 1892, c. 234, extended the prohibition to include ale, beer, and intoxicating liquors of any kind, as well as ardent spirits and wine. The primary effect of this section is to amend said act of 1892. U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160.

This section is an amendment of Act July 23, 1892, c. 234, amending R. S. § 2139, ante, § 4136a, though not so entitled, and is not repeal of the act of 1892. Ex parte Webb (1912) 32 Sup. Ct. 769, 225 U. S. 663, 56 L. Ed. 1248; U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; Joplin Mercantile Co. v. U. S. (1915) 35 Sup. Ct. 291, 236 U. S. 531, 59 L. Ed. 705. Schaap v. Same (1914) 210 Fed. 853, 127 C. C. A. 415; Ammerman v. Same (1914) 216 Fed. 326, 132 C. C. A. 470; Morgan v. Ward (1915) 224 Fed. 698, 140 C. C. A. 238; U. S. v. Miller (D. C. 1901) 105 Fed. 944; Same v. Sutton (D. C. 1908) 165 Fed. 253. See Fowler v. U. S. (1890) 1 Wash. T. 3, holding that neither expressly nor by implication did the amendment of March 3, 1847, to Act June 30, 1834, regulating trade and intercourse with the Indian tribes, repeal any portion of the original act.

7. Construction and operation of statute in general.—The terms of this section show that it was specially designed to provide for the changes consequent on the adoption of the policy of allotting the Indian lands in severalty. U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160.

Rev. St. § 2139, ante, § 4136a, as amended by Act July 23, 1892, c. 234, 27 Stat. 260, and this section apply to charges of attempts to introduce intoxicating liquors into the Indian country from within as well as from without the state of Oklahoma. Schaap v. U. S. (1914) 210 Fed. 853, 127 C. C. A. 415.

In none of the legislation of Congress prohibiting the introduction of liquor into the Indian country have state lines been recognized. Joplin Mercantile Co. v. U. S. (1914) 213 Fed. 926, 131 C. C. A. 160, Ann. Cas. 1916C, 470.

R. S. § 2139, ante, § 4136a, was only intended to prohibit the selling, giving, or bartering of spirituous liquors or wine to an Indian in the Indian country. U. S. v. Downing (D. C. 1876) Fed. Cas. No. 14,991. This section is a police regulation; and if it is to apply within a state it must be because of the status of the Indians for whose protection it was enacted, or of the locus of the forbidden act as being on a reservation. U. S. v. Boss (D. C. 1906) 160 Fed. 132. See U. S. v. Winslow (D. C. 1875) Fed. Cas. No. 16,742, holding that the exception in the section "an Indian in the Indian country," applies only to the person who may commit the offense.

Introduction of spirituous liquors into the Indian country is impliedly prohibited, when not done by authority of War Department. But its authority is exclusive. (1873) 14 Op. Atty. Gen. 290.

8. —— Effect of other legislation or state constitutions.—Prohibition against introduction and sale of liquors in Indian country made by Act July 23, 1892, amendatory of R. S. § 2139, ante, § 4136a, was not superseded in the Indian Territory by Act March 1, 1895, §§ 8, 13. U. S. v. Wright (1913) 33 S. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160. Prohibition made by R. S. § 2139, ante § 4136a as amended were not superseded as to transactions within the state by admission of Oklahoma into the Union under Enabling Act June 16, 1906. U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; Mosier v. U. S. (1912) 198 Fed. 54, 117 C. C. A. 162. Act Jan. 30, 1897, was not rendered inapplicable in Oklahoma by the provisions of the Enabling Act under which its Constitution was adopted nor by such Constitution. Mosier v. U. S. (1912) 198 Fed. 54, 117 C. C. A. 162. See Joplin Mercantile Co. v. U. S. (C. C. A. 1914) 213 Fed. 926, holding that Act March 1, 1895, c. 145, § 8, 28 Stat. 697, which inter alia prohibits the carrying of liquor into Indian Territory, was not repealed by the Oklahoma Enabling Act and the admission of the state thereunder as to importations from parts of the state of Oklahoma not within the former Indian Territory.

9. —— Effect of statute on other legislation.—Act March 1, 1895, § 8, making it a criminal offense to introduce intoxicating liquor into Indian Territory, is still in force in the portion of Oklahoma which was at the time of its passage a part of the Indian Territory, and is enforceable by prosecution in the federal court. Segna v. U. S. (1914) 218 Fed. 791, 134 C. C. A. 527.

Act March 1, 1895, c. 145, § 8, 28 Stat. 697, making it an offense for any person "who shall carry or in any manner have carried" into the Indian Territory any intoxicating liquors, is not impliedly repealed by this section.

U. S. v. Buckles (Ind. T. 1906) 97 S. W. 1022.

Comp. St. Mont. div. 4, § 160, which provides that "if any person shall, directly or indirectly, sell intoxicating liquor, whether fermented, vinous, or spirituous * * * to any Indian or half-breed Indian" in that territory, he shall be guilty of a felony, etc., does not conflict with R. S. § 2139, ante, § 4136a, and is constitutional. Territory v. Guyott (1889) 9 Mont. 46, 22 Pac. 134.

10. Validity of contract to pay for liquor.—The validity of a contract to pay for beer bought to be resold in the Indian Territory is not affected by the fact that the introduction and sale of beer in the Indian Territory was thereafter made an offense by Act July 23, 1892, amending R. S. § 2139, ante, § 4136a. Anheuser-Busch Brewing Ass'n v. Bond (1895) 66 Fed. 653, 13 C. C. A. 665.

11. Collection of internal revenue taxes.—Internal revenue taxes on distilled spirits, fermented liquors, tobacco, etc., produced in the Indian Territory, and special taxes on the manufacture and sale of those articles in that territory, may lawfully be collected within the same. (1884) 18 Op. Atty. Gen. 66. The internal revenue department may decline to furnish special revenue stamps for the sale of intoxicating liquors within that territory until congress shall have time to consider the subject. (1889) 19 Op. Atty. Gen. 306.

A holding that R. S. § 2139, ante, § 4136a, and section 4141, post, are no longer applicable in Oklahoma, and that the sale of spirituous liquors and beer in such territory is not forbidden, does not conflict with the collection of the special tax on retail liquor dealers in the Indian country and Alaska under section 6176, post. (1894) 21 Op. Atty. Gen. 25.

12. Persons who may be offenders in general.—In the offense created by this section neither race nor color is significant, and the Indians are the beneficiaries, and for their protection the prohibition is against all whites and Indians alike. U. S. v. Sutton (1909) 30 Sup. Ct. 116, 117, 215 U. S. 291, 54 L. Ed. 200.

13. —— Indians as offenders.—The statute prohibits the furnishing of intoxicating liquors by one Indian to another Indian. U. S. v. Sutton (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200, and cases cited; Same v. Shaw-Mux (D. C. 1873) Fed. Cas. No. 16,268; U. S. v. Miller (D. C. 1901) 105 Fed. 944, 948.

14. Indians within protection of statute in general.—A sale to an Indian under charge of an Indian agent, though outside of any Indian reservation and within the limits of a state is within R. S. § 2139, ante, § 4136a. U. S. v. Holliday (1865) 3 Wall. 407, 416, 18 L. Ed. 182.

The disposition of spirituous liquors to an Indian, under the charge of an Indian agent, who has abandoned his nomadic life and tribal relations, and adopted the habits and manners of civilized people, violates section 2139. U. S. v. Osborn (D. C. 1880) 2 Fed. 58, 60.

When a tribe of Indians is placed under the charge of an Indian agent by treaty or otherwise, each member of such tribe is under the charge of such agent, and no member thereof can dissolve his tribal relation or escape from such charge by absenting himself from such reservation, or otherwise, without the consent of the United States. U. S. v. Earl (C. C. 1883) 17 Fed. 75.

Indians who, living in their tribal relations, are, under the laws and treaties, wards of the government, are necessarily under the charge of "an Indian superintendent or agent," though off the reservation at the time liquor is given them within R. S. § 2139, as amended July 23, 1892, ante, § 4136a, and Jan. 30, 1897 (this section). U. S. v. Miller (D. C. 1901) 105 Fed. 944.

The Indian need not be under the actual control or immediate personal superintendence of an Indian agent, if the tribe to which he belonged is under the charge of such agent, and he maintains his tribal relation. U. S. v. Flynn (C. C. 1870) Fed. Cas. No. 15,-124.

A sale of spirituous liquor to an Indian under the charge of an Indian superintendent or agent, though not made within the Indian country, is an offense. U. S. v. Burdick (1875) 1 Dak. 142, 46 N. W. 571.

An Indian belonging to a tribe living on the Flathead reservation in charge of an agent is within R. S. § 2139, ante, § 4136a. Territory v. Guyott (1889) 9 Mont. 46, 22 Pac. 134.

It is no defense that the Indian to whom the liquor was sold received allotted lands in 1866, and thereafter lived on the same, and became an elector of a state, and was an adult, where he was not released by the government from the control of an Indian agent. R. S. § 2139, ante, § 4136a, is applicable to all Indians who are in any degree under the control or charge of an Indian agent. Renfrow v. U. S. (1895) 41 P. 88, 3 Okl. 161.

All Indians born and resident in Oregon are prima facie members of some Oregon tribe, and within the statute. U. S. v. Wirt (D. C. 1874) Fed. Cas. No. 16,745.

The Pueblo Indians are not within this section. U. S. v. Sandoval (D. C. 1912) 198 Fed. 539.

A Puyallup Indian is not within this section, it appearing only that he has inherited from his mother land in the Puyallup reservation patented in 1886,

pursuant to the treaty of December 26, 1854 (10 Stat. 1132, art. 6). Though section 3951, ante, confers the right of citizenship on Indians to whom allotments shall be or shall have been made, section 4201, post, applies only to patents thereafter issued. U. S. v. Kopp (D. C. 1901) 110 Fed. 160.

15. —— Indian allottees.—A conviction of an Indian for introducing intoxicating liquor into the Indian country and into an Indian allotment while the title to the same is held in trust by the government may be had under this section, though the defendant Indian is a citizen of the United States and entitled under sections 3951, 4203, to the rights, privileges, and immunities of such citizens, and to the benefits of the laws, civil and criminal, of the state in which his allotment is situated, and on which the offense was alleged to have been committed. Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 589, 221 U. S. 317, 55 L. Ed. 750.

The expression "any Indian to whom allotment of land has been made, while the title to the same shall be held in trust by the government," and definition of "Indian country" as including "any Indian allotment while the title to the same shall be held in trust by the government, or while the same shall remain inalienable by the allottee without the consent of the United States," seem to justify the construction that Congress was of the opinion that, had they been omitted, Indians residing upon allotted lands would not have been within the provisions of the act. U. S. v. Kiya (D. C. 1903) 126 Fed. 879, 881.

The sale of liquor to an Indian who has an allotment or patent to land which the United States holds in trust for him is a public offense. Mulligan v. U. S. (1903) 120 Fed. 98, 56 C. C. A. 50.

Under Act June 28, 1906, relating to the Osage Indians, an allottee of that tribe who has not received a certificate of competency as therein provided is in charge of a superintendent, and an Indian over whom the Interior Department exercises guardianship within this section. Mosier v. U. S. (1912) 198 Fed. 54, 117 C. C. A. 162.

See In re Heff (1905) 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848, holding that this section does not apply to an Indian allottee who has become a citizen.

See U. S. v. Hall (D. C. 1909) 171 Fed. 214, holding that, where an Indian reservation had been broken up and a large part of it was owned in trust by allottees, such allottees became citizens of the state, and were not subject to prosecution in the federal courts for carrying ardent spirits into the reservation in violation of this section. See U. S. v. Winslow (D. C. 1875) Fed. Cas. No. 16,742, holding that an indictment under R. S. § 2139, ante, § 4136a, must allege that defendant is not an Indian in the Indian country. U. S. v. Torrey Cedar Co. (C. C. 1904) 154 Fed. 263; Ex parte Viles (D. C. 1905) 139 Fed. 68; U. S. v. Zumwalt (D. C. 1910) 186 Fed. 596.

16. —— Indian soldiers.—An Indian of the Nez Perce tribe, a soldier in the United States army, is within R. S. § 2139, ante, § 4136a. U. S. v. Hurshman (D. C. 1892) 53 Fed. 543.

17. —— Students at Carlisle School.—This section extends to Indian students at the Carlisle school, which is maintained at the expense of the government under the direction of the Interior Department. U. S. v. Belt (D. C. 1904) 128 Fed. 168.

18. "Indian country" within statute in general.—See §§ 4130, 4141, 4148, 10502, 10503, and notes thereunder.

It must be assumed that in this section congress used the words "Indian country" in the accepted sense. Clairmont v. U. S. (1912) 32 Sup. Ct. 787, 225 U. S. 551, 56 L. Ed. 1201.

Act June 20, 1834, c. 161, § 1, defining "Indian country," though not reenacted in the Revised Statutes, and therefore repealed by section 10593, post, may be referred to, to ascertain meaning of "Indian country." Ex parte Crow Dog (1883) 109 U. S. 556, 27 L. Ed. 1030, 3 Sup. Ct. 396; U. S. v. Le Bris (1887) 7 Sup. Ct. 894, 895, 121 U. S. 278, 30 L. Ed. 946; Clairmont v. U. S. (1912) 32 Sup. Ct. 787, 225 U. S. 551, 56 L. Ed. 1201.

The term "Indian country" applies to all the country to which the Indian title has not been extinguished though not within an Indian reservation, but excluding any territory within a state not excepted from its jurisdiction by treaty or statute at its admission as a state, though as to territory not excepted, but actually in the exclusive occupancy of Indians, congress has authority over it. U. S. v. Forty-Three Gallons of Whisky (1876) 93 U. S. 188, 23 L. Ed. 846; Bates v. Clark (1877) 95 U. S. 204, 24 L. Ed. 471; Ex parte Crow Dog (1883) 3 Sup. Ct. 396, 109 U. S. 556, 27 L. Ed. 1030; Dick v. U. S. (1908) 28 Sup. Ct. 399, 400, 208 U. S. 340, 52 L. Ed. 520; U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195; Same v. Sutton (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200; Clairmont v. U. S. (1912) 32 Sup. Ct. 787, 225 U. S. 551, 56 L. Ed. 1201; United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219; Evans v. Victor (1913) 204 Fed. 361, 122 C. C. A. 531; Forty-Three Cases Cognac Brandy (C. C. 1882) 14 Fed. 539; Benson v. U. S. (C. C. 1890) 44 Fed. 178; U. S. v. Seveloff (D. C. 1872) Fed. Cas. No. 16,252; Same v. Payne (D. C. 1881) 8 Fed. 883; In re Sah Quah (D. C. 1886) 31 Fed. 327; U. S. v. Four Bot-

tles Saur Mash Whisky (D. C. 1898) 90 Fed. 720; Evans v. Victor (D. C. 1912) 199 Fed. 504; U. S. v. Twelve Bottles of Whisky (D. C. 1912) 201 Fed. 191; Same v. Certain Property (1871) 25 Pac. 517, 1 Ariz. 31; Same v. Cohn (1899) 52 S. W. 38, 2 Ind. T. 474.

The words "Indian country," in R. S. § 2139, ante, § 4136a, as amended and re-enacted by Act July 23, 1892, c. 234, forbidding the introduction of intoxicating liquors into such country, do not, standing alone, embrace territory in which, at the time, the Indian title had been extinguished, and over which, with its inhabitants, the jurisdiction of the state, for all purposes of government, was full and complete. Dick v. U. S. (1908) 28 Sup. Ct. 399, 208 U. S. 340, 52 L. Ed. 520.

As used in R. S. § 2139, as amended by Act July 23, 1892, c. 234, ante, § 4136a, and this section, "Indian country" includes that declared to be such by Act June 30, 1834, c. 161, 4 Stat. 729, as long as the Indians retain their original title, and, in the absence of a different provision by treaty or by act of Congress, a place ceases to be Indian country whenever that title is extinguished. Bates v. Clark (1877) 95 U. S. 204, 209, 24 L. Ed. 471; Clairmont v. U. S. (1912) 32 Sup. Ct. 787, 225 U. S. 551, 56 L. Ed. 1201; U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; Evans v. Victor (1913) 204 Fed. 361, 122 C. C. A. 531; Schaap v. U. S. (1914) 210 Fed. 853, 127 C. C. A. 415; (1873) 14 Op. Atty. Gen. 290.

"Indian country" is only that portion of the United States which has been declared to be such by act of congress. U. S. v. Seveloff (D. C. 1872) Fed. Cas. No. 16,252.

"Indian country" includes allotments, so long as the legal title is in the United States, and so long as there are restrictions on alienation. U. S. v. Twelve Bottles of Whisky (D. C. 1912) 201 Fed. 191.

What is Indian country, within this section, depends on whether the Indian title under which the land was formerly held has or has not been completely extinguished by subsequent grants. Royal Brewing Co. v. Missouri, K. & T. Ry. Co. (D. C. 1914) 217 Fed. 146.

19. —— Reservations as Indian country.—See § 4130, ante, and §§ 4148, 10502, 10503, post, and notes thereunder.

Under Act June 30, 1834, § 1, the Red Lake and Pembina Indian reservation is Indian country. U. S. v. Le Bris (1887) 7 Sup. Ct. 894, 121 U. S. 278, 30 L. Ed. 946.

Right of way through Flathead Indian Reservation granted the Northern Pacific Railway Company by Act July 2, 1864, § 2, the Indian title to which was extinguished without reservation by agreement of Sept. 2, 1882, is not Indian territory. Clairmont v. U. S. (1912) 32 Sup. Ct. 787, 225 U. S. 551, 56 L. Ed. 1201.

An Indian reservation is Indian country. Pronovost v. U. S. (1914) 34 Sup. Ct. 391, 232 U. S. 487, 58 L. Ed. 696.

Villages established in the Cattaraugus and Allegany Indian reservations in New York are not "Indian country." Benson v. U. S. (C. C. 1890) 44 Fed. 178, 181, 183.

Pyramid Lake Indian reservation, reserved for the use of the Pah Utes and other Indians residing thereon, is "Indian country." U. S. v. Leathers (D. C. 1879) Fed. Cas. No. 15,581.

The Cherokee Nation is "Indian country." Ex parte Morgan (D. C. 1883) 20 Fed. 298.

A railroad right of way through an Indian reservation, granted by Act Feb. 15, 1887, is not "Indian country," within which to introduce intoxicating liquors is a crime. U. S. v. Lindahl (D. C. 1915) 221 Fed. 143.

The Indian title to land in a railroad right of way held extinguished prior to adoption of treaty with Nez Perce Indians of Aug. 15, 1894 (28 Stat. 330), so that such land was not "Indian country," within article 9, prohibiting the introduction of intoxicants. State v. Tilden (1915) 147 P. 1056, 27 Idaho, 262.

But see U. S. v. Boss (D. C. 1906) 160 Fed. 132, holding that since the allotment of lands in severalty to all of the Indians on the Uintah Indian reservation in Utah, subject to Act Feb. 8, 1887, post, § 4195 et seq., and the restoration of the remainder of the lands of the reservation to the public domain, no part of such lands is "Indian country," within this section; and a prosecution cannot be maintained thereunder for introducing liquor thereon, even on a portion which was subsequently reserved by executive order for agency and school purposes.

20. —— States and territories as Indian country.—Alaska is "Indian country." Waters v. Campbell (C. C. 1876) Fed. Cas. No. 17,264. See In re Carr (D. C. 1875) Fed. Cas. No. 2,432; U. S. v. Seveloff (D. C. 1872) Fed. Cas. No. 16,252; Same v. Kie (D. C. 1885) Fed. Cas. No. 15,528a; Kie v. U. S. (C. C. 1886) 27 Fed. 351; U. S. v. Nelson (D. C. 1886) 29 Fed. 202; In re Sah Quah (D. C. 1886) 31 Fed. 327.

Portion of Oklahoma formerly the Indian Territory did not cease to be Indian country on the admission of the state. U. S. v. Wright (1913) 33 Sup. Ct. 630, 632, 229 U. S. 226, 57 L. Ed. 1160; United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219 (reversing judgment U. S. v. United States Express Co. [D. C. 1910] 180 Fed. 1006); Evans v. Victor (D. C. 1912) 199 Fed. 504, order reversed (C. C. A. 1913) 204 Fed. 361. But R. S. § 2139, as amended by Act

July 23, 1892, c. 234, 27 Stat. 260, ante, § 4136a, and by this section, ceased to apply to portions of Oklahoma which were formerly in the Indian country, when such portions ceased to be Indian country. Schaap v. U. S. (C. C. A. 1914) 210 Fed. 853; (1889) 19 Op. Atty. Gen. 306.

Lands within the original corporate limits of the city of Muskogee and of other cities in Oklahoma, the original Indian title to which has been extinguished, held not "Indian country." Evans v. Victor (1913) 204 Fed. 361, 122 C. C. A. 531.

Oregon is "Indian country." U. S. v. Tom (1853) 1 Or. 26. Act June 5, 1850, § 5, making the territory of Oregon Indian country, held not repealed by section 10593. U. S. v. Winslow (D. C. 1875) Fed. Cas. No. 16,742.

21. —— Mining locations as Indian country.—A valid location under Act July 1, 1898, c. 545, authorizing entry of mineral lands in the Colville Indian reservation, in Washington, segregates the claim from the reservation, and the land ceases to be Indian country. U. S. v. Four Bottles Sour Mash Whisky (D. C. 1898) 90 Fed. 720, 723. But the statute was applicable to the condition of the tribes in the territory. Fowler v. U. S. (1854) 1 Wash. T. 3.

22. —— School lands as Indian country.—School lands sold by a state to whom granted are not Indian country. U. S. v. Thomas (C. C. 1891) 47 Fed. 488.

23. Violations of laws of United States and Territories.—A person who sells liquor to Indians may be punished therefor both under the law of the United States and that of the territory. Territory v. Coleman (1855) 1 Or. 191, 75 Am. Dec. 554. See In re Heff (1905) 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848, holding that an act is a violation of both the state and federal laws only when those laws occupy different planes.

24. Selling liquor to Indians or introducing liquor into Indian country as offenses.—Transporting liquor as an article of commerce through an Indian country, between places outside the same, by citizens of the United States and persons who have declared their intention to become citizens, is not an offense. U. S. v. Twenty-Nine Gallons of Whisky, etc. (D. C. 1891) 45 Fed. 847; U. S. v. Stephens (C. C. 1882) 12 Fed. 52; U. S. v. Four Bottles Sour-Mash Whisky (D. C. 1898) 90 Fed. 720; U. S. v. Tadish (D. C. 1913) 211 Fed. 490; Archard v. U. S. (1914) 212 Fed. 146, 129 C. C. A. 83; U. S. v. Carr (1875) 2 Mont. 234.

Introducing spirituous liquor into the Indian country held an offense, under R. S. § 2139, ante, § 4136a. In re Boyd (1892) 49 Fed. 48, 1 C. C. A. 156.

When distilled spirits are imported into the district of Alaska, within the meaning of the act: see The Louisa Simpson (D. C. 1871) Fed. Cas. No. 8,533.

Introduction of liquors within former Cass Lake Indian reservation, though sold by a white man upon lands purchased from the heirs of a deceased allottee, is an offense. (1905) 25 Op. Atty. Gen. 416. But the carrying of liquors into territory purchased from the Indians after Act March 30, 1802, although the territory was at that time inhabited exclusively by Indians, was not an offense. American Fur Co. v. U. S. (1829) 2 Pet. 358, 367, 7 L. Ed. 450.

25. Grade of offense.—This section removes the maximum punishment. United States Express Co. v. Friedman (1911) 191 Fed. 676, 112 C. C. A. 219. But the sale of liquor to an Indian is a misdemeanor, under R. S. § 2139, ante, § 4136a. Bruguier v. U. S. (1867) 1 Dak. 5, 46 N. W. 502.

26. Intoxicating liquor within the statute.—This section extended prohibition to all mild spirituous and vinous liquors, including beer, ale and wine, and any ardent or intoxicating liquor of any kind, and any essence, extract, bitters, preparation, compound, composition, or any article whatever under any name, label, or brand, which produces intoxication. United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219.

R. S. § 2139, ante, § 4136a, previous to the amendment of July 23, 1892, made punishable the introduction into the Indian country of "spirituous liquor or wine," only, it did not include lager beer. U. S. v. Ellis (D. C. 1892) 51 Fed. 808, reversed Sarlls v. U. S. (1894) 14 S. Ct. 720, 152 U. S. 570, 38 L. Ed. 556; In re McDonough (D. C. 1892) 49 Fed. 360. See U. S. v. Cohn (1899) 52 S. W. 38, 2 Ind. T. 474, holding that a malt liquor, whether intoxicating or not, is within a federal statute prohibiting the manufacture or sale of any vinous, malt, or fermented liquors, or any other intoxicating drinks of any kind.

27. Intent and knowledge as element of offense.—A criminal intent need not be proved. U. S. v. Leathers (D. C. 1879) Fed. Cas. No. 15,581. Same v. Miller (D. C. 1901) 105 Fed. 944.

One selling liquor to an unallotted Indian under charge of an agent or representative of the government violates the law, though he may have been ignorant of that fact, or may have believed that the person to whom he made the sale was not an Indian. U. S. v. Anderson (D. C. 1911) 189 Fed. 262. It is no defense that accused did not know that the person to whom he sold was an Indian. U. S.

v. Stofello (1904) 76 P. 611, 8 Ariz. 461.

28. Payment of internal revenue tax as defense.—Payment of an internal revenue tax as a retail liquor dealer, for selling liquor in the internal revenue district which embraced the ceded territory, did not relieve such dealer from the penalties imposed by Act March 15, 1864 (incorporated into R. S. § 2139, ante, § 4136a), for introducing liquor into Indian country. U. S. v. Forty-Three Gallons of Whisky (1883) 2 Sup. Ct. 906, 108 U. S. 491, 27 L. Ed. 803; U. S. v. Ellis (D. C. 1892) 51 Fed. 808.

29. Procedure for violations.—See §§ 4140, 4141, 4142, 4143, post, and notes thereunder.

In case of violation of R. S. § 2139, ante, § 4136a, as amended, and of article 7 of the treaty of February 22, 1855 (10 Stat. 1165), with the Chippewa Indians, proceedings may be taken either under § 4136a, ante, or § 4141, post. (1905) 25 Op. Atty. Gen. 416.

See Fowler v. U. S. (1854) 1 Wash. T. 3, holding that imprisonment can only be imposed on defendant after conviction by indictment.

30. Jurisdiction of courts.—Act March 1, 1889, establishing a United States court in the Indian Territory, and giving exclusive jurisdiction of offenses "not punishable by death or by imprisonment at hard labor," did not give it jurisdiction of the offense of retailing liquors without a license, made punishable, under R. S. § 2139, ante, § 4136a, and R. S. § 3242, post, § 5965, by imprisonment for "not less than six months nor more than two years," since under R. S. § 5541, post, § 10527, a punishment which a statute prescribes shall be by imprisonment merely may, if it be for more than one year, be executed in a state prison, the rules of which prescribe hard labor. In re Mills (1889) 10 Sup. Ct. 762, 763, 135 U. S. 263, 34 L. Ed. 107.

A United States commissioner has jurisdiction of the offense of introducing spirituous liquor into the Indian country, and the power to determine whether beer is a spirituous liquor, and his decision on that question, is not reviewable on a writ of habeas corpus. In re Boyd (1892) 49 Fed. 48, 49, 1 C. C. A. 156.

Under the Nez Perce Indian treaty of May 1, 1893, art. 9, approved by Act Aug. 15, 1894, jurisdiction was reserved to the United States to prosecute violations of the federal statutes relating to introduction of intoxicating liquors into the Indian country. State v. Lott (1912) 123 P. 491, 21 Idaho, 646.

31. Indictment.—Destination of intoxicants held sufficiently averred to have been in the Indian country under an indictment for introducing liquors into the Indian territory contrary to this section. Omission of any averment in indictment charging a conspiracy to introduce liquors into the Indian territory, that the conspiracy was to introduce such liquors from without the state, is not a defect in form to be ignored under R. S. § 1025, ante, § 1691. Joplin Mercantile Co. v. U. S. (1915) 35 Sup. Ct. 291, 236 U. S. 531, 59 L. Ed. 705, affirming judgment (1914) 213 Fed. 926, 131 C. C. A. 160.

A charge that defendant sold liquor to divers Indians of a certain tribe to the grand jurors unknown sufficiently specifies the buyers, in the absence of evidence of their identity. Foerster v. U. S. (1902) 116 Fed. 860, 54 C. C. A. 210, writ of certiorari denied (1902) 23 Sup. Ct. 844, 187 U. S. 644, 47 L. Ed. 347.

A count charging accused with aiding and abetting another and a count charging him as principal held properly joined under section 1690, ante. Roonev v. U. S. (1913) 203 Fed. 928, 122 C. C. A. 230.

An indictment charging in the same count a violation of Act March 1, 1895, c. 145, § 8, 28 Stat. 693, by introducing liquor into "Indian Territory," and also of this section, by introducing liquor into the "Indian country," charges two distinct offenses and is bad for duplicity. Ammerman v. U. S. (C. C. A. 1914) 216 Fed. 326; Allison v. Same (C. C. A. 1914) 216 Fed. 329.

An indictment for carrying liquor into the Indian country held duplicitous, as charging the offenses defined by this section, and by Act March 1, 1895, c. 145. Lewellen v. U. S. (1915) 223 Fed. 18, 138 C. C. A. 432.

Indictment charging introduction of spirituous liquors into Indian allotment held to charge public offense, although not alleging that title to land was held in trust by the government. Indictment in prosecution for introducing spirituous liquors into Indian country held not bad for duplicity, as charging introduction into Indian reservation as well as into Indian allotment. Estes v. U. S. (C. C. A. 1915) 225 Fed. 980.

An indictment alleging that defendant sold liquor to persons named, both Indians of a named tribe and under the charge of a named Indian agent, is bad, under R. S. § 2139, ante, § 4136a, for failing to charge that the liquor was sold in the Indian country. U. S. v. Downing (D. C. 1876) Fed. Cas. No. 14,991. See U. S. v. Winslow (D. C. 1875) Fed. Cas. No. 16,742, for sufficiency of indictment.

Indictment charging offense under R. S. § 2139, ante, § 4136a. need charge that the act was done feloniously. Bruguier v. U. S. (1867) 1 Dak. 5, 46 N. W. 502.

An indictment under R. S. § 2139, ante, § 4136a, which alleged the introduction of certain "ardent spirits, ale, beer, wine, and intoxicating liquors,"

did not charge more than one offense; nor need it allege the quantity introduced. Parris v. U. S. (Ind. T. 1896) 35 S. W. 243.

An indictment held to charge the offense denounced by Act March 1, 1895, c. 145, § 8, 28 Stat. 697, and not the offense denounced by this section. U. S. v. Buckles (Ind. T. 1906) 97 S. W. 1022.

32. **Evidence — Admissibility.** — In a prosecution for attempting to introduce liquor into the Indian country in violation of R. S. § 2139, as amended by Act July 23, 1892, c. 234, 27 Stat. 260 (ante, § 4136a), and this section it was error to exclude evidence that the town into which it was alleged defendant attempted to introduce liquor had ceased to be Indian country when the offense was charged to have been committed. Schaap v. U. S. (1914) 210 Fed. 853, 127 C. C. A. 415.

In prosecution for selling liquor to tribal Indian, in violation of this section, exclusion of evidence as to who was present and as to the sale held erroneous. Shecil v. U. S. (C. C. A. 1915) 226 Fed. 184.

33. —— **Judicial notice.**—In a prosecution for introducing intoxicating liquors into Indian country, the court would take judicial notice of the signature of the President on a trust patent of an Indian allotment. Estes v. U. S. (C. C. A. 1915) 225 Fed. 980.

34. —— **Sufficiency to sustain conviction.**—See Buffo v. U. S. (1914) 213 Fed. 222, 129 C. C. A. 566.

35. —— **Insufficiency to sustain conviction.**—The mere possession by a defendant of liquor within that part of the state of Oklahoma which was formerly a part of Indian Territory is not sufficient to warrant his conviction for introducing the liquor into the state. Collins v. U. S. (1915) 225 Fed. 365, 140 C. C. A. 389.

Failure to prove that the introduction was by accused is fatal to a prosecution for introducing liquor into a part of the state of Oklahoma which was formerly part of the Indian Territory. Talkington v. U. S. (1915) 225 Fed. 367, 140 C. C. A. 391; Key v. Same (1915) 225 Fed. 368, 140 C. C. A. 392.

See Cecil v. U. S. (1915) 225 Fed. 368, 140 C. C. A. 392; Parks v. Same (1915) 225 Fed. 369, 140 C. C. A. 393; Isbell v. Same (C. C. A. 1915) 227 Fed. 788; Fielder v. Same (C. C. A. 1915) 227 Fed. 832; Wright v. Same (C. C. A. 1915) 227 Fed. 855; U. S. v. Healy (D. C. 1913) 202 Fed. 349.

36. —— **Issues, proof, and variance.**—There was no variance between an indictment alleging that the Indian to whom the liquor had been sold was a ward of the government and the evidence that he was a ward of the government, and also an Indian to whom an allotment of land had been made. Mulligan v. U. S. (1903) 120 Fed. 98, 56 C. C. A. 50.

Where an indictment charged a sale of liquor to an Indian named "John Lumby," and, though the record showed that he stated his name was "John Lombard," he was otherwise referred to as "John Lumby," there was no variance. Rogers v. U. S. (C. C. A. 1914) 214 Fed. 981.

37. **Instructions.**—In a prosecution of defendant for selling liquor to an Indian, an instruction with reference to the conduct of officers in furnishing the Indian money to buy the liquor held erroneous, as inapplicable to the evidence. Taylor v. U. S. (1912) 193 Fed. 968, 113 C. C. A. 543.

In a prosecution for violating Act March 1, 1895, relating to the introduction of liquor into the Indian Territory, requests applicable to this section are properly refused. McSpadden v. U. S. (1915) 224 Fed. 935, 140 C. C. A. 413.

An instruction that the possession of liquor in the territory was prima facie evidence of the introduction of the same by the party in whose possession it was found was error, and the court should have instructed that if the jury found beyond a reasonable doubt that defendant was in possession of liquor within the territory the law presumed him guilty of having introduced it, unless he could show otherwise by a reasonable, truthful explanation. Ellis v. U. S. (Ind. T. 1906) 97 S. W. 1013.

38. **Verdict.**—On an indictment charging in one count a sale of intoxicating liquor to an Indian and in another a gift, a general verdict of guilty is sufficient, though based on proof of a single transaction. Bruguier v. U. S. (1867) 1 Dak. 5, 46 N. W. 502.

39. **Review.**—A decision sustaining a demurrer to an indictment for introducing liquor into the Indian country is reviewable in the federal Supreme Court by writ of error, under Act March 2, 1907, ante, § 1704, where the question whether the indictment charges any offense against the United States involves the validity of this section as applied to the facts stated. U. S. v. Sutton (1909) 30 Sup. Ct. 116, 117, 215 U. S. 291, 54 L. Ed. 200, reversing judgment (D. C. 1908) 165 Fed. 253.

The district court having, on habeas corpus, remanded a prisoner charged with selling liquor to an Indian in violation of law, an appeal lies to the supreme court of the territory, under section 3459, ante, and R. S. § 1910. U. S. v. Burdick (1875) 1 Dak. 142, 46 N. W. 571.

The Criminal Court of Appeals is without jurisdiction to review a conviction for introducing intoxicating liquor into the Indian Territory before statehood, the jurisdiction of the United States courts, both original and appellate, being exclusive in this class of

offenses. McDaniels v. U. S. (Okl. Cr. App. 1909) 103 P. 737.

40. Punishment.—Under Act July 23, 1892, incorporated into § 4136a, ante, and this section, held that, upon conviction under the latter act for introducing liquor into an Indian allotment, a sentence of two years was valid. Morgan v. Ward (1915) 224 Fed. 698, 140 C. C. A. 238.

Under Indian Intercourse Act June 30, 1834, prohibiting the sale or gift of spirituous liquor to Indians in Indian country under a penalty, and providing that the penalty should be recovered in an action of debt in the name of the United States, and Act March 3, 1847, providing that, in addition to the penalty, a person convicted of violation of the act may be imprisoned, on indictment for violation of the act, defendant may only be sentenced to imprisonment, and that a fine imposed in addition thereto is void. Fowler v. U. S. (1854) 1 Wash. T. 3.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 398, 232 U. S. 442, 58 L. Ed. 676; Same v. Birdsall (1914) 34 Sup. Ct. 512, 515, 233 U. S. 223, 58 L. Ed. 930; Johnson v. Southern Pac. Co. (1902) 117 Fed. 462, 54 C. C. A. 508 (reversed [1904] 25 Sup. Ct. 158, 196 U. S. 1, 49 L. Ed. 363); Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50; In re Chavez (C. C. 1896) 72 Fed. 1006; In re Christian (C. C. 1897) 82 Fed. 199, 202; U. S. v. Bridleman (D. C. 1881) 7 Fed. 894, 903; Same v. Martin (D. C. 1883) 14 Fed. 817, 821; Ex parte Shores (D. C. 1912) 195 Fed. 627.

§ 4138. (Act July 4, 1884, c. 180, § 1.) Officers, soldiers, etc., of Army furnishing liquors, etc., to Indians.

No part of section twenty-one hundred and thirty-nine or of section twenty-one hundred and forty of the Revised Statutes shall be a bar to the prosecution of any officer, soldier, sutler or storekeeper, attaché, or employé of the Army of the United States who shall barter, donate, or furnish in any manner whatsoever liquors, beer, or any intoxicating beverage whatsoever to any Indian. (23 Stat. 94.)

This was a provision, accompanying an appropriation for detecting and prosecuting persons selling liquors, etc., to Indians, in the Indian appropriation act for the fiscal year 1885, cited above.

R. S. § 2139, mentioned in this provision, is set forth ante, § 4136a. See notes to said section.

R. S. § 2140, also mentioned in this provision, is set forth post, § 4141.

Notes of Decisions

Operation of statute in general.—This section is not a legislative construction of R. S. § 2139. In re McDonough (D. C. 1892) 49 Fed. 360.

§ 4139. (Act Aug. 24, 1912, c. 388, § 1.) Introducing and using wines, within Indian country, for sacramental purposes, not unlawful.

Hereafter it shall not be unlawful to introduce and use wines solely for sacramental purposes, under church authority, at any place within the Indian country or any Indian reservation, including the Pueblo Reservations in New Mexico. (37 Stat. 519.)

This was a proviso annexed to an appropriation for suppression of the traffic in intoxicating liquors among Indians in the Indian appropriation act for the fiscal year 1913, cited above.

§ 4140. (Act July 23, 1892, c. 234.) Complaints for violations of provisions prohibiting sale, etc., to Indians, or introduction into Indian country, of intoxicating liquors; arrests and examinations.

All complaints for the arrest of any person or persons made for violation of any of the provisions of this act shall be made in the county where the offense shall have been committed, or if committed upon or within any reservation not included in any county, then in any county adjoining such reservation, * *; but in all cases such arrests shall be made before any United States court commissioner residing in such adjoining county, or before any magistrate or judicial officer authorized by the laws of the State in which such reservation is located to issue warrants for the arrest and examination of offenders by section ten hundred and fourteen

of the Revised Statutes of the United States. And all persons so arrested shall, unless discharged upon examination, be held to answer and stand trial before the court of the United States having jurisdiction of the offense. (27 Stat. 261.)

These were provisions added to R. S. § 2139, as part of the amendments of that section made by Act July 23, 1892, c. 234, cited above.

See ante, §§ 4136a, 4137, and notes thereunder.

The portion of this section omitted here related to arrests in the Indian Territory. It was superseded by the admission of that Territory and the Territory of Oklahoma into the Union as the State of Oklahoma, pursuant to Act June 16, 1906, c. 3335, 34 Stat. 267.

R. S. § 1014, mentioned in these provisions, is set forth ante, § 1674.

Notes of Decisions

Procedure for violations of liquor laws.—See notes under § 4137, ante, and §§ 4141, 4143, post.

The proceeding by criminal information being comparatively unknown in the federal courts, the court declines to issue a warrant of arrest on an information for the offense of selling spirituous liquor to an Indian. U. S. v. Joe (D. C. 1871) Fed. Cas. No. 15,478.

§ 4141. (R. S. § 2140.) Searches for concealed liquors; powers of officers; seizure of and proceedings against liquors found, etc.

If any [superintendent of Indian affairs,] Indian agent, or subagent, or commanding officer of a military post, has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of law, such superintendent, agent, subagent, or commanding officer, may cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited, one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in suit. It shall moreover be the duty of any person in the service of the United States, or of any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. In all cases arising under this and the preceding section Indians shall be competent witnesses.

Act March 15, 1864, c. 33, 13 Stat. 29.

Act July 23, 1892, c. 234, by its title purported to amend this section and R. S. § 2141, besides R. S. § 2139, but its provisions amended R. S. § 2139 only.

The words of this section, "superintendent of Indian affairs," inclosed in brackets, have become inoperative; no appropriations for such superintendents having been made since 1877. See note to R. S. § 2045, ante, § 3989.

The powers conferred by this section on the officers named therein were conferred also on the special agent of the Indian Bureau for suppression of the liquor traffic among Indians, etc., and his deputies, by a provision of Act March 1, 1907, c. 2285, post, § 4142.

The above section was made applicable to beer and other intoxicating liquors and possession is made prima facie evidence of unlawful introduction, by Act May 18, 1916, c. 125, § 1, post, § 4144a.

Notes of Decisions

1. Construction in general.
2. "Indian country" within statute.
3. Procedure for violations of liquor laws.
4. —— Search warrants, necessity of.
5. —— Persons against whom search and seizure may be had.
6. —— Property subject to search and seizure.
7. —— Indian country as place of search and seizure.
8. —— Jurisdiction of courts.
9. —— Answers or pleas.
10. Internal revenue taxes.

1. Construction in general.—This section is highly penal, and is not in aider of the revenues, and it must be strictly construed, doubts resolved in favor of those against whom it is invoked, no

person or case held within it unless clearly within its letter, and all not to defeat, but to effectuate, the legislative intent. U. S. v. Two Gallons of Whisky (D. C. 1914) 213 Fed. 986.

2. **"Indian country" within statute.**—See § 4137, ante, and notes thereunder.

A valid location under Act July 1, 1898, c. 545, authorizing entry of mineral lands in the Colville Indian reservation, in Washington, segregates the claim from the reservation and extinguishes the Indian title thereto, which is merely possessory, and the land embraced in such location ceases to be Indian country. U. S. v. Four Bottles Sour-Mash Whisky (D. C. 1898) 90 Fed. 720, 723.

See (1889) 19 Op. Atty. Gen. 306.

3. **Procedure for violations of liquor laws.**—In proceedings under this section the thing involved, and not its owner, is the offender and is proceeded against, and it is the thing made liable. U. S. v. Two Gallons of Whisky (D. C. 1914) 213 Fed. 986.

In case of violation of R. S. § 2139, as amended (ante, § 4136a), and of article 7 of the treaty of February 22, 1855 (10 Stat. 1165), with the Chippewa Indians, proceedings may be taken under the section as amended and this section. (1905) 25 Op. Atty. Gen. 416.

4. —— **Search warrants, necessity of.**—No special officer of the Indian service, no Indian superintendent, agent or subagent, or deputy, has authority, without a search warrant, to search lands, stores, houses, or other improvements, owned or occupied by citizens of the United States. Evans v. Victor (1913) 204 Fed. 361, 122 C. C. A. 531, reversing order (D. C. 1912) 199 Fed. 504.

5. —— **Persons against whom search and seizure may be had.**—A seizure is authorized only as against a white person or Indian. Webb v. Nickerson (1884) 11 Or. 382, 4 Pac. 1126.

6. —— **Property subject to search and seizure.**—A stock of liquors transported across a reservation to a place where it may be lawfully sold is not subject to seizure while in transit, or after it reaches its destination. U. S. v. Four Bottles Sour-Mash Whisky (D. C. 1898) 90 Fed. 720, 723.

This section and R. S. § 2139, ante, § 4136a, were intended to prevent introduction of intoxicating liquor for the purpose of furnishing it to the Indians, and hence proof that a number of hunters passing through an Indian reservation had intoxicating liquor in their possession, presumably for their own use, and without any evidence that they intended to sell or furnish it to Indians, was insufficient to show an offense. U. S. v. Tadish (D. C. 1913) 211 Fed. 490.

Where an Indian, owning one horse, borrowed another horse and wagon from his mother and a harness from his father, drove outside the reservation and brought back whisky, the whisky and his horse were subject to forfeiture, but the property of his mother and father was not. U. S. v. Two Gallons of Whisky (D. C. 1914) 213 Fed. 986.

A seizure of a team is not wrongful, though the team is the property of another than the one so using it. Webb v. Nickerson (1884) 11 Or. 382, 4 Pac. 1126.

7. —— **Indian country as place of search and seizure.**—Searches and seizures are limited to searches and seizures in the Indian country. Bates v. Clark (1877) 95 U. S. 204, 24 L. Ed. 471; Evans v. Victor (1913) 204 Fed. 361, 122 C. C. A. 531, and cases cited.

A search for and seizure of liquors in a case where the liquors found were not claimed to have been seized within the limits of an Indian reservation, was held unauthorized. Palcher v. U. S. (C. C. 1882) 11 Fed. 47, rehearing denied Forty-Three Cases Cognac Brandy (C. C. 1882) 14 Fed. 539.

This section does not authorize the federal officers to seize and destroy ardent spirits in a state, however near they may be to the prohibited line; the officers' jurisdiction being territorial and confined to the Indian country. Fehrenbach Wine & Liquor Co. v. Atchison, T. & S. F. Ry. Co. (1914) 167 S. W. 631, 182 Mo. App. 1. But see Danciger v. Atchison, T. & S. F. Ry. Co. (Mo. App. 1915) 179 S. W. 800, holding that under Act March 1, 1907, post, § 4142, giving Indian agents the authority conferred by this section, Indian agent held authorized to seize liquors in wareroom of defendant carrier in Kansas which he was informed were to be introduced into the Indian country.

8. —— **Jurisdiction of courts.**—There is no jurisdiction unless the libel shows a seizure by one of the officers enumerated and an amended libel is fatally defective which shows only a seizure by the marshal under a writ based on the original libel. U. S. v. The Cora (1867) 1 Dak. 1, 46 N. W. 503.

9. —— **Answers or pleas.**—In a libel to forfeit whisky introduced into Indian country, a plea that claimant did not unlawfully introduce the whisky into any Indian country, and that he did not introduce it intending to sell or dispose of it to any Indian, is bad, since the first allegation is a conclusion of law, and the second is irrelevant. A plea that the whisky when seized was in the claimant's possession, and that he was then on his road from a town named to another town not named neither of such towns being within any Indian country, is also bad, since it does not show that the whisky was in transit when seized, or that the unnam-

ed town was off the reservation. U. S. v. Twenty-Nine Gallons of Whisky, etc. (D. C. 1891) 45 Fed. 847.

The answer of an Indian agent, in an action against him for seizure of plaintiff's property is defective, though it shows that such property, when seized, was being used to violate the law as to the introduction of liquors into the reservations, where it does not show that the offender so using it was a "white man" or an "Indian." Webb v. Nickerson (1884) 11 Or. 382, 4 Pac. 1126.

10. Internal revenue taxes.—Internal revenue taxes on liquors, tobacco, etc., produced in Indian Territory, and special taxes on the manufacture and sale of those articles in that territory, may lawfully be collected within the same. (1884) 18 Op. Atty. Gen. 66. The internal revenue department may decline to furnish special revenue stamps for the sale of intoxicating liquors within that territory until Congress shall have time to consider the subject. Refusal may be based on the fact that there are no counties, nor legally organized towns, whose limits are capable of definition, and hence the license cannot specifically define and describe known places of doing business as contemplated by sections 5963, 5964, post. (1889) 19 Op. Atty. Gen. 306.

A holding that this section and section 4137 are no longer applicable in Oklahoma, and that the sale of liquors in such territory is not forbidden, does not conflict with the collection of the special tax on retail liquor dealers in the Indian country and Alaska, under section 6176. (1894) 21 Op. Atty. Gen. 25.

Cited without definite application, U. S. v. Birdsall (1914) 34 Sup. Ct. 512, 515, 233 U. S. 223, 58 L. Ed. 930; United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219; Gearlds v. Johnson (C. C. 1910) 183 Fed. 611.

§ 4142. (Act March 1, 1907, c. 2285.) Suppression of liquor traffic among Indians; powers of officers conferred also on special agent of Indian Bureau and his deputies.

The powers conferred by section twenty-one hundred and forty of the Revised Statutes upon Indian agents, and subagents, and commanding officers of military posts are hereby conferred upon the special agent of the Indian Bureau for the suppression of the liquor traffic among Indians and in the Indian country and duly authorized deputies working under his supervision. (34 Stat. 1017.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

R. S. § 2140, mentioned in this provision, is set forth ante, § 4141.

The powers of sheriffs and their deputies, in each State, conferred on marshals and their deputies, were conferred also on the chief special officer for suppression of the liquor traffic among Indians and his deputies, by a provision of Act Aug. 24, 1912, c. 388, § 1, post, § 4143.

Notes of Decisions

"Indian country" within statute.—See § 4137, ante, and notes thereunder.

Authority of special agent of Indian bureau.—This section does not extend the powers of officers within section 4141 to make searches and seizures without process to places outside the Indian country, but merely confers on the special agent of the Indian bureau for the suppression of the liquor traffic among Indians and in the Indian country, and his deputies, the same authority which is conferred by section 4141 on the Indian superintendents, the Indian agents, subagents, and the commanding officers of military posts, but no greater or more extended authority. Evans v. Victor (1913) 204 Fed. 361, 364, 122 C. C. A. 531, reversing order (D. C. 1912) 199 Fed. 504. This section does not extend the powers of officers of the Interior Department and of the army to make searches and seizures without warrant or process to places outside the Indian country. Id.

A special agent of the Indian bureau for the suppression of the liquor traffic among the Indians, or his deputy, may make searches for liquor in that part of Oklahoma formerly Indian Territory without search warrants or other process. Id.

§ 4143. (Act Aug. 24, 1912, c. 388, § 1.) Suppression of liquor traffic among Indians; powers of marshals and deputy marshals conferred also on chief special officer and his deputies.

The powers conferred by section seven hundred and eighty-eight of the Revised Statutes upon marshals and their deputies are hereby conferred upon the chief special officer for the suppression of the liquor traffic among Indians and duly authorized officers work-

ing under his supervision whose appointments are made or affirmed by the Commissioner of Indian Affairs or the Secretary of the Interior. (37 Stat. 519.)

This was a further proviso annexed to an appropriation for suppression of the traffic in intoxicating liquors among Indians, in the Indian appropriation act for the fiscal year 1913, cited above.

R. S. § 788, mentioned in this provision, giving marshals and their deputies the powers of sheriffs and their deputies, in each State, is set forth ante, § 1312.

§ 4144. (R. S. § 2141.) Setting up distillery in Indian country.

Every person who shall, within the Indian country, set up or continue any distillery for manufacturing ardent spirits, shall be liable to a penalty of one thousand dollars; and the [superintendent of Indian affairs,] Indian agent, or subagent, within the limits of whose agency any distillery of ardent spirits is set up or continued, shall forthwith destroy and break up the same.

Act June 30, 1834, c. 161, § 21, 4 Stat. 732.

The words of this section, "superintendent of Indian affairs," inclosed in brackets, have become inoperative, no appropriations for such superintendents having been made since 1877. See note to R. S. § 2045, ante, § 3989.

The above section was made applicable to beer and other intoxicating liquors and possession is made prima facie evidence of unlawful introduction, by Act May 18, 1916, c. 125, § 1, post, § 4144a.

Notes of Decisions

Establishment of distillery in Indian Territory as offense.—Establishment of distillery in the Indian Territory on lands wherein the Indian title is said to be extinct would be in contravention of this section, and also of section 8, Act March 1, 1895 (28 Stat. 697), which applies specially to the Indian Territory; for there is no portion of the Indian Territory wherein the Indian title has become extinct to the extent that it has ceased to be Indian country, or where this prohibition does not apply. (1898) 22 Op. Atty. Gen. 232.

Collection of internal revenue taxes.—Internal revenue taxes on distilled spirits, fermented liquors, tobacco, etc., produced in the Indian Territory, and special taxes on the manufacture and sale of those articles in that territory, may lawfully be collected within the same. (1884) 18 Op. Atty. Gen. 66.

Cited without definite application, U. S. v. Birdsall (1914) 34 Sup. Ct. 512, 515, 233 U. S. 223, 58 L. Ed. 930; United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219.

§ 4144a. (Act May 18, 1916, c. 125, § 1.) Sections 4141, 4144, applicable to liquors mentioned in § 4137; possession prima facie evidence of unlawful introduction.

The provisions of sections twenty-one hundred and forty and twenty-one hundred and forty-one of the Revised Statutes of the United States shall also apply to beer and other intoxicating liquors named in the Act of January thirtieth, eighteen hundred and ninety-seven (Twenty-ninth Statutes at Large, page five hundred and six), and the possession by a person of intoxicating liquors in the country where the introduction is prohibited by treaty or Federal statute shall be prima facie evidence of unlawful introduction. (39 Stat.)

This was a provision of the Indian appropriation act for the fiscal year 1917, cited above.

The sections referred to are set forth ante, §§ 4141, 4144.

§ 4145. (R. S. § 2142.) Assault.

Every white person who shall make an assault upon an Indian, or other person, and every Indian who shall make an assault upon a white person, within the Indian country, with a gun, rifle, sword, pistol, knife, or any other deadly weapon, with intent to kill or maim the person so assaulted, shall be punishable by imprisonment, at hard labor, for not more than five years, nor less than one year.

Act March 27, 1854, c. 26, § 5, 10 Stat. 270.

Indians committing any of seven crimes specified including assault with intent to kill, within any Territory, were made subject to the laws of such Territory relating to said crimes, and those committing any of said crimes within the boundaries of a State and within the limits of an Indian reservation

were made subject to the same laws as persons committing any of said crimes within the exclusive jurisdiction of the United States, by the Seven Crimes Act, Act March 3, 1885, c. 341, § 9, 23 Stat. 385, which was incorporated into the Criminal Code, in section 328 thereof, post, § 10502, and was repealed by section 341 thereof, post, § 10515.

Notes of Decisions

Assault with intent to kill.—To be guilty of an assault with intent to kill, it is not necessary that the act would be murder if death had ensued, but it is sufficient if it would be manslaughter in case of death. Ex parte Brown (C. C. 1889) 40 Fed. 81.

It is not necessary to allege and prove malice aforethought. Jennings v. U. S. (1899) 2 Ind. T. 670, 53 S. W. 456.

Jurisdiction.—Assault with intent to kill, or an assault and battery, when committed in the Indian country, is not punishable in the federal courts. U. S. v. Terrel (C. C. 1840) Fed. Cas. No. 16,453.

Cited without definite application, Ex parte Kan-gi-shun-ca (1883) 3 Sup. Ct. 396, 397, 109 U. S. 556, 27 L. Ed. 1030; U. S. v. Williams (C. C. 1880) 2 Fed. 61, 62; In re Blackbird (D. C. 1901) 109 Fed. 139, 144; U. S. v. Cardish (D. C. 1906) 145 Fed. 242.

§ 4146. (R. S. § 2143.) Arson.

Every white person who shall set fire, or attempt to set fire, to any house, out-house, cabin, stable, or other building, in the Indian country, to whomsoever belonging; and every Indian who shall set fire to any house, out-house, cabin, stable, or other building, in the Indian country, in whole or in part belonging to or in lawful possession of a white person, and whether the same be consumed or not, shall be punishable by imprisonment at hard labor for not more than twenty-one years, nor less than two years.

Act March 27, 1854, c. 26, § 4, 10 Stat. 270.

Arson was one of the crimes specified in the Seven Crimes Act, making Indians committing any of said crimes if within a Territory, subject to the laws of the Territory, and if within an Indian reservation in any State, subject to the laws of the United States. See note to R. S. § 2142, ante, § 4145.

Notes of Decisions

Repeal of statute.—Act March 3, 1885, § 9 (incorporated in post, § 10502), by implication repeals this section in so far as that section makes a distinction between white persons and Indians in respect to the crime of arson committed in the Indian country, and under the later statute the crime and the punishment are the same whether committed by a white person or an Indian, or against a white person or an Indian. U. S. v. Cardish (D. C. 1906) 145 Fed. 242.

Indictment.—Act March 3, 1885, § 9, post, § 10502, which provides for the trial and punishment of any Indian who shall commit any one of the crimes enumerated, including "arson," upon an Indian reservation, uses such term in its common-law meaning, and is in effect an extension of the provisions of R. S. § 5385, post, § 10458, punishing the offense of arson within a fort, dockyard, etc., to the same offense committed by an Indian on a reservation; and an indictment charging an Indian with the burning of a "building" on a reservation, not averred to have been a dwelling house, nor occupied as such, does not state an offense thereunder. U. S. v. Cardish (D. C. 1906) 143 Fed. 640.

Cited without definite application, Ex parte Kan-gi-shun-ca (1883) 3 Sup. Ct. 396, 397, 109 U. S. 556, 27 L. Ed. 1030; In re Blackbird (D. C. 1901) 109 Fed. 139, 144.

§ 4147. (R. S. § 2144.) Laws defining, etc., forgery and depredations on mails, extended to Indian country.

The general laws of the United States defining and prescribing punishments for forgery and for depredations upon the mails, shall extend to the Indian country.

Act March 3, 1855, c. 204, § 8, 10 Stat. 700.

Cited without definite application, Ex parte Kan-gi-shun-ca (1883) 3 Sup. Ct. 396, 397, 109 U. S. 556, 27 L. Ed. 1030.

§ 4148. (R. S. § 2145.) General laws as to punishment of crimes extended to Indian country.

Except as to crimes the punishment of which is expressly provided for in this Title, the general laws of the United States as to

the punishment of crimes committed in any place within the sole and exclusive jurisdiction of the United States, except the District of Columbia, shall extend to the Indian country.

Act June 30, 1834, c. 161, § 25, 4 Stat. 733. Act March 27, 1854, c. 26, § 3, 10 Stat. 270.

Notes of Decisions

1. Power of congress to define and punish crimes.
2. Meaning of "sole and exclusive" in statute.
3. Effect of other statutes.
4. "Indian country" within statute in general.
5. —— Lands allotted to Indians.
6. Indians within statute.
7. —— Indian reservations as Indian country.
8. —— Alaska as Indian country.
9. Jurisdiction of federal courts over offenses in general.
10. —— Adultery.
11. —— Incest.
12. —— Larceny.
13. —— Murder.
14. —— Rape.
15. —— Robbery.
16. Jurisdictional averments in indictments.
17. Admissibility and sufficiency of evidence of jurisdictional facts.
18. Jurisdiction of states and courts thereof.
19. —— Jurisdictional averments in indictments.
20. Time to challenge want of jurisdiction.

1. Power of congress to define and punish crimes.—Where the country occupied by Indians is not within any state, congress may by law punish any offense committed there, whether the offender be a white man or an Indian. U. S. v. Rogers (1846) 4 How. 567, 572, 11 L. Ed. 1105.

Independently of any question of title, the federal courts have jurisdiction of crimes committed by Indians on a reservation, for, regarding them as the wards of the nation, the United States has full power to pass such laws as may be necessary to their full protection, and to punish all offenses committed against them or by them within the reservation. U. S. v. Thomas (1894) 14 Sup. Ct. 426, 428, 151 U. S. 577, 38 L. Ed. 276, denying motion for new trial (C. C. 1891) 47 Fed. 488.

Congress may define and punish crimes committed by white men on the person or property of an Indian, and vice versa, within as well as without the limits of a state. U. S. v. Kagama (1886) 6 Sup. Ct. 1109, 118 U. S. 375, 30 L. Ed. 228; In re Wilson (1891) 11 Sup. Ct. 870, 140 U. S. 575, 35 L. Ed. 513; U. S. v. Martin (D. C. 1883) 14 Fed. 817, 818.

Indian country is not within exclusive jurisdiction of United States under treaties with Indian tribes securing local self-government. Anonymous (C. C. 1843) Fed. Cas. No. 447. But is within the jurisdiction of the United States, and congress may extend all laws within the constitutional limits of municipal legislation over the same. U. S. v. Tobacco Factory (D. C. 1870) Fed. Cas. No. 16,528.

Lands allotted to be held in trust for the sole use and benefit of the allottee or his heirs are during the trust period under the exclusive jurisdiction and control of congress for all governmental purposes relating to the guardianship and protection of the Indians. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 188 U. S. 432, 47 L. Ed. 532; McKay v. Kalyton (1907) 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566; Couture v. U. S. (1907) 28 Sup. Ct. 259, 207 U. S. 581, 52 L. Ed. 350; U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195; Same v. Sutton (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200; Tiger v. Western Investment Co. (1911) 31 Sup. Ct. 578, 221 U. S. 286, 55 L. Ed. 738; Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750; U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160; Same v. Pelican (1914) 34 Sup. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

2. Meaning of "sole and exclusive" in statute.—The words "sole and exclusive" do not apply to the jurisdiction extended over the Indian country, but are only used in the description of the laws which are extended to it. Ex parte Wilson (1891) 11 Sup. Ct. 870, 871, 140 U. S. 575, 35 L. Ed. 513.

3. Effect of other statutes.—No implied repeal of this section can be inferred from section 10,502, post. Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied (1913) 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

This section and section 4149, post, are not affected by any subsequent legislation, except by section 10502, post, and section 10490, post, defining and punishing incest, is not in force within an Indian reservation, where both parties to the alleged act are Indians. Ex parte Hart (D. C. 1907) 157 Fed. 130.

Section 10451, post, is one of the general laws of the United States in relation to crimes committed in places within their exclusive jurisdiction, from which, by virtue of this section and section 4149, post, crimes committed in the Indian country by one Indian against another were excluded. U. S. v. Ward (C. C. 1890) 42 Fed. 320, 321.

The organic act of Oklahoma is not inconsistent with this section, and does not repeal said section, and hence the territorial legislature may make only those acts criminal when committed on an Indian reservation which are not already punishable by a law of the

United States. The territorial laws defining crimes, and prescribing punishments therefor, have no application to Indian reservations, where congress has by special enactment created the same offenses, and made them punishable under the laws of the United States. Goodson v. U. S. (1898) 54 P. 423, 7 Okl. 117.

4. "Indian country" within statute in general.—See §§ 4130, 4137, 4141, ante, and notes thereunder.

The term "Indian country" embraces all land within the limits of the United States to which the Indian title has never been extinguished, except that which lies within the exterior geographical limits of a state, and which was not excepted from the jurisdiction of that state at the time of its admission into the Union. Ex parte Kan-gi-shun-ca (1883) 3 Sup. Ct. 396, 109 U. S. 556, 27 L. Ed. 1030. It is not confined to lands to which the Indians retained their original right of possession, but includes land lawfully set apart for an Indian reservation out of the public domain, and not previously occupied by Indians. Donnelly v. U. S. (1913) 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied (1913) 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035.

The creation of a school district by California including public land other than school sections or lieu lands granted to the state by Act March 3, 1853, § 6, and Act July 23, 1866, § 6, could not impair the title of the United States to those lands, or limit its authority over them when set apart for an Indian reservation. Id.

An Indian reservation set apart by executive order is Indian country, to which this section refers, and it is none the less embraced within that description because it has been segregated from the public domain. In re Wilson (1891) 140 U. S. 575, 11 Sup. Ct. 870, 35 L. Ed. 513; U. S. v. Pelican (1914) 34 Sup. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

Lands within Treaty April 29, 1868, 15 Stat. 635, allotted to an Indian under Act March 2, 1889, on the Great Sioux Reservation in Dakota, but not within any of the separate reservations established by the act, and held under a trust patent, are Indian lands and a part of the "Indian country." Ex parte Van Moore (D. C. 1915) 221 Fed. 954.

See U. S. v. Bridleman (D. C. 1881) 7 Fed. 894, defining Indian country. And see State v. Columbia George (1901) 65 Pac. 604, 39 Or. 127.

5. —— Lands allotted to Indians.—Land allotted to an Indian under Act July 1, 1892, c. 140, 27 Stat. 62, and therefore excepted from that part of the Colville Indian reservation which was restored to the public domain by that act, is, during the trust period, "Indian country." U. S. v. Pelican (1914) 34 Sup. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

6. Indians within statute.—An illegitimate child of a Choctaw Indian by a colored woman, who was a slave in the Cherokee Nation, must be regarded, not as an Indian, but as a negro, for the purposes of the jurisdiction of the United States courts. Alberty v. U. S. (1896) 16 Sup. Ct. 864, 865, 162 U. S. 499, 40 L. Ed. 1051. The Choctaw Nation having adopted its freedmen as citizens, there is no presumption that a negro found within the Indian Territory, associating with that Nation, is not a member thereof. Lucas v. U. S. (1896) 16 Sup. Ct. 1168, 1169, 163 U. S. 612, 41 L. Ed. 282. A white man, who, at a mature age, is adopted into an Indian tribe, is not an "Indian," within the exception of this section. U. S. v. Rogers (C. C. 1845) Fed. Cas. No. 16,187. Half-breeds, who never receive recognition from their white parents, but are left to be nurtured during childhood by Indian relatives, and live as savages, and are subjects of governmental care, have the status of Indians. U. S. v. Hadley (C. C. 1900) 99 Fed. 437.

7. —— Indian reservations as Indian country.—An Indian reservation is Indian country. Ex parte Wilson (1891) 11 Sup. Ct. 870, 871, 140 U. S. 575, 35 L. Ed. 513; U. S. v. Martin (D. C. 1883) 14 Fed. 817, 819.

The treaty of March 2, 1868, with the Ute Indians is not repealed by Enabling Act Colo. March 3, 1875 (18 Stat. 474), and the Ute reservation therefore remains within the sole and exclusive jurisdiction of the United States. U. S. v. Berry (C. C. 1880) 4 Fed. 779, 782.

The Umatilla Indian reservation is "Indian country." U. S. v. Barnhart (C. C. 1884) 22 Fed. 285; Same v. Bridleman (D. C. 1881) 7 Fed. 894, 895; Same v. Martin (D. C. 1883) 14 Fed. 817.

Prior to the admission of Montana as a state, the Crow Indian reservation situated therein was part of the "Indian country." U. S. v. Partello (C. C. 1891) 48 Fed. 670.

The Osage Indian reservation in Oklahoma is "Indian country." In re Ingram (1902) 69 P. 868, 12 Okl. 54.

8. —— Alaska as Indian country.—Alaska is not "Indian country." Kie v. U. S. (C. C. 1886) 27 Fed. 351, 352; U. S. v. Kie (D. C. 1885) Fed. Cas. No. 15,528a.

9. Jurisdiction of federal courts over offenses in general.—See §§ 4149, 10502, 10503, post and notes thereunder.

The federal court has no jurisdiction of a crime committed by one Indian against another in the Indian country, and there is nothing in the treaty of July 19, 1886, which prevents the application of this statute to the Cherokee Nation. Smith v. U. S. (1894) 14

Sup. Ct. 234, 235, 151 U. S. 50, 38 L. Ed. 67.

Under Act June 9, 1888, c. 382, 25 Stat. 178, providing that any Indian committing certain crimes against any deputy marshal, posse comitatus, or guard while engaged in the performance of duty, or who shall commit either of such crimes in the Indian Territory against any person who at the time of the commission of such crime, or at any time previous thereto, belonged to either of the classes of officials named, shall be subject to the laws of the United States relating to such crimes, the offense of killing a posse man or guard is within the jurisdiction of the United States, though the killing occurred when deceased was not engaged in performing any services. A de facto deputy marshal is within the protection of the act. Wright v. U. S. (1895) 15 Sup. Ct. 819, 822, 158 U. S. 232, 39 L. Ed. 963.

Admission of California into the Union, without any express reservation by congress of governmental jurisdiction over the public lands within her borders, did not qualify former federal jurisdiction over the Indian country therein, so as to withdraw from the United States authority to punish crimes committed by or against Indians on an Indian reservation. Donnelly v. U. S. (1913) 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied (1913) 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

Previous to Act June 17, 1844, the federal courts had no jurisdiction to hear, try, and punish offenses committed in the Indian country west of Arkansas, and such act was not retrospective. U. S. v. Starr (C. C. 1846) Fed. Cas. No. 16,379; Same v. Ivy (C. C. 1847) Fed. Cas. No. 15,451.

Act March 3, 1851, transferring the Indian Territory to the Western district of Arkansas, did not deprive the court where an indictment was pending of the right to try and determine it. U. S. v. Dawson (C. C. 1853) Fed. Cas. No. 14,933.

The federal courts have jurisdiction under Act June 30, 1834, of offenses against the laws of the United States committed on Indian reservations in Kansas. U. S. v. Ward (C. C. 1863) Fed. Cas. No. 16,639. But have no jurisdiction to punish offenses committed by one Indian against the person or property of another Indian. U. S. v. Sanders (C. C. 1847) Fed. Cas. No. 16,220.

Where the Indians occupy a territory of very limited extent within a state surrounded by a white population, and it becomes impracticable to enforce a law prohibiting intercourse, federal jurisdiction will cease. U. S. v. Cisna (C. C. 1835) Fed. Cas. No. 14,795.

A crime committed in the Indian country west of Arkansas is not triable in the district court. U. S. v. Ta-wanga-ca (D. C. 1836) Fed. Cas. No. 16,435.

The United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man. U. S. v. Martin (D. C. 1883) 14 Fed. 817, 822.

The United States courts of the district of Oregon have jurisdiction over all crimes committed on the Umatilla reservation by a white man on the property or person of an Indian, and vice versa, so far as the same have been defined by act of congress. U. S. v. Barnhart (C. C. 1884) 22 Fed. 285, 286.

The supreme court of the District of Columbia has jurisdiction of an offense committed by one Indian upon another Indian. In re Wolf (D. C. 1886) 27 Fed. 606, 609.

Under Act June 21, 1906, c. 3504, 34 Stat. 382, provided for the allotment of all the land remaining in the Stockbridge and Munsee Reservation in Wisconsin, prior to approval of allotments and delivery of patents to the allottees for the balance of such reservation, it continued subject to the jurisdiction of the federal courts with reference to crimes committed by one Indian against another thereon; the statute not constituting a grant in præsenti, but only authority to break up the reservation by allotments and patents to be made in futuro. U. S. v. Gardner (D. C. 1911) 189 Fed. 690.

The revocation of an executive order creating an Indian reservation does not affect the jurisdiction of the United States court to try an indictment found after the revocation for a murder committed before. U. S. v. Brave Bear (1882) 3 Dak. 34, 13 N. W. 565; Same v. Knowlton (1882) 3 Dak. 58, 13 N. W. 573.

The district courts of the territory, when sitting with, and exercising the powers and jurisdiction of, a United States court, have exclusive jurisdiction of all crimes punishable by the laws of the United States, when committed by persons other than Indians upon an Indian reservation occupied by Indian tribes, and to which reservation the Indian title has not been extinguished; also, of all such crimes when committed by an Indian on such reservation, except the specific crimes of murder, manslaughter, rape, assault with intent to kill, arson, burglary, and larceny. Goodson v. U. S. (1898) 54 P. 423, 7 Okl. 117; Herd v. U. S. (1904) 75 P. 291, 13 Okl. 512 (affirmed Brown v. U. S. [1906] 146 Fed. 975, 77 C. C. A. 173); Welty v. Same (1904) 76 P. 121, 14 Okl. 7.

It is not required that the United States shall exercise sole and exclusive jurisdiction over an Indian reservation and its inhabitants, in order that the United States courts may have juris-

diction to try offenses made punishable by the laws of the United States when committed upon such reservations. Goodson v. U. S. (1898) 54 P. 423, 7 Okl. 117.

The United States courts have not exclusive jurisdiction over an offense committed by one Indian against another Indian on an Indian allotment upon the public domain outside the boundaries of any reservation and within the limits of the state. Ex parte Moore (S. D. 1911) 133 N. W. 817.

10. —— **Adultery.**—Under the treaty with the Cherokee Nation (14 Stat. 799, art. 13), providing that a court may be established by the United States in that territory, and that the judicials of the tribunals of the nation shall be allowed to retain exclusive jurisdiction in all cases arising within their country in which members of the nation shall be the only parties, or where the cause of action shall arise in the Cherokee Nation, and Act March 1, 1889 (25 Stat. 783), providing for the establishment of a court in the Indian Territory with criminal jurisdiction limited to cases not punishable by death or hard labor, jurisdiction of the crime of adultery committed by a citizen of nation with a white woman within the territory where they both resided, was vested in the Indian courts. Ex parte Mayfield (1891) 11 Sup. Ct. 939, 141 U. S. 107, 35 L. Ed. 635.

Adultery is a crime, under the laws of the United States, when committed on an Indian reservation, and the United States court exercising jurisdiction over such reservation has jurisdiction to try and determine such case. Goodson v. U. S. (1898) 54 P. 423, 7 Okl. 117.

11. —— **Incest.**—A statute defining and prescribing the punishment for the crime of incest held not applicable where the alleged act was committed between Indians on a reservation. Ex parte Hart (D. C. 1907) 157 Fed. 130, 134.

12. —— **Larceny.**—Larceny committed in an Indian reservation in the territory of Oklahoma by one not an Indian is a crime against the laws of the United States, and cognizable by the district courts of the territory, under this section, while exercising the jurisdiction vested in the Circuit and District Courts of the United States. Brown v. U. S. (1906) 146 Fed. 975, 77 C. C. A. 173, affirming judgment Herd v. Same (1904) 75 P. 291, 13 Okl. 512.

Under Act June 30, 1834 (4 Stat. 729), defining "Indian country," and treaty of April 19, 1858, with the Yankton tribe, and acts creating the territory of Dakota, and subsequently providing for the organization of North and South Dakota reserving to the United States jurisdiction of Indian lands, the United States district court has jurisdiction of an indictment against a white man for stealing horses of an Indian on the Yankton reservation under section 10460, post. U. S. v. Ewing (D. C. 1891) 47 Fed. 809. See U. S. v. Bridleman (D. C. 1881) 7 Fed. 894. See, also, State v. Condon (1914) 79 Wash. 97, 139 Pac. 871.

The federal courts have no jurisdiction of the crime of larceny, alleged to have been committed on an Indian reservation in the state of Nebraska. All the territory embraced within the boundaries of the state was withdrawn from the jurisdiction of the federal courts by the act admitting the state into the Union. 13 Stat. 47. Painter v. Ives (1875) 4 Neb. 122.

Larceny committed on an Indian reservation in the territory of Oklahoma is a crime punishable under the laws of the United States on the federal side of the district court. A district court sitting as a United States court has jurisdiction to punish a white person for larceny committed on the Osage Indian reservation in Oklahoma. In re Ingram (1902) 69 P. 868, 12 Okl. 54.

13. —— **Murder.**—The United States circuit court for the district of Colorado has no jurisdiction of an indictment against a white man for the murder of a white man within the Ute reservation in the state of Colorado. U. S. v. McBratney (1881) 104 U. S. 621, 622, 26 L. Ed. 869.

A murder of one Indian by another in the Indian country is not an offense against the laws of the United States. Ex parte Kan-gi-shun-ca (1883) 3 Sup. Ct. 396, 397, 109 U. S. 556, 27 L. Ed. 1030.

Act March 3, 1885 (23 Stat. 385), conferring upon the territory of Arizona and her courts jurisdiction of the offense of murder committed on an Indian reservation by an Indian, did not take away from the courts of the United States jurisdiction over the offense there committed by one other than an Indian, on the ground that the United States, by yielding up a part of her jurisdiction over the offense, lost all. Congress could provide for the punishment in one court of an offense committed by one person, and in another court of the same offense committed by another person. Ex parte Wilson (1891) 11 Sup. Ct. 870, 140 U. S. 575, 35 L. Ed. 513.

The crime of murder committed by one Cherokee Indian upon another within the jurisdiction of the Cherokee Nation is an offense, not against the United States, but against the local laws of the Cherokee Nation. Talton v. Mayes (1896) 16 Sup. Ct. 986, 163 U. S. 376, 41 L. Ed. 196.

The murder of one negro by another within an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction

of the United States, within section 10445, post, and extended by section 4148, post, to the Indian country, when not within the exceptions by section 4149, post, which, by reason of the race of the accused and deceased, do not apply. Pickett v. U. S. (1910) 30 Sup. Ct. 265, 266, 216 U. S. 456, 54 L. Ed. 566.

The killing of an Indian by one not of Indian blood on an Indian reservation within the limits of a state is cognizable in the federal courts. Donnelly v. U. S. (1913) 33 S. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied (1913) 33 S. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

The killing of an Indian allottee during the trust period by persons not of Indian blood, when committed upon land allotted to him by the act of July 1, 1892, within that part of the Colville Indian reservation which was restored to the public domain by that act, is cognizable in the federal courts. U. S. v. Pelican (1914) 34 Sup. Ct. 396, 232 U. S. 442, 58 L. Ed. 676.

The crime of murder, charged against a white man for killing another white man in an Indian country within a state, cannot be punished within the courts of the United States. U. S. v. Bailey (C. C. 1834) Fed. Cas. No. 14,495.

The fact that land lying in a state, of which the fee is in the United States, is set apart as an Indian reservation, is not enough to give the federal courts jurisdiction over a murder committed on the reservation. Ex parte Sloan (D. C. 1877) Fed. Cas. No. 12,944.

The United States circuit court for the district of Oregon has jurisdiction of the crime of murder committed on the Umatilla reservation by an Indian upon a white man. It is a violation of section 10310 for any one to resist or obstruct the execution of an order made by a circuit court commissioner, engaged in the examination of an Indian charged before him with the commission of murder, under such circumstances. U. S. v. Martin (D. C. 1883) 14 Fed. 817. See Ex parte Morgan (D. C. 1883) 20 Fed. 298. See, also, U. S. v. Berry (D. C. 1880) 4 Fed. 779.

The courts of the United States have no jurisdiction of a crime of murder committed by an Indian belonging to one tribe against an Indian belonging to another tribe within the reservation of a third tribe which has no law covering the case. The "bad men" clause in a treaty with the tribe to which the murdered Indian belonged does not bring the case within this section, giving the United States courts jurisdiction over such offense. (1883) 17 Op. Atty. Gen. 566.

An Apache Indian, charged with murdering another Indian of the same tribe on an Indian reservation in Arizona, and in the custody of the territorial authorities, should be delivered up to the authorities of his tribe for trial and punishment. (1885) 18 Op. Atty. Gen. 138.

A trial for homicide in an Indian reservation within a territory must be had on the federal side of the territorial court. McCall v. U. S. (1876) 1 Dak. 320, 46 N. W. 608; U. S. v. Beebe (1880) 2 Dak. 292, 11 N. W. 505.

The crime of murder, committed by an Indian against a white man, the place of the crime being in the "Indian country," within the boundaries of New Mexico, is within the exclusive jurisdiction of the United States branch of the territorial district court. U. S. v. Monte (1884) 3 N. M. 173 (Gild.) 3 Pac. 45.

Murder committed within the Osage Indian reservation by a white person is punishable under the laws of the United States and by the United States courts. Barclay v. U. S. (1902) 69 P. 798, 11 Okl. 503.

Under sections 4203, 10502, post, an allottee of the Umatilla reservation, charged with murder on such reservation, could only be tried in the federal courts. State v. Columbia George (1901) 65 P. 604, 39 Or. 127.

A homicide committed on an Indian reservation is within federal jurisdiction, and the rules of the common law govern. Shapoomash v. U. S. (1862) 1 Wash. T. 188.

14. —— Rape.—The federal courts have jurisdiction to punish a rape committed on the Crow reservation by a white man against a white woman. U. S. v. Partello (C. C. 1891) 48 Fed. 670.

The offense of assault with intent to commit rape, committed by an Indian upon an Indian woman, both residing upon an Indian reservation, is not cognizable as a crime by any statute of the United States, and United States courts have no jurisdiction of such offense. U. S. v. King (D. C. 1897) 81 Fed. 625.

15. —— Robbery.—Robbery committed in the Indian country is punishable as larceny.

16. Jurisdictional averments in indictments.—In the prosecution, in a United States court, of an Indian for murder committed in the Indian territory, an averment that deceased was a negro, and not a white man, is jurisdictional. Lucas v. U. S. (1896) 16 Sup. Ct. 1168, 1169, 163 U. S. 612, 41 L. Ed. 282.

R. S. § 5345, post, 10451, is one of the general laws of the United States in relation to crimes committed in places within their exclusive jurisdiction, from which, by virtue of this and the next section crimes committed in the Indian country by one Indian against another were excluded. U. S.

v. Ward (C. C. 1890) 42 Fed. 320, 321.

An indictment for a larceny committed "in the county of Charles Mix, in the district aforesaid, and at a place in said county of Charles Mix within the Great Sioux Indian reservation and within the Indian country," sufficiently alleges the venue, although the name "Great Sioux reservation" is more properly applicable to another Sioux reservation in the state. U. S. v. Ewing (D. C. 1891) 47 Fed. 809.

An indictment which charged that a crime was committed "at a place near the Crow Creek Indian agency, in the Indian country, in a place and district of country under the exclusive jurisdiction of the United States, in the said second judicial district and territory of Dakota, and within the jurisdiction of this court," sufficiently stated the place of commission of the offense, the court taking judicial notice of the fact that the Crow Creek Indian agency is within its jurisdiction. Beebe v. U. S. (1880) 2 Dak. 292, 11 N. W. 505.

17. Admissibility and sufficiency of evidence of jurisdictional facts.—A declaration by deceased that he did not belong to the Indian country, but had come from another state, is not admissible in a prosecution for murder to sustain an averment that deceased was a negro and not a member of an Indian tribe. Lucas v. U. S. (1896) 16 Sup. Ct. 1168, 1169, 163 U. S. 612, 41 L. Ed. 282.

The burden of proof on the government to sustain federal jurisdiction to show that one killed by an Indian in the Indian country was a white man is not sustained, as against strong evidence that he was an Indian, by merely showing that he said he had lived in Arkansas, without stating why or how long, and that he was refused a vote in the district where the crime was committed on the ground that he had not lived there long enough, for these facts have no legitimate tendency to prove that he was a white man, or that he had severed his tribal relations and become a citizen. Smith v. U. S. (1894) 14 Sup. Ct. 234, 235, 151 U. S. 50, 38 L. Ed. 67.

The burden is on an Indian, accused by the state of an offense against another Indian, to show that the offense was committed on a reservation, so as to give the federal courts exclusive jurisdiction, excepting cases where judicial notice will be taken of the existence of a lawfully established and defined Indian reservation. State v. Buckaroo Jack (Nev. 1908) 96 P. 497.

That a homicide occurred at a house about a quarter of a mile from an Indian day school is insufficient to show that it occurred on a reservation. Id.

18. Jurisdiction of states and courts thereof.—See §§ 4149, 10502, 10503, post, and notes thereunder.

Under section 10502, post, when an Indian is charged with committing crime within a territory, it is improper to indict and try him before the district court of the territory while sitting for the trial of cases arising under the constitution and laws of the United States. Ex parte Gon-shay-ee (1889) 9 Sup. Ct. 542, 544, 130 U. S. 343, 32 L. Ed. 973.

Indians of a tribe maintaining a tribal organization on a reservation within a state are subject to state laws for offenses off the reservation. U. S. v. Sa-coo-da-cot (C. C. 1870) Fed. Cas. No. 16,212.

Where both defendant and deceased were Indians, but it did not appear that defendant was a member of any tribe of Indians having its chief and tribal laws, nor that his ancestral tribe had been treated with by the government, but it appeared that he had lived among the whites several years, the state courts of California had jurisdiction. People v. Ketchum (1887) 73 Cal. 635, 15 Pac. 353. That both defendant and the person whom he is alleged to have murdered were Indians does not deprive the superior court of jurisdiction of the crime. People v. Turner (1890) 85 Cal. 432, 24 Pac. 857.

Under section 10502, post, an Indian, tribal or otherwise, is amenable to state jurisdiction for the murder of another Indian outside of the reservation. Pablo v. People (1896) 46 P. 636, 23 Colo. 134, 37 L. R. A. 636.

Contention that defendant, killing one of the Nez Perce tribe of Indians, was amenable to the law of the territory, not to the law of the United States, held untenable. Pickett v. U. S. (1874) 1 Idaho, 523.

Reservations in Act Iowa Feb. 14, 1896 (Acts 26th Gen. Assem. c. 110), did not subject Indians to the criminal laws of the state, except for offenses committed against white persons, or reserve to the state any jurisdiction or control over the domestic affairs or relations of the Indians, which would practically nullify the purpose of the act as declared in its first section, and which jurisdiction the state in fact never possessed. Peters v. Malin (C. C. 1901) 111 Fed. 244.

A member of the "United Tribes," who commits a homicide not shown by the record to be within any Indian reserve, is not exempt from prosecution therefor in the state courts. Hunt v. State (1866) 4 Kan. 60.

A tract of land included in that receded by the treaty of November, 1854, to the Shawnee Indians, and thereafter patented to one of the tribe, and by him conveyed by approved deed, is within the territorial limits of the state of Kansas, and wholly subject to its laws; and a state court has jurisdiction of an indictment for obstructing a public

highway. State v. O'Laughlin (1882) 29 Kan. 20.

State courts have jurisdiction to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian reservation. In re Now-ge-zhuck (1904) 76 P. 877, 69 Kan. 410.

Indians residing in Maine, while they have a partial organization for tenure of property and local affairs, have no separate political organization, and are subject as other individuals to laws of the state prohibiting the killing of deer. State v. Newell (1892) 84 Me. 465, 24 Atl. 943.

Indians, while preserving their tribal relations and residing on a reservation set apart for them by the United States, are the wards of the general government, and as such the subject of federal authority, and the power to legislate for them is exclusively in congress, and for acts committed within the limits of the reservation they are not subject to the criminal laws of the state. Unless otherwise provided by treaty with an Indian tribe or by the act admitting the state into the Union, the criminal laws of the state, except so far as restricted by the authority of congress "to regulate commerce with the Indian tribes," extend to all crimes committed on an Indian reservation by persons other than tribal Indians. State v. Campbell (1893) 53 Minn. 354, 55 N. W. 553, 21 L. R. A. 169.

State courts have jurisdiction of crimes committed against whites, outside of an Indian reservation, by Indians maintaining tribal relations on a reservation within the state, in charge of the federal government. State v. Spotted Hawk (1899) 55 P. 1026, 22 Mont. 33; State v. Little Whirlwind (1899) 56 P. 820, 22 Mont. 425.

An indictment against an Indian for murdering a white man in a certain county need not show that the crime was not committed within the limits of any Indian reservation. State v. Spotted Hawk (1899) 55 P. 1026, 22 Mont. 33.

The courts of Nebraska have jurisdiction and authority to try and punish persons other than Indians for crimes committed on Indian reservations within the state. Enabling Act U. S. April 19, 1864, makes no reservations within the boundaries fixed. Marion v. State (1884) 16 Neb. 349, 20 N. W. 289; Id. (1886) 20 Neb. 233, 29 N. W. 911, 57 Am. Rep. 825. But they have no authority to prosecute and punish one Indian for a crime committed against another on the reservation to which they each belong, so long as they maintain their tribal relations. In re Cross (1886) 20 Neb. 417, 30 N. W. 428.

The authority to try an Indian, belonging to a tribe recognized as such by the federal government, for killing another Indian of the tribe, not having been conferred on the Nevada courts, does not exist. State v. McKenney (1883) 18 Nev. 182, 2 Pac. 171.

Cherokee Indians residing within the state are subject to the general criminal laws of the state. State v. Ta-cha-na-tah (1870) 64 N. C. 614.

The courts have criminal jurisdiction over the Brothertown Indians. In re Peters (N. Y. 1801) 2 Johns. Cas. 344.

"Reservation" held not to include the Tuscarora reservation, in Niagara county, so that a Tuscarora Indian, committing an assault on another Indian on such reservation, was subject to the jurisdiction of the state of New York. People ex rel. Cusick v. Daly (1912) 138 N. Y. S. 817, 78 Misc. Rep. 657.

Enabling Act of South Dakota did not prevent the state from taking jurisdiction over crimes committed in the territory which was restored to public domain, and the mere fact that an Indian took allotments therein did not make such allotments quasi Indian reservations under the exclusive jurisdiction of the United States. Ex parte Moore (1911) 28 S. D. 339, 133 N. W. 817.

An Indian amenable to the general criminal laws of the state may be prosecuted in the state courts for bigamy committed within an Indian reservation notwithstanding section 10503, post. An Indian who has taken land in severalty under Dawes Act, and who has voluntarily taken up within the limits of the state his residence separate and apart from any tribe of Indians, and who has adopted the habits of civilized life, is amenable to the general criminal laws of the state, except where the acts of Congress make the laws of the United States applicable. State v. Nimrod (S. D. 1912) 138 N. W. 377.

Act June 30, 1834 (3 Stat. 729), to regulate trade and intercourse with the Indian tribes, having been extended over Oregon, so far as the same was applicable, by Act June 5, 1850 (9 Stat. 437), the provisions of such act of 1834 for the punishment of a white man for stealing the property of an Indian, and vice versa, was applicable to Oregon, and was not modified or repealed by Enabling Act Or. Feb. 14, 1859 (11 Stat. 383). U. S. v. Bridleman (D. C. 1881) 7 Fed. 894, 895. But the state of Oregon has jurisdiction over murder of one Indian by another, committed upon an Indian reservation within the limits of the state, unless the reservation was excepted out of the state at the time of its admission, or unless its jurisdiction is restricted by the provisions of some treaty with the Indians still in force. (1882) 17 Op. Atty. Gen. 460.

Article 5 of the treaty of Jan. 22, 1855, with the several Indian tribes of Washington Territory was not intended

to secure to the Indians exclusive rights at any particular places, but only such rights as might be enjoyed by all citizens in common, and valid state laws effective to abridge the fishing rights of citizens are equally effective as against the Indians. U. S. v. Alaska Packers' Ass'n (C. C. 1897) 79 Fed. 152, appeal dismissed (1899) 19 Sup. Ct. 881, 43 L. Ed. 1188.

An Indian who retains his tribal relations may be prosecuted in the courts of a state for a crime committed at a place without the limits of a reservation. But an Indian who has severed his tribal relations may be prosecuted in the courts of the state, whether the crime was committed within or without the reservation. State v. Williams (1895) 13 Wash. 335, 43 Pac. 15. See, also, State v. Howard (1903) 74 P. 382, 33 Wash. 250. The Puyallup Indian reservation having been abandoned, the lands allotted to the Indians in severalty, and the tribe having abandoned its tribal organization, laws, habits, and customs, and the only parcel of reservation land retained by the government being such as was used for school purposes, a homicide committed by one of such Indians on another within the territory previously embraced in the reservation was punishable by the state court, and was not within section 10502. State v. Smokalem (1905) 79 P. 603, 37 Wash. 91.

Under this section and Act March 3, 1885, § 9 (incorporated into section 10502, post), the superior court of Washington did not have jurisdiction of larceny committed on an Indian reservation within the state by one Indian against the property of another Indian. State v. Condon (Wash. 1914) 139 P. 871.

The right acquired by Wisconsin, under her enabling act, to the sixteenth section of land in every township, for school purposes, was subject to the Indian right of occupancy in regions where such right had not been extinguished; and, where a permanent Indian reservation was subsequently established so as to include one of these sections, the state's title thereto constitutes no obstacle to the exercise of jurisdiction by the federal courts over crimes committed thereon by Indians. U. S. v. Thomas (1894) 14 Sup. Ct. 426, 428, 151 U. S. 577, 38 L. Ed. 276, denying motion for new trial (C. C. 1891) 47 Fed. 488.

The criminal laws of Wisconsin apply to the Indians on their reservations within the state; and the circuit court for Brown county has jurisdiction of all violations of such laws committed, whether by Indians or others, in the Oneida reservation, which is included within the boundaries of that county as fixed by law. State v. Doxtater (1879) 47 Wis. 278, 2 N. W. 439; Same v. Harris (1879) 47 Wis. 298, 2 N. W. 543.

The laws of the state for the peace and good order of people within its boundaries extend over Indian reservations, and apply to infractions of such laws, whether by Indians or others. Deragon v. Sero (1908) 118 N. W. 839.

19. —— **Jurisdictional averments in indictments.**—Under Comp. Laws Nev. § 4655, extending all criminal laws to all Indians, excepting offenses committed upon a reservation by one Indian against another, and under section 10,502, post, it is not necessary that a state indictment against one Indian, for an offense against another, charge, and that the state prove, that the offense was committed off a reservation, since it is not necessary, in a state prosecution, to negative the federal jurisdiction, nor for the state to prove more than that the offense was committed within the county. State v. Buckaroo Jack (Nev. 1908) 96 P. 497.

20. **Time to challenge want of jurisdiction.**—In a prosecution of an Indian for murder, the jurisdiction of the state courts on the ground that defendant and deceased were both Indians, and that the crime was committed within the limits of an Indian reservation, and that there was no proof that defendant had severed his tribal relations, can be challenged for the first time on appeal. State v. Howard (1903) 74 P. 382, 33 Wash. 250.

Cited without definite application, Cochran v. U. S. (1906) 147 Fed. 206, 77 C. C. A. 432; Goodwin v. Same (1912) 200 Fed. 121, 118 C. C. A. 295; Same v. Martin (D. C. 1883) 17 Fed. 150, 156; Cherokee Nation v. Southern Kansas R. Co. (D. C. 1888) 33 Fed. 900, 913 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295); In re Blackbird (D. C. 1901) 109 Fed. 139, 144; U. S. v. Cardish (D. C. 1906) 145 Fed. 242.

§ 4149. (R. S. § 2146, as amended, Act Feb. 18, 1875, c. 80, § 1.) Exceptions to operation of preceding section.

The preceding section shall not be construed to extend to crimes committed by one Indian against the person or property of another Indian, nor to any Indian committing any offense in the Indian country who has been punished by the local law of the tribe, or to any case where, by treaty stipulations, the exclusive jurisdiction

over such offenses is or may be secured to the Indian tribes respectively.

Act March 27, 1854, c. 26, § 3, 10 Stat. 270. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 318.

This section, as enacted in the Revised Statutes, did not contain the words "crimes committed by one Indian against the person or property of another Indian, nor to." Said words were inserted by amendment, making the section read as set forth here, by Act Feb. 18, 1875, c. 80, § 1, last cited above.

Indians committing any of seven crimes specified, if committed within a Territory, were made subject to the laws of the Territory, and if committed within an Indian reservation in any State, were made subject to the same laws as persons committing any of said crimes within the exclusive jurisdiction of the United States, by the Seven Crimes Act, Act March 3, 1885, c. 341, § 9, 23 Stat. 385, which was incorporated into the Criminal Code, in section 328 thereof, post, § 10502, and was repealed by section 341 thereof, post, § 10515.

Notes of Decisions

1. Effect of other legislation.
2. Offenses against laws of United States.
3. Indian within statute.
4. —— Presumptions.
5. —— Personal privilege of Indian charged with crime.
6. Indian country within statute.
7. Jurisdiction of United States courts.
8. —— Averments in indictment.
9. —— Admissibility and sufficiency of evidence of jurisdictional facts.
10. Jurisdiction of courts of Indian nation.
11. Jurisdiction of the states and the courts thereof.

1. Effect of other legislation.—See §§ 10502, 10503, post, and notes thereunder.

Section 10502, post, repeals in part the limitation imposed by this section on the effect of section 4148, ante. Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 458, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710, rehearing denied (1913) 33 Sup. Ct. 1024, 228 U. S. 708, 57 L. Ed. 1035, Ann. Cas. 1913E, 710.

Section 10451, post, is one of the general laws of the United States in relation to crimes committed in places within their exclusive jurisdiction, from which, by virtue of this section and section 4148, ante, crimes committed in the Indian country by one Indian against another were excluded. U. S. v. Ward (C. C. 1890) 42 Fed. 320, 321.

This section and section 4148, ante, are not affected by any subsequent legislation, except by section 10502, post, and section 10490, post, is not in force within an Indian reservation, where both parties to the alleged act are Indians. Ex parte Hart (D. C. 1907) 157 Fed. 130.

2. Offenses against laws of United States.—See § 4148, ante, and notes thereunder.

3. Indian within statute.—See notes under § 4148, ante.

A white person, adopted into an Indian tribe, is not an Indian. U. S. v. Rogers (1846) 4 How. 567, 572, 11 L. Ed. 1105; Westmoreland v. U. S. (1895) 15 Sup. Ct. 243, 155 U. S. 545, 39 L. Ed. 255.

An illegitimate child of a Choctaw Indian by a colored woman, who was a slave in the Cherokee Nation, is not an Indian, but a negro. Alberty v. U. S. (1896) 16 Sup. Ct. 864, 866, 162 U. S. 499, 40 L. Ed. 1051.

The provisions of article 9 of the treaty of 1866 (14 Stat. 799, 801), by which the Cherokee Nation agreed to abolish slavery, and that certain freedmen in the nation should have all the rights of native Cherokees, does not make freedmen Indians. Id.

4. —— Presumptions.—The Choctaw Nation having adopted its freedmen as citizens, there is no presumption that a negro found within the Indian Territory, associating with that nation, is not a member thereof. Lucas v. U. S. (1896) 16 Sup. Ct. 1168, 1169, 163 U. S. 612, 41 L. Ed. 282.

5. —— Personal privilege of Indian charged with crime.—The prohibition by this section of the jurisdiction of a court of the United States over a crime committed by one Indian upon another Indian is one which is personal to the Indian only when the crime is committed in the Indian country. In re Wolf (D. C. 1886) 27 Fed. 606, 610.

6. Indian country within statute.—See §§ 4130, 4136, 4137, and 4148, ante, and § 4150, post, and notes thereunder.

Alaska is not Indian country. Kie v. U. S. (C. C. 1886) 27 Fed. 351.

Since the repeal of section 1 of the Indian intercourse act of 1834 by section 10593, post, the only Indian country in the United States is the tracts of country set apart as Indian reservations, and the Umatilla reservation in such Indian country. U. S. v. Martin (D. C. 1883) 14 Fed. 817, 818.

7. Jurisdiction of United States courts.—See § 4148, ante, and §§ 10502, 10503, and notes thereunder.

Under this section and the treaty with the Cherokee Nation (14 Stat. 799, art. 13) and Act March 1, 1889 (25 Stat. 783), providing for the establishment of a court in the Indian Territory with criminal jurisdiction limited to cases not punishable by death or hard labor, even if the establishment of a court was necessary to give validity to the proviso of the treaty, on establishment of such court

jurisdiction of the crime of adultery committed by a citizen of the nation with a white woman, within the territory where they both resided, was vested in the Indian courts. Ex parte Mayfield (1891) 11 Sup. Ct. 939, 141 U. S. 107, 35 L. Ed. 635.

The federal court has no jurisdiction of a crime committed by one Indian against another in the Indian country, and there is nothing in the treaty of July 19, 1886, which prevents the application of this statute to the Cherokee Nation. Smith v. U. S. (1894) 14 Sup. Ct. 234, 151 U. S. 50, 38 L. Ed. 67.

Crimes committed by one Indian upon the person of another within the limits of the Tulalip reservation, in the state of Washington, are not excepted from the exclusive jurisdiction of the federal courts, under section 10502, post, because both parties hold patents from the United States, issued under the authority of the treaty with the Omahas, of March 16, 1854, and the treaty of Point Elliot of January 22, 1855, and are, under section 3951, ante, citizens of the United States. U. S. v. Celestine (1909) 30 Sup. Ct. 93, 94, 215 U. S. 278, 54 L. Ed. 195.

The murder of one negro by another within the limits of an Indian reservation in a territory is committed within a place or district under the exclusive jurisdiction of the United States, within section 10445, post, and extended by section 4148, ante, to the Indian country, when not within the exceptions by this section, which, by reason of the race of the accused and deceased, do not apply. Pickett v. U. S. (1910) 30 Sup. Ct. 265, 266, 216 U. S. 456, 54 L. Ed. 566.

Prohibition against jurisdiction of the courts of the United States to try an Indian for an offense committed on another Indian applies only when the offense is committed in the Indian country. When the Indian commits a crime outside the Indian country (although that crime may be on another Indian), he is, like any other person, amenable to the criminal laws of the place where the crime is committed. In re Wolf (D. C. 1886) 27 Fed. 606.

8. —— **Averments in indictment.**—An indictment against a person for murder in the Indian Territory, which describes him and deceased as "white persons, and not Indians," negatives the exception to the jurisdiction of the federal court in this section. Westmoreland v. U. S. (1895) 15 Sup. Ct. 243, 155 U. S. 545, 39 L. Ed. 255.

An indictment negatives the exception in this section, when it charges that defendants were not Indians, nor citizens of the Indian Territory. Wheeler v. U. S. (1895) 16 Sup. Ct. 93, 159 U. S. 523, 40 L. Ed. 244.

In a prosecution, in a United States court, of an Indian for murder committed in the Indian territory, an averment that deceased was a negro, and not a white man, is jurisdictional. Lucas v. U. S. (1896) 16 Sup. Ct. 1168, 1169, 163 U. S. 612, 41 L. Ed. 282.

Though the treaty of April 28, 1866 (14 Stat. 779), art. 38, provides that a white person who marries a Choctaw or Chickasaw, and resides in the Choctaw or Chickasaw Nation, or who has been adopted by the legislative authorities, is to be deemed a member of the Nation, and shall be tried before its tribunals as though a native Choctaw or Chickasaw, the exception to the jurisdiction of the federal court in this section of a case where, by treaty stipulation, exclusive jurisdiction over the offense is or may be secured to the Indian tribes, will, after verdict, be held sufficiently negatived by an allegation in an indictment that defendant was not a citizen of the Indian Territory. Westmoreland v. U. S. (1895) 15 Sup. Ct. 243, 155 U. S. 545, 39 L. Ed. 255.

9. —— **Admissibility and sufficiency of evidence of jurisdictional facts.**—The burden of proof on the government to sustain federal jurisdiction to show that one killed by an Indian in the Indian country was a white man is not sustained as against strong evidence that he was an Indian by merely showing that he said he had lived in Arkansas, without stating why or how long, and that he was refused a vote in the district where the crime was committed, on the ground that he had not lived there long enough, for these facts have no legitimate tendency to prove that he was a white man, or that he had severed his tribal relations and become a citizen. Smith v. U. S. (1894) 14 Sup. Ct. 234, 235, 151 U. S. 50, 38 L. Ed. 67.

A declaration by deceased that he did not belong to the Indian country, but had come from another state, is not admissible in a prosecution for murder to sustain an averment that deceased was a negro and not a member of an Indian tribe. Lucas v. U. S. (1896) 16 Sup. Ct. 1168, 1169, 163 U. S. 612, 41 L. Ed. 282.

10. **Jurisdiction of courts of Indian nation.**—The courts of the Cherokee Nation have jurisdiction to try the crime of murder only when the ones charged with the crime are Indians by blood. Ex parte Morgan (D. C. 1883) 20 Fed. 298, 308.

11. **Jurisdiction of the states and the courts thereof.**—See § 4148, ante, and §§ 10502, 10503, post, and notes thereunder.

Cited without definite application, U. S. v. King (C. C. 1897) 81 Fed. 625; Same v. Bridleman (D. C. 1881) 7 Fed. 894, 895; Same v. Martin (D. C. 1883) 17 Fed. 150, 156.

§ 4150. (R. S. § 2147.) Removal of persons from Indian country. The [superintendent of Indian affairs, and the] Indian agents and sub-agents, shall have authority to remove from the Indian country all persons found therein contrary to law; and the President is authorized to direct the military force to be employed in such removal.

Act June 30, 1834, c. 161, § 10, 4 Stat. 730.

The words of this section, "superintendent of Indian Affairs, and the," inclosed in brackets, have become inoperative; no appropriations for such superintendents having been made since 1877. See note to R. S. § 2045, ante, § 3989.

Notes of Decisions

1. Construction in general.
2. —— Statute supplemented by subsequent act.
3. Authority of Indian officers in general.
4. Exclusive right of occupancy by Indians.
5. Persons in Indian country contrary to law.
6. Exercise by Indian officers of power of removal.
7. Use and authority of military force.
8. Aid of courts.
9. —— Relief.
10. Liability to penalty.

1. Construction in general.—The President having set apart the Pyramid Lake reservation for the Indians, white persons who go on the reservation to fish do so contrary to law, within this section. U. S. v. Sturgeon (D. C. 1879) Fed. Cas. No. 16,413.

This statute is applicable to the Cheyenne and Arapahoe reservations, and persons found therein contrary to law may be removed. (1874) 14 Op. Atty. Gen. 451.

The superintending control of the Interior Department over the Creeks is nowhere abolished, but is confirmed by recent legislation, leaving all powers of that department in full force as regards the removal of persons from the Indian Territory for the causes specified by the treaties and statutes. Maxey v. Wright (1900) 54 S. W. 807, 3 Ind. T. 243.

The power given an Indian agent by this section relates only to unlicensed traders, trappers, settlers on Indian lands, and foreigners without passports, all of whom are by law intruders, liable to be removed by military force. George v. Greenwood (1856) 11 La. Ann. 299.

2. —— Statute supplemented by subsequent act.—This section was supplemented by section 4151. U. S. v. Stocking (D. C. 1898) 87 Fed. 857.

3. Authority of Indian officers in general.—An Indian agent has no power to determine a private controversy respecting the validity of a lease under which a noncitizen has gone into possession of Indian lands and made valuable improvements thereon, and to order his eviction from such land, without his removal from the Indian country. Such contracts involving private property rights are matters for adjudication by the judicial, and not the executive, department. Stephens v. Quigley (1903) 126 Fed. 148, 61 C. C. A. 214, affirming Quigley v. Stephens (1900) 54 S. W. 814, 3 Ind. T. 265.

4. Exclusive right of occupancy by Indians.—Indians have a right to occupy the country inhabited by them to the exclusion of white people, until their rights shall have been relinquished by them or terminated by Congress. U. S. v. Ashton (C. C. 1909) 170 Fed. 509, appeal dismissed Bird v. Same (1911) 31 Sup. Ct. 718, 220 U. S. 604, 55 L. Ed. 605.

Act June 28, 1898 (30 Stat. 495), providing for the organization of cities and towns in Indian country and the extinguishment of Indian title therein, has not yet been consummated, and does not deprive Indians of power to enact laws with regard to licenses or taxes, nor exempt purchasers of town or city lots from the operation of such legislation. (1900) 23 Op. Atty. Gen. 214. It does not affect the Indians' right of occupancy of the lands, nor the treaties giving them the right to exclude white men therefrom. A lawyer, who is a white man, and not a citizen of such nation, is required to pay an occupation tax imposed by the laws of such nation; and, if he refuses payment thereof, he is subject to removal by the interior department. Maxey v. Wright (1900) 54 S. W. 807, 3 Ind. T. 243. The interior department had power to remove from the Indian Territory any white man doing business within the Creek Nation who refused to pay such amounts as were required by the laws of such nation for the privilege of engaging in such business, until such power was taken away, so far as applied to persons in the lawful possession of a lot of land in a town or city designated as a town site by the act of May 27, 1902. But since this act the payment of a tax on merchants imposed by the Creek Nation can be enforced only through the ordinary channels of the courts. Buster v. Wright (1902) 69 S. W. 882, 4 Ind. T. 300.

5. Persons in Indian country contrary to law.—Indians at peace with the government cannot be arrested and held for removal to and confining them on a reservation in the Indian Territory. U. S. v. Crook (C. C. 1879) Fed. Cas. No. 14,891.

Where land is set apart by the president for the use of Indians, whites who go upon the reservation to fish do so "contrary to law." U. S. v. Sturgeon (D. C. 1879) Fed. Cas. No. 16,413.

Colored persons who were never held as slaves in the Indian country, but who may have been slaves elsewhere, have no more rights in the Indian country than other citizens of the United States. U. S. v. Payne (D. C. 1881) 8 Fed. 883.

Under the treaties with the Five Civilized Tribes, no person not a citizen or member of a tribe, or belonging to the exempted classes, can be lawfully within the limits of the country occupied by these tribes without their permission, and they have the right to impose the terms upon which such permission will be granted. The department of the interior must remove all classes forbidden by treaty or law who are within the domain of the Five Civilized Tribes without Indian permission, close all businesses which require permit or license and are being conducted without the same, and remove all cattle which are being pastured on said land without Indian permit or license. (1900) 23 Op. Atty. Gen. 214.

Under treaty between the Chickasaws and the United States on the 20th of October, 1832, stipulating that no one, not a Chickasaw or connected with that nation by marriage, shall be permitted to settle on any land ceded by that treaty until the same had been sold by the United States, it was not permissible for a reservee, by a lease of his reservation, to introduce into the nation one who was inhibited by the treaty from settling on the lands; and such lease was not validated by the treaty of 1834, conferring a right of sale on the reservee. Lewis v. Love (1840) 1 Ala. 335.

Persons in the possession of land without the consent and acquiescence of an Indian citizen are mere trespassers and intruders, and not entitled to the benefit of Curtis Bill June 28, 1898, relating to improvements. Hockett v. Alston (1900) 58 S. W. 675, 3 Ind. T. 432.

Under this section and section 4000, ante, and R. S. §§ 2128, 2129, and a regulation that the agency shall not be used for the concealment of persons or property against creditors, a licensed trader, who had sold out his business and abandoned his post, and was avoiding his creditors, was properly ousted from the agency, with his property. Echols v. Tate (1890) 53 Ark. 12, 13 S. W. 253.

The Secretary of the Interior, acting through the Indian agent, held authorized to remove one in possession of allotted land belonging to a minor under a lease executed by the guardian, but void because made without order of court. Indian Land & Trust Co. v. Shoenfelt (1904) 79 S. W. 134, 5 Ind. T. 41.

6. Exercise by Indian officers of power of removal.—The commissioner of Indian affairs may remove from an Indian reservation all persons found thereon without authority of law, or whose presence may be detrimental to the peace and welfare of the Indians. U. S. v. Crook (C. C. 1879) Fed. Cas. No. 14,891. In executing treaties with Cherokee Nation providing for removal of intruders, the government must determine for itself, under the general law of the land, the existence and extent of the exigency upon which removal is based. (1879) 16 Op. Atty. Gen. 404. The Commissioner of Indian Affairs and his subordinate, the Indian agent, have full discretion to remove from the Puyallup Indian reservation, Wash., any person not of the tribe of Indians entitled to remain thereon. An order of a state court, restraining an Indian agent from removing from an Indian reservation any person not of the tribe of Indians entitled to remain thereon, is beyond its jurisdiction and void, and should be disregarded. (1891) 20 Op. Atty. Gen. 245.

Under the constitution, the acts of congress and the rules and regulations adopted in the Indian department, the power of the commissioner of Indian affairs, and the agent acting under him and by his discretion, in removing any one not a member of an Indian tribe from the reservation of such tribe, is a matter intrusted to the discretion of the commissioner, and is not reviewable. Adams v. Freeman (Okl. 1897) 50 P. 135.

An Indian agent held without power to eject one entering on land under the homestead law, and his possession should be protected by injunction pending determination of validity of his claim. La Chapelle v. Bubb (C. C. 1894) 62 Fed. 545. But one cannot maintain an action for holding over, contrary to the terms of a lease of lands within the Nez Perce Indian reservation. Such a plaintiff is a trespasser there, and the courts will not recognize nor protect his rights under his lease. Langford v. Monteith (1876) 1 Idaho, 612.

7. Use and authority of military force.—This section and sections 4151–4153, post, confer the right to use the military forces of the United States in ejecting trespassers upon Indian lands, and the grant of this power carries with it the duty of its exercise. (1891) 20 Op. Atty. Gen. 245; (1900) 23 Op. Atty. Gen. 214.

An order directing the employment of the military in the removal from Indian country of persons found therein contrary to law need not be issued by the President by his own hand, but it is sufficient if issued by the Secretary

of War. (1874) 14 Op. Atty. Gen. 451.

The military has no authority to hold a person apprehended for being unlawfully in the country indefinitely as a prisoner, nor to destroy property so found. U. S. v. Crook (D. C. 1875) 179 Fed. 391.

8. Aid of courts.—The government may by mandatory injunction exclude intruders on lands reserved by congress for use and occupation, and actually used and occupied by the native tribes of Alaska. U. S. v. Berrigan (1905) 2 Alaska, 442. It may invoke the aid of the court to remove from the lands of Indians under its supervision and control persons who have intruded thereon under unauthorized leases from the Indians, and to restrain such persons from procuring other such leases from the Indians. U. S. v. Flournoy Live Stock & Real Estate Co. (C. C. 1896) 71 Fed. 576.

9. —— Relief.—Where it appeared that a defendant brought in by an amended complaint, by an agreement with the original defendants, obtained possession of the premises and improvements after the bringing of the suit, and wrongfully withheld possession from the tribe, a judgment may properly be rendered against him for the damages caused by his wrongful detention, as well as for possession of the property. Hargrove v. Cherokee Nation (1904) 129 Fed. 186, 63 C. C. A. 276, affirming judgment (1902) 69 S. W. 823, 4 Ind. T. 129.

Where defendants in suit by an Indian tribe to dispossess an intruder on its lands and recover damages for wrongful detention do not plead the value of their improvements, or ask to recover for the same, the court is without authority to set off such value against the damages awarded plaintiff. Brought v. Cherokee Nation (1904) 129 Fed. 192, 63 C. C. A. 350.

That defendant is an intruder in possession of improvements in the Indian Territory, in violation of the law of the Indian nation, affords no ground for the recovery of improvements by a plaintiff who shows no title thereto. Walker v. McLoud (1905) 138 Fed. 394, 70 C. C. A. 534, affirming decree Ansley v. McLoud (1904) 82 S. W. 908, 5 Ind. T. 563, and decree affirmed (1907) 27 Sup. Ct. 293, 204 U. S. 302, 51 L. Ed. 495.

10. Liability to penalty.—The penalty imposed by section 4151, post, was incurred when return was made after removal under section 4152, post. U. S. v. Baker (1903) 76 S. W. 103, 4 Ind. T. 544.

Cited without definite application, Morris v. Hitchcock (1904) 24 Sup. Ct. 712, 715, 194 U. S. 384, 48 L. Ed. 1030; Red Bird v. U. S. (1906) 27 Sup. Ct. 29, 31, 203 U. S. 76, 51 L. Ed. 96; Buchanan v. Drovers' Nat. Bank (1893) 55 Fed. 223, 225, 5 C. C. A. 83; Eells v. Ross (1894) 64 Fed. 417, 419, 12 C. C. A. 205 (appeal dismissed [1896] 16 Sup. Ct. 1205, 163 U. S. 702, 41 L. Ed. 320); U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427; Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 913 (reversed [1890] 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295); In re Blackbird (D. C. 1901) 109 Fed. 139, 144; U. S. v. Kopp (D. C. 1901) 110 Fed. 160.

§ 4151. (R. S. § 2148.) Return after removal; penalty.

If any person who has been removed from the Indian country shall thereafter at any time return or be found within the Indian country, he shall be liable to a penalty of one thousand dollars.

Act Aug. 18, 1856, c. 128, § 2, 11 Stat. 80.

Notes of Decisions

Construction in general.—This section is supplementary to section 4150, ante. U. S. v. Myers (1913) 206 Fed. 387, 124 C. C. A. 269; Same v. Stocking (D. C. 1898) 87 Fed. 857.

This section is in legal effect a prohibition against any person who has been removed from the Indian country returning thereto. U. S. v. Howard (C. C. 1883) 17 Fed. 638, 641. See U. S. v. Sturgeon (D. C. 1879) Fed. Cas. No. 16,413, holding that persons who established contrary to law fisheries in Indian country, and who returned after removal, committed the offense defined by this section.

Indian country within statute.—Indian country is a country to which the Indians retained the right of use and occupancy, and ceases to be such when their title is extinguished, unless by virtue of some reservation expressed at the time and clearly appearing. The setting apart of a limited tract of the public domain for a school, which the government devotes mainly, or even entirely, to the training and education of Indian children attending in their individual capacity, could not convert the tract into Indian country. The lands ceded by the Kiowa, Comanche, and Apache tribes of Indians in Oklahoma by treaty of Oct. 21, 1892, ratified by Act June 6, 1900, ceased on such session to be "Indian country." U. S. v. Myers (1913) 206 Fed. 387, 124 C. C. A. 269.

Use of military force.—This section and sections 4150, ante, and sections 4152, 4153, post, confer the right to use the military forces in ejecting trespassers on Indian lands, and the grant

of this power carries with it the duty of its exercise. (1900) 23 Op. Atty. Gen. 214.

Liability for penalty.—The penalty imposed by this section was incurred when the return was made after a removal under section 4152. U. S. v. Baker (1903) 76 S. W. 103, 4 Ind. T. 544.

Procedure for recovery of penalty.—Section 4116, ante, ought to be construed as only applicable to penalties prescribed by Act June 30, 1834, of which it is a part; but, if considered applicable to this section, the remedy therein provided is not exclusive of the common-law remedy by indictment or information, but only cumulative. U. S. v. Howard (C. C. 1883) 17 Fed. 638–641.

Indictment lies to recover penalty provided by this section. U. S. v. Howard (C. C. 1883) 17 Fed. 638; Same v. Stocking (D. C. 1898) 87 Fed. 857. But see U. S. v. Payne (D. C. 1884) 22 Fed. 426, 427, holding that a conspiracy to make settlement on Indian lands, and to return to the Indian country after being removed therefrom, is not an indictable offense, or one that can be prosecuted by criminal proceedings; the proper proceeding being by action under section 4116 to recover penalty. And see In re Seagraves (1896) 48 Pac. 272, 4 Okl. 422, and U. S. v. Baker (1903) 76 S. W. 103, 4 Ind. T. 544, holding that the penalty can only be recovered in a civil action.

Cited without definite application, Morris v. Hitchcock (1904) 24 Sup. Ct. 712, 715, 194 U. S. 384, 48 L. Ed. 1030; Red Bird v. U. S. (1906) 27 Sup. Ct. 29, 31, 203 U. S. 76, 51 L. Ed. 96; U. S. v. Crook (D. C. 1875) 179 Fed. 391; Same v. Bridleman (D. C. 1881) 7 Fed. 894, 903; Same v. Martin (D. C. 1883) 14 Fed. 817, 821.

§ 4152. (R. S. § 2149.) Removal from reservations.

The Commissioner of Indian Affairs is authorized and required, with the approval of the Secretary of the Interior, to remove from any tribal reservation any person being therein without authority of law, or whose presence within the limits of the reservation may, in the judgment of the Commissioner, be detrimental to the peace and welfare of the Indians; and may employ for the purpose such force as may be necessary to enable the agent to effect the removal of such person.

Act June 12, 1858, c. 155, § 2, 11 Stat. 332.

Notes of Decisions

Construction in general.—An agent has no power to determine a private controversy respecting the validity of a lease under which a noncitizen has gone into possession of Indian lands and made valuable improvements thereon, and to order his eviction from such land, without his removal from the Indian country. Such contracts involving private property rights are matters for adjudication by the judicial, and not the executive, department. Stephens v. Quigley (1903) 126 Fed. 148, 61 C. C. A. 214.

This section justifies the removal of all persons on reservations in violation of law, or whose presence thereon may be detrimental to the peace and welfare of the Indians, and applies to Indians and whites. U. S. v. Crook (C. C. 1879) Fed. Cas. No. 14,891.

The federal government, by the terms of the treaty of March 8, 1865, with the Winnebago Indians, and the statutes, is charged with the duty of protecting the Indians in the use and occupancy of the reservation lands, whether allotted in severalty or not; and the executive department, acting through the Indian agents on the reservation, has full power to do whatever may be necessary for the proper performance of this duty. U. S. v. Mullin (D. C. 1895) 71 Fed. 682, 684.

The commissioner of Indian affairs, with the approval of the Secretary of the Interior, and also the superintendent of Indian affairs, Indian agents, and subagents, may remove from said reservation all persons found thereon contrary to law, and the President is authorized to direct the military force to be employed in effecting their removal. (1874) 14 Op. Atty. Gen. 452.

This section only authorizes the removal of troublesome persons from a reservation, and does not imply authority to detain them in confinement after such removal. Ex parte Bi-a-lille (Ariz. 1909) 100 P. 450.

Removal of persons from Indian country.—The enforcement of the permit taxes levied by the Creek Nation by a removal under this section is not exclusive, but the collection of such tax may also be enforced by the closing of the business of those who refuse to pay it. Buster v. Wright (1905) 135 Fed. 947, 68 C. C. A. 505.

The commissioner of Indian affairs may, with the approval of the Secretary of the Interior, cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians, though the reservation be

within a state and the Indians are holders under trust patents of allotments adjacent to the reservation, and are therefore citizens of the United States and of the state. Rainbow v. Young (1908) 161 Fed. 835, 88 C. C. A. 653.

All persons, other than Choctaws or Chickasaws by birth or adoption, not comprised within some one of the excepted classes described in treaties, held intruders. But the permit laws of the Choctaws and Chickasaws are valid, and those persons who are permitted thereunder to reside within their territory, or to be employed by their citizens as teachers, mechanics, or skilled agriculturists, may enter and remain on the lands of these tribes, until the permit expires. Teachers, mechanics, and skilled agriculturists, not in the employ of the government, and who are on such lands without permits from the Indian authorities, are intruders, and should be removed therefrom. (1881) 17 Op. Atty. Gen. 134.

The commissioner of Indian affairs and his subordinates, the Indian agents, have full discretion to remove from the Puyallup Indian reservation, Wash., any person not of the tribe of Indians entitled to remain there. (1891) 20 Op. Atty. Gen. 245.

Under this section the commissioner of Indian affairs, prior to Act May 27, 1902, c. 888, 32 Stat. 245, prohibiting the removal of certain citizens from the Indian Territory, with the approval of the Secretary of the Interior, was authorized to remove a person from the Indian Territory who, in his judgment, was detrimental to the welfare of the Indians, though he was an alderman of an incorporated town in the territory. Ex parte Carter (1903) 76 S. W. 102, 4 Ind. T. 539.

Order of removal as legal process.—A written order of an Indian agent, acting in pursuance of instructions from the interior department, for the purpose of fulfilling the duty of the government to protect the Indians in the use and occupancy of their reservations, is a legal writ or process within section 10310, post. U. S. v. Mullin (D. C. 1895) 71 Fed. 682, 684.

Use of military force.—The President has power on the requisition of the commissioner of Indian affairs, with the approval of the Secretary of the Interior, to direct the military force to co-operate with the proper Indian agent in effecting the removal of intruders from the tribal reservations in Kansas. (1866) 12 Op. Atty. Gen. 51.

An order directing the military to be thus employed need not be issued by the President by his own hand; it would be sufficient if issued by the Secretary of War. (1874) 14 Op. Atty. Gen. 452.

This section, sections 4150, 4151, ante, and section 4153, post, confer the right to use the military forces of the United States in ejecting trespassers on Indian lands, and the grant of this power carries with it the duty of its exercise. (1900) 23 Op. Atty. Gen. 214. See, also, (1891) 20 Op. Atty. Gen. 245. But Indians arrested by military held not "prisoners of war," and their detention could not be justified on the ground that a state of war existed. Ex parte By-a-lil-le (1909) 12 Ariz. 150, 100 P. 450.

Jurisdiction of courts.—Whether it is proper to permit a trader in the Indian country, or whether any person in the Indian country is detrimental to the welfare of Indians, are for the superintendent of Indian affairs and the Secretary of the Interior, and the courts will review their decision. U. S. v. Sturgeon (D. C. 1879) Fed. Cas. No. 16,413.

An order of state court restraining Indian agent from removing from an Indian reservation any person not entitled to remain is beyond its jurisdiction and void, and should be disregarded. (1891) 20 Op. Atty. Gen. 245.

Liability for penalty.—The penalty imposed by section 4151, ante, was incurred when the return was made after a removal under this section. U. S. v. Baker (1903) 76 S. W. 103, 4 Ind. T. 544.

Cited without definite application, Morris v. Hitchcock (1904) 24 Sup. Ct. 712, 715, 194 U. S. 384, 48 L. Ed. 1030; Fells v. Ross (1894) 64 Fed. 417, 419, 12 C. C. A. 205 (appeal dismissed [1896] 16 Sup. Ct. 1205, 163 U. S. 702, 41 L. Ed. 320); U. S. v. Myers (1913) 206 Fed. 387, 124 C. C. A. 269; Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50; In re Blackbird (D. C. 1901) 109 Fed. 139, 144.

§ 4153. (R. S. § 2150.) Employment of the military in apprehending persons violating the law, and for other purposes.

The military forces of the United States may be employed in such manner and under such regulations as the President may direct—

First. In the apprehension of every person who may be in the Indian country in violation of law; and in conveying him immediately from the Indian country, by the nearest convenient and safe route, to the civil authority of the Territory or judicial district in

which such person shall be found, to be proceeded against in due course of law;

Second. In the examination and seizure of stores, packages, and boats, authorized by law;

Third. In preventing the introduction of persons and property into the Indian country contrary to law; which persons and property shall be proceeded against according to law;

Fourth. And also in destroying and breaking up any distillery for manufacturing ardent spirits set up or continued within the Indian country.

Act June 30, 1834, c. 161, §§ 21, 23, 4 Stat. 732, 733.
See, also, R. S. § 2152, post, § 4155.

Notes of Decisions

Employment and authority of military force.—The army is the proper force to employ when intruders and trespassers who go on the reservation are to be ejected therefrom. U. S. v. Crook (C. C. 1879) Fed. Cas. No. 14,891.

The territory of Alaska, under Act March 3, 1873, became, as to the introduction of liquors, "Indian country," and the military force of the United States may be employed for the arrest of persons violating the Indian intercourse act of 1834. In re Carr (D. C. 1875) Fed. Cas. No. 2,432.

The military power may be employed to effect the removal of a person from an Indian reservation in a proper case, but the person thus removed cannot be held by the military authorities. U. S. v. Crook (C. C. 1879) Fed. Cas. No. 14,891.

The military has no authority to hold a person apprehended for being unlawfully in the country indefinitely as a prisoner, nor to destroy property so found. U. S. v. Crook (D. C. 1875) 179 Fed. 391.

Where certain persons claiming to belong to the Cherokee Nation attempted to settle on certain lands, their removal therefrom by the military authorities held justifiable. (1880) 16 Op. Atty. Gen. 470. See Waters v. Campbell (C. C. 1877) Fed. Cas. No. 17,265, holding that a person arrested by military force may be confined in the military prison, but he cannot be lawfully required to labor or perform any duty other than taking care of his person.

The President may, under section 10140, post, direct the military forces to render the marshal such aid as may be necessary to enable him to maintain the peace and enforce the laws of the United States in that territory. (1889) 19 Op. Atty. Gen. 293.

Persons apprehended by the military for unlawful traffic with Indians, and also property taken with them, should be placed in the custody of the marshal, whereupon the United States attorney should institute proceedings for the penalty and forfeiture of the property. Where the persons have also violated articles of war, they may be tried by and punished by court-martial, or turned over to the civil authorities to be proceeded against. (1871) 13 Op. Atty. Gen. 470.

Authority of Indian agent.—An Indian agent has no power to determine a private controversy respecting the validity of a lease under which a noncitizen has gone into possession of Indian lands and made valuable improvements thereon, and to order his eviction from such land, without his removal from the Indian country. Stephens v. Quigley (1903) 126 Fed. 148, 152, 61 C. C. A. 214.

Cited without definite application, Morris v. Hitchcock (1904) 24 Sup. Ct. 712, 715, 194 U. S. 384, 48 L. Ed. 1030; United States Express Co. v. Friedman (1911) 191 Fed. 673, 112 C. C. A. 219.

§ 4154. (R. S. § 2151.) Detention of persons apprehended by the military.

No person apprehended by military force under the preceding section shall be detained longer than five days after arrest and before removal. All officers and soldiers who may have any such person in custody shall treat him with all the humanity which the circumstances will permit.

Act June 30, 1834, c. 161, § 23, 4 Stat. 733.

Notes of Decisions

Detention of person arrested by military force.—A person arrested by military force is not a military prisoner, subject to the articles of war, but a citizen charged with a nonmilitary crime, and must be removed for trial by the civil authorities within five days from his arrest or discharge, and his detention thereafter under any circumstances is unlawful. Waters v. Camp-

bell (C. C. 1877) Fed. Cas. No. 17,-265; In re Carr (D. C. 1875) Fed. Cas. No. 2,432.

The military department has no authority to hold a person apprehended for being unlawfully in the country indefinitely as a prisoner, nor to destroy property so found. U. S. v. Crook (D. C. 1875) 179 Fed. 391.

§ 4155. (R. S. § 2152.) Arrest of absconding Indians guilty of crime.

The [superintendents,] agents, and sub-agents shall endeavor to procure the arrest and trial of all Indians accused of committing any crime, offense, or misdemeanor, and of all other persons who may have committed crimes or offenses within any State or Territory, and have fled into the Indian country, either by demanding the same of the chiefs of the proper tribe, or by such other means as the President may authorize. The President may direct the military force of the United States to be employed in the apprehension of such Indians, and also in preventing or terminating hostilities between any of the Indian tribes.

Act June 30, 1834, c. 161, § 19, 4 Stat. 732.

The word "superintendents," inclosed in brackets in this section, has become inoperative; no appropriations for such superintendents having been made since 1877. See note to R. S. § 2045, ante, § 3989.

See, also, R. S. § 2150, ante, § 4153.

Notes of Decisions

Employment and authority of military force.—The troops of the United States cannot be employed in the Indian Territory for the purpose of assisting in the preservation of peace and the arrest of bandits and outlaws unless they are trespassing on Indian country, or absconding offenders within this section. (1894) 21 Op. Atty. Gen. 72.

A military officer, unless he be an Indian agent, or be called on to act by such agent, has no power to arrest fugitives from justice in a state who have escaped into the Indian Territory. Such persons may be removed from the territory as intruders, and surrendered to the state authorities, by the proper Indian agent. (1877) 15 Op. Atty. Gen. 601.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4156. (R. S. § 2153.) Employment by marshal of posse comitatus in executing process.

In executing process in the Indian country, the marshal may employ a posse comitatus, not exceeding three persons in any of the States respectively, to assist in executing process by arresting and bringing in prisoners from the Indian country, and allow them three dollars for each day in lieu of all expenses and services.

Act June 14, 1858, c. 163, § 3, 11 Stat. 363.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4157. (R. S. § 2154.) Reparation for injuries to property of Indians.

Whenever, in the commission, by a white person, of any crime, offense, or misdemeanor, within the Indian country, the property of any friendly Indian is taken, injured, or destroyed, and a conviction is had for such crime, offense, or misdemeanor, the person so convicted shall be sentenced to pay to such friendly Indian to whom the property may belong, or whose person may be injured, a sum equal to twice the just value of the property so taken, injured, or destroyed.

Act June 30, 1834, c. 161, § 16, 4 Stat. 731.

Notes of Decisions

Liability of United States.—The statute does not create a liability on the part of the United States to individual members of the tribe. Blackfeather v. U. S. (1902) 37 Ct. Cl. 233.

Payment for theft by negro.—This section does not apply to the theft of property of an Indian by a negro. U. S. v. Perryman (1879) 100 U. S. 235, 25 L. Ed. 645.

Cited without definite application, Blackfeather v. U. S. (1903) 23 Sup. Ct. 772, 776, 190 U. S. 368, 47 L. Ed. 1099; Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50.

§ 4158. (R. S. § 2155.) Payment where the offender is unable.

If such offender shall be unable to pay a sum at least equal to the just value or amount, whatever such payment shall fall short of the same shall be paid out of the Treasury of the United States. If such offender cannot be apprehended and brought to trial, the amount of such property shall be paid out of the Treasury. But no Indian shall be entitled to any payment out of the Treasury of the United States, for any such property, if he, or any of the nation to which he belongs, have sought private revenge, or have attempted to obtain satisfaction by any force or violence.

Act June 30, 1834, c. 161, § 16, 4 Stat. 731.

Notes of Decisions

Liability of United States.—The statute does not create a liability on the part of the United States to individual members of the tribe. Blackfeather v. U. S. (1902) 37 Ct. Cl. 233.

Payment for theft by negro.—An Indian whose property is stolen by a negro, is not entitled to payment therefor out of the treasury of the United States. U. S. v. Perryman (1879) 100 U. S. 235, 25 L. Ed. 645.

Jurisdiction of courts.—This and the preceding section do not confer jurisdiction upon the court of claims over claims for the destruction, etc., of the property of individual Indians by white citizens and soldiers. Blackfeather v. U. S. (1903) 23 Sup. Ct. 772, 776, 190 U. S. 368, 47 L. Ed. 1099.

Cited without definite application, Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 48.

§ 4159. (R. S. § 2156.) Injuries to property by Indians.

If any Indian, belonging to any tribe in amity with the United States, shall, within the Indian country, take or destroy the property of any person lawfully within such country, or shall pass from Indian country into any State or Territory inhabited by citizens of the United States, and there take, steal, or destroy, any horse, or other property belonging to any citizen or inhabitant of the United States, such citizen or inhabitant, his representative, attorney, or agent, may make application to the proper [superintendent,] agent, or sub-agent, who, upon being furnished with the necessary documents and proofs, shall, under the direction of the President, make application to the nation or tribe to which such Indian shall belong, for satisfaction; and if such nation or tribe shall neglect or refuse to make satisfaction, in a reasonable time not exceeding twelve months, such [superintendent] agent, or sub-agent shall make return of his doings to the Commissioner of Indian Affairs, that such further steps may be taken as shall be proper, in the opinion of the President, to obtain satisfaction for the injury.

Act June 30, 1834, c. 161, § 17, 4 Stat. 731. Act Feb. 28, 1859, c. 66, § 8, 11 Stat. 401.

Notes of Decisions

Construction in general.—This section defines a right which it creates. French v. U. S. (1914) 49 Ct. Cl. 337.

The rights of the parties are fixed as of the date of wrong. Valk v. U. S. (1893) 28 Ct. Cl. 241; Johnson v. Same (1893) 29 Ct. Cl. 1; Valk v. Same (1894) 29 Ct. Cl. 62.

This section does not contemplate a partial investigation, nor an allowance by the Secretary of the Interior of part, leaving the rest of the demand to further investigation and payment by installments. Brice v. U. S. (1896) 32 Ct. Cl. 23.

The liability created by the act of 1834 and the guaranty given by the United States did not constitute a vested right. Garrison v. U. S. (1895) 30 Ct. Cl. 272.

Under Act June 30, 1834, § 17, it was necessary that the wrong was committed by Indians off the reservation, or, if on the reservation, that the person injured was lawfully there. Welch v. U. S. (1897) 32 Ct. Cl. 106;

Merchant v. Same (1900) 35 Ct. Cl. 403.

The rights and liabilities of the parties are determined in accordance with Indian Trade and Intercourse Act of June 30, 1834, as modified by Act Feb. 28, 1859 (incorporated in part in this section), and the joint resolution of June 25, 1860, where two classes of cases are provided for: (1) Those involving wrongs by Indians outside of their reservations; and (2) those involving wrongs within the reservations where the injured party was lawfully in the Indian country. French v. U. S. (1914) 49 Ct. Cl. 337. Where there was neither malicious intent nor gross negligence of Indians, they were not liable. Jaeger v. U. S. (1898) 33 Ct. Cl. 214.

—— **Amity defined.**—Amity means a condition of actual peace. Abrew v. U. S. (1902) 37 Ct. Cl. 510. See Valk v. U. S. (1894) 29 Ct. Cl. 63.

—— **Citizen.**—See Valk v. U. S. (1893) 28 Ct. Cl. 241; Johnson v. Same (1893) 29 Ct. Cl. 1; Valk v. Same (1894) 29 Ct. Cl. 62.

—— **Indian country.**—See ante, § 4130, and notes thereunder.

See, also, French v. U. S. (1914) 49 Ct. Cl. 337, for a discussion as to Indian country within this section.

Where a settler is on Indian land in the supposed exercise of his rights and is robbed by Indians not the owners of the land, the depredation occurred in Indian country. Thomison v. U. S. (1900) 35 Ct. Cl. 395.

Lawfully within Indian reservation.—The owner of cattle taken and carried away by Indians while he was traveling on an Indian reservation over a legally established trail was lawfully within such territory and was not a trespasser, in view of the provision of article 6 of the treaty of Aug. 25, 1868, providing that the Indian tribes who were parties thereto would not object to the construction of railroads, wagon roads, or other works of utility or necessity. U. S. v. Andrews (1900) 21 Sup. Ct. 46, 179 U. S. 96, 45 L. Ed. 105.

Liability for depredations.—It is not necessary that Indians must pass directly "from the Indian country into any state or territory" where they may commit a depredation. Lowe v. U. S. (1902) 37 Ct. Cl. 413.

The liability of an Indian tribe for depredations may arise out of a treaty, even though the Indian Intercourse Act has not been extended by Congress to the country in which the Indians reside. Pino v. U. S. (1903) 38 Ct. Cl. 64.

Remedy for unlawful seizure of cattle.—In case of seizure of cattle by Indians in Indian Territory, alleged to be in violation of the treaties between the Cherokee Nation and the United States, complainant should seek redress not by application to the executive but to the judicial department of the government, the courts of the United States for the western district of Arkansas having full jurisdiction of the subject-matter. (1888) 19 Op. Atty. Gen. 173.

Cited without definite application, Johnson v. U. S. (1896) 16 Sup. Ct. 377, 379, 160 U. S. 546, 40 L. Ed. 529; Leighton v. Same (1896) 16 Sup. Ct. 495, 497, 161 U. S. 291, 40 L. Ed. 703; Corralitos Co. v. Same (1900) 20 Sup. Ct. 941, 942, 178 U. S. 280, 44 L. Ed. 1069; Thurston v. U. S. (1914) 34 Sup. Ct. 394, 396, 232 U. S. 469, 58 L. Ed. 688; Forty-Three Gallons of Cognac Brandy (C. C. 1882) 11 Fed. 47, 50; Woolverton v. U. S. (1894) 29 Ct. Cl. 107; Stone v. Same (1894) 29 Ct. Cl. 111; Love v. Same (1894) 29 Ct. Cl. 332; Cox v. Same (1894) Id. 349; Hegwer v. Same (1895) 30 Ct. Cl. 405; Price v. Same (1897) 33 Ct. Cl. 106; Ayers v. Same (1899) 35 Ct. Cl. 26; De Baca v. Same (1901) 37 Ct. Cl. 482; McCoy v. Same (1903) 38 Ct. Cl. 163; Hayt v. Same, Id. 455.

§ 4160. (R. S. § 2157.) Agents, etc., authorized to take depositions touching depredations.

The superintendents, agents, and sub-agents within their respective districts are authorized and empowered to take depositions of witnesses touching any depredations, within the purview of the three preceding sections, and to administer oaths to the deponents.

Act June 30, 1834, c. 161, § 18, 4 Stat. 732.

Indian agents were empowered to take acknowledgments and administer oaths in investigations committed to them, by R. S. § 2064, ante, § 4009.

Special agents, school supervisors, and certain other officials were empowered to administer oaths to persons in the Indian Service by Act March 1, 1899, c. 324, § 1, ante, § 4027.

Cited without definite application, Thurston v. U. S. (1914) 34 Sup. Ct. 394, 396, 232 U. S. 469, 58 L. Ed. 688.

CHAPTER FOUR A

Education of Indians

This chapter, inserted here as additional to the original chapters of Title XXVIII of the Revised Statutes, includes the provisions of section 2071 of the Revised Statutes, and of subsequent acts, general and permanent in their nature, and remaining in force, relating to education of Indians, particularly children, by schools and other means of instruction.

Sec.
4161. Employment of persons to instruct Indians in agriculture, and to teach their children, etc.; reports to Congress.
4162. Detail of officer of Army for Indian education.
4163. Vacant military posts or barracks for normal and industrial training-schools; detail of officers of Army to such schools; places of expenditure of appropriations.
4164. Census of Indians at agency or reservation, and numbers of school children, school-houses, schools, etc., to be reported annually.
4165. No appropriation to be made for any sectarian school.
4166. Rations to mission schools for children enrolled in them.
4167. Superintendent of Indian schools; appointment; qualifications; duties.
4168. Employment of Indian girls and boys as assistants in schools.
4169. Leaves of absence to employés at Indian schools, for attendance at educational gatherings, etc.
4170. Expenditure of appropriations for school purposes; supervision and regulation; limitation per capita.
4170a. Expenditure of appropriations without restriction as to per capita of pupils; limitation.
4171. Suspension or discontinuance of schools; sale of buildings and plants; disposition of proceeds.
4172. Children of Indians taking lands in severalty not excluded.
4173. Regulations to secure attendance of children at school.
4174. Rations, etc., may be withheld for children not attending school.
4175. Rations, etc., may be withheld from parents, etc., for nonattendance of children at school.
4176. Annuities, etc., may be withheld from Osage Indians for nonattendance of children at school.
4177. Child not to be sent to school out of State without consent of parents, etc.
4178. Child not to be taken to school in another State against its will or without consent of parents.
4179. Admission of white children to Indian day schools; tuition fees, and disposition thereof.
4180. Admission of white children to Indian boarding schools; tuition fees, and disposition thereof.
4180a. Transportation of Indian youths under fourteen to schools at government expense prohibited.

§ 4161. (R. S. § 2071.) Employment of persons to instruct Indians in agriculture, and to teach their children, etc.; reports to Congress.

The President may, in every case where he shall judge improvement in the habits and condition of such Indians practicable, and that the means of instruction can be introduced with their own consent, employ capable persons of good moral character to instruct them in the mode of agriculture suited to their situation; and for teaching their children in reading, writing, and arithmetic, and performing such other duties as may be enjoined according to such instructions and rules as the President may give and prescribe for the regulation of their conduct, in the discharge of their duties. A report of the proceedings adopted in the execution of this provision shall be annually laid before Congress.

Act March 3, 1819, c. 85, 3 Stat. 516.

The nature and effects of alcoholic drinks and narcotics on the human system were required to be studied in the Indian schools, by Act May 20, 1886, c. 362, post, §§ 9379–9381.

Notes of Decisions

Construction in general.—The act of 1819 (incorporated into this section) contemplates the preservation of the Indian nations as an object sought by

the United States, and proposes to effect this object by civilizing and converting them from hunters to agriculturists. Worcester v. Georgia (1832) 6 Pet. 515, 556, 8 L. Ed. 483.

See U. S. v. Imoda (1881) 4 Mont. 38, 1 Pac. 721, holding that under this section and an Indian treaty the United States had no authority over Indian children and could not compel them to attend school.

Right of Indians to attend public school.—See Ammons v. School Dist. No. 5 (1864) 7 R. I. 596.

Cited without definite application, Cherokee Nation v. Southern Kan. R. Co. (D. C. 1888) 33 Fed. 900, 913, reversed (1890) 10 Sup. Ct. 965, 135 U. S. 641, 34 L. Ed. 295.

(R. S. § 2099. Superseded.)

This section provided that moneys appropriated for purposes of education among the Indian tribes should not be expended elsewhere than in Indian country, excepting certain expenditures authorized by treaty to be under direction either of the President or of the Indian tribes. Its provisions were superseded by a proviso annexed to Act July 31, 1882, c. 363, post, § 4163, that moneys appropriated for general purposes of education among the Indians might be expended for education of Indian youth at such posts, institutions, and schools as the Secretary of the Interior might consider advantageous, or as Congress from time to time might authorize and provide.

Subsequent appropriations provide for schools, etc., for Indian children "elsewhere than in Indian country."

§ 4162. (Act June 23, 1879, c. 35, § 7.) Detail of officer of Army for Indian education.

The Secretary of War shall be authorized to detail an officer of the Army, not above the rank of captain, for special duty with reference to Indian education. (21 Stat. 35.)

This section was part of the legislative, executive, and judicial appropriation act for the fiscal year 1880, cited above.

Subsequent provisions for detail of officers of the Army to certain schools were made by Act July 31, 1882, c. 363, post, § 4163.

§ 4163. (Act July 31, 1882, c. 363.) Vacant military posts or barracks for normal and industrial training-schools; detail of officers of Army to such schools; places of expenditure of appropriations.

That the Secretary of War be, and he is hereby, authorized to set aside, for use in the establishment of normal and industrial training-schools for Indian youth from the nomadic tribes having educational treaty claims upon the United States, any vacant posts or barracks, so long as they may not be required for military occupation, and to detail one or more officers of the Army for duty in connection with Indian education, under the direction of the Secretary of the Interior, at each such school so established: Provided, That moneys appropriated or to be appropriated for general purposes of education among the Indians may be expended, under the direction of the Secretary of the Interior, for the education of Indian youth at such posts, institutions, and schools as he may consider advantageous, or as Congress from time to time may authorize and provide. (22 Stat. 181.)

This was an act entitled "An act to provide additional industrial training-schools for Indian youth, and authorizing the use of unoccupied military barracks for such purposes." The proviso to this section superseded R. S. § 2099.

Cited without definite application, U. S. v. Berry (C. C. 1880) 4 Fed. 779, 786.

§ 4164. (Act July 4, 1884, c. 180, § 9.) Census of Indians at agency or reservation, and numbers of school children, schoolhouses, schools, etc., to be reported annually.

That hereafter each Indian agent be required, in his annual report, to submit a census of the Indians at his agency or upon the reservation under his charge, the number of males above eighteen

years of age, the number of females above fourteen years of age, the number of school children between the ages of six and sixteen years, the number of school-houses at his agency, the number of schools in operation and the attendance at each, and the names of teachers employed and salaries paid such teachers. (23 Stat. 98.)

This section was part of the Indian appropriation act for the fiscal year 1885, cited above.

§ 4165. (Act June 7, 1897, c. 3, § 1.) No appropriation to be made for any sectarian school.

It is hereby declared to be the settled policy of the Government to hereafter make no appropriation whatever for education in any sectarian school: * * Provided further, That the foregoing shall not apply to public schools of any State, Territory, county, or city, or to schools herein or hereafter specifically provided for. (30 Stat. 79.)

These were provisions of the Indian appropriation act for the fiscal year 1898, cited above.

The portion of the act omitted here was a proviso authorizing the Secretary of the Interior to make contracts with schools of various denominations for the education of Indian pupils during the fiscal year 1898, but only at places where nonsectarian schools could not be provided, and was temporary merely.

A previous provision of Act June 29, 1888, c. 503, § 10, 25 Stat. 239, that at certain schools, at which "church organizations are assisting in the educational work, the Christian Bible may be taught in the native language of the Indians," etc., may be regarded as superseded by a provision that the Government should, as early as practicable, make provision for the education of Indian children in Government schools, made by Act March 2, 1895, c. 188, § 1, 28 Stat. 904, and by the provisions of this act.

Similar provisions were made by the Indian appropriation act for the preceding year, Act June 10, 1896, c. 398, § 1, 29 Stat. 345.

Notes of Decisions

Appropriations for sectarian school.— The statute has reference only to gratuitous appropriations. Reuben Quick Bear v. Leupp (1908) 28 Sup. Ct. 690, 210 U. S. 50, 52 L. Ed. 954.

§ 4166. (Act June 21, 1906, c. 3504.) Rations to mission schools for children enrolled in them.

Mission schools on an Indian reservation may, under rules and regulations prescribed by the Commissioner of Indian Affairs, receive for such Indian children duly enrolled therein, the rations of food and clothing to which said children would be entitled under treaty stipulations if such children were living with their parents. (34 Stat. 326.)

This was a provision of the Indian appropriation act for the fiscal year 1907, cited above.

§ 4167. (Act March 2, 1889, c. 412, § 10.) Superintendent of Indian schools; appointment; qualifications; duties.

There shall be appointed by the President, by and with the advice and consent of the Senate, a person of knowledge and experience in the management, training, and practical education of children, to be Superintendent of Indian Schools, whose duty it shall be to visit and inspect the schools in which Indians are taught in whole or in part from appropriations from the United States Treasury, and report to the Commissioner of Indian Affairs, what, in his judgment, are the defects, if any, in any of them, in system, in administration, or in means for the most effective advancement of the pupils therein toward civilization and self-support, and what changes are needed to remedy such defects as may exist, and to perform such other duties in connection with Indian

schools as may be prescribed by the Secretary of the Interior. (25 Stat. 1003.)

This section was part of the Indian appropriation act for the fiscal year 1890, cited above.

A further provision of this section repealed a provision of the similar act for the preceding year for the appointment of a superintendent of Indian schools, Act June 29, 1888, c. 503, § 8, 25 Stat. 239.

Subsequent Indian appropriation acts made appropriations annually for pay of the superintendent of Indian schools and for his traveling and other expenses, accompanied from year to year by a proviso that he should perform such other duties as might be imposed upon him by the Commissioner of Indian Affairs, subject to the approval of the Secretary of the Interior. But no such appropriation has been made since that for the fiscal year 1910, by Act March 3, 1909, c. 263, 35 Stat. 785.

§ 4168. (Act June 7, 1897, c. 3, § 1.) Employment of Indian girls and boys as assistants in schools.

Hereafter the Commissioner of Indian Affairs shall employ Indian girls as assistant matrons and Indian boys as farmers and industrial teachers in all Indian schools when it is practicable to do so. (30 Stat. 83.)

This was a provision of the Indian appropriation act for the fiscal year 1898, cited above.

Provisions to the same effect were made in the similar appropriation acts for previous years.

For various acts regarding the preferential employment of, and purchase of supplies from, Indians, see R. S. § 2069, ante, § 4015, and notes thereunder.

§ 4169. (Act Aug. 24, 1912, c. 388, § 1.) Leaves of absence to employés at Indian schools, for attendance at educational gatherings, etc.

Hereafter employees of Indian schools may be allowed, in addition to annual leave, educational leave not to exceed fifteen days per calendar year for attendance at educational gatherings, conventions, institutions, or training schools, if the interests of the service require, and under such regulations as the Secretary of the Interior may prescribe, and no additional salary or expense on account of this leave of absence shall be incurred. (37 Stat. 519.)

This was a proviso annexed to the appropriation for Indian schools, etc., in the Indian appropriation act for the fiscal year 1913, cited above.

§ 4170. (Act April 30, 1908, c. 153, § 1.) Expenditure of appropriations for school purposes; supervision and regulation; limitation per capita.

All expenditure of money herein or hereafter appropriated for school purposes among the Indians, shall be at all times under the supervision and direction of the Commissioner of Indian Affairs, and in all respects in conformity with such conditions, rules, and regulations as to the conduct and methods of instruction and expenditure of money as may be from time to time prescribed by him, subject to the supervision of the Secretary of the Interior: Provided, That, except for pay of superintendents, not more than one hundred and sixty-seven dollars shall be expended for the annual support and education of any one pupil in any school herein specifically provided for, except when, by reason of epidemic, accident, or other sufficient cause, the attendance is so reduced or cost of maintenance so high that a larger expenditure is absolutely necessary, when the Commissioner of Indian Affairs, with the approval of the Secretary of the Interior, may allow a larger per capita expenditure: Provided further, That the total amount appropriated for the support of such school shall not be exceeded: Provided further, That the number of pupils in any school entitled to the per capita allowance hereby provided for

shall be determined by taking the average enrollment for the entire fiscal year and not any fractional part thereof. (35 Stat. 72.)

These were provisions of the Indian appropriation act for the fiscal year 1909, cited above.

Similar provisions were made by the Indian appropriation acts for previous years, applicable to the appropriations by each particular act.

Subsequent Indian appropriation acts provide that "all moneys appropriated herein for school purposes among the Indians may be expended, without restriction as to per capita expenditure, for the annual support and education of any one pupil in any school." The provision for the fiscal year 1916 was by Act Aug. 1, 1914, c. 222, § 1, 38 Stat. 585. Said provision was not included in the Indian appropriation act for the fiscal year 1917, Act May 18, 1916, c. 125, § 1, 39 Stat. But, by a provision of Act Sept. 7, 1916, c. 455, post, § 4170a, all moneys appropriated or available for Indian school purposes may be expended without restriction as to per capita expenditure.

The recent appropriations for Indian schools, etc., are accompanied by a proviso restricting the expenditure thereof to educate children of less than one-fourth Indian blood. The provision for the fiscal year 1917, by Act May 18, 1916, c. 125, § 1, 39 Stat., was as follows:

"No part of this appropriation, or any other appropriation provided for herein, except appropriations made pursuant to treaties, shall be used to educate children of less than one-fourth Indian blood whose parents are citizens of the United States and the State wherein they live and where there are adequate free school facilities provided and the facilities of the Indian schools are needed for pupils of more than one-fourth Indian blood."

Previous provisions for admitting white children to Indian schools, on payment for tuition, made by Act March 1, 1907, c. 2285, and Act March 3, 1909, c. 263, are set forth post, §§ 4179, 4180.

Recent Indian appropriation acts also make separate appropriations for collection and transportation of pupils to and from Indian schools, etc., with a proviso that a specified part of the amount so appropriated may be used in placing Indian youths in employment in industrial pursuits. The provision for the fiscal year 1917, by Act May 18, 1916, c. 125, § 1, 39 Stat., was as follows:

"For collection and transportation of pupils to and from Indian and public schools, and placing school pupils, with the consent of their parents, under the care and control of white families qualified to give them moral, industrial, and educational training, $72,000: Provided, That not to exceed $5,000 of this sum may be used for obtaining remunerative employment for Indian youths and, when necessary, for payment of transportation and other expenses to their places of employment. The provisions of this section shall also apply to native pupils of school age under twenty-one years of age brought from Alaska."

The per capita limitation in the above section is modified by Act Sept. 7, 1916, c. 455, post, § 4170a.

Notes of Decisions

Proceeds of sales of articles manufactured in Indian schools.—See § 4041, ante, and notes thereunder.

Proceeds of sales of articles manufactured in Indian manual and training schools should be received by the Indian bureau and used for the benefit of the Indian children in the schools. (1883) 17 Op. Atty. Gen. 531.

§ 4170a. (Act Sept. 7, 1916, c. 455.) Expenditure of appropriations without restriction as to per capita of pupils; limitation.

All moneys appropriated or available for Indian school purposes may be expended without restriction as to per capita expenditure for the annual support and education of any one pupil in any Indian school: Provided, That in no event shall the per capita cost at any one school exceed the sum of $200 per annum. (39 Stat.)

This was an act entitled "An act providing that Indian schools may be maintained without restriction as to annual rate of expenditure per pupil," cited above.

For previous per capita limitation, see Act April 30, 1908, c. 153, § 1, ante, § 4170.

§ 4171. (Act April 21, 1904, c. 1402, § 1.) Suspension or discontinuance of schools; sale of buildings and plants; disposition of proceeds.

The Commissioner of Indian Affairs, may, when in his judgment the good of the service will be promoted thereby, suspend or dis-

continue any reservation Indian school, and, with the approval of the Secretary of the Interior, may sell any reservation school building or plant, that is no longer desirable as an Indian school upon any reservation and invest the proceeds in other school buildings and plants, as the needs of the service may demand, under such rules and regulations as he may, with the approval of the Secretary of the Interior, prescribe. (33 Stat. 211.)

This was a proviso annexed to the appropriation for Indian schools, etc., in the Indian appropriation act for the fiscal year 1905, cited above.

For other provisions regarding the disposition of government property at Indian reservations, see R. S. § 2122, ante, § 4112, and notes thereunder.

§ 4172. (Act Aug. 15, 1894, c. 290, § 1.) Children of Indians taking lands in severalty not excluded.

Hereafter in the expenditure of money appropriated for any of the purposes of education of Indian children, those children of Indians who have taken or may hereafter take lands in severalty under any existing law shall not, by reason thereof, be excluded from the benefits of such appropriation. (28 Stat. 311.)

This was a provision of the Indian appropriation act for the fiscal year 1895, cited above.

Similar provisions were made by the Indian appropriation acts for previous years.

§ 4173. (Act July 13, 1892, c. 164, § 1.) Regulations to secure attendance of children at school.

Hereafter the Commissioner of Indian Affairs, subject to the direction of the Secretary of the Interior, is hereby authorized and directed to make and enforce by proper means such rules and regulations as will secure the attendance of Indian children of suitable age and health at schools established and maintained for their benefit. (27 Stat. 143.)

This was a provision of the Indian appropriation act for the fiscal year 1893, cited above.

§ 4174. (Act March 3, 1893, c. 209, § 1.) Rations, etc., may be withheld for children not attending school.

The Secretary of the Interior may in his discretion, establish such regulations as will prevent the issuing of rations or the furnishing of subsistence either in money or in kind to the head of any Indian family for on account of any Indian child or children between the ages of eight and twenty-one years who shall not have attended school during the preceding year in accordance with such regulations. This provision shall not apply to reservations or part of reservations where sufficient school facilities have not been furnished nor until full notice of such regulations shall have been given to the Indians to be affected thereby.

The amount and value of subsistence so withheld shall be credited to the tribe or tribes from whom the same is withheld, to be issued and paid when in the judgment of the Secretary of the Interior they shall have fully complied with such regulations. (27 Stat. 628.)

These were provisions of the Indian appropriation act for the fiscal year 1894, cited above.

Further provisions of this act, for withholding rations, etc., from parents for non-attendance of their children at school, are set forth post, § 4175.

A special provision for withholding annuities or other payments due to Osage Indian minors, whose parents fail to place them in school, was made by Act June 30, 1913, c. 4, § 18, post, § 4176.

Cited without definite application,
In re Lelah-puc-ka-chee (D. C. 1899)
98 Fed. 429.

§ 4175. (Act March 3, 1893, c. 209, § 1.) Rations, etc., may be withheld from parents, etc., for nonattendance of children at school.

Hereafter the Secretary of the Interior may in his discretion withhold rations, clothing and other annuities from Indian parents or guardians who refuse or neglect to send and keep their children of proper school age in some school a reasonable portion of the year. (27 Stat. 635.)

This was a further provision of the Indian appropriation act for the fiscal year 1894, cited above.

See notes to preceding provisions of this act, ante, § 4174.

Cited without definite application.
In re Lelah-puc-ka-chee (D. C. 1899)
98 Fed. 429.

§ 4176. (Act June 30, 1913, c. 4, § 18.) Annuities, etc., may be withheld from Osage Indians for nonattendance of children at school.

Hereafter the Commissioner of Indian Affairs is authorized in his discretion to withhold any annuities or other payments due to Osage Indian minors, above six years of age, whose parents fail, neglect, or refuse to place such minors in some established school for a reasonable portion of each year and to keep such children in regular attendance thereof. The Commissioner of Indian Affairs is authorized to make such rules and regulations as may be necessary to put this provision into force and effect. (38 Stat. 96.)

These were provisions of the Indian appropriation act for the fiscal year 1914, cited above.

Previous general provisions of the same nature, of Act March 3, c. 209, § 1, are set forth ante, §§ 4174, 4175.

§ 4177. (Act Aug. 15, 1894, c. 290, § 11.) Child not to be sent to school out of State without consent of parents, etc.

No Indian child shall be sent from any Indian reservation to a school beyond the State or Territory in which said reservation is situated without the voluntary consent of the father or mother of such child if either of them are living, and if neither of them are living without the voluntary consent of the next of kin of such child. Such consent shall be made before the agent of the reservation, and he shall send to the Commissioner of Indian Affairs his certificate that such consent has been voluntarily given before such child shall be removed from such reservation. And it shall be unlawful for any Indian agent or other employé of the Government to induce, or seek to induce, by withholding rations or by other improper means, the parents or next of kin of any Indian to consent to the removal of any Indian child beyond the limits of any reservation. (28 Stat. 314.)

This section was part of the Indian appropriation act for the fiscal year 1895, cited above.

A subsequent provision that no Indian child should be taken to a school in another State against its will or without the written consent of its parents, was made by Act June 10, 1896, c. 398, § 1, post, § 4178.

Notes of Decisions

Habeas corpus by United States for custody of children taken from agency.—See U. S. v. Imoda (1881) 4 Mont. 38, 1 Pac. 721.

Application of statutes.—Act March 2, 1895 (28 Stat. 906), prohibiting any Indian agent or other employé of the government from withholding rations, to induce the parents or next of kin of any Indian child to consent to the removal of such child beyond the limits of the reservation, is applicable to the Sac and Fox tribe of Indians in Iowa, and is paramount to any regulation of the department. Under such statute the agent of the tribe and the superintendent of the school established therefor not only have no power to compel children to attend the school,

which is situated outside the reservation, by force, but the consent of the parents or next of kin of such children is required to authorize their removal thereto. In re Lelah-puc-ka-chee (D. C. 1899) 98 Fed. 429.

§ 4178. (Act June 10, 1896, c. 398, § 1.) Child not to be taken to school in another State against its will or without consent of parents.

Hereafter no Indian child shall be taken from any school in any State or Territory to a school in any other State against its will or without the written consent of its parents. (29 Stat. 348.)

This was a proviso annexed to appropriations for Indian schools in the Indian appropriation act for the fiscal year 1897, cited above.

Notes of Decisions

Marriage of Indian pupil as affecting right to remain at school.—The fact that an Indian girl, a minor, while in attendance at a government school which is outside the reservation of the tribe of which she is a member, contracts a marriage, in accordance with the custom of her tribe, with another member, does not entitle her husband to a writ of habeas corpus to remove her from the school, nor can she be retained there against her own will; but in such case her marriage releases her from parental authority, and she has the right to remain or not at her own election. So long as she remains unmarried, her attendance during her minority is subject entirely to the will of her parents, or those who stand to her in the parental relation. In re Lelah-puc-ka-chee (D. C. 1899) 98 Fed. 429.

§ 4179. (Act March 1, 1907, c. 2285.) Admission of white children to Indian day schools; tuition fees, and disposition thereof.

Hereafter white children may, under rules and regulations prescribed by the Commissioner of Indian Affairs, be admitted to any Indian day school: Provided, That the tuition fees charged for such children shall in no case exceed the tuition fees allowed or charged by the State or county in which such school is situated for the children admitted in the common schools of such State or county: And provided further, That all tuition fees paid for white children enrolled in Indian day schools shall be deposited in the United States Treasury to reimburse the funds out of which the schools last mentioned are maintained. (34 Stat. 1018.)

These were provisions of the Indian appropriation act for the fiscal year 1908, cited above.

Subsequent provisions for admission of white children to Indian boarding schools were made by Act March 3, 1909, c. 263, post, § 4180.

§ 4180. (Act March 3, 1909, c. 263.) Admission of white children to Indian boarding schools; tuition fees, and disposition thereof.

Hereafter white children may, under rules prescribed by the Commissioner of Indian Affairs, be admitted to Indian boarding schools on the payment of tuition fees at a rate to be fixed in said rules: Provided further, That all tuition fees paid for white children so enrolled shall be deposited in the United States Treasury to reimburse the fund out of which the school is supported. (35 Stat. 783.)

These were provisos annexed to the appropriation for collection and transportation of pupils to and from Indian schools in the Indian appropriation act for the fiscal year 1910, cited above.

Previous provisions for admission of white children to Indian day schools were made by Act March 1, 1907, c. 2285, ante, § 4179.

§ 4180a. (Act March 3, 1909, c. 263.) Transportation of Indian youths under fourteen to schools at government expense prohibited.

No Indian pupil under the age of fourteen years shall be transported at government expense to any Indian school beyond the

limits of the State or Territory in which the parents of such child reside or of the adjoining State or Territory. (35 Stat. 783.)

This was a provision of the Indian appropriation act for the fiscal year 1910, cited above.

CHAPTER FOUR B

Rights of Way Through Indian Lands

This chapter, inserted here as additional to the original chapters of Title XXVIII of the Revised Statutes, includes the provisions, subsequent to the Revision, and general in their nature, for grants of rights of way for railroad, telegraph, and telephone lines and purposes incident thereto, for pipe lines, and for public highways, consisting mainly of provisions of Act March 2, 1899, c. 374, 30 Stat. 990, and later acts amendatory thereof or additional thereto, remaining in force and applicable to Indian reservations, lands, and allotments.

Sec.
4181. Rights of way through Indian reservations, etc., for railway, telegraph and telephone lines; town site stations.
4182. Width of right of way; grounds for stations, etc.
4183. Survey; maps; compensation for right of way.
4184. Time for completion of road; forfeiture of rights granted.
4185. Payments by railroads in Indian Territory for benefit of Indians; transportation rates; transportation of mails.
4186. Application of Act March 3, 1875, c. 152, § 2.
4187. Regulations for execution of act.
4188. Right to amend or repeal act.
4189. Railways in Indian reservations; acquisition of lands for reservoirs, materials, or ballast pits, or for growing trees to protect lines; application and conveyance; restrictions; use of proceeds.
4190. Railways in Indian reservations; acquisition of lands allotted in severalty to Indians, for reservoirs, materials, etc.
4191. Rights of way for telephone and telegraph lines through Indian reservations, etc.; grants by Secretary of Interior; approval of maps of location; compensation to Indians; annual tax; regulations; state, territorial or municipal taxation; regulation of tolls or charges; regulation of lines by municipalities.
4192. Right of way through Indian reservations or other Indian lands for pipe lines.
4193. Right to amend or repeal act.
4194. Opening highways through Indian reservations, etc.

§ 4181. (Act March 2, 1899, c. 374, § 1, as amended, Act June 25, 1910, c. 431, § 16.) Rights of way through Indian reservations, etc., for railway, telegraph and telephone lines; town site stations.

A right of way for a railway, telegraph and telephone line through any Indian reservation in any State or Territory, or through any lands held by an Indian tribe or nation in Indian Territory, or through any lands reserved for an Indian agency or for other purposes in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, is hereby granted to any railroad company organized under the laws of the United States, or of any State or Territory, which shall comply with the provisions of this Act and such rules and regulations as may be prescribed thereunder: Provided, That no right of way shall be granted under this Act until the Secretary of the Interior is satisfied that the company applying has made said application in good faith and with intent and ability to construct said road, and in case objection to the granting of such right of way shall be made, said Secretary shall afford the parties so objecting a full opportunity to be heard: Provided further, That where a railroad has heretofore been constructed, or is in actual course of construction, no parallel right

of way within ten miles on either side shall be granted by the Secretary of the Interior unless, in his opinion, public interest will be promoted thereby. Provided also, That as a condition precedent to each and every grant of a right of way under authority of this Act, each and every railway company applying for such grant shall stipulate that it will construct and permanently maintain suitable passenger and freight stations for the convenience of each and every town site established by the Government along said right of way. (30 Stat. 990. 36 Stat. 859.)

This was the first section of an act entitled "An act to provide for the acquiring of rights of way by railroad companies through Indian reservations, Indian lands, and Indian allotments, and for other purposes."

The other sections of the act, sections 2–8 thereof, are set forth post, §§ 4182–4188.

This section, as originally enacted, did not contain the last proviso thereof, as set forth here. Said proviso was added by amendment by Act June 25, 1910, c. 431, § 16, last cited above.

This act, so far as it applied to the Indian Territory and Oklahoma, was repealed by Act Feb. 28, 1902, c. 134, § 23, 32 Stat. 50. Said repealing section contained a clause saving rights already accrued.

Further provisions for grants of rights of way for telephone and telegraph lines through Indian reservations, etc., were made by Act March 3, 1901, c. 832, § 3, post, § 4191.

Grants for railways in Indian reservations of lands for reservoirs, materials, etc., were authorized by provisions of Act March 3, 1909, c. 263, and Act May 6, 1910, c. 204, post, §§ 4189, 4190.

Grants of rights of way for pipe lines for conveyance of oil and gas through Indian reservations and other Indian lands were authorized by Act March 11, 1904, c. 505, post, §§ 4192, 4193.

Grants of rights of way for electrical poles and lines for transmission, etc., of electrical power, and for telephone and telegraph purposes, over public lands, national forests, and reservations of the United States, were also authorized by provisions of said Act March 4, 1911, c. 238, post, §§ 4192, 4193.

Sections 1–12 of Act Feb. 28, 1902, c. 134, 32 Stat. 43, granted to the Enid & Anadarko Railway Company a right of way for a railway and telegraph and telephone line through the Territory of Oklahoma and the Indian Territory, with provisions for the construction and regulation thereof. These sections are omitted as local only. Sections 13–23 of said Act Feb. 28, 1902, c. 134, 32 Stat. 47, related to rights of way for railway and telegraph and telephone lines in the Indian Territory and the Territory of Oklahoma. Said sections were superseded by the admission of said Territories to the Union as the State of Oklahoma, pursuant to Act June 16, 1906, c. 3335, 34 Stat. 267.

Notes of Decisions

"Public land" in grant of railroad right of way.—See Kindred v. Union Pac. R. Co. (1912) 32 Sup. Ct. 780, 782, 225 U. S. 582, 56 L. Ed. 1216, affirming decree (1909) 168 Fed. 648, 94 C. C. A. 112.

Grant of right of way as extinguishing Indian right.—The United States has full control of the fee in lands reserved by treaty for the occupation of Indians; and while a grant, without reference to possession, and without designation of any use, requiring the delivery of possession, is subject to the Indian right of occupancy until the same is extinguished by the government, yet a grant for a purpose necessarily involving possession, as a railroad right of way, operates of itself to extinguish the Indian right, and carries both title and right of possession. Missouri, K. & T. Ry. Co. v. Roberts (1894) 14 Sup. Ct. 496, 497, 152 U. S. 114, 38 L. Ed. 377.

Operation of rights acquired by grants of railroad rights of way.—See Payne v. Kansas & A. V. R. Co. (C. C. 1891) 46 Fed. 546 (order reversed Kansas & A. V. Ry. Co. v. Payne [1892] 49 Fed. 114, 1 C. C. A. 183); California & O. Land Co. v. Rankin (C. C. 1898) 87 Fed. 532 (affirming on rehearing California & O. Land Co. v. Worden [C. C. 1898] 85 Fed. 94); (1870) 13 Op. Atty. Gen. 285.

Conditions precedent annexed to grant of right of way.—See (1888) 19 Op. Atty. Gen. 199.

Cited without definite application, U. S. v. Ft. Smith & W. R. Co. (1912) 195 Fed. 211, 115 C. C. A. 163.

§ 4182. (Act March 2, 1899, c. 374, § 2, as amended, Act June 21, 1906, c. 3504.) Width of right of way; grounds for stations, etc.

Such right of way shall not exceed fifty feet in width on each

side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include grounds adjacent thereto for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed two hundred feet in width by a length of three thousand feet, and not more than one station to be located within any one continuous length of ten miles of road. (30 Stat. 990. 34 Stat. 330.)

This section as originally enacted, was as follows:

"Such right of way shall not exceed fifty feet in width on each side of the center line of the road, except where there are heavy cuts and fills, when it shall not exceed one hundred feet in width on each side of the road, and may include ground adjacent thereto for station buildings, depots, machine shops, side tracks, turnouts, and water stations, not to exceed one hundred feet in width by a length of two thousand feet, and not more than one station to be located within any one continuous length of ten miles of road: Provided, That this section shall apply to all rights of way heretofore granted to railroads in the Indian Territory where no provisions defining the width of the rights of way are set out in the Act granting the same."

It was amended to read as set forth here, by Act June 21, 1906, c. 3504, last cited above.

See notes to preceding section of this act, ante, § 4181.

Cited without definite application,
U. S. v. Ft. Smith & W. R. Co. (1912)
195 Fed. 211, 115 C. C. A. 163.

§ 4183. (Act March 2, 1899, c. 374, § 3.) Survey; maps; compensation for right of way.

The line of route of said road may be surveyed and located through and across any of said lands at any time, upon permission therefor being obtained from the Secretary of the Interior; but before the grant of such right of way shall become effective a map of the survey of the line or route of said road must be filed with and approved by the Secretary of the Interior, and the company must make payment to the Secretary of the Interior for the benefit of the tribe or nation, of full compensation for such right of way, including all damage to improvements and adjacent lands, which compensation shall be determined and paid under the direction of the Secretary of the Interior, in such manner as he may prescribe. Before any such railroad shall be constructed through any land, claim, or improvement, held by individual occupants or allottees in pursuance of any treaties or laws of the United States, compensation shall be made to such occupant or allottee for all property to be taken, or damage done, by reason of the construction of such railroad. In case of failure to make amicable settlement with any such occupant or allottee, such compensation shall be determined by the appraisement of three disinterested referees, to be appointed by the Secretary of the Interior, who, before entering upon the duties of their appointment, shall take and subscribe before competent authority an oath that they will faithfully and impartially discharge the duties of their appointment, which oath, duly certified, shall be returned with their award to the Secretary of the Interior. If the referees can not agree, then any two of them are authorized to make the award. Either party being dissatisfied with the finding of the referees shall have the right within sixty days after the making of the award and notice of the same, to appeal, in case the land in question is in the Indian Territory, by original petition to the United States court in the Indian Territory sitting at the place nearest and most convenient to the property sought to be condemned; and if said land is situated in any State or Territory other than the Indian Territory, then to the United States district court for such State or Territory, where the case shall be tried de novo and the judgment for damages rendered by the court shall be final and conclusive.

When proceedings are commenced in court as aforesaid, the railroad company shall deposit the amount of the award made by the referees with the court to abide the judgment thereof, and then have the right to enter upon the property sought to be condemned and proceed with the construction of the railway. Each of the referees shall receive for his compensation the sum of four dollars per day while engaged in the hearing of any case submitted to them under this Act. Witnesses shall receive the fees usually allowed by courts within the district where such land is located. Costs, including compensation of the referees, shall be made part of the award or judgment, and be paid by such railroad company. (30 Stat. 991.)

See notes to section 1 of this act, ante, § 4181.

Notes of Decisions

Reversion of right of way.—As to reversion of right of way, see Enid & A. Ry. Co. v. Kephart (1907) 19 Okl. 1, 91 P. 1049.

§ 4184. (Act March 2, 1899, c. 374, § 4.) Time for completion of road; forfeiture of rights granted.

If any such company shall fail to construct and put in operation one-tenth of its entire line in one year, or to complete its road within three years after the approval of its map of location by the Secretary of the Interior, the right of way hereby granted shall be deemed forfeited and abandoned ipso facto as to that portion of the road not then constructed and in operation: Provided, That the Secretary may, when he deems proper, extend, for a period not exceeding two years, the time for the completion of any road for which right of way has been granted and a part of which shall have been built. (30 Stat. 991.)

See notes to section 1 of this act, ante, § 4181.

§ 4185. (Act March 2, 1899, c. 374, § 5.) Payments by railroads in Indian Territory for benefit of Indians; transportation rates; transportation of mails.

Where a railroad is constructed under the provisions of this Act through the Indian Territory there shall be paid by the railroad company to the Secretary of the Interior, for the benefit of the particular nation or tribe through whose lands the road may be located, such an annual charge as may be prescribed by the Secretary of the Interior, not less than fifteen dollars for each mile of road, the same to be paid so long as said land shall be owned and occupied by such nation or tribe, which payment shall be in addition to the compensation otherwise required herein. And within the Indian Territory upon any railroad constructed under the provisions of this Act the rates and charges for passenger and freight service, if not otherwise prescribed by law, may be prescribed by the Secretary of the Interior from time to time, and the grants herein are made upon condition that the companies shall transport mails whenever required to do so by the Post-Office Department. (30 Stat. 992.)

See notes to section 1 of this act, ante, § 4181.

Notes of Decisions

Compensation for railroad right of way.—See U. S. v. Ft. Smith & W. R. Co. (1912) 195 Fed. 211, 115 C. C. A. 163; (1882) 17 Op. Atty. Gen. 265; (1888) 19 Op. Atty. Gen. 199.

§ 4186. (Act March 2, 1899, c. 374, § 6.) Application of Act March 3, 1875, c. 152, § 2.

The provisions of section two of the Act of March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," are hereby extended and made applicable to rights of way

granted under this Act and to railroad companies obtaining such rights of way. (30 Stat. 992.)

See notes to section 1 of this act, ante, § 4181.

Act March 3, 1875, c. 152, § 2, mentioned in this section, is set forth post, § 4922.

§ 4187. (Act March 2, 1899, c. 374, § 7.) Regulations for execution of act.

The Secretary of the Interior shall make all needful rules and regulations, not inconsistent herewith, for the proper execution and carrying into effect of all the provisions of this Act. (30 Stat. 992.)

See notes to section 1 of this act, ante, § 4181.

§ 4188. (Act March 2, 1899, c. 374, § 8.) Right to amend or repeal act.

Congress hereby reserves the right at any time to alter, amend, or repeal this Act, or any portion thereof. (30 Stat. 992.)

See notes to section 1 of this act, ante, § 4181.

§ 4189. (Act March 3, 1909, c. 263.) Railways in Indian reservations; acquisition of lands for reservoirs, materials, or ballast pits, or for growing trees to protect lines; application and conveyance; restrictions; use of proceeds.

When, in the judgment of the Secretary of the Interior, it is necessary for any railway company owning or operating a line of railway in any Indian reservation to acquire lands in such Indian reservation for reservoirs, material, or ballast pits for the construction, repair, and maintenance of its railway, or for the purpose of planting and growing thereon trees to protect its line of railway, the said Secretary be, and he is hereby, authorized to grant such lands to any such railway company under such terms and conditions and such rules and regulations as may be prescribed by the said Secretary.

That when any railway company desiring to secure the benefits of this provision shall file with the Secretary of the Interior an application describing the lands which it desires to purchase, and upon the payment of the price agreed upon the said Secretary shall cause such lands to be conveyed to the railway company applying therefor upon such terms and conditions as he may deem proper: Provided, That no lands shall be acquired under the terms of this provision in greater quantities than forty acres for any one reservoir, and one hundred and sixty acres for any material or ballast pit, to the extent of not more than one reservoir and one material or gravel pit in any one section of ten miles of any such railway in any Indian reservation: And provided further, That the lands acquired for tree planting shall be taken only at such places along the line of the railway company applying therefor as in the judgment of the said Secretary may be necessary, and shall be taken in strips adjoining and parallel with the right of way of the railway company taking the same, and shall not exceed one hundred and fifty feet in width.

That all moneys paid for such lands shall be deposited in the Treasury of the United States to the credit of the tribe or tribes, and the moneys received by said Secretary as damages sustained by individual members of the Indian tribe, which damages shall be ascertained by the Secretary of the Interior and paid by the railway company taking such lands, shall be paid by said Secretary to the Indian or Indians sustaining such damages. (35 Stat. 781.)

These paragraphs were part of the Indian appropriation act for the fiscal year 1910, cited above.

These provisions were extended to lands allotted in severalty to individual Indians, by Act May 6, 1910, c. 204, post, § 4190.

Notes of Decisions

Rights beyond railroad right of way.—See (1887) 19 Op. Atty. Gen. 42.

—— Jurisdiction of courts.—See (1887) 19 Op. Atty. Gen. 42.

§ 4190. (Act May 6, 1910, c. 204.) Railways in Indian reservations; acquisition of lands allotted in severalty to Indians, for reservoirs, materials, etc.

The provisions of the Act entitled "An Act making appropriation for the current and contingent expenses of the Indian Department, for fulfilling treaty stipulations with various Indian tribes, and for other purposes, for the fiscal year ending June thirtieth, nineteen hundred and ten," approved March third, nineteen hundred and nine, which authorized the Secretary of the Interior to grant to railway companies lands in Indian reservations for reservoirs, material or ballast pits, or for the purpose of planting and growing trees to protect their lines of railway, be, and the same are hereby, extended and made applicable to any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation; that the damages and compensation to be paid to any Indian allottee shall be ascertained and fixed in such manner as the Secretary of the Interior may direct and shall be paid by the railway company to said Secretary; that the damages and compensation paid to the Secretary of the Interior by the railway company taking any such land shall be paid by said Secretary to the allottee sustaining such damages. (36 Stat. 349.)

This was an act entitled "An act granting lands for reservoirs, and so forth."

The provisions of Act March 3, 1909, c. 263, mentioned in this act, are set forth ante, § 4189.

§ 4191. (Act March 3, 1901, c. 832, § 3.) Rights of way for telephone and telegraph lines through Indian reservations, etc.; grants by Secretary of Interior; approval of maps of location; compensation to Indians; annual tax; regulations; state, territorial or municipal taxation; regulation of tolls or charges; regulation of lines by municipalities.

The Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from the Secretary of the Interior, and the maps of definite location of the lines shall be subject to his approval. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; and where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained; and all such lines shall be constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority; and Congress hereby expressly

reserves the right to regulate the tolls or charges for the transmission of messages over any lines constructed under the provisions of this Act: Provided, That incorporated cities and towns into or through which such telephone or telegraphic lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities. (31 Stat. 1083.)

This section was part of the Indian appropriation act for the fiscal year 1902.

A further provision of the section, that lands allotted in severalty to Indians might be condemned for any public purpose under the laws of the state or territory where located, in the same manner as land owned in fee might be condemned, is set forth post, § 4240

Notes of Decisions

Franchises under statute.—Telephone companies doing business in the Indian Territory prior to statehood obtained their authority to construct lines in streets of municipalities therein under this section. South McAlester-Eufaula Telephone Co. v. State (Okl. 1910) 106 P. 962.

Annulling grants by Indian nations.—This legislation annulled any prior grants by one of Indian nations in conflict therewith. Muskogee Nat. Tel. Co. v. Hall (1902) 118 Fed. 382, 55 C. C. A. 208. See Munn v. Illinois (1876) 94 U. S. 113, 24 L. Ed. 77; Chicago, B. & Q. R. Co. v. Iowa (1876) 94 U. S. 155, 24 L. Ed. 94; Pensacola Tel. Co. v. Western Union Tel. Co. (1877) 96 U. S. 1, 24 L. Ed. 708; Wabash, St. L. & P. R. Co. v. Illinois (1886) 118 U. S. 557, 7 Sup. Ct. 4, 30 L. Ed. 244. And see Muskogee Nat. Tel. Co. v. Hall (1901) 64 S. W. 600, 4 Ind. T. 18.

Parties to suits involving right to erect telephones.—The Creek Nation is a proper party to a suit by a telephone company to restrain persons from erecting telephones in a certain town in such nation, where the latter are taking possession of the lands of such nation in the town without having obtained authority from the interior department. Muskogee Nat. Tel. Co. v. Hall (1901) 64 S. W. 600, 4 Ind. T. 18.

Conflicting state statutes.—Laws N. Y. 1902, c. 296, entitled "An act to amend the Indian Law in relation to the erection of poles and wires on the Tonawanda reservation," is not unconstitutional, as conflicting with this section. Jemison v. Bell Telephone Co. of Buffalo (1906) 79 N. E. 728, 186 N. Y. 493, affirming judgment (1905) 95 N. Y. S. 1137, 109 App. Div. 911.

§ 4192. (Act March 11, 1904, c. 505, § 1.) Right of way through Indian reservations or other Indian lands for pipe lines.

The Secretary of the Interior is hereby authorized and empowered to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. No such lines shall be constructed across Indian lands, as above mentioned, until authority therefor has first been obtained from, and the maps of definite location of said lines approved by, the Secretary of the Interior: Provided, That the construction of lateral lines from the main pipe line establishing connection with oil and gas wells on the individual allotments of citizens may be constructed without securing authority from the Secretary of the Interior and without filing maps of definite location, when the consent of the allottee upon whose lands oil or gas wells may be located and of all other allottees through whose lands said lateral pipe lines may pass has been obtained by the pipe line company: Provided further, That in case it is desired to run a pipe line under the line of any railroad, and satisfactory arrangements can not be made with the railroad company, then the question shall be

referred to the Secretary of the Interior, who shall prescribe the terms and conditions under which the pipe line company shall be permitted to lay its lines under said railroad. The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. And where such lines are not subject to State or Territorial taxation the company or owner of the line shall pay to the Secretary of the Interior, for the use and benefit of the Indians, such annual tax as he may designate, not exceeding five dollars for each ten miles of line so constructed and maintained under such rules and regulations as said Secretary may prescribe. But nothing herein contained shall be so construed as to exempt the owners of such lines from the payment of any tax that may be lawfully assessed against them by either State, Territorial, or municipal authority. And incorporated cities and towns into and through which such pipe lines may be constructed shall have the power to regulate the manner of construction therein, and nothing herein contained shall be so construed as to deny the right of municipal taxation in such towns and cities, and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: Provided, That the rights herein granted shall not extend beyond a period of twenty years: Provided further, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this Act for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. (33 Stat. 65.)

This section and the section next following were an act entitled "An act authorizing the Secretary of the Interior to grant right of way for pipe lines through Indian lands."

Previous provisions for grants of rights of way for pipe lines through public lands in Colorado and Wyoming were made by Act May 21, 1896, c. 212, post, §§ 4949–4952.

Notes of Decisions

Power to enact statute.—This act is constitutional. Congress could authorize the Secretary of the Interior by law to grant a right of way in the nature of an easement for pipe lines over the allotment of a minor Creek Indian, whose allotment contained restrictions against alienation, for the conveyance of oil and gas, on payment of due consideration for the benefit of the allottee. Texas Co. v. Henry (1912) 34 Okl. 342, 126 P. 224.

Cited without definite application, Henry Gas Co. v. U. S. (1911) 191 Fed. 132, 111 C. C. A. 612.

§ 4193. (Act March 11, 1904, c. 505, § 2.) Right to amend or repeal act.

The right to alter, amend, or repeal this Act is expressly reserved. (33 Stat. 65.)

§ 4194. (Act March 3, 1901, c. 832, § 4.) Opening highways through Indian reservations, etc.

The Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or treaties but which have not been conveyed to the allottees with full power of alienation. (31 Stat. 1084.)

This section was part of the Indian appropriation act for the fiscal year 1902, cited above.

A provision of section 3 of this act, that lands allotted in severalty to Indians

might be condemned for any public purpose under the laws of the State or Territory where located, in the same manner as land owned in fee might be condemned, is set forth post, § 4240.

Notes of Decisions

Highways through Indian reservations.—The state has power to construct a highway across an Indian reservation. O'Meara v. Commissioners of Allegany (N. Y. 1874) 3 Thomp. & C. 235; France v. Erie R. Co. (N. Y. 1874) 2 Hun, 513, 5 Thomp. & C. 12.

—— **Dedication.**—An Indian, under disability to convey his lands without the consent of the secretary of the interior, cannot make a valid dedication of a portion of such lands for a public highway, nor can any dedication be presumed against him. State v. O'Laughlin (1878) 19 Kan. 504.

Conflicting state statutes.—Laws N. Y. 1902, c. 296, entitled "An act to amend the Indian Law in relation to the erection of poles and wires on the Tonawanda reservation," is not unconstitutional, as conflicting with this section. Jemison v. Bell Telephone Co. of Buffalo (1906) 79 N. E. 728, 186 N. Y. 493, affirming judgment (1905) 95 N. Y. S. 1137, 109 App. Div. 911.

CHAPTER FOUR C

Allotment of Indian Lands

This chapter, inserted here as additional to the original chapters of Title XXVIII of the Revised Statutes, includes provisions, general and permanent in their nature, for allotment of land in severalty to Indians and the protection of the rights of the allottees, their heirs, etc., particularly the provisions, remaining in force, of the General Allotment Act of Feb. 8, 1887, c. 119, 24 Stat. 388, the act to amend and extend the benefits of said General Allotment Act, Act Feb. 28, 1891, c. 383, 26 Stat. 794, and the act to provide for determining the heirs and for disposition and sale of allotments of deceased Indians, etc., Act June 25, 1910, c. 431, 36 Stat. 855, and acts amendatory thereof and additional thereto. Special provisions relating to such allotments, etc., to particular tribes or bands, or to individual Indians, or of particular reservations or tracts, etc., of land, are not included.

Sec.
4195. Allotments on Indian reservations; irrigable and non-irrigable lands; effect of provisions for allotments in treaty or act setting apart reservation.
4196. Selection of allotments.
4197. Allotments to be made by special agents and agents in charge of reservations; certificates thereof.
4198. Allotments from public lands to Indians not residing on reservations, etc.; payment from Treasury of fees to officers of local land offices.
4199. Allotments from public lands to Indians making settlement thereon; patents therefor; payment from Treasury of fees to officers of local land offices.
4200. Allotments within national forests, to Indians occupying lands therein, not entitled to allotments on Indian reservations, etc.; lands more valuable for agriculture or grazing than for timber to be allotted.
4201. Patents for allotments to be held in trust; laws of descent and partition applicable; purchase by United States of lands not allotted, for homesteads to settlers, purchase money to be held in trust; confirmation of occupancy of lands by religious organizations; preference of allottees in employment of Indian police, etc.
4202. Continuance of restrictions on alienation contained in patent.
4203. Allottees, after conveyance to them in fee, entitled to benefit of and subject to laws of State, etc.; issue of patents in fee to allottees, when competent, at any time; lands not liable for prior debts; allottees having trust patents to be under exclusive jurisdiction of United States.
4204. Irrigation of allotted lands; regulation of use of water.
4205. Irrigation of allotted lands in carrying out irrigation project under Reclamation Act; arrangements authorized; no lien, etc., to be created against lands.
4205a. Irrigation projects; estimates; maximum of cost; reports.
4205b. Statements of irrigation projects to Congress.
4205c. Superintendents of irrigation; employment.
4205d. Statements of irrigation projects to Congress.

Sec.
4205e. Irrigation for Indian reservations and allotments; expenditure of appropriations; maintenance charges on irrigable lands; expenditures reimbursable from Indian funds; apportionment for reimbursement; annual cost account, etc., to be transmitted to Congress.
4206. Provisions of allotment Act not to extend to territory occupied by certain tribes.
4207. Provisions of Allotment Act extended to certain tribes in Indian Territory.
4208. Appropriation for surveys to be repaid out of proceeds of sales under act.
4209. Power to grant rights of way, etc., not affected by act.
4210. Removal of Southern Utes to new reservation not prevented by act.
4211. Surrender of patent, and selection of and patent for other land.
4212. Correction of errors in allotments and patents; cancellation of patents erroneously issued, and opening to settlement of lands so patented; restrictions on cancellation of conditional patents.
4213. Cancellation of allotment of unsuitable land, and exchange for and allotment of other land.
4214. Actions for allotments; jurisdiction; parties; effect of judgment; right of appeal.
4215. Actions for allotments; proceedings; service of petition on and defense by district attorney.
4216. Limitations of actions for lands patented in severalty under treaties.
4217. Leases of allotted lands where allottee is incapacitated to occupy or improve them.
4217a. Leases of arid allotted lands where allottee is incapacitated to occupy or improve them.
4218. Leases of lands occupied by Indians, bought and paid for by them, not needed for farming, etc., purposes.
4219. Leases of surplus lands of tribe.
4220. Leases of allotted lands for mining purposes.
4221. Leases of allotments held in trust; disposition of proceeds.
4222. Determination of descent of land to heirs of deceased allottee.
4223. Sale of allotted lands by heirs of deceased Indian.
4224. Sale of allotted lands on petition of allottee or his heirs, etc.; patents to heirs of deceased allottee, or sale of lands allotted to him; use of proceeds of sales; patents to purchasers; exception from section of certain States.
4225. Sale of allotment, or inherited interest therein, of noncompetent Indian; use of proceeds; title conveyed.
4226. Ascertainment of heirs of deceased allottee; issue of patent to such heirs, or sale or partition of lands; disposition of proceeds of sale; certificate of competency, and effect to remove restrictions on alienation; deposit of Indian moneys in banks.
4226a. Ascertainment of heirs of deceased allottees; authority to administer oaths in investigations; power to require attendance of witnesses at hearings.
4226b. Witnesses; compelling attendance.
4227. Payment or deduction of cost of determining heirs from proceeds of lands or trust funds of estates; account and report thereof.
4227a. Partition of allotment among heirs; patents.
4228. Disposal by will of allotments held under trust or other patent containing restrictions, or of moneys, etc., held in trust; approval of will required; trust or restrictive period not terminated thereby; sale of lands, issue of patents in fee to devisees, payment of moneys to legatee, etc.; certain tribes excepted.
4229. Surrender of allotments by relinquishment for benefit of children.
4230. Sale of timber on unallotted lands of reservations; use of proceeds; certain states excepted.
4231. Sale of timber on allotments held under trust or other patents containing restrictions; use of proceeds.
4232. Patents with restrictions for lots in Indian villages on reservations in State of Washington.
4233. Cancellation of trust patents for allotments within power or reservoir sites or reservation for irrigation purposes; reimbursement for improvements; lieu allotments.
4234. Provisions of act not to apply to certain tribes.
4235. Lands acquired under Allotment Act not liable for debts prior to final patent therefor.
4236. Moneys from lease or sale of lands held in trust not liable for debts contracted during trust period or during minority of Indian.

Sec.
4237. Interest on moneys from proceeds of sale of lands, held for minors.
4238. Sale of allotted lands within reclamation projects; use of proceeds.
4239. Payment of taxes on allotted lands from share of allottee in tribal funds.
4240. Condemnation of allotted lands for public purposes under laws of States, etc.

§ 4195. (Act Feb. 8, 1887, c. 119, § 1, as amended, Act Feb. 28, 1891, c. 383, § 1, and Act June 25, 1910, c. 431, § 17.) Allotments on Indian reservations; irrigable and non-irrigable lands; effect of provisions for allotments in treaty or act setting apart reservation.

In all cases where any tribe or band of Indians has been or shall hereafter be located upon any reservation created for their use by treaty stipulation, Act of Congress, or executive order, the President shall be authorized to cause the same or any part thereof to be surveyed or resurveyed whenever in his opinion such reservation or any part may be advantageously utilized for agricultural or grazing purposes by such Indians, and to cause allotment to each Indian located thereon to be made in such areas as in his opinion may be for their best interest not to exceed eighty acres of agricultural or one hundred and sixty acres of grazing land to any one Indian. And whenever it shall appear to the President that lands on any Indian reservation subject to allotment by authority of law have been or may be brought within any irrigation project, he may cause allotments of such irrigable lands to be made to the Indians entitled thereto in such areas as may be for their best interest not to exceed, however, forty acres to any one Indian, and such irrigable land shall be held to be equal in quantity to twice the number of acres of non-irrigable agricultural land and four times the number of acres of non-irrigable grazing land: Provided, That the remaining area to which any Indian may be entitled under existing law after he shall have received his proportion of irrigable land on the basis of equalization herein established may be allotted to him from nonirrigable agricultural or grazing lands: Provided further, That where a treaty or Act of Congress setting apart such reservation provides for allotments in severalty in quantity greater or less than that herein authorized, the President shall cause allotments on such reservations to be made in quantity as specified in such treaty or Act subject, however, to the basis of equalization between irrigable and non-irrigable lands established herein, but in such cases allotments may be made in quantity as specified in this Act, with the consent of the Indians expressed in such manner as the President in his discretion may require. (24 Stat. 388. 26 Stat. 794. 36 Stat. 859.)

This was the first section of the General Allotment Act of Feb. 8, 1887, c. 119, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

The section, as originally enacted, provided for allotments of different quantities to various classes of Indians, viz., heads of families, single persons over 18 years of age, orphan children under 18 years of age, and other single persons under that age.

It was amended, by substituting for said provisions a clause providing for allotment to each Indian of one-eighth of a section of land, and besides some minor changes, by inserting a proviso for making allotments in the quantity specified, where existing agreements or laws provided for allotments in accordance with the original act, by Act Feb. 28, 1891, c. 383, § 1, cited above.

Said section 1 of said amendatory act was thereafter amended, by making numerous verbal changes, by changing said provision as to the quantity of land to be allotted to each Indian so that it should not exceed 80 acres of agricultural land or 160 acres of grazing land, by inserting the provisions as to allotment of irrigable and nonirrigable lands which are contained in the section and the two provisos set forth here, and by omitting other provisos of said

original and first amendatory acts, by Act June 25, 1910, c. 431, § 17, last cited above.

The other sections of said General Allotment Act, sections 2–11 thereof, are set forth post, §§ 4196–4198, 4201, 4203, 4204, 4206, 4208–4210.

Said first amendatory Act Feb. 28, 1891, c. 383, 26 Stat. 794, was entitled "An act to amend and further extend the benefits of" said General Allotment Act of Feb. 8, 1887.

Section 2 of said amendatory Act Feb. 28, 1891, c. 383, provided that where allotments had been made upon any reservation under said original act, and the quantity of land in such reservation was sufficient to give each member of the tribe 80 acres, such allotments should be revised and equalized under the provisions of said amendatory act. Said section is omitted as temporary merely, and executed.

The other sections of said amendatory Act of Feb. 28, 1891, c. 383, being sections 3–5 thereof, so far as they remain in force, are set forth post, §§ 4199, 4218, 4222.

Notes of Decisions

1. Constitutionality.
2. Construction in general.
3. Indian reservations.
4. —— Creation.
5. —— President's power.
6. ——Power of the secretary of the Interior.
7. —— Regulations by Indian officers.
8. —— Revocation of reservations.
9. —— Extinguishment of Indian tribe's interest.
10. —— Appropriations for surveys and resurveys.
11. "Allotment" defined.
12. —— Effect of.
13. —— Necessity of allotment of right to land subject to Indian right of occupancy.
14. —— Quantity of allotment.
15. —— Barring right to allotment.
16. —— United States' title to allotments.
17. —— Indian allottees' title to and interest in allotments.
18. "Allottee" defined.
19. Allotments under statute.
20. Indians "located" on reservation.
21. Indians entitled to allotments.
22. Reservation to chief or other member of a tribe as present grant of title.
23. Decisions of department of interior.
24. Laws governing allottees.

1. Constitutionality.—Act Feb. 8, 1887, c. 119, is not in conflict with Const. art. 1, § 8. State v. Norris (1893) 37 Neb. 299, 55 N. W. 1086.

2. Construction in general.—An Indian need not have been on the reservation at the instant Act 1891, amending the General Allotment Act of 1887, was passed, to avail himself of the benefit of the provision of the later act giving to each Indian located thereon one-eighth section of land. Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 223 U. S. 215, 56 L. Ed. 409.

Act 1887, c. 119, marks a new epoch, in which congress has begun to deal with the Indians as individuals. (1890) 19 Op. Atty. Gen. 559.

Nothing contained in Allotment Act Feb. 8, 1887, c. 119, nor the Amendatory Act Feb. 28, 1891 (this and following sections), which would forbid the allotment of pine lands, was imported into Steenerson Act April 28, 1904, c. 1786, 33 Stat. 539, providing for allotment to Chippewa Indians residing on the White Earth Reservation. Steenerson Act held to modify Act Feb. 8, 1887, Act Jan. 14, 1889, and Act Feb. 28, 1891 (in part section 4195 et seq., this compilation). Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 296, 223 U. S. 215, 56 L. Ed. 409, affirming decree U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229.

Under Act 1887, c. 119, a continuing power was vested in the President, which is not exhausted by the first order for allotments, but others may be thereafter made from time to time in his discretion. U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229.

Under this section and sections 4201, 4223, post, and Act March 1, 1907, c. 2285, 34 Stat. 1034, all adult mixed-blood Indians acquired the right to transfer their allotments without restriction, whether they had acquired the same by selection or by inheritance from a full or mixed blood adult or minor, and that all such restrictions were also removed as to full-blood Indians on their being able to satisfy the Secretary of Interior that they are able to manage their own affairs. U. S. v. Park Land Co. (C. C. 1911) 188 Fed. 383.

People of South Dakota held to assent to section 10503. Hollister v. U. S. (1906) 145 Fed. 773, 76 C. C. A. 337.

Nelson Act Jan. 14, 1889, c. 24, applies the general allotment act of 1887, with some modification, to the Chippewa Indians of Minnesota and their reservation lands. Holmes v. Praun (1915) 130 Minn. 487, 153 N. W. 951.

The act of 1887 does not repeal or modify Act March 3, 1885, post, § 10502. State v. Columbia George (1901) 65 Pac. 604, 39 Or. 127.

3. Indian reservations.—An Indian reservation is a part of the public domain set apart by proper authority for the use and occupation of a tribe or tribes of Indians. Forty-Three Cases of Cognac Brandy (C. C. 1882) 14 Fed. 539. See U. S. v. Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195.

4. —— Creation.—See In re Wilson (1891) 11 Sup. Ct. 870, 140 U. S. 575, 35 L. Ed. 513, as to the effect of Act

1887, c. 119, in confirming an executive order establishing a reservation.

No set form of words or phrases need be used to set aside a reservation. It is enough if there are sufficient words to indicate the purpose of the power that acts to show that it intended to act in a given case. U. S. v. Payne (D. C. 1881) 8 Fed. 883.

5. —— **President's power.**—The President has power to make a reservation for occupation by Indians from public domain lying within the limits of a state. (1882) 17 Op. Atty. Gen. 258. The power does not include the case of a reservation for Indians not born or commorant in the United States. (1887) 18 Op. Atty. Gen. 557.

6. —— **Power of the secretary of the interior.**—In absence of authority conferred by treaty or statutory provision, it is not competent for the Secretary of the Interior to set apart a portion of the public domain for an Indian reservation. (1873) 14 Op. Atty. Gen. 181.

7. —— **Regulations by Indian officers.**—The commissioner of Indian affairs may, with the approval of the secretary of the interior, cause collectors to be excluded and removed from a tribal Indian reservation on days when payments are being made to the Indians, if in his judgment the presence of collectors therein at such times is detrimental to the peace and welfare of the Indians, though the reservation be within a state and the Indians are holders, under trust patents, of allotments adjacent to the reservation, and are therefore citizens of the United States and of the state. Rainbow v. Young (1908) 161 Fed. 835, 88 C. C. A. 653.

8. —— **Revocation of reservations.**—The treaty with the Indians of the Puyallup reservation, allotting to them lands in severalty, and section 3951, conferring citizenship on such Indians, did not revoke the reservation. Eells v. Ross (1894) 64 Fed. 417, 12 C. C. A. 205, reversing judgment Ross v. Eells (C. C. 1893) 56 Fed. 855, and appeal dismissed Ross v. Eells (1896) 16 S. Ct. 1205, 163 U. S. 702, 41 L. Ed. 320.

9. —— **Extinguishment of Indian tribe's interest.**—Where an Indian tribe agreed to cede all its interest in its reservation to the United States, and congress ratified the agreement, and allotments were made to the tribe, and accepted by individual members thereof, the interest of the tribe in the reservation was extinguished. U. S. v. Choctaw, O. & G. R. Co. (1895) 3 Okl. 404, 41 Pac. 729.

10. —— **Appropriations for surveys and resurveys.**—The appropriation made by section 4208, post, is applicable to the making of "surveys and resurveys" provided for in this section. (1887) 18 Op. Atty. Gen. 593.

11. **"Allotment" defined.**—See Stout v. Simpson (1912) 34 Okl. 129, 124 Pac. 754; Lynch v. Franklin (1913) 37 Okl. 60, 130 Pac. 599.

12. —— **Effect of.**—Rights held not infringed by allotment. California & Oregon Land Co. v. Worden (C. C. 1898) 85 Fed. 94.

An allotment to individual members of a tribe held not to terminate the Indian right of occupancy and vest the right of immediate possession in an individual claiming title through a grant to a missionary society that formerly occupied a station on that tract. A mere partition of the Indian right of occupancy among the members of the tribe is no injury to his title to the ultimate fee, if in fact he has any such title. (1891) 20 Op. Atty. Gen. 42.

13. —— **Necessity of allotment of right to land subject to Indian right of occupancy.**—The Indian right of occupancy is the right to enjoy the land forever, with the right of alienation limited to one alienee, the United States, or to such persons as the United States, in its capacity of guardian over the Indians, may permit. And subject to the possibility and probability of the Indians reaching such a state of civilization as to make necessary an allotment of that right. (1891) 20 Op. Atty. Gen. 42.

14. —— **Quantity of allotment.**—See Sloan v. U. S. (C. C. 1902) 118 Fed. 283 (appeal dismissed [1904] 24 Sup. Ct. 570, 193 U. S. 614, 48 L. Ed. 814); Morrisett v. U. S. (C. C. 1904) 132 Fed. 891.

15. —— **Barring right to allotment.**—See La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

16. —— **United States' title to allotments.**—See §§ 4201–4203, post, and notes thereunder.

17. —— **Indian allottees' title to and interest in allotments.**—See §§ 4201–4203, post, and notes thereunder.

18. **"Allottee" defined.**—See Parkinsson v. Skelton (1912) 128 P. 131, 33 Okl. 813; Lynch v. Franklin (1913) 37 Okl. 60, 130 Pac. 599.

19. **Allotments under statute.**—Indian allottees of the Kickapoo tribe, under the treaty of June 28, 1862 (13 Stat. 623), take their rights to the tracts allotted to them which have not yet been patented under and by virtue of the said treaty as extended by Act Aug. 4, 1886 (24 Stat. 219), and not under section 4195 et seq., this compilation. (1889) 19 Op. Atty. Gen. 255.

20. **Indians "located" on reservation.**—An Indian need not have been on the reservation at the instant when Act Feb. 28, 1891, c. 383, was passed, in order to avail himself of the provisions of the latter act giving to each Indian located thereon one-eighth section of

land. Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 296, 223 U. S. 215, 56 L. Ed. 409, affirming decree U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229.

21. Indians entitled to allotments.—An Indian woman of a tribe to which lands were authorized to be allotted in severalty, although married to a white man, was herself the head of a family, and her children were entitled to allotments as members of the tribe. Bonifer v. Smith (1909) 166 Fed. 846, 92 C. C. A. 604.

22. Reservation to chief or other member of a tribe as present grant of title.—A reservation, to a chief or other member of a tribe of Indians, of a specified number of sections of land, whether already identified or to be surveyed and located in the future, when made by the United States in a treaty with the tribe, and as part of the consideration for a cession by the tribe of a tract of country to the United States converts the reserved sections into individual property, and, if unaccompanied by words limiting its effect, is equivalent to a present grant of a complete title in fee simple, which is alienable at the pleasure of the grantee, unless the United States, by provision of the treaty or of an act of congress, has expressly or impliedly prohibited or restricted its alienation. Jones v. Meehan (1899) 20 Sup. Ct. 19, 175 U. S. 1, 44 L. Ed. 49.

23. Decisions of Department of Interior.—Decisions of the Department of the Interior based purely upon findings of fact, relative to the title to Indian allotments, will not be disturbed by the courts in the absence of fraud or apparent error of law. Baltz v. Mitchell (Okl. 1913) 137 P. 666.

24. Laws governing allottees.—See § 4137, ante, and §§ 4201, 4203, post, and notes thereunder.

Allotment of lands in severalty to an Indian does not exempt him from the operation of regulations provided for the government of reservations, or from liability to prosecution for crime under their provisions. U. S. v. Logan (C. C. 1900) 105 Fed. 240.

Allotment to Indians residing on the Umatilla reservation in Oregon, under Act March 3, 1885, c. 319, 23 Stat. 340, did not terminate their tribal relations, and so long as the same continue the marriage relations of such Indians are to be determined by their tribal customs, and not by the laws of the state, and their marriage or divorce in accordance with such customs is valid everywhere and for all purposes. Yakima Joe v. To-is-lap (C. C. 1911) 191 Fed. 516.

An Indian born within the United States, to whom an allotment of land in severalty has been made pursuant to law, becomes a citizen of the United States, with all the rights, privileges, and immunities of such, among which is the right to sue in any proper forum, federal or state, and thereafter the government is relieved from the duty of representing him in suits involving his personal or domestic rights. In re Celestine (D. C. 1902) 114 Fed. 551.

Under this section and sections 4201, 4203, post, after public land had been allotted to an Indian, he was not subject to prosecution for violating section 10502, post, but was subject to the laws of the state in which the crime was committed. U. S. v. Kiya (D. C. 1903) 126 Fed. 879.

Since the allotment of lands in severalty to all of the Indians on the Uintah Indian reservation in Utah, and the restoration of the remainder of the lands of the reservation to the public domain, no part of such lands is "Indian country," within section 4137, ante. U. S. v. Boss (D. C. 1906) 160 Fed. 132.

Congress could enact so much of section 4137, ante, as makes criminal the introduction of intoxicating liquor on an allotment within the limits of the Yakima Indian reservation, in the state of Washington, made and patented to the Indian allottee under this and following sections, by which the title is held in trust by the government, and is not alienable by the allottee without the consent of the United States, since, under Enabling Act Wash. Feb. 22, 1889, c. 180, § 4, 25 Stat. 677, jurisdiction and control of Indian lands remain in the United States. U. S. v. Sutton (D. C. 1908) 165 Fed. 253, judgment reversed (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200.

Cited without definite application, Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 658, 185 U. S. 373, 46 L. Ed. 954; In re Heff (1905) 25 Sup. Ct. 506, 512, 197 U. S. 488, 49 L. Ed. 848; U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 398, 400, 232 U. S. 442, 58 L. Ed. 676; Beck v. Flournoy Live Stock & Real Estate Co. (1894) 65 Fed. 30, 33, 12 C. C. A. 497; Lucy v. U. S. (1911) 190 Fed. 289, 111 C. C. A. 254; U. S. v. Myers (1913) 206 Fed. 387, 124 C. C. A. 269; Lane v. Anderson (C. C. 1895) 67 Fed. 563, 564; U. S. v. Dooley (C. C. 1906) 151 Fed. 697; Same v. Leslie (C. C. 1909) 167 Fed. 670; Same v. Ashton (C. C. 1909) 170 Fed. 509 (dismissed Bird v. Same [1911] 31 Sup. Ct. 718, 220 U. S. 604, 55 L. Ed. 605); Same v. Rundell (C. C. 1910) 181 Fed. 887 (affirmed Bowling v. U. S. [1911] 191 Fed. 19, 111 C. C. A. 561); Yakima Joe v. To-is-lap (C. C. 1911) 191 Fed. 516.

§ 4196. (Act Feb. 8, 1887, c. 119, § 2.) Selection of allotments.

All allotments set apart under the provisions of this act shall be selected by the Indians, heads of families selecting for their minor children, and the agents shall select for each orphan child, and in such manner as to embrace the improvements of the Indians making the selection. Where the improvements of two or more Indians have been made on the same legal subdivision of land, unless they shall otherwise agree, a provisional line may be run dividing said lands between them, and the amount to which each is entitled shall be equalized in the assignment of the remainder of the land to which they are entitled under this act: Provided, That if any one entitled to an allotment shall fail to make a selection within four years after the President shall direct that allotments may be made on a particular reservation, the Secretary of the Interior may direct the agent of such tribe or band, if such there be, and if there be no agent, then a special agent appointed for that purpose, to make a selection for such Indian, which election shall be allotted as in cases where selections are made by the Indians, and patents shall issue in like manner. (24 Stat. 388.)

This section was part of the General Allotment Act of 1887, cited above. See notes to section 1 of the act, ante, § 4195.

Notes of Decisions

Selection of and filing on allotment as inception of title.—Allotments set apart under the Act of 1887 were to be selected by the Indians, heads of families selecting for their minor children in such manner as to embrace the improvements of the Indians making the selection. Henkel v. U. S. (1915) 35 Sup. Ct. 536, 237 U. S. 43, 59 L. Ed. 831. Selections by living Indians only were contemplated. Death of Chippewa Indian before selecting allotment under Nelson Act, terminates all right to an allotment on his behalf in view of Allotment Act contemplating selections on the part of living Indians only. La Roque v. U. S. (1915) 36 Sup. Ct. 22.

A member of an Indian tribe born after the passage of this act, is not excluded from the right to an allotment. U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229.

Selection of and filing on an allotment is the inception of title of Indian allottee or his heirs, and when the patent, which is only the evidence of title, is issued, it relates back to the inception of the title. Hooks v. Kennard (Okl. 1911) 114 P. 744.

See Smith v. Bonifer (C. C. 1904) 132 Fed. 889; Same v. Bonifer (C. C. 1907) 154 Fed. 883; Morrisett v. U. S. (C. C. 1904) 132 Fed. 891.

Ratification of allotment.—See La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4197. (Act Feb. 8, 1887, c. 119, § 3, as amended, Act June 25, 1910, c. 431, § 9.) Allotments to be made by special agents and agents in charge of reservations; certificates thereof.

The allotments provided for in this Act shall be made by special agents appointed by the President for such purpose, and the superintendents or agents in charge of the respective reservations on which the allotments are directed to be made, or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such reservation, under such rules and regulations as the Secretary of the Interior may from time to time prescribe, and shall be certified by such special allotting agents, superintendents, or agents to the Commissioner of Indian Affairs, in duplicate, one copy to be retained in the Indian Office and the other to be transmitted to the Secretary of the Interior for his action, and to be deposited in the General Land Office. (24 Stat. 389. 36 Stat. 858.)

This section was part of the General Allotment Act of 1887, first cited above. The section, as originally enacted, did not contain the words "superintendents or," the provision, "or, in the discretion of the Secretary of the Interior, such allotments may be made by the superintendent or agent in charge of such res-

ervation," and the further words, "special allotting agents, superintendents, or." The words quoted were inserted by amendment by Act June 25, 1910, c. 431, § 9, last cited above.

See notes to section 1 of this act, ante, § 4195.

Notes of Decisions

Construction in general.—See Leecy v. U. S. (1911) 190 Fed. 289, 111 C. C. A. 254.

Allotments made jointly by special agent and agent in charge of reservation.—Allotments to Indians should be made jointly by an agent specially appointed for that purpose and the agent in charge of the reservation. (1887) 19 Op. Atty. Gen. 14.

Male adult Indians becoming electors.—Male adult Indians, who had complied with the law in every respect by severing their tribal relations, and choosing their allotments, and had received the special agent's certificates, were electors of Nebraska, though they had not yet received their patents. State v. Norris (1893) 37 Neb. 299, 55 N. W. 1086.

Rights of heirs of persons entitled to allotment.—Where a selection of lands for allotment has been made by an Indian, and his right to their allotment to him has attached, the act of the allotting commissioners in wrongfully allotting them to another cannot operate to cut off the heirs of the person entitled to the allotment, who, under the act under which the allotment was made, succeed to his interest. Smith v. Bonifer (C. C. 1904) 132 Fed. 889.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4198. (Act Feb. 8, 1887, c. 119, § 4.) Allotments from public lands to Indians not residing on reservations, etc.; payment from Treasury of fees to officers of local land offices.

Where any Indian not residing upon a reservation, or for whose tribe no reservation has been provided by treaty, act of Congress, or executive order, shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land-office for the district in which the lands are located, to have the same allotted to him or her, and to his or her children, in quantities and manner as provided in this act for Indians residing upon reservations; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto; and patents shall be issued to them for such lands in the manner and with the restrictions as herein provided. And the fees to which the officers of such local land-office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them, from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior. (24 Stat. 389.)

This section was part of the General Allotment Act 1887, cited above.

See notes to section 1 of this act, ante, § 4195.

Subsequent provisions for allotments to Indians entitled to allotment under existing laws, making settlement upon lands not otherwise appropriated, were made by Act Feb. 28, 1891, c. 383, § 4, amended by Act June 25, 1910, c. 431, § 17, post, § 4199.

Notes of Decisions

Indians within statute.—A child who is the offspring of a white father and an Indian woman is not by birth an Indian, but is a citizen of the United States, and is not entitled to the benefit of this section. Keith v. U. S. (1899) 58 P. 507, 8 Okl. 446.

Indian country reservations.—Under this section and section 4199, post, and Act March 2, 1889, c. 405, 25 Stat. 888, dissolving the Great Sioux reservation and restoring a certain section of land to the public domain, the section allotted to an Indian held no longer Indian country reservation, over which the United States had exclusive jurisdiction. Ex parte Moore (S. D. 1911) 133 N. W. 817. But see Ex parte Van Moore (D. C. 1915) 221 Fed. 954.

Allotments from public lands.—See Ex parte Van Moore (D. C. 1915) 221 Fed. 955.

Homestead entry on Indian allotment.—The Secretary of the Interior has authority to deny an application to make a homestead entry, made by a person who had no equities in the land, when such land is covered by an Indian allotment, even though such Indian allotment has been erroneously made, when the equities in favor of the allottee are such that a great injustice would be done him if the allotment should be canceled. Baldwin v. Keith (1904) 75 P. 1124, 13 Okl. 624.

Cited without definite application, Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 658, 185 U. S. 373, 46 L. Ed. 954; U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4199. (Act Feb. 28, 1891, c. 383, § 4, as amended, Act June 25, 1910, c. 431, § 17.) Allotments from public lands to Indians making settlement thereon; patents therefor; payment from Treasury of fees to officers of local land offices.

Where any Indian entitled to allotment under existing laws shall make settlement upon any surveyed or unsurveyed lands of the United States not otherwise appropriated, he or she shall be entitled, upon application to the local land office for the district in which the lands are located, to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian; and when such settlement is made upon unsurveyed lands the grant to such Indians shall be adjusted upon the survey of the lands so as to conform thereto, and patent shall be issued to them for such lands in the manner and with the restrictions provided in the Act of which this is amendatory. And the fees to which the officers of such local land office would have been entitled had such lands been entered under the general laws for the disposition of the public lands shall be paid to them from any moneys in the Treasury of the United States not otherwise appropriated, upon a statement of an account in their behalf for such fees by the Commissioner of the General Land Office, and a certification of such account to the Secretary of the Treasury by the Secretary of the Interior. (26 Stat. 795. 36 Stat. 860.)

This section was part of the act to amend and further extend the benefits of the General Allotment Act of Feb. 8, 1887, c. 119.

This section, as originally enacted, contained, after the words "to have the same allotted to him or her and to his or her children," the further words, "in quantities and manner as provided in the foregoing section of this amending act for Indians residing upon reservations;" the section so referred to as "the foregoing section" being apparently section 1 of this act, which amended section 1 of the General Allotment Act. See notes to said amended section, ante, § 4195.

The words quoted were changed to read, "to have the same allotted to him or her and to his or her children in manner as provided by law for allotments to Indians residing upon reservations, and such allotments to Indians on the public domain as herein provided shall be made in such areas as the President may deem proper, not to exceed, however, forty acres of irrigable land or eighty acres of nonirrigable agricultural land or one hundred sixty acres of nonirrigable grazing land to any one Indian;" and at the end of the sentence next following, the words of the original section, "to which this is an amendment," were changed to, "of which this is amendatory," by amendment by Act June 25, 1910, c. 431, § 17, last cited above.

A provision for allotments to Indians on the Public domain, who had not theretofore received an allotment, made by Act March 3, 1909, c. 263, 35 Stat. 782, subsequent to the original enactment of this section, was repealed by a provision of the same section which amended this section, Act June 25, 1910, c. 431, § 17, 36 Stat. 859.

Notes of Decisions

Indian country reservation.—Under this section and section 4198, ante, and Act March 2, 1889, c. 405, 25 Stat. 888, dissolving the Great Sioux reservation, and restoring a certain section of land to the public domain, the section al-

lotted to an Indian held no longer Indian country reservation, over which the United States had exclusive jurisdiction. Ex parte Moore (1911) 28 S. D. 339, 133 N. W. 817. But see Ex parte Van Moore (D. C. 1915) 221 Fed. 954, holding that lands not restored to the public domain open to settlement, but held by an Indian allottee under a trust patent, are Indian lands over which the United States and its courts have exclusive jurisdiction.

Allotments from public lands.—See Ex parte Van Moore (D. C. 1915) 221 Fed. 954.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 398, 232 U. S. 442, 58 L. Ed. 676.

§ 4200. (Act June 25, 1910, c. 431, § 31.) Allotments within national forests, to Indians occupying lands therein, not entitled to allotments on Indian reservations, etc.; lands more valuable for agriculture or grazing than for timber to be allotted.

The Secretary of the Interior is hereby authorized, in his discretion, to make allotments within the national forests in conformity with the general allotment laws as amended by section of this Act, to any Indian occupying, living on, or having improvements on land included within any such national forest who is not entitled to an allotment on any existing Indian reservation, or for whose tribe no reservation has been provided, or whose reservation was not sufficient to afford an allotment to each member thereof. All applications for allotments under the provisions of this section shall be submitted to the Secretary of Agriculture who shall determine whether the lands applied for are more valuable for agricultural or grazing purposes than for the timber found thereon; and if it be found that the lands applied for are more valuable for agricultural or grazing purposes, then the Secretary of the Interior shall cause allotment to be made as herein provided. (36 Stat. 863.)

This section was part of an act to provide for determining the heirs of, and for the disposition of allotments of, deceased Indians, cited above.

The reference in blank to the amendment of the general allotment laws "by section of this Act" was intended, apparently, for section 17 of this act, amending section 1 of Act Feb. 28, 1891, c. 383, which section amended section 1 of the General Allotment Act of Feb. 8, 1887, c. 119, set forth, with said amendments incorporated therein, ante, § 4951.

§ 4201. (Act Feb. 8, 1887, c. 119, § 5.) Patents for allotments to be held in trust; laws of descent and partition applicable; purchase by United States of lands not allotted, for homesteads to settlers, purchase money to be held in trust; confirmation of occupancy of lands by religious organizations; preference of allottees in employment of Indian police, etc.

Upon the approval of the allotments provided for in this act by the Secretary of the Interior, he shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, for the period of twenty-five years, in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, or his heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever: Provided, That the President of the United States may in any case in his discretion extend the period. And if any conveyance shall be made of the lands set apart and allotted as herein provided, or any contract made touching the same, before the expiration of the time above mentioned, such conveyance or contract shall be absolutely null and void: Provided, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after pat-

ents therefor have been executed and delivered, except as herein otherwise provided; and the laws of the State of Kansas regulating the descent and partition of real estate shall, so far as practicable, apply to all lands in the Indian Territory which may be allotted in severalty under the provisions of this act: And provided further, That at any time after lands have been allotted to all the Indians of any tribe as herein provided, or sooner if in the opinion of the President it shall be for the best interests of said tribe, it shall be lawful for the Secretary of the Interior to negotiate with such Indian tribe for the purchase and release by said tribe, in conformity with the treaty or statute under which such reservation is held, of such portions of its reservation not allotted as such tribe shall, from time to time, consent to sell, on such terms and conditions as shall be considered just and equitable between the United States and said tribe of Indians, which purchase shall not be complete until ratified by Congress, and the form and manner of executing such release shall also be prescribed by Congress: Provided however, That all lands adapted to agriculture, with or without irrigation so sold or released to the United States by any Indian tribe shall be held by the United States for the sole purpose of securing homes to actual settlers and shall be disposed of by the United States to actual and bona fide settlers only in tracts not exceeding one hundred and sixty acres to any one person, on such terms as Congress shall prescribe, subject to grants which Congress may make in aid of education: And provided further, That no patents shall issue therefor except to the person so taking the same as and for a homestead, or his heirs, and after the expiration of five years occupancy thereof as such homestead; and any conveyance of said lands so taken as a homestead, or any contract touching the same, or lien thereon, created prior to the date of such patent, shall be null and void. And the sums agreed to be paid by the United States as purchase money for any portion of any such reservation shall be held in the Treasury of the United States for the sole use of the tribe or tribes of Indians; to whom such reservations belonged; and the same, with interest thereon at three per cent. per annum, shall be at all times subject to appropriation by Congress for the education and civilization of such tribe or tribes of Indians or the members thereof. The patents aforesaid shall be recorded in the General Land Office, and afterward delivered, free of charge, to the allottee entitled thereto. And if any religious society or other organization is now occupying any of the public lands to which this act is applicable, for religious or educational work among the Indians, the Secretary of the Interior is hereby authorized to confirm such occupation to such society or organization, in quantity not exceeding one hundred and sixty acres in any one tract, so long as the same shall be so occupied, on such terms as he shall deem just; but nothing herein contained shall change or alter any claim of such society for religious or educational purposes heretofore granted by law. And hereafter in the employment of Indian police, or any other employés in the public service among any of the Indian tribes or bands affected by this act, and where Indians can perform the duties required, those Indians who have availed themselves of the provisions of this act and become citizens of the United States shall be preferred. (24 Stat. 389.)

This section was part of the General Allotment Act of 1887, cited above.

See notes to section 1 of this act, ante, § 4195.

Another proviso, authorizing the Secretary of the Interior, whenever any Indian of the Siletz Indian reservation, in the State of Oregon, fully capable of managing his own affairs, etc., should become the owner of more than 80

acres of land upon said reservation, to cause patent to be issued to him for all such land over 80 acres was added to this section by Act March 3, 1901, c. 832, § 9, 31 Stat. 1085. Said proviso is omitted, as special only.

The continuance of restrictions on alienation contained in a trust or other patent to an allottee was authorized by a provision of Act June 21, 1906, c. 3504, post, § 4202.

Notes of Decisions

1. Power to restrict alienation by Indians.
2. Purpose and construction of restrictions on alienation.
3. —— Restriction as running with the land.
4. —— Heirs within statute.
5. —— Extension of trust period.
6. —— Federal laws restricting alienation.
7. Removal or modifications of restrictions.
8. Patents for allotments as declaration of trust for 25 years.
9. Laws governing Indian allottees.
10. —— Jurisdiction of state courts.
11. United States title during trust period.
12. —— Suit for cancellation of trust patent.
13. Indian title during trust period.
14. —— Devisable interest during trust period.
15. —— Inheritable estate.
16. —— Dower.
17. —— Curtesy.
18. —— Rents, issues, and profits.
19. —— Growing crops.
20. —— Right to cut and sell timber.
21. —— Ejectment by Indians.
22. — Actions by Indian allottees for trespass.
23. —— Interference with powers of Secretary of Interior.
24. Deeds and incumbrances by Indians during trust period.
25. —— Agreements to purchase.
26. —— Right to attack validity of deed.
27. —— Estoppel.
28. —— Laches.
29. —— Power of alienation—Consideration by court.
30. —— Conditions precedent to setting aside contracts of sale.
31. Leases by Indians during trust period.
32. —— Subleasing.
33. —— Authority of Secretary of Interior to cancel approved leases.
34. Descent—Laws governing.
35. Judgment lien during trust period.
36. Garnishment.
37. Taxation by states during trust period.
38. Protection by government of Indian allottees.
39. Suits by United States to cancel conveyances or leases.
40. —— Equitable relief in general.
41. —— Injunction.
42. —— Decree barring relief.
43. —— Pleadings.
44. —— Parties.
45. Suits by United States to protect allotted lands —— Against adverse claims.
46. —— To restrain collection of taxes.
47. —— For damages for breach of lease.
48. —— For timber unlawfully cut on allotted lands.
49. Proceeding in state court involving Indian allottee's title.

1. Power to restrict alienation by Indians.—See § 4202, post, and notes thereunder.

Congress has full power to legislate concerning the tribal property of Indians, and may determine for itself when the guardianship which has been maintained over the Indians shall cease. Tiger v. Western Investment Co. (1911) 31 Sup. Ct. 578, 221 U. S. 286, 55 L. Ed. 738 (citing Cherokee Nation v. Hitchcock [1902] 23 Sup. Ct. 115, 187 U. S. 294, 47 L. Ed. 183; U. S. v. Rickert [1903] 23 Sup. Ct. 478, 188 U. S. 432, 47 L. Ed. 532; McKay v. Kalyton [1907] 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566; Beck v. Flourney Live Stock & Real Estate Co. [1894] 65 Fed. 30, 12 C. C. A. 497, and Rainbow v. Young [1908] 161 Fed. 835, 88 C. C. A. 653, and distinguishing In re Heff [1905] 25 Sup. Ct. 506, 197 U. S. 488, 49 L. Ed. 848).

The guardianship of the federal government over an Indian does not cease when allotment is made and the allottee becomes a citizen. Bowling v. U. S. (1914) 34 Sup. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080, affirming decree (1911) 191 Fed. 19, 111 C. C. A. 561.

Congress can provide when and on what terms lands allotted to Indians shall be alienable. U. S. v. Board of Com'rs of Osage County, Okl. (C. C. 1911) 193 Fed. 485. See, on power of Congress, Truskett v. Closser (1915) 35 Sup. Ct. 385, 236 U. S. 223, 59 L. Ed. 549.

It is within the power of Congress to impose restrictions on the alienation of the lands of Indian allottees although restrictions imposed by prior legislation have expired by limitation. U. S. v. Allen (1910) 179 Fed. 13, 103 C. C. A. 1 (affirmed upon conditions in [1912] 32 Sup. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and [1912] 32 Sup. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and [1912] 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and [1912] 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820); Same v. Shock (C. C. 1911) 187 Fed. 870. But see Bartlett v. U. S. (1913) 203 Fed. 410, 121 C. C. A. 520, holding that Congress cannot impose restrictions on alienation after restrictions imposed by prior laws have expired and both the equitable and legal title has become vested in the allottee, and acts general in their terms should not be construed as intended to apply to such cases.

Congress may impose restrictions on alienation of land allotted to an Indian and remove restrictions imposed, and change manner of transferring title. Egan v. McDonald (1915) 153 N. W. 915, 36 S. D. 92.

Restrictions placed by Congress on alienation by Indians of lands allotted to them in severalty are valid. Nelson v. John (1906) 86 Pac. 933, 43 Wash. 483; Felix v. Yaksum (1914) 137 Pac. 1037, 77 Wash. 519.

A restriction on alienation in a deed of the United States to its Indian wards, pursuant to treaty stipulations made between the government and the Indians, is valid. Jackson v. Thompson (1905) 80 Pac. 454, 38 Wash. 282.

The right of Congress to enact laws in the interest of Indians as an independent people does not cease when the allotment is made and the allottee becomes a citizen of the United States. Walker v. Brown (Okl. 1914) 141 Pac. 681.

2. **Purpose and construction of restrictions on alienation.**—The limitations imposed on the power of Indians to sell or make contracts respecting land that might be set apart to them for their individual use and benefit were imposed to protect them from the greed and superior intelligence of the white man; the motive is so obvious, and the language of the statute in that behalf is so plain, as to leave no room for doubt that congress intended to put it beyond the power of white men to secure any interest whatever in lands situated within Indian reservations that might be allotted to Indians. Beck v. Flournoy Live Stock & Real Estate Co. (1894) 65 Fed. 30, 34, 12 C. C. A. 497.

The act of 1887 is only applicable to lands held in common at date of its passage. (1889) 19 Op. Atty. Gen. 255.

See Mullen v. U. S. (1912) 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834; Skelton v. Dill (1914) 35 Sup. Ct. 60, 235 U. S. 206, 59 L. Ed. 198; Adkins v. Arnold (1914) 35 Sup. Ct. 118, 235 U. S. 417, 59 L. Ed. 294; U. S. v. Shock (C. C. 1911) 187 Fed. 870; Levindale Lead & Zinc Mining Co. v. Coleman (Okl. 1914) 140 Pac. 607; Greenlees v. Wettack (Okl. 1914) 141 Pac. 282; Postoak v. Lee (Okl. 1915) 149 Pac. 155.

3. —— **Restriction as running with the land.**—A restriction on power to alienate land for 25 years after patent, imposed by statute and also embodied in the patent, runs with the land and invalidates any attempted conveyance of the land by heirs of the allottee after his death during the limitation period. Goodrum v. Buffalo (1908) 162 Fed. 817, 89 C. C. A. 525; Bowling v. U. S. (1911) 191 Fed. 19, 111 C. C. A. 561, affirming decree U. S. v. Rundell (C. C. 1910) 181 Fed. 887.

A restriction on power of Indian allottee to alienate land for 25 years, imposed by a patent, is binding on his heirs. Egan v. McDonald (S. D. 1915) 153 N. W. 915. But see Farrington v. Wilson (1872) 29 Wis. 383, holding that a restriction, in a patent of land granted to an Indian, that the same should not be sold or leased by the grantee to any person whatever without the permission of the president of the United States, held to be valid, but not to bind the heirs of the grantee. See, also, Bowling v. U. S. (1914) 34 S. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080, affirming decree (1911) 191 Fed. 19, 111 C. C. A. 561, holding that land, whether in the hands of an Indian allottee or his heirs, is bound by the restriction forbidding alienation for 25 years from the issuance of the patent. And see Snyder v. Worten (Okl. 1915) 147 Pac. 1010; Gray v. Deal (Okl. 1915) 151 Pac. 205.

4. —— **Heirs within statute.**—Where, after the Secretary of the Interior, in a controversy between the adopted children of a deceased holder of trust patents under this section and his natural heirs, found that the adoption was legal, and that the adopted children were the legal heirs of the decedent, the adopted children petitioned the Secretary, under the provisions of Act May 8, 1906, and Act June 25, 1910, post, § 4226, to issue them patents in fee simple on the ground that they were competent to manage their own affairs, whereupon one of the natural heirs protested against the issuance of such patents, and also filed a motion for a review and reconsideration of the Secretary's former decision, on the ground of newly discovered evidence, it was held in a suit in equity by the adopted children against the Secretary, that the natural heirs, claiming as they did under the adoptive parent, were estopped to attack the decree of adoption which he had procured, and also that the Secretary was without jurisdiction to reopen his first decision, in the absence of any claim that it was procured by fraud. U. S. v. Lane (1915) 43 App. D. C. 414.

A white person who is a member by adoption of an Indian tribe is not excepted from the term "heirs" of an allottee. Reed v. Clinton (1909) 101 Pac. 1055, 23 Okl. 610.

5. —— **Extension of trust period.**—See § 4202, post, and notes thereunder.

This section does not contemplate that the President may extend the period of 25 years as to all trust patents issued to Indian allottees of land, but only that such extension may be made in particular cases, in the discretion of the President. (1905) 25 Op. Atty. Gen. 483.

6. —— **Federal laws restricting alienation.**—Federal laws restricting Indians from alienating their land become part of the patents of such Indians, and the restrictions against alienation cannot be defeated because the patent does not contain them. Felix v. Yaksum (1914) 137 Pac. 1037, 77 Wash. 519.

7. **Removal or modifications of restrictions.**—See § 4203, post, and notes thereunder.

Restrictions on alienation imposed on an Indian allottee were not instantly removed by Indian Appropriation Act March 3, 1905, c. 1479, 33 Stat. 1067. Monson v. Simonson (1913) 34 Sup. Ct. 71, 231 U. S. 341, 58 L. Ed. 260.

Under this section and section 4195,

ante, and section 4223, post, and Act March 1, 1907, c. 2285, 34 Stat. 1034, adult mixed-blood Indians acquired the right to transfer their allotments without restriction, whether acquired by selection or inheritance from a full or mixed blood adult or minor, and all restrictions were also removed as to full-blood Indians, on their being able to satisfy the Secretary of Interior that they are able to manage their own affairs. U. S. v. Park Land Co. (C. C. 1911) 188 Fed. 383.

The power of Indians to deal with land held by the government in trust for their benefit was not enlarged, nor was the restriction against alienation in this section removed, because of section 3951, ante, and section 4203, post. Beck v. Flournoy Live Stock & Real Estate Co. (1894) 65 Fed. 30, 35, 12 C. C. A. 497.

The making of an allotment to a mixed blood Chippewa Indian vested him with an estate conveyable in nature, the restrictions on the conveyance of which, as imposed by this section, were removed by the Clapp amendment (Act June 21, 1906, amended by Act March 1, 1907), though the patent was not issued and recorded until after the allottee's death. Vachon v. Nichols-Chisolm Lumber Co. (1914) 148 N. W. 288, 126 Minn. 303, reversing order on rehearing Same v. Nichols-Chisholm (1913) 144 N. W. 223, 126 Minn. 303.

The conferring of the right of citizenship on an Indian allottee does not authorize him to alienate or lease the land allotted to him or to make any contract in relation thereto in violation of this section. Williams v. Steinmetz (1905) 82 P. 986, 16 Okl. 104.

Restrictions on alienation imposed by Congress and by treaty with the various Indian tribes were not removed by the Constitution and the creation of the state of Oklahoma, but will remain in force until they expire by their own limitations, or are removed by Congress. Chapman v. Siler (Okl. 1912) 120 P. 608.

See, on same subject, Taylor v. Parker (1914) 35 Sup. Ct. 22, 235 U. S. 42, 59 L. Ed. 121. See U. S. v. First Nat. Bank of Detroit, Minn. (1914) 34 Sup. Ct. 846, 234 U. S. 245, 58 L. Ed. 1298 (affirming decree First Nat. Bank of Detroit, Minn., v. U. S. [1913] 208 Fed. 988, 126 C. C. A. 76); Same v. Bartlett (1914) 35 Sup. Ct. 14, 235 U. S. 72, 59 L. Ed. 137, holding that restrictions terminated by lapse of time are removed. See, also, Williams v. Johnson (1915) 36 Sup. Ct. 150; Lewis v. Allen (1914) 142 Pac. 384, 42 Okl. 584.

8. Patents for allotments as declaration of trust for 25 years.—"Patents" are only instruments showing that the United States holds the land in trust for 25 years, and then, unless time is extended, will convey the same free of incumbrance. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 480, 188 U. S. 432, 47 L. Ed. 532; Monson v. Simonson (1913) 34 Sup. Ct. 71, 231 U. S. 341, 58 L. Ed. 260; Beam v. U. S. (1908) 162 Fed. 260, 89 C. C. A. 240; (1890) 19 Op. Atty. Gen. 559, 562; Colombe v. Wilson (1912) 135 N. W. 668, 29 S. D. 49, Ann. Cas. 1914C, 894.

By operation of the law and the preliminary patent the equitable interest in the land, subject to the statutory restrictions, passed, and the government retained the legal title for 25 years. Hallowell v. Commons (1914) 210 Fed. 793, 127 C. C. A. 343.

This section is restricted to patents to be issued in the future. U. S. v. Kopp (D. C. 1901) 110 Fed. 160.

See Meeker v. Kaelin (C. C. 1909) 173 Fed. 216; In re Lands of Five Civilized Tribes (D. C. 1912) 199 Fed. 811; (1889) 19 Op. Atty. Gen. 255.

9. Laws governing Indian allottees.—See §§ 4137, 4148, 4149, 4195, ante, and notes thereunder, and § 10502, post, and notes thereunder.

Lands allotted to Indians, to hold in trust for them, or heirs, are during the trust period under the exclusive jurisdiction and control of Congress for all governmental purposes relating to the guardianship and protection of the Indians. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 188 U. S. 432, 47 L. Ed. 532; In re Celestine (1909) 30 Sup. Ct. 93, 215 U. S. 278, 54 L. Ed. 195; U. S. v. Sutton (1909) 30 Sup. Ct. 116, 215 U. S. 291, 54 L. Ed. 200; Tiger v. Western Investment Co. (1911) 31 Sup. Ct. 578, 221 U. S. 286, 55 L. Ed. 738; Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750; U. S. v. Pelican (1914) 34 Sup. Ct. 396, 232 U. S. 442, 58 L. Ed. 676; Same v. Commons (1916) 36 Sup. Ct. 203, 239 U. S. 506, 60 L. Ed. —; Farrell v. U. S. (1901) 110 Fed. 942, 49 C. C. A. 183; Rainbow v. Young (1908) 161 Fed. 835, 88 C. C. A. 653; Bond v. U. S. (C. C. 1910) 181 Fed. 613. See U. S. v. Wright (1913) 33 Sup. Ct. 630, 229 U. S. 226, 57 L. Ed. 1160.

Failure to limit duration of prohibition against sale of intoxicating liquors on ceded lands embraced in agreement ratified and confirmed by Congress by Act Aug. 15, 1894, by which the Yankton tribe of Sioux Indians ceded all their unallotted lands in a reservation in South Dakota, will not invalidate such prohibition so long as the period during which the United States, under this section, holds the allotted lands in trust, has not expired, and the tribal relation has not been dissolved, and the wardship of the Indians has not been terminated. Perrin v. U. S. (1914) 34 Sup. Ct. 387, 232 U. S. 478, 58 L. Ed. 691.

An Indian allottee, by accepting an allotment, does not cease to be a ward of the government, and the general control of the Indian remains within

the jurisdiction of the Secretary of the Interior. Bond v. U. S. (C. C. 1910) 181 Fed. 613.

That an Indian allottee had become a citizen of the United States and the state of Utah did not necessarily withdraw him or his property from the protection of the United States. U. S. v. Fitzgerald (1912) 201 Fed. 295, 119 C. C. A. 533.

An Indian, receiving an allotment and patent for land, thereby becomes a citizen of the United States and the state wherein he resides, and therefore cannot claim immunity from the criminal laws of the state regulating the taking of fish from the state waters by virtue of old federal Indian treaties. State v. Lott (1912) 123 Pac. 491, 21 Idaho, 646; Moore v. Nah-con-be (1905) 83 P. 400, 72 Kan. 169; State v. Morrin (1908) 117 N. W. 1006, 136 Wis. 552. See In re Heff (1905) 25 Sup. Ct. 506, 509, 197 U. S. 488, 49 L. Ed. 848; Ex parte Savage (C. C. 1908) 158 Fed. 205; Bond v. U. S. (C. C. 1910) 181 Fed. 613; U. S. v. Kopp (D. C. 1901) 110 Fed. 160; Same v. Kiya (D. C. 1903) 126 Fed. 879; Same v. Hall (D. C. 1909) 171 Fed. 214; State v. Lott (1912) 123 P. 491, 21 Idaho, 646; Same v. Wise (1897) 72 N. W. 843, 70 Minn. 99; Same v. Nimrod (1912) 138 N. W. 377, 30 S. D. 239.

10. —— Jurisdiction of state courts.—State courts have no jurisdiction over controversies concerning title to Indian allotments during the trust period. McKay v. Kalyton (1907) 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566; Smith v. Mosgrove (1908) 94 Pac. 970, 51 Or. 495.

An Indian may resort to the state courts to recover damages for a tort against his person or property, though the wrong was committed against the possession of land allotted to him. Smith v. Mosgrove (1908) 94 Pac. 970, 51 Or. 495.

11. United States title during trust period.—During the entire trust period the title remains in the United States, and when conveyed to the allottee or his heirs by the ultimate patent at the end of that period it should be unaffected by any prior conveyance or contract touching it. McKay v. Kalyton (1907) 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566; Hallowell v. U. S. (1911) 31 Sup. Ct. 587, 221 U. S. 317, 55 L. Ed. 750; Heckman v. U. S. (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820; Monson v. Simonson (1913) 34 Sup. Ct. 71, 231 U. S. 341, 58 L. Ed. 260; United States Fidelity & Guaranty Co. v. Hansen (1912) 129 Pac. 60, 36 Okl. 459, Ann. Cas. 1915A, 402.

The ultimate title in fee in Indian lands is in the United States, and the Indian title cannot be conveyed by the Indians to any but the United States without its consent. Johnson v. McIntosh (1823) 8 Wheat. 543, 5 L. Ed. 681; Cherokee Nation v. Georgia (1831) 5 Pet. 1, 8 L. Ed. 25; Worcester v. Georgia (1832) 6 Pet. 515, 8 L. Ed. 483; Doe v. Wilson (1859) 23 How. 457, 16 L. Ed. 584; U. S. v. Cook (1873) 19 Wall. 591, 22 L. Ed. 210; Same v. Kagama (1886) 6 Sup. Ct. 1109, 118 U. S. 375, 30 L. Ed. 228; Buttz v. Northern Pac. R. Co. (1886) 7 Sup. Ct. 100, 119 U. S. 55, 30 L. Ed. 330; Jones v. Meehan (1899) 20 Sup. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

Lands allotted to Indians subject to the conditions imposed by this section remain during the trust period the property of the United States. U. S. v. Gardner (1904) 133 Fed. 285, 66 C. C. A. 663. Without any right in the allottee, except to occupy and cultivate the lands under a paper or writing showing that at a particular time in the future, unless extended by the President, he will be entitled to a patent for the fee. Bond v. U. S. (C. C. 1910) 181 Fed. 613.

12. —— Suit for cancellation of trust patent.—See § 4212, post, and notes thereunder.

The United States may maintain a suit for the cancellation of a trust patent to an Indian allotment issued without authority of law. U. S. v. La Roque (1912) 198 Fed. 645, 117 C. C. A. 349.

13. Indian title during trust period.—Indians have no right to make contracts with reference to them, or do any more than occupy and cultivate them, until a regular patent has been issued. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 480, 188 U. S. 432, 47 L. Ed. 532; Smith v. Mosgrove (1908) 94 Pac. 970, 51 Or. 495.

Under this section, and under the law prior thereto, the Indians were entitled only to the use of the lands, and not to the fee, and the land was always a part of the public domain. Morris v. Bean (C. C. 1906) 146 Fed. 423.

Indian allottees of the Kickapoo tribe, under the treaty of June 28, 1862 (13 Stat. 623), take their rights to the tracts allotted to them which have not yet been patented, under and by virtue of the said treaty as extended by Act Aug. 4, 1886 (24 Stat. 219). (1889) 19 Op. Atty. Gen. 255.

The effect of the allotment and declaration of trust are to place the allottee in possession of the land allotted and to give him a qualified ownership therein. (1890) 19 Op. Atty. Gen. 559. See, on same subject (1891) 20 Op. Atty. Gen. 42.

The selection of and the filing on an allotment of land is the inception and beginning of the title of the allottee or his heirs, and when the patent is issued it relates back to the inception of the title. De Graffenreid v. Iowa Land & T. Co. (1908) 95 Pac. 624, 20 Okl. 687; Godfrey v. Iowa Land & T. Co. (1908) 95 Pac. 792, 21 Okl. 293;

Irving v. Diamond (1909) 100 Pac. 557, 23 Okl. 325; Hooks v. Kennard (1911) 114 Pac. 744, 28 Okl. 457. See Fleming v. McCurtain (1909) 30 Sup. Ct. 16, 17, 215 U. S. 56, 54 L. Ed. 88, holding that no trust in favor of the then existing members of the tribe and their descendants was created by letters patent which, following the language of the Choctaw treaty of September 27, 1830 (7 Stat. 333), article 2, under the authority of which the patent was made, granted to the Choctaw Nation a tract of land "in fee simple, to them and their descendants, to inure to them while they shall exist as a nation and live on it," but such grant was one to the nation only, limited in point of time to the corporate existence of the nation. See, also, U. S. v. Saunders (C. C. 1899) 96 Fed. 268, holding that the insertion of a void limitation, in a paragraph separate from the granting clause, does not affect the validity of the patent to convey the land to the patentee, and he takes the title in fee simple, without any restrictions on his power of alienation. Western Inv. Co. v. Tiger (Okl. 1908) 96 Pac. 602, holding that where the United States conveys property to an Indian absolutely, without any restriction on its alienation, such Indian can dispose of the same and give a good title. Wood v. Gleason (Okl. 1914) 140 P. 418, holding that after compliance with the acts of Congress and agreements relative to the distribution of Indian lands, the allottee's title becomes absolute, and the execution and delivery of patents thereafter are mere ministerial acts.

See Woodward v. De Graffenried (1915) 35 Sup. Ct. 764, 238 U. S. 284, 59 L. Ed. 1310; Goodrum v. Buffalo (1908) 162 Fed. 817, 89 C. C. A. 525 (affirming judgment [Ind. T. 1907] 104 S. W. 942); Ewers v. Same (1908) 162 Fed. 828, 89 C. C. A. 536 (affirming judgment Goodrum v. Same [Ind. T. 1907] 104 S. W. 944); Auditor General v. Williams (1892) 53 N. W. 1097, 94 Mich. 180.

14. —— Devisable interest during trust period.—See § 4228, post.

An allottee, who died within the 25-year period, had no power to devise his interest in the land allotted. U. S. v. Zane (1902) 69 S. W. 842, 4 Ind. T. 185; In re House's Heirs (1907) 112 N. W. 27, 132 Wis. 212.

See Taylor v. Parker (1914) 35 Sup. Ct. 22, 235 U. S. 42, 59 L. Ed. 121, holding that a prohibition on alienation by allottees extends to devise by will. See, to same effect, Hayes v. Barringer (1909) 168 Fed. 221, 93 C. C. A. 507. See, also, Jackson v. Thompson (1905) 80 P. 454, 38 Wash. 282.

15. —— Inheritable estate.—The estate of a Puyallup Indian allotted land held an inheritable estate in land on his death in 1888. Little Bill v. Swanson (1911) 117 Pac. 481, 64 Wash. 650. See Beam v. U. S. (1908) 162 Fed. 260, 89 C. C. A. 240 (affirming decree [C. C. 1907] 153 Fed. 474); Simpkins v. Ware (1915) 145 Pac. 355, 45 Okl. 327.

16. —— Dower.—Widow of Indian allottee is entitled to dower. Wheeler v. Petite (C. C. 1907) 153 Fed. 471.

17. —— Curtesy.—Surviving husband of allottee held entitled to curtesy. Beam v. U. S. (1908) 162 Fed. 260, 89 C. C. A. 240, affirming (C. C. 1907) 153 Fed. 474.

18. —— Rents, issues, and profits.—Surviving husband of Indian allottee held entitled to rents, issues, and profits. Beam v. U. S. (C. C. 1907) 153 Fed. 474, decree affirmed (1908) 162 Fed. 260, 89 C. C. A. 240.

19. —— Growing crops.—A member of the Prairie band of Pottawatomie Indians can sell the corn growing on his allotment; such contract not being one touching the land or any interest therein. McClain v. Miller (Kan. 1915) 149 Pac. 399.

20. —— Right to cut and sell timber.—See § 4122, ante, and § 4231, post, and notes thereunder.

A sale of timber on land patented, to a Nooksack Indian, with a restriction that the land would be held in trust for the patentee for 25 years, held not a violation of the restriction. United States v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212.

An Indian allottee may not, during trust period, cut and sell merchantable timber standing upon the land, excepting such as it may be necessary to cut in clearing the premises for agricultural or grazing purposes, or to erect suitable buildings thereon. (1889) 19 Op. Atty. Gen. 232. Nor impart to a third person, by contract, the right to erect on his allotment mills for the manufacture of lumber or other products. But may remove and sell dead timber, standing or fallen, from his allotment. Appropriating and selling dead timber of any kind is not waste at common law or by the law of Wisconsin. (1890) 19 Op. Atty. Gen. 559.

See Vachon v. Nichols-Chisolm Lumber Co. (1914) 148 N. W. 288, 126 Minn. 303, reversing order on rehearing Same v. Nichols-Chisholm (1913) 144 N. W. 223, 126 Minn. 303.

21. —— Ejectment by Indians.—An Indian patentee of public land, who was entitled to present and exclusive possession thereof, though the land was held in trust for him by the United States for a period of 25 years, at the end of which time he would acquire the fee, could maintain ejectment therefor alone without joining the United States; his title being sufficient to support a possessory action. Frazee v. Piper (1908) 98 P. 760, 51 Wash. 278.

22. —— Actions by Indian allottees for trespass.—Indians holding lands by

allotment may sue for trespass thereon. Carter v. Wann (1899) 57 P. 314, 6 Idaho, 556. An occupant of land, the title to which is in the government may maintain trespass against one who wrongfully interferes with his possession to his injury; and so, though the government holds in trust the legal title to land allotted in severalty to an Indian, the latter, who is in the rightful possession of the land and has the beneficial use therein, may recover damages for an unlawful trespass upon it. Under Const. Or. art. 1, § 10, which declares that "every man shall have remedy by due course of law for injury done him in person, property, or reputation," an Indian has as much right to resort to the state courts having jurisdiction of the subject-matter to recover for a tort against his person or property as any other suitor, and it is not material that the wrong was committed against the possession of land allotted to him under the acts of Congress providing for allotments of land in severalty to Indians. Smith v. Mosgrove (Or. 1908) 94 P. 970.

23. —— **Interference with powers of Secretary of Interior.**—Where trespass has been committed on land held by an Indian through allotment from the government, the trial of an action by the Indian against the trespasser will not interfere with any of the rights given to the secretary of the interior or the federal court over the Indian or his land, the action of trespass not necessarily involving the question of title. Smith v. Mosgrove (Or. 1908) 94 P. 970.

24. **Deeds and incumbrances by Indians during trust period.**—A title acquired by an Indian allottee through an unrestricted patent issued conformably to Indian Appropriation Act March 3, 1905, could not, by reason of any state statute, inure to the benefit of the grantee in a deed made by an allottee while the restrictions on alienation imposed by this section remained in force. Monson v. Simonson (1913) 34 Sup. Ct. 71, 231 U. S. 341, 58 L. Ed. 260.

One who contracts to convey Indian lands not belonging to him, but allotted and patented to members of the Pottawatomie tribe, cannot in view of the restrictions on alienation made by this section, Act Aug. 15, 1894, and Act May 31, 1900, § 7, be held bound by his contract so as to be liable for its breach. Sage v. Hampe (1914) 35 Sup. Ct. 94, 235 U. S. 99, 59 L. Ed. 147, reversing judgment Hampe v. Sage (1912) 125 P. 53, 87 Kan. 536.

A deed and mortgages by a member of the absentee Shawnee Tribe of lands allotted and held in trust for him by the United States are void. Perkins v. Cissell (Okl. 1912) 124 P. 7. See Jacobs v. Prichard (1912) 32 Sup. Ct. 289, 223 U. S. 200, 56 L. Ed. 405 (affirming judgment Prichard v. Jacobs [1907] 90 P. 922, 46 Wash. 562); Nunn v. Hazelrigg (C. C. A. 1914) 216 Fed. 330; Smythe v. Henry (C. C. 1890) 41 Fed. 705; Barbre v. Hood (D. C. 1914) 214 Fed. 473; Sayer v. Brown (Ind. T. 1907) 104 S. W. 877; Rogers v. Noel (1912) 124 P. 976, 34 Okl. 238. See, also, St. Louis & S. F. Ry. Co. v. Skelton (1914) 141 P. 440, 42 Okl. 266; Thraves v. Greenlees (1914) 142 P. 1021, 42 Okl. 764.

25. —— **Agreements to purchase.**—The deed of one purchasing from an Indian allottee after the allottee's restrictions upon alienation have been removed is not void because the purchaser, before removal of the restrictions, told the allottee if, when she obtained a removal of her restrictions upon alienation, she could not find another buyer, he would buy her land if they could agree upon a price; such transaction not amounting to an agreement to purchase. Simmons v. Whittington (1910) 112 Pac. 1018, 27 Okl. 356.

26. —— **Right to attack validity of deed.**—A grantee of an Indian allottee, after the order removing the allottee's restrictions on alienation became effective, may attack the validity of deeds executed by the allottee before removal of her restrictions conveying the same land, though the grantee had notice of such deeds before his purchase from the allottee. Simmons v. Whittington (1910) 112 P. 1018, 27 Okl. 356; Chapman v. Siler (1912) 120 Pac. 608, 30 Okl. 714; Perkins v. Cissell (1912) 124 Pac. 7, 32 Okl. 827.

27. —— **Estoppel.**—The rule that a conveyance with warranty estops the grantor when he becomes the owner of the land granted to deny the grantee's title does not apply to a conveyance by an Indian allottee while the legal title remained in the United States. Starr v. Long Jim (1913) 33 Sup. Ct. 358, 227 U. S. 613, 57 L. Ed. 670 (affirming judgment [1910] 109 P. 810, 59 Wash. 190); Monson v. Simonson (1913) 34 Sup. Ct. 71, 231 U. S. 341, 58 L. Ed. 260 (reversing Simonson v. Monson [1908] 117 N. W. 133, 22 S. D. 238); Gannon v. Johnston (1914) 140 P. 430, 40 Okl. 695, Ann. Cas. 1915D, 522; Starr v. Long Jim (1909) 100 P. 194, 52 Wash. 138.

When a legislative grant of land to an Indian expressly withholds from him the right of conveying it, except by lease for a term of two years, and such Indian attempts to convey the land by deed, and then accepts a lease of the land from the grantee, the deed from the Indian being void, his execution of the deed and acceptance of the lease do not estop his devisees and their assigns from disputing the title of the grantee.

Smythe v. Henry (C. C. 1890) 41 Fed. 705.

See Heckman v. U. S. (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820.

28. —— **Laches.**—An Indian, to whom another Indian conveyed land by a deed approved by the Secretary of the Interior, and his second grantee, are precluded, after a delay of 30 years, under the doctrine of laches and stale claim, from asserting title to the land against his first grantee and those claiming under him, who have been in possession all that time, on the ground that the deed to such first grantee was not approved by the Secretary of the Interior. Pope v. Falk (1903) 72 P. 246, 66 Kan. 793.

29. —— **Power of alienation—Consideration by court.**—In an action to enforce alienation of lands by an Indian, the court will, in view of the status of Indians, consider the defendant's power of alienation, though not shown by the record below. Felix v. Yaksum (1914) 137 P. 1037, 77 Wash. 519.

30. —— **Conditions precedent to setting aside contracts of sale.**—Those dealing with Indians contrary to the restrictions against alienation may not insist that they should keep the land if the purchase price is not repaid. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; Heckman v. U. S. (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820.

An Indian need not return or offer to return the consideration received by him under a void contract to sell land as a condition to having the contract set aside. Colombe v. Wilson (S. D. 1912) 135 N. W. 668. But see U. S. v. Debell (1915) 227 Fed. 775, 142 C. C. A. 299, holding that the United States required to repay the money paid for Indian land fraudulently procured from an allottee as a condition to the cancellation of the patent and deed.

31. **Leases by Indians during trust period.**—See §§ 4217, 4218, 4220, and 4221, post, and notes thereunder.

The restriction against alienation found in this section is not removed by Act Feb. 8, 1887, § 6, post, § 4203, and leases secured during the trust period are void. Beck v. Flournoy Live Stock & Real Estate Co. (1894) 65 Fed. 30, 12 C. C. A. 497.

Leases by Omaha and Winnebago Indians of lands allotted to them in severalty are void. U. S. v. Flournoy Live Stock & Real Estate Co. (C. C. 1895) 69 Fed. 886.

Leases by Indians of lands allotted them in severalty are void, and neither such leases nor occupancy and planting of crops on the lands give the occupants any right to restrain the government officers from removing them. Pilgrim v. Beck (C. C. 1895) 69 Fed. 895.

An Indian allottee cannot lawfully lease or rent the whole or any part of his allotment, either with or without the approval of the Secretary of the Interior. (1890) 19 Op. Atty. Gen. 559.

A lease of land allotted to an Indian on a reservation, made by such Indian, and not approved by the Secretary of the Interior, is invalid, and the assignee thereof acquires no rights thereunder. Reservation State Bank v. Holst (1903) 95 N. W. 931, 17 S. D. 240, 70 L. R. A. 799.

The lease of an Indian allotment which has not been approved by the Secretary of the Interior is null and void, and where a party under such lease plants the land, and the cattle of the allottee in connection with those of another break down the fence and destroy the crop, he cannot recover for the value of his share thereof. Williams v. Steinmetz (1905) 82 Pac. 986, 16 Okl. 104.

See U. S. v. Noble (1915) 35 Sup. Ct. 532, 237 U. S. 74, 59 L. Ed. 844; Eldred v. Okmulgee Loan & Trust Co. (Okl. 1908) 98 Pac. 929; Sharp v. Lancaster (Okl. 1909) 100 Pac. 578; Webber v. Blake (Okl. 1915) 153 Pac. 109.

32. —— **Subleasing.**—A note executed by a sublessee for rent is not enforceable, even by a bona fide holder, where the lease to the lessee was void under this section. Larson v. First Nat. Bank (1901) 87 N. W. 18, 62 Neb. 303.

Where a party holds a lease of Indian lands, approved by the Interior Department, containing a provision that the lessee will not at any time during the lease sublet or assign the same, or any interest therein, without the consent of the party of the first part and the approval of the Secretary of the Interior, a sublease without such consent is void and conveys no rights. Megreedy v. Macklin (1903) 73 Pac. 293, 12 Okl. 666.

See Webber v. Blake (Okl. 1915) 153 Pac. 109, holding that subleasing of Indian land without written consent of the lessor and approval of the Secretary of Interior held to render the lease voidable at the option of the lessor and with the approval of the Secretary.

33. —— **Authority of secretary of interior to cancel approved leases.**—A lease of allotment land, entered into by an allottee having power so to do, and pursuant to the terms prescribed by the secretary of the interior, cannot, after its approval by the secretary, be canceled or annulled by him for fraud or imposition, since on such approval the lessee acquires a vested interest, and the courts afford the lessor an adequate remedy. Mosgrove v. Harper (1898) 54 P. 187, 33 Or. 252.

34. Descent—Laws governing.—Under Gen. St. Kan. 1889, pars. 20, 21, 29, which by this section are made to govern the descent of lands allotted in severalty to the members of certain tribes in Indian Territory, providing that, if an intestate leaves neither husband, nor wife, nor issue, his estate shall go to his parents, and, if his parents be dead, shall be disposed of in the same manner as if they, or either of them, had outlived the intestate and died in the ownership and possession of the portion thus falling to their share, or to either of them, and that "children of the half blood shall inherit equally with children of the whole blood," the word "children," should be construed as meaning "kindred," and where an Indian woman, whose parents were dead, died unmarried and without issue, but leaving a half-brother, he inherited her land, to the exclusion of her uncles and cousins. Finley v. Abner (1904) 129 Fed. 734, 64 C. C. A. 262, affirming judgment (1902) 69 S. W. 911, 4 Ind. T. 386.

The state law governing the descent of community property did not apply to the descent of Indian reservation lands patented to a Puyallup Indian allottee who was the head of a family. Meeker v. Kaelin (C. C. 1909) 173 Fed. 216.

The proviso adopting the laws of descent of the state was merely for the purpose of providing a rule by which the heirs should be determined, and the partition statutes were adopted only so far as they provided for a division of the land in case the heirs could not agree to hold it in common, and there was no intention of abrogating the trust in any case, and the clause "except as herein otherwise provided" excluded the application of a provision of a state partition statute authorizing a sale of the land where it could not be advantageously divided; and such a sale of land in the Indian Territory, although under an order of court based on the Kansas statute, was null and void. U. S. v. Bellm (C. C. 1910) 182 Fed. 161.

Where the allottee of land in Minnesota dies after his trust patent has issued, his allotment descends to his heirs, as provided by the laws of that state, to be ascertained by the probate court of the county in which the lands are located. U. S. v. Park Land Co. (C. C. 1911) 188 Fed. 383.

The laws of descent of the state apply. Guyatt v. Kautz (1905) 83 Pac. 9, 41 Wash. 115.

A white person, a member of a tribe by adoption, is an "heir," though not of Indian blood. Reed v. Clinton (Okl. 1909) 101 Pac. 1055.

Under the laws of descent of Washton, which by this section are made applicable to allotted and patented Indian lands herein, the estate of a Puyallup Indian allotted land under a patent from the United States which contained restrictions on alienation, and provided for forfeiture upon neglect to till the soil or on return to a nomadic life, was an inheritable estate in the lands on his death in 1888. Little Bill v. Swanson (Wash. 1911) 117 Pac. 481; Same v. Dyslin, Id. 487.

See Sizemore v. Brady (1914) 35 Sup. Ct. 135. 235 U. S. 441, 59 L. Ed. 308; Reynolds v. Fewell (1915) 35 Sup. Ct. 230, 236 U. S. 58, 59 L. Ed. 465; McDougal v. McKay (1915) 35 Sup. Ct. 605, 237 U. S. 372, 59 L. Ed. 1001; Gillum v. Anglin (1915) 145 Pac. 1145, 44 Okl. 684; Butler v. Wilson (Okl. 1915) 153 Pac. 823; Stalcup v. Mullen (Okl. 1915) 153 Pac. 868.

35. Judgment lien during trust period.—See § 4235, post, and notes thereunder.

A judgment of the district court against an adult Kickapoo Indian is not a lien on his inherited lands situated in the county where such judgment is rendered, under this section. Beall v. Graham (Kan. 1907) 88 Pac. 543.

Under this section and Act June 21, 1906, c. 3504, 34 Stat. 353, all restrictions as to incumbrances on allotments in White Earth reservation terminated June 21, 1906, and the land was subject to a judgment acquired November 19th next following, where there was no evidence as to when the claim which was the basis of such judgment was contracted. Stephenson v. Lohn (Minn. 1911) 131 N. W. 1018.

36. Garnishment.—Neither this section nor sections 4203, 4235, post, has any application to a suit by garnishment to subject to the payment of the debt of an Indian allottee to whom a patent to the land had been issued in fee a part of the purchase price of the land, on its being conveyed to another. Chase v. Doxtater (1911) 132 N. W. 904, 147 Wis. 581.

37. Taxation by states during trust period.—See §§ 4203, 4239, post, and notes thereunder.

Congress can provide when and on what terms lands allotted to Indians shall be taxable. U. S. v. Board of Com'rs of Osage County, Okl. (C. C. 1911) 193 Fed. 485.

A state may not during the trust period tax lands allotted to Indians in severalty. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 188 U. S. 432, 47 L. Ed. 532; U. S. v. Chehalis County (D. C. 1914) 217 Fed. 281; (1888) 19 Op. Atty. Gen. 161; Frazee v. Spokane County (1902) 69 Pac. 779, 29 Wash. 278.

Lands patented to Indians are not taxable so long as the United States has an interest, legal or equitable, therein, or is charged with the performance of some obligation or duty respecting the same. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790, decree re-

versed Hemmer v. U. S. (C. C. A. 1912) 204 Fed. 898.

Cattle, horses, and other property of like character, furnished by the United States to Indian allottees to enable them to maintain themselves while the land is held in trust by the United States are not subject to state taxation. Permanent improvements cannot be taxed by a state as personal property. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 482, 188 U. S. 432, 47 L. Ed. 532. But see CONTRA, U. S. v. Rickert (C. C. 1901) 106 Fed. 1.

Lands allotted to Indians, inalienable for certain periods of time during which they are held in trust by the United States for the benefit of the allottees and their heirs, under Act Aug. 7, 1882, c. 434, § 6, 22 Stat. 341, or this section, are exempt from taxation by any state or county during the period of the trust. U. S. v. Thurston County, Neb. (1906) 143 Fed. 287, 74 C. C. A. 425.

See Truscott v. Hurlbut Land & Cattle Co. (1896) 73 Fed. 60, 19 C. C. A. 374, holding that Const. Mont. § 4, subd. 2, disclaiming all right to public lands held by Indian tribes, and providing that, until the Indian title is extinguished, such lands shall remain under the control of congress, does not prevent the state or counties from taxing cattle grazing on a reservation under a contract with the Indians, and sanctioned by the United States. U. S. v. Shock (C. C. 1911) 187 Fed. 862; Id., 870; U. S. v. Board of Com'rs of Osage County, Okl. (C. C. 1911) 193 Fed. 485. And see Keokuk v. Ulam (1894) 38 Pac. 1080, holding that where an Indian reservation is included within an organized county and territory, and the tribe surrenders its interest therein, and the members take allotments, they become residents of the territory and county, and their personal property is subject to taxation. See, also, Board v. Godfrey (1901) 60 N. E. 177, 27 Ind. App. 610.

38. Protection by government of Indian allottees.—See U. S. v. Mackey (C. C. A. 1914) 216 Fed. 126 (reversing decree [D. C. 1913] 214 Fed. 137); (1890) 19 Op. Atty. Gen. 511.

39. Suits by United States to cancel conveyances or leases.—The United States can sue to set aside a conveyance of land allotted to an Indian when restrictions on alienation have been transgressed. Heckman v. U. S. (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820; Bowling v. Same (1914) 34 Sup. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080 (affirming decree [1911] 191 Fed. 19, 111 C. C. A. 561); U. S. v. Dooley (C. C. 1906) 151 Fed. 697.

It is competent for the United States, in the carrying out of its declared policy with respect to the Indians, to maintain suits to set aside conveyances of land by allottees or their heirs in violation of the restrictions on alienation imposed by Congress, and the fact that the allottees may be citizens is immaterial. Bowling v. U. S. (1911) 191 Fed. 19, 111 C. C. A. 561, affirming decree U. S. v. Rundell (C. C. 1910) 181 Fed. 887. It may maintain a suit in its own name to cancel a deed to allotted Indian lands, though made under order of court, if the sale was in violation of the statutory restrictions on alienation. U. S. v. Bellm (C. C. 1910) 182 Fed. 161. And to set aside a conveyance of lands allotted to an Indian of the Osage Tribe in Oklahoma, in violation of the restrictions. U. S. v. Aaron (C. C. 1910) 183 Fed. 347.

There is no ground upon which the United States can maintain a suit in equity against the grantees of an Indian who are in possession of land conveyed to such Indian by a patent issued by the land department, containing a provision prohibiting its alienation, for the purpose of annulling the deed to defendants, in the absence of a law forfeiting the grant in case of such alienation. U. S. v. Saunders (C. C. 1899) 96 Fed. 268.

The United States may, without making the Indian a party to the suit, sue to set aside for fraud or error a patent under Act May 8, 1906, and a deed by an Indian allottee whereby the restriction on alienation of Indian land is violated, and may sue in equity to set aside a patent and deed as against one who has wrongfully procured land from an Indian having no capacity to alienate same, and, where title has passed to an innocent purchaser, may recover from the appropriator the amount realized by him from the land above the amount paid to the Indian. U. S. v. Debell (1915) 227 Fed. 760, 142 C. C. A. 284.

See, as to leases, U. S. v. Abrams (C. C. 1910) 181 Fed. 847, decree affirmed Same v. Noble (1912) 197 Fed. 292, 116 C. C. A. 654.

Lands of an incompetent Indian allottee held to have been fraudulently procured by falsely representing her as competent and obtaining the issuance of a fee-simple patent. U. S. v. Debell (C. C. A. 1915) 227 Fed. 775.

40. —— Equitable relief in general.—One who, with knowledge of an Indian's incapacity, induces him to procure a patent and then to convey to himself becomes a trustee de son tort thereof and of its proceeds for the benefit of the Indian. U. S. v. Debell (1915) 227 Fed. 760, 142 C. C. A. 284.

The United States held entitled to relief against a purchaser of land from an incompetent Indian allottee, who was given a patent in fee simple, through fraudulent representations made to the Secretary of the Interior. U. S. v. Debell (C. C. A. 1915) 227 Fed. 771.

Equity has jurisdiction of a bill by the United States, as trustee of Indians to whom lands have been allotted in severalty, against persons occupying under illegal leases, to oust such persons and restrain the making of other leases, the remedy at law being inadequate. U. S. v. Flournoy Live Stock & Real Estate Co. (C. C. 1895) 69 Fed. 886.

The United States may maintain a suit in equity for the cancellation as a cloud on its title of an invalid conveyance made by the heir of an Indian allottee, who held under a trust patent, the legal title remaining in the United States; there being no adequate remedy at law. U. S. v. Leslie (C. C. 1909) 167 Fed. 670.

A suit to enjoin defendants from taking oil and gas without right from lands alleged to be the property of an Indian tribe and to be chiefly valuable for such minerals is cognizable in equity, and may be maintained by the United States. U. S. v. Mackey (D. C. 1913) 214 Fed. 137, appeal of certain parties dismissed Gladys Belle Oil Co. v. Same (C. C. A. 1914) 216 Fed. 129, and decree reversed (C. C. A. 1914) U. S. v. Same 216 Fed. 126.

41. —— **Injunction.**—The right of the United States to maintain a suit for the cancellation of a conveyance of land allotted to a Cherokee minor held not so clear as to warrant the granting of a preliminary injunction restraining the grantee from removing gas from the land where adequate security was offered by defendant, and especially where it appeared from the proofs that, if the operation of the wells was discontinued, there was danger that during the pendency of the suit the land would be drained of its gas by surrounding wells. Henry Gas Co. v. U. S. (1911) 191 Fed. 132, 111 C. C. A. 612.

42. —— **Decree barring relief.**—The right of the United States to maintain a suit in equity to set aside conveyances of lands by Indian allottees in violation of the statutory restrictions on alienation is not barred by a decree entered against such allottees in a suit for specific enforcement of their contract to convey, to which the United States was not a party. Bowling v. U. S. (1911) 191 Fed. 19, 111 C. C. A. 561, affirming decree U. S. v. Rundell (C. C. 1910) 181 Fed. 887.

43. —— **Pleadings.**—A bill filed by the United States to cancel a large number of separate conveyances made by individual Indian allottees to the several defendants as invalid, because made in violation of a statute imposing restrictions upon the alienation of the land by the Indians, is not multifarious. U. S. v. Allen (1910) 179 Fed. 13, 103 C. C. A. 1, reversing decree (C. C. 1909) 171 Fed. 907, and judgment affirmed upon conditions Deming Inv. Co. v. U. S. (1912) 32 Sup. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and Goat v. Same (1912) 32 Sup. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and Mullen v. Same (1912) 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and Heckman v. Same (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820.

A bill against persons occupying under void leases, to oust such persons, is not multifarious, though the defendants hold under leases from different lessors, and have no common interest. U. S. v. Flournoy Live Stock & Real Estate Co. (C. C. 1895) 69 Fed. 886.

44. —— **Parties.**—Allottees are not necessary parties. Bowling v. U. S. (1911) 191 Fed. 19, 111 C. C. A. 561. See Mullen v. U. S. (1912) 32 Sup. Ct. 494, 496, 224 U. S. 448, 56 L. Ed. 834 (affirming judgment upon conditions U. S. v. Allen [1910] 179 Fed. 13, 103 C. C. A. 1); U. S. v. Allen (1910) 179 Fed. 13, 103 C. C. A. 1, reversing decrees (C. C. 1909) 171 Fed. 907, and judgment affirmed upon conditions Deming Inv. Co. v. U. S. (1912) 32 Sup. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and Goat v. Same (1912) 32 Sup. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and Mullen v. Same (1912) 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and Heckman v. Same (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820.

45. **Suits by United States to protect allotted lands—Against adverse claims.**—The United States may maintain a suit to protect the title to and possession of land allotted to an Indian against adverse claims arising through an attempted conveyance by the allottee, void under this section. U. S. v. Dooley (C. C. 1906) 151 Fed. 697.

46. —— **To restrain collection of taxes.**—The United States has such interest in preventing taxation as entitles it to maintain a suit in equity to restrain the collection of a tax. It has no such remedy at law as will deprive it of the right to equitable relief against the unlawful taxation. U. S. v. Rickert (1903) 23 Sup. Ct. 478, 483, 188 U. S. 432, 47 L. Ed. 532.

47. —— **For damages for breach of lease.**—The United States can sue to recover damages for breach of a lease made by an Indian allottee with approval of the Secretary of the Interior, or to enforce any other Indian property right remaining under control of the Secretary or the Indian agent. U. S. v. Gray (1912) 201 Fed. 291, 119 C. C. A. 529.

48. —— **For timber unlawfully cut on allotted lands.**—The United States may maintain action for timber unlawfully cut by a third person during trust period. U. S. v. Gardner (1904) 133 Fed. 285, 66 C. C. A. 663.

Until the second patent is granted, the Interior Department must prevent

the cutting of timber except for clearing for agricultural or building purposes, whether the land is or is not within an Indian reservation. (1889) 19 Op. Atty. Gen. 232.

49. Proceeding in state court involving Indian allottee's title.—When the United States has by patent or otherwise reserved title to itself for the benefit of an Indian allottee, it is, in the absence of legislation to the contrary, a necessary party to any action or proceeding involving such title, and an adjudication by a state court would not be binding, since the United States is not subject to the jurisdiction of a state court. Little Bill v. Swanson (Wash. 1911) 117 Pac. 481; Same v. Dyslin, Id. 487.

Cited without definite application, U. S. v. Choctaw Nation (1900) 21 Sup. Ct. 149, 150, 179 U. S. 494, 45 L. Ed. 291; Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 658, 185 U. S. 373, 46 L. Ed. 954; Sloan v. U. S. (1904) 24 Sup. Ct. 570, 571, 193 U. S. 614, 48 L. Ed. 814; U. S. v. Celestine (1909) 30 Sup. Ct. 93, 96, 215 U. S. 278, 54 L. Ed. 195; The African Prince (D. C. 1914) 212 Fed. 552.

§ 4202. (Act June 21, 1906, c. 3504.) Continuance of restrictions on alienation contained in patent.

Prior to the expiration of the trust period of any Indian allottee to whom a trust or other patent containing restrictions upon alienation has been or shall be issued under any law or treaty the President may in his discretion continue such restrictions on alienation for such period as he may deem best: Provided, however, That this shall not apply to lands in the Indian Territory. (34 Stat. 326.)

This was a provision of the Indian appropriation act for the fiscal year 1907, cited above.

Notes of Decisions

Power of congress to enlarge trust period.—See § 4201, ante, and notes thereunder.

Congress may enlarge the period within which an Indian allottee is prohibited from alienating his land beyond that imposed when the allotment was made, so long as the land is held by the allottee, though in the meantime he may have been made a citizen. U. S. v. Allen (1910) 179 Fed. 13, 103 C. C. A. 1, reversing decrees (C. C. 1909) 171 Fed. 907, and judgment affirmed upon conditions Deming Inv. Co. v. U. S. (1912) 32 Sup. Ct. 549, 224 U. S. 471, 56 L. Ed. 847, and Goat v. Same (1912) 32 Sup. Ct. 544, 224 U. S. 458, 56 L. Ed. 841, and Mullen v. Same (1912) 32 Sup. Ct. 494, 224 U. S. 448, 56 L. Ed. 834, and Heckman v. Same (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820. See U. S. v. Shock (C. C. 1911) 187 Fed. 870, holding that it is within the power of congress to impose restrictions on the alienation of the lands of Indian allottees, though restriction imposed by prior act has expired by limitation.

§ 4203. (Act Feb. 8, 1887, c. 119, § 6, as amended, Act May 8, 1906, c. 2348.) Allottees, after conveyance to them in fee, entitled to benefit of and subject to laws of State, etc.; issue of patents in fee to allottees, when competent, at any time; lands not liable for prior debts; allottees having trust patents to be under exclusive jurisdiction of United States.

At the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. * * Provided, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: Provided further, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the

United States: And provided further, That the provisions of this Act shall not extend to any Indians in the Indian Territory. (24 Stat. 390. 34 Stat. 182.)

This section was part of the General Allotment Act of 1887, first cited above.

See notes to section 1 of said act, ante, § 4195.

Further provisions of said Amendatory Act May 8, 1906, c. 2348, 34 Stat. 183, for patents to heirs of a deceased allottee or sale of the lands allotted to him, were superseded by provisions relating to the same subject of Act May 29, 1908, c. 216, post, § 4224.

This section, as originally enacted, provided as follows:

"Upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law."

It further declared every Indian born within the United States to whom allotment should be made, or who had taken up his residence separate from any tribe and had adopted the habits of civilized life, a citizen of the United States, and entitled to all the rights, etc., of such citizens, etc.

The section was amended by changing the provisions quoted to read as set forth here, and by changing said further provisions relating to citizenship of Indians to read as set forth, with a further amendment by Act May 8, 1906, c. 2348, ante, § 3951, and also by adding, at the end of the section, the three provisos set forth here.

See, also, Act June 21, 1906, c. 3504, post, §§ 4235, 4236.

Notes of Decisions

1. Removal or modifications of restrictions against alienation.
2. Allotments within statute.
3. Allottees as citizens and electors.
4. Allottees' interests in land.
5. Laws governing Indian allottees.
6. —— Civil jurisdiction of courts.
7. —— Jurisdiction of offenses.
8. Taxation by states.
9. Competency of allottees.
10. Patents to allotted lands.

1. Removal or modifications of restrictions against alienation.—See § 4201, ante, and notes thereunder.

The power of Indians to deal with land held by the government in trust for their benefit was not enlarged, nor was the restriction against alienation in section 4201, ante, removed, because of this section and section 3951, ante. Beck v. Flournoy Live Stock & Real Estate Co. (1894) 65 Fed. 30, 35, 12 C. C. A. 497; U. S. v. Real Estate Co. (C. C. 1895) 69 Fed. 886; Pilgrim v. Beck (C. C. 1895) 69 Fed. 895; Same v. Flournoy Live Stock & Real Estate Co. (C. C. 1896) 71 Fed. 576; Fazee v. Spokane County (1902) 69 Pac. 779, 29 Wash. 278; Nelson v. John (1906) 86 P. 933, 43 Wash. 483.

The granting of citizenship does not take away a power of alienation conferred by treaty under which an allotment was made. Jones v. Meehan (1899) 20 Sup. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

Act Jan. 14, 1889, c. 24, 25 Stat. 642, relating to the cession of part of the Chippewa reservation of Minnesota, and to the allotment in severalty of the remainder, does not displace the saving provisions of this section and section 4611, post. Oakes v. U. S. (1909) 172 Fed. 305, 97 C. C. A. 139.

2. Allotments within statute.—See §§ 3951, 4201, ante, and notes thereunder.

This section as originally enacted applies to Kickapoos who took allotments under a treaty before its passage, as well as to those who have taken allotments since its passage and in pursuance of its provisions; but as the right of citizenship is only to be accorded after the patent is granted, the oath and proof required by the treaty, being prerequisites thereunder, must be taken and furnished. Patents to those allottees to whom certificates were given under the treaty, but who had not received patents, should be issued under and in accordance with the terms of the treaty as extended by the act of 1886. (1889) 19 Op. Atty. Gen. 255.

3. Allottees as citizens and electors.—See § 3951, ante, and notes thereunder.

4. Allottees' interests in land.—See § 4201, ante, and notes thereunder.

An Indian allottee, having received her allotment, became a citizen of the United States and entitled to contract with reference thereto, except as restrained by congressional act. U. S. v. Abrams (1912) 194 Fed. 82, 114 C. C. A. 160.

Under this section and sections 4195, 4201, ante, an allottee who died within the 25-year period had no power to devise his interest in the land allotted. In re House's Heirs (Wis. 1907) 112 N. W. 27.

5. Laws governing Indian allottees.—See § 4201, ante, and notes thereunder.

6. —— Civil jurisdiction of courts.—See § 4201, ante, and notes thereunder.

An Indian born within the United States, to whom an allotment has been made, becomes a citizen, with the privileges thereof, and may sue in any proper forum, federal or state. In re Celestine (D. C. 1902) 114 Fed. 551.

Indians of the Nez Perce tribe, who have received and accepted allotments of land and patents therefor, are entitled to institute or defend actions in the state courts. Wa-la-note-tke-tynin v. Carter (1898) 53 P. 106, 6 Idaho, 85.

The state courts have jurisdiction of a suit between Indians to quiet title to allotted lands. Bird v. Winyer (1901) 64 P. 178, 24 Wash. 269.

7. —— Jurisdiction of offenses.—See chapter 4, ante, of this title, and notes therein, and see § 4201, ante, and notes thereunder; and see, also, § 1502, ante, and notes thereunder.

State courts have jurisdiction to try an Indian for any public offense, except the introduction of liquor into the Indian territory. State v. Lott (1912) 123 P. 491, 21 Idaho, 646.

This section as originally enacted confers jurisdiction on the state courts to try and punish an allottee for any violation of the laws of the state, though the offense committed be one against the person or property of an Indian or other person within the limits of an Indian Reservation. In re Now-ge-zhuck (1904) 76 P. 877, 69 Kan. 410.

This section is applicable only to allottees receiving trust patents after date of amendment, and cannot be held to have given the United States courts exclusive jurisdiction of plaintiff, who received her allotment under Act April 23, 1904, c. 1495, 33 Stat. 302, directing lands to be immediately surveyed and allotted; the record not showing when she received her allotment or trust patent. Mattison v. Connerly (Mont. 1912) 126 P. 851.

An allottee of the Umatilla reservation, charged with murder on such reservation, could only be tried in the federal courts. State v. Columbia George (1901) 65 P. 604, 39 Or. 127.

The provision that allottees to whom lands shall be patented shall be subject to the laws of the state of their residence does not repeal Act 1885 (incorporated into post, § 10502), and an allottee on the Umatilla reservation, in Oregon, charged with any offense enumerated therein, is triable in the federal courts. State v. Columbia George (1901) 65 Pac. 604, 39 Or. 127.

See State v. Nimrod (S. D. 1912) 138 N. W. 377. See, also, Nagle v. U. S. (1911) 191 Fed. 141, 111 C. C. A. 621.

8. Taxation by states.—See § 4201, ante, and § 4239, post, and notes thereunder.

Land allotted under Indian treaty which exempts such land from levy, sale, or forfeiture until the state legislature shall, with the consent of congress, remove the restriction, can no longer escape taxation after the Indian patentee has become a citizen under this section and ante, § 3951, as originally enacted and the 10 years during which congress, by Act March 3, 1893, c. 209, 27 Stat. 612, 633, postponed the operation of the provision of Laws Wash. 1889–90, p. 499, granting the power of alienation "in like manner and with like effect as any other person may do under the laws of the United States and of this state," and removing all restrictions in reference thereto, have expired. Goudy v. Meath (1906) 27 Sup. Ct. 48, 50, 203 U. S. 146, 51 L. Ed. 130, affirming judgment (1905) 80 Pac. 295, 38 Wash. 126. See, also, U. S. v. Osage County (1914) 216 Fed. 883, 133 C. C. A. 87.

9. Competency of allottees.—An Indian, competent and capable of managing his affairs, must at least have sufficient ability, knowledge, experience, and judgment to enable him to conduct negotiations for the sale of his land, and to care for, manage, invest, or dispose of its proceeds with a reasonable degree of prudence and wisdom. An uneducated Indian, inexperienced in business affairs, held incapable of managing his affairs within the first proviso of the amended section in Act May 8, 1906, and especially incompetent to sell his land and handle the proceeds thereof. U. S. v. Debell (C. C. A. 1915) 227 Fed. 760.

The Secretary of the Interior may provide what evidence shall be submitted as to the competency of the grantor, his ability to manage his affairs, the fact that the money was paid and that he acknowledged the deed; but the Secretary has no judicial power to adjudge a forfeiture, to decide questions of inheritance, or to divest the owner of his title without his knowledge or consent. Richardville v. Thorpe (C. C. 1886) 28 Fed. 52.

See Snyder v. Worten (Okl. 1915) 147 Pac. 1010; Gray v. Deal (Okl. 1915) 151 Pac. 205.

10. Patents to allotted lands.—The Secretary of the Interior is empowered to find that an Indian allottee is competent and to issue to him a patent in fee simple, and where he so found and issued a patent, the patent was a conveyance of the complete title, freed from all restrictions, and the United States and all parties claiming under the patent are estopped from assailing the patent or the title as against an innocent purchaser. U. S. v. Debell (1915) 227 Fed. 760, 142 C. C. A. 284.

Where patent to land allotted to one Indian was issued to another, it will be presumed that assignment of the allotment had been made, as authorized by law. That an Indian was a member of a certain tribe at the time patent to land was issued to him is in no way

disproved by the fact that theretofore he belonged to another tribe. The patentee in a patent issued to an Indian, the son-in-law of the Indian to whom the land was allotted, will not be held to have taken the title in trust for such allottee, the patent showing the government was familiar with the circumstances at the time it was issued, there being no proof of fraud or deception, the allottee, while living on the land, living there with her daughter and her family, and making no claim to the land, though knowing the land was patented to her son-in-law, and no attack on the patent being made till nearly 20 years after its issuance, for more than 10 years after death of the patentee, and for several years after death of the allottee. Meeker v. Winyer (Wash. 1907) 92 P. 883.

Cited without definite application, U. S. v. Parkhurst-Davis Mercantile Co. (1900) 20 Sup. Ct. 423, 424, 176 U. S. 317, 44 L. Ed. 485; Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 658, 185 U. S. 373, 46 L. Ed. 954; U. S. v. Celestine (1909) 30 Sup. Ct. 93, 96, 215 U. S. 278, 54 L. Ed. 195; Same v. Sutton (1909) 30 Sup. Ct. 116, 117, 215 U. S. 291, 54 L. Ed. 200; Same v. Pelican (1914) 34 Sup. Ct. 396, 397, 399, 232 U. S. 442, 58 L. Ed. 676; Bowling v. U. S. (1911) 191 Fed. 19, 111 C. C. A. 561.

§ 4204. (Act Feb. 8, 1887, c. 119, § 7.) Irrigation of allotted lands; regulation of use of water.

In cases where the use of water for irrigation is necessary to render the lands within any Indian reservation available for agricultural purposes, the Secretary of the Interior be, and he is hereby, authorized to prescribe such rules and regulations as he may deem necessary to secure a just and equal distribution thereof among the Indians residing upon any such reservations; and no other appropriation or grant of water by any riparian proprietor shall be authorized or permitted to the damage of any other riparian proprietor. (24 Stat. 390.)

This section was part of the General Allotment Act of 1887, cited above.

See notes to section 1 of the act, ante, § 4195.

Provisions for irrigation of allotted lands in carrying out irrigation projects within the Reclamation Act were made by Act March 3, 1909, c. 263, post, § 4205.

Cancellation of trust patents for allotments within reservations for irrigation purposes was authorized, with provisions for reimbursement for improvements, and allotments in lieu of those canceled, by Act June 25, 1910, c. 431, § 14, post, § 4223.

Appropriation for irrigation works, etc., for Indian reservations and allotments, are made by the Indian appropriation acts. The provisions for the fiscal year 1917 were by Act May 18, 1916, c. 125, § 1, 39 Stat.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 399, 232 U. S. 442, 58 L. Ed. 676.

§ 4205. (Act March 3, 1909, c. 263.) Irrigation of allotted lands in carrying out irrigation project under Reclamation Act; arrangements authorized; no lien, etc., to be created against lands.

In carrying out any irrigation project which may be undertaken under the provisions of the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), known as "The Reclamation Act," and which may make possible, and provide for in connection with the reclamation of other lands, the irrigation of all or any part of the irrigable lands heretofore included in allotments made to Indians under the fourth section of the general allotment Act, the Secretary of the Interior be, and he hereby is, authorized to make such arrangement and agreement in reference thereto as said Secretary deems for the best interest of the Indians: Provided, That no lien or charge for construction, operation, or maintenance shall thereby be created against any such lands. (35 Stat. 798.)

These were provisions of the Indian appropriation act for the fiscal year 1910, cited above.

A further proviso annexed thereto, authorized the expenditure, to meet the cost of carrying out this legislation, of a limited amount from the appropriation in the act for irrigation. It is omitted as temporary merely.

Provisions substantially the same were made by the similar appropriation act for the preceding year, Act April 30, 1908, c. 153, 35 Stat. 85.

Act June 17, 1902, c. 1093, mentioned in this section, is set forth post, §§ 4700–4708.

Provisions for the payment of drainage assessments on allotted Indian lands in Oklahoma were made by Act July 19, 1912, c. 240, 37 Stat. 194, as amended by Act Aug. 31, 1916, c. 425, 39 Stat.

Further as to irrigation of allotted, etc., Indian lands, see post, §§ 4205a–4205e.

Cited without definite application, Baker v. Swigart (D. C. 1912) 196 Fed. 569, reversed (1912) 199 Fed. 865, 118 C. C. A. 313, and (1913) 33 Sup. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

§ 4205a. (Act April 4, 1910, c. 140, § 1.) Irrigation projects; estimates; maximum of cost; reports.

Hereafter no new irrigation project on any Indian reservation, allotments or lands, shall be undertaken until it shall have been estimated for and a maximum limit of cost ascertained from surveys, plans, and reports submitted by the chief irrigation engineer in the Indian service and approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and such limit of cost shall in no case be exceeded without express authorization of Congress, and hereafter no project to cost in the aggregate to exceed thirty-five thousand dollars shall be undertaken on any Indian reservation or allotment without specific authority of Congress. (36 Stat. 270.)

This was a provision of section 1 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205b. (Act April 4, 1910, c. 140, § 1.) Statements of irrigation projects to Congress.

The Secretary of the Interior shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement, by systems or projects, showing the original estimated cost, the present estimated cost, and the total amount of all moneys, from whatever source derived, expended thereon for construction, extension, repair, or maintenance, of each irrigation system or reclamation project on Indian reservations, allotments or lands to and including June thirtieth, nineteen hundred and ten; and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year. (36 Stat. 270.)

This was a further provision of section 1 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205c. (Act April 4, 1910, c. 140, § 1.) Superintendents of irrigation; employment.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, may employ superintendents of irrigation who shall be skilled irrigation engineers, not to exceed seven in number. (36 Stat. 271.)

This was a further provision of section 1 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205d. (Act April 4, 1910, c. 140, § 3.) Statements of irrigation projects to Congress.

The Secretary of the Interior shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement showing the original estimated cost, the present estimated cost, and the total amount of all moneys, from whatever source derived, expended thereon, of each irrigation project for which specific appropriation is made in this Act, to and including June thirtieth, nineteen hundred and ten, and annually thereafter the Secretary of the

Interior shall transmit to Congress a cost account of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year. (36 Stat. 272.)

This was a provision of section 3 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205e. (Act Aug. 1, 1914, c. 222, § 1.) Irrigation for Indian reservations and allotments; expenditure of appropriations; maintenance charges on irrigable lands; expenditures reimbursable from Indian funds; apportionment for reimbursement; annual cost account, etc., to be transmitted to Congress.

For the construction, repair, and maintenance of ditches, reservoirs, and dams, purchase and use of irrigation tools and appliances, water rights, ditches, lands necessary for canals, pipe lines, and reservoirs for Indian reservations and allotments, and for drainage and protection of irrigable lands from damage by floods, or loss of water rights, including expenses of necessary surveys and investigations to determine the feasibility and estimated cost of new projects and power and reservoir sites on Indian reservations in accordance with the provisions of section thirteen of the Act of June twenty-fifth, nineteen hundred and ten, $335,000, to remain available until expended: Provided, That no part of this appropriation shall be expended on any irrigation system or reclamation project for which specific appropriation is made in this Act or for which public funds are or may be available under any other Act of Congress; for pay of one chief inspector of irrigation, who shall be a skilled irrigation engineer, $4,000; one assistant inspector of irrigation, who shall be a skilled irrigation engineer, $2,500; for traveling and incidental expenses of two inspectors of irrigation, including sleeping-car fare and a per diem of $3 in lieu of subsistence when actually employed on duty in the field and away from designated headquarters, $4,200; in all, $345,700: Provided also, That not to exceed seven superintendents of irrigation, six of whom shall be skilled irrigation engineers and one competent to pass upon water rights, and one field-cost accountant, may be employed: Provided further, That the proceeds of sales of material utilized for temporary work and structures shall be covered into the appropriation made therefor and be available for the purpose of the appropriation; and for lands irrigable under any such system or project the Secretary of the Interior may fix maintenance charges which shall be paid as he may direct, such payments to be available for use in maintaining the project or system for which collected: Provided further, That all moneys expended heretofore or hereafter under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: Provided further, That the Secretary of the Interior is hereby authorized and directed to apportion the cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account in detail of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year, including a résumé of previous expenditures, which shall show the number of Indians on the reservation where the land is irrigated, irrigable area under ditch, irrigable area under project (ap-

Provisions substantially the same were made by the similar appropriation act for the preceding year, Act April 30, 1908, c. 153, 35 Stat. 85.

Act June 17, 1902, c. 1093, mentioned in this section, is set forth post, §§ 4700–4708.

Provisions for the payment of drainage assessments on allotted Indian lands in Oklahoma were made by Act July 19, 1912, c. 240, 37 Stat. 194, as amended by Act Aug. 31, 1916, c. 425, 39 Stat.

Further as to irrigation of allotted, etc., Indian lands, see post, §§ 4205a–4205e.

Cited without definite application, Baker v. Swigart (D. C. 1912) 196 Fed. 569, reversed (1912) 199 Fed. 865, 118 C. C. A. 313, and (1913) 33 Sup. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

§ 4205a. (Act April 4, 1910, c. 140, § 1.) Irrigation projects; estimates; maximum of cost; reports.

Hereafter no new irrigation project on any Indian reservation, allotments or lands, shall be undertaken until it shall have been estimated for and a maximum limit of cost ascertained from surveys, plans, and reports submitted by the chief irrigation engineer in the Indian service and approved by the Commissioner of Indian Affairs and the Secretary of the Interior, and such limit of cost shall in no case be exceeded without express authorization of Congress, and hereafter no project to cost in the aggregate to exceed thirty-five thousand dollars shall be undertaken on any Indian reservation or allotment without specific authority of Congress. (36 Stat. 270.)

This was a provision of section 1 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205b. (Act April 4, 1910, c. 140, § 1.) Statements of irrigation projects to Congress.

The Secretary of the Interior shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement, by systems or projects, showing the original estimated cost, the present estimated cost, and the total amount of all moneys, from whatever source derived, expended thereon for construction, extension, repair, or maintenance, of each irrigation system or reclamation project on Indian reservations, allotments or lands to and including June thirtieth, nineteen hundred and ten; and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year. (36 Stat. 270.)

This was a further provision of section 1 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205c. (Act April 4, 1910, c. 140, § 1.) Superintendents of irrigation; employment.

The Commissioner of Indian Affairs, under the direction of the Secretary of the Interior, may employ superintendents of irrigation who shall be skilled irrigation engineers, not to exceed seven in number. (36 Stat. 271.)

This was a further provision of section 1 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205d. (Act April 4, 1910, c. 140, § 3.) Statements of irrigation projects to Congress.

The Secretary of the Interior shall transmit to Congress on the first Monday in December, nineteen hundred and ten, a statement showing the original estimated cost, the present estimated cost, and the total amount of all moneys, from whatever source derived, expended thereon, of each irrigation project for which specific appropriation is made in this Act, to and including June thirtieth, nineteen hundred and ten, and annually thereafter the Secretary of the

Interior shall transmit to Congress a cost account of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year. (36 Stat. 272.)

This was a provision of section 3 of the Indian appropriation act for the fiscal year 1911, cited above.

§ 4205e. (Act Aug. 1, 1914, c. 222, § 1.) Irrigation for Indian reservations and allotments; expenditure of appropriations; maintenance charges on irrigable lands; expenditures reimbursable from Indian funds; apportionment for reimbursement; annual cost account, etc., to be transmitted to Congress.

For the construction, repair, and maintenance of ditches, reservoirs, and dams, purchase and use of irrigation tools and appliances, water rights, ditches, lands necessary for canals, pipe lines, and reservoirs for Indian reservations and allotments, and for drainage and protection of irrigable lands from damage by floods, or loss of water rights, including expenses of necessary surveys and investigations to determine the feasibility and estimated cost of new projects and power and reservoir sites on Indian reservations in accordance with the provisions of section thirteen of the Act of June twenty-fifth, nineteen hundred and ten, $335,000, to remain available until expended: Provided, That no part of this appropriation shall be expended on any irrigation system or reclamation project for which specific appropriation is made in this Act or for which public funds are or may be available under any other Act of Congress; for pay of one chief inspector of irrigation, who shall be a skilled irrigation engineer, $4,000; one assistant inspector of irrigation, who shall be a skilled irrigation engineer, $2,500; for traveling and incidental expenses of two inspectors of irrigation, including sleeping-car fare and a per diem of $3 in lieu of subsistence when actually employed on duty in the field and away from designated headquarters, $4,200; in all, $345,700: Provided also, That not to exceed seven superintendents of irrigation, six of whom shall be skilled irrigation engineers and one competent to pass upon water rights, and one field-cost accountant, may be employed: Provided further, That the proceeds of sales of material utilized for temporary work and structures shall be covered into the appropriation made therefor and be available for the purpose of the appropriation; and for lands irrigable under any such system or project the Secretary of the Interior may fix maintenance charges which shall be paid as he may direct, such payments to be available for use in maintaining the project or system for which collected: Provided further, That all moneys expended heretofore or hereafter under this provision shall be reimbursable where the Indians have adequate funds to repay the Government, such reimbursements to be made under such rules and regulations as the Secretary of the Interior may prescribe: Provided further, That the Secretary of the Interior is hereby authorized and directed to apportion the cost of any irrigation project constructed for Indians and made reimbursable out of tribal funds of said Indians in accordance with the benefits received by each individual Indian so far as practicable from said irrigation project, said cost to be apportioned against such individual Indian under such rules, regulations, and conditions as the Secretary of the Interior may prescribe, and annually thereafter the Secretary of the Interior shall transmit to Congress a cost account in detail of all moneys, from whatever source derived, expended on each such irrigation project for the preceding fiscal year, including a résumé of previous expenditures, which shall show the number of Indians on the reservation where the land is irrigated, irrigable area under ditch, irrigable area under project (ap-

proximate), irrigable area cultivated by Indians, irrigable area cultivated by lessees, amount expended on construction to June thirtieth of the preceding fiscal year, amount necessary to complete, and cost per acre when completed (estimated); value of land when irrigated, and such other detailed information as may be requisite for a thorough understanding of the conditions on each system or project. (38 Stat. 582.)

This was part of the Indian appropriation act for the fiscal year 1915, cited above.

The appropriation for the fiscal year 1917 was made by the Indian appropriation act for that year, Act May 18, 1916, c. 125, § 1, 39 Stat.

Act June 25, 1910, § 13, above referred to, is set forth as § 4526, post.

§ 4206. (Act Feb. 8, 1887, c. 119, § 8.) Provisions of allotment Act not to extend to territory occupied by certain tribes.

The provision of this act shall not extend to the territory occupied by the Cherokees, Creeks, Choctaws, Chickasaws, Seminoles, and Osage, Miamies and Peorias, and Sacs and Foxes, in the Indian Territory, nor to any of the reservations of the Seneca Nation of New York Indians in the State of New York, nor to that strip of territory in the State of Nebraska adjoining the Sioux Nation on the south added by executive order. (24 Stat. 391.)

This section was part of the General Allotment Act of 1887, cited above, and mentioned in the first words of the section.

See notes to section 1 of the act, ante, § 4195.

The provisions of the act were extended to certain tribes named, in the Indian Territory, by a provision of Act March 2, 1889, c. 422, § 1, post, § 4207.

No allotment of lands was to be made or annuities of money paid to any of the Sac and Fox of the Missouri Indians who were not enrolled as members of said tribe on January 1, 1890, by a proviso annexed to Act Feb. 28, 1891, c. 383, § 5, 26 Stat. 796.

Cited without definite application,
U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4207. (Act March 2, 1889, c. 422, § 1.) Provisions of Allotment Act extended to certain tribes in Indian Territory.

The provisions of chapter one hundred and nineteen of the acts of eighteen hundred and eighty seven, entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes," are hereby declared to extend to and are made applicable to the Confederated Wea, Peoria, Kaskaskia, and Piankeshaw tribes of Indians, and the Western Miami tribe of Indians, now located in the northeastern part of the Indian Territory and to their reservation, in the same manner and to the same extent as if said tribes had not been excepted from the provisions of said act, except as to section six of said act, and as otherwise hereinafter provided. (25 Stat. 1013.)

This provision was part of section 1 of an act to provide for allotment of land in severalty to United Peorias and Miamies in Indian Territory, etc., cited above.

The provisions of the General Allotment Act of Feb. 8, 1887, c. 119, mentioned in this act, are set forth ante, §§ 4195–4198, 4201, 4203, 4204, 4206, and post, §§ 4208–4210.

The remaining portions of this section and the other sections of this act, referred to in the last words of this provision, related to the making of an allotment among the members of the tribes named. They are omitted as special only.

Notes of Decisions

Divesting title by conveyance with approval of the secretary of the interior. —When land held by a member of the Kaskaskia, Peoria, Piankeshaw, or Wea tribes of Indians, under a patent restricting his right to convey the same unless the conveyance is approved by the secretary of the interior, is by the patentee, with such approval, conveyed to another member of said tribe,

such approved conveyance devests the title of the United States therein, and places the title outside of the restrictions upon the sale of Indian lands. Dagenett v. Jenks (1898) 54 P. 135, 7 Kan. App. 499.

§ 4208. (Act Feb. 8, 1887, c. 119, § 9.) Appropriation for surveys to be repaid out of proceeds of sales under act.

That for the purpose of making the surveys and resurveys mentioned in section two of this act, there be, and hereby is, appropriated, out of any moneys in the Treasury not otherwise appropriated, the sum of one hundred thousand dollars, to be repaid proportionately out of the proceeds of the sales of such land as may be acquired from the Indians under the provisions of this act. (24 Stat. 391.)

This section and the two sections next following were part of the General Allotment Act of 1887, cited above.

See notes to section 1 of said act, ante, § 4195.

Section 2 of this act, mentioned in this section, is set forth ante, § 4196.

Appropriations for survey, etc., and allotment of lands under this or other acts, to be repaid proportionately out of any Indian moneys held in trust or otherwise and available for such reimbursable purpose, are made annually in the Indian appropriation acts. The provision for the fiscal year 1917 was by Act May 18, 1916, c. 125, § 1, 39 Stat. which stated that no part of the money appropriated should be used for the survey, etc., of any land in severalty to any Indian in New Mexico or Arizona who was not residing upon the public domain prior to June 30, 1914.

Notes of Decisions

Appropriation for surveys and resurveys.—The appropriation is applicable to making of "surveys and resurveys," provided for in section 4195. (1887) 18 Op. Atty. Gen. 593.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4209. (Act Feb. 8, 1887, c. 119, § 10.) Power to grant rights of way, etc., not affected by act.

Nothing in this act contained shall be so construed as to affect the right and power of Congress to grant the right of way through any lands granted to an Indian, or a tribe of Indians, for railroads or other highways, or telegraph lines, for the public use, or to condemn such lands to public uses, upon making just compensation. (24 Stat. 391.)

See notes to section 1 of this act, ante, § 4195.

Condemnation of allotted lands for any public purpose under the laws of the State, etc., where located, was authorized by a provision of Act March 3, 1901, c. 832, § 3, post, § 4240.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4210. (Act Feb. 8, 1887, c. 119, § 11.) Removal of Southern Utes to new reservation not prevented by act.

Nothing in this act shall be so construed as to prevent the removal of the Southern Ute Indians from their present reservation in Southwestern Colorado to a new reservation by and with the consent of a majority of the adult male members of said tribe. (24 Stat. 391.)

See notes to section 1 of this act, ante, § 4195.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 232 U. S. 442, 58 L. Ed. 676.

§ 4211. (Act Oct. 18, 1888, c. 1212, § 2.) Surrender of patent, and selection of and patent for other land.

The Secretary of the Interior is hereby authorized, in his discretion, and whenever for good and sufficient reason he shall consider it to be for the best interest of the Indians, in making allot-

ments under the statute aforesaid, to permit any Indian to whom a patent has been issued for land on the reservation to which such Indian belongs, under treaty or existing law, to surrender such patent with formal relinquishment by such Indian to the United States of all his or her right, title, and interest in the land conveyed thereby, properly indorsed thereon, and to cancel such surrendered patent: Provided, That the Indian so surrendering the same shall make a selection, in lieu thereof, of other land and receive patent therefor, under the provisions of the act of February eighth, eighteen hundred and eighty-seven. (25 Stat. 612.)

This section was part of an act entitled "An act authorizing the Secretary of the Interior to accept the surrender of and cancel land patents to Indians in certain cases."

Section 1 of the act authorized the acceptance of the surrender of and the cancellation of patents issued to certain Indians named therein, and is omitted as special only.

Notes of Decisions

Surrender of allotment.—An Indian allottee, who has received a certificate of allotment and made no valid conveyance, held to have the power by agreement with the department and before the issuance of a patent to surrender the certificate of allotment and take a new allotment. U. S. v. Dowden (C. C. 1911) 194 Fed. 475.

Cited without definite application, Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 658, 185 U. S. 373, 46 L. Ed. 954.

§ 4212. (Act Jan. 26, 1895, c. 50, as amended, Act April 23, 1904, c. 1489.) Correction of errors in allotments and patents; cancellation of patents erroneously issued, and opening to settlement of lands so patented; restrictions on cancellation of conditional patents.

In all cases where it shall appear that a double allotment of land has heretofore been, or shall hereafter be, wrongfully or erroneously made by the Secretary of the Interior to any Indian by an assumed name or otherwise, or where a mistake has been or shall be made in the description of the land inserted in any patent, said Secretary is hereby authorized and directed, during the time that the United States may hold the title to the land in trust for any such Indian, and for which a conditional patent may have been issued, to rectify and correct such mistakes and cancel any patent which may have been thus erroneously and wrongfully issued whenever in his opinion the same ought to be canceled for error in the issue thereof, and if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office; and no proclamation shall be necessary to open to settlement the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry: And provided, That such lands shall not be open to settlement for sixty days after such cancellation: And further provided, That no conditional patent that shall have heretofore or that may hereafter be executed in favor of any Indian allottee, excepting in cases hereinbefore authorized, and excepting in cases where the conditional patent is relinquished by the patentee or his heirs to take another allotment, shall be subject to cancellation without authority of Congress. (28 Stat. 641. 33 Stat. 297.)

This act originally contained the provisions set forth here, down to and including the words "ought to be canceled for error in the issue thereof," followed by a clause, "or for the best interests of the Indian," and the further clause set forth here, "and, if possession of the original patent can not be obtained, such cancellation shall be effective if made upon the records of the General Land Office," ending with a provision, "and no proclamation shall be necessary to open the lands so allotted to settlement." The act was amended by omitting said clause, "or for the best interests of the Indian," by changing said last clause to read, "and no proclamation shall be necessary to open to settlement

the lands to which such an erroneous allotment patent has been canceled, provided such lands would otherwise be subject to entry," and by adding the two provisos, to read as set forth here, by Act April 23, 1904, c. 1489, last cited above.

Notes of Decisions

Authority of interior department to cancel patents.—Where the interior department by its officers and agents has recognized the right of Indians to allotments of land as members of a tribe, after full investigation, with full knowledge of the facts and without fraud, and allotments have been made and patents issued to the allottees, the department is without authority to subsequently cancel such patents because of a change in its interpretation of the law; nor is there any equity which warrants a court in canceling the patents at suit of the government, the allotments being satisfactory to the tribe from whose lands they were made. La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

—— **Notice and hearing.**—The secretary of the interior must give notice and opportunity to be heard before setting aside allotments. A cancellation of Indian allotments by the secretary of the interior after repeated changes in decisions in the department is not made without notice when the proceedings were single. Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 223 U. S. 215, 56 L. Ed. 409.

Jurisdiction of courts to cancel patents.—Jurisdiction of federal court to entertain a suit by the United States to cancel a so-called trust patent for allotment in an Indian reservation as in contravention of Nelson Act is not affected by this section. La Roque v. United States (1915) 36 Sup. Ct. 22, 239 U. S. 62, 60 L. Ed. —, affirming U. S. v. La Roque (1912) 198 Fed. 645, 117 C. C. A. 349.

Equity has jurisdiction to grant relief against a mistake in conditional patents to Indian allottees; remedy by Secretary of Interior under this section not being exclusive. U. S. v. Chehalis County (D. C. 1914) 217 Fed. 281.

—— **Appointment of receiver.**—In a suit by the United States to cancel a certificate of allotment of Indian land, in which the material allegations of the bill were denied, and the court denied a motion by complainant for a temporary injunction against defendant, who was in possession of the land, it was within its discretion to appoint a receiver therefor; it appearing that oil was being produced thereon. U. S. v. Whitmire (1911) 188 Fed. 422, 110 C. C. A. 222.

—— **Limitations.**—The six-year limitation prescribed by Act March 3, 1891, § 8, post, § 5114, for suits by the United States to annul patents, does not govern suit on so-called trust patent for allotment in an Indian reservation as made in contravention of Nelson Act 1889, c. 24, 25 Stat. 642. La Roque v. United States (1915) 36 Sup. Ct. 22, 239 U. S. 62, 60 L. Ed. —. But see, CONTRA, La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

§ 4213. (Act March 3, 1909, c. 263.) Cancellation of allotment of unsuitable land, and exchange for and allotment of other land.

If any Indian of a tribe whose surplus lands have been or shall be ceded or opened to disposal has received or shall receive an allotment embracing lands unsuitable for allotment purposes, such allotment may be canceled and other unappropriated, unoccupied, and unreserved land of equal area, within the ceded portions of the reservation upon which such Indian belongs, allotted to him upon the same terms and with the same restrictions as the original allotment, and lands described in any such canceled allotment shall be disposed of as other ceded lands of such reservation. This provision shall not apply to the lands formerly comprising Indian Territory. The Secretary of the Interior is authorized to prescribe rules and regulations to carry this law into effect. (35 Stat. 784.)

These were provisions of the Indian appropriation act for the fiscal year 1910, cited above.

Notes of Decisions

Cancellation of allotments—Notice.—Cancellation of Indian allotments by Secretary of Interior after changes in decisions of the department held not ordered without notice and opportunity to be heard. Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 296, 223 U. S. 215, 56 L. Ed. 409, affirming decree U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229. See Garfield v. U. S. (1908) 29 Sup. Ct. 62, 211 U. S. 249, 53 L. Ed. 168.

§ 4214. (Act Aug. 15, 1894, c. 290, § 1, as amended, Act Feb. 6, 1901, c. 217, § 1.) Actions for allotments; jurisdiction; parties; effect of judgment; right of appeal.

All persons who are in whole or in part of Indian blood or descent who are entitled to an allotment of land under any law of Congress, or who claim to be so entitled to land under any allotment Act or under any grant made by Congress, or who claim to have been unlawfully denied or excluded from any allotment or any parcel of land to which they claim to be lawfully entitled by virtue of any Act of Congress, may commence and prosecute or defend any action, suit, or proceeding in relation to their right thereto in the proper [circuit court] of the United States; and said [circuit courts] are hereby given jurisdiction to try and determine any action, suit, or proceeding arising within their respective jurisdictions involving the right of any person, in whole or in part of Indian blood or descent, to any allotment of land under any law or treaty (and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant); and the judgment or decree of any such court in favor of any claimant to an allotment of land shall have the same effect, when properly certified to the Secretary of the Interior, as if such allotment had been allowed and approved by him, but this provision shall not apply to any lands now held by either of the Five Civilized Tribes, nor to any of the lands within the Quapaw Indian Agency: Provided, That the right of appeal shall be allowed to either party as in other cases. (28 Stat. 305. 31 Stat. 760.)

This section, as originally enacted as part of Act Aug. 15, 1894, c. 290, § 1, first cited above, did not contain the provision in parenthesis, "(and in said suit the parties thereto shall be the claimant as plaintiff and the United States as party defendant)." Said provision was inserted by amendment by Act Feb. 6, 1901, c. 217, § 1, last cited above.

The words of this section inclosed in brackets, "circuit court," and "circuit courts," were superseded by the abolition of the circuit courts and the transfer of their jurisdiction to the district courts by the Judicial Code, §§ 289–291, ante, §§ 1266–1268.

Notes of Decisions

1. Construction in general.
2. Repeal of statute in part.
3. Suits authorized by statute.
4. Persons entitled to relief.
5. Selection of allotment as condition precedent to suit.
6. Grounds for relief.
7. Jurisdiction and proceedings of courts.
8. —— State or territorial courts.
9. —— Pleadings.
10. —— Parties.
11. —— Receiver—Power to appoint.
12. —— Nature and extent of relief.
13. Conclusiveness of decision of land department.
14. Decree binding the United States.

1. Construction in general.—See § 4226, post, and notes thereunder.

See U. S. v. Mani (D. C. 1912) 196 Fed. 160, for a discussion of the statute.

Act 1894 (incorporated into this section) confers on a federal court jurisdiction to hear and determine the complaint of any person, who is in whole or in part of Indian blood, who claims to have been unlawfully excluded from any allotment, and is in effect a consent by the United States to be bound by the decree rendered. Hy-yu-tse-mil-kin v. Smith (1902) 119 Fed. 114, 55 C. C. A. 216; Sloan v. U. S. (C. C. 1899) 95 Fed. 193; Smith v. He-yu-tse-mil-kin (C. C. 1901) 110 Fed. 60; Sloan v. U. S. (C. C. 1902) 118 Fed. 283.

2. Repeal of statute in part.—Section 4226, post, repealed this section in so far as the same might be construed to confer jurisdiction on federal courts to determine heirship. Bond v. U. S. (C. C. 1910) 181 Fed. 613; Pel-ata-yakot v. Same (C. C. 1911) 188 Fed. 387.

3. Suits authorized by statute.—An invalid retrospective effect is not given to this section, as originally enacted, by construing it to include a suit by an Indian to obtain an allotment to which she claims she was, at the time of the passage of such act, entitled, under Allotment Act March 3, 1885, c. 319, 23 Stat. 340, and to have canceled the alleged improper allotment of such land to another. Judgment (1902) 119 Fed. 114, 55 C. C. A. 216, affirmed. Hy-yu-tse-mil-kin v. Smith (1904) 24 Sup. Ct. 676, 678, 194 U. S. 401, 48 L. Ed. 1039.

As between two claimants, the first in time is the first in right. Waldron v. U. S. (C. C. 1905) 143 Fed. 413, and cases cited.

Where several claimants of allotments sued jointly to establish their rights to separate allotments in a district court of the territory of Oklahoma, a demurrer to the petition was properly sustained for misjoinder of causes of action. Young v. U. S. (C. C. 1910) 176 Fed. 612.

4. Persons entitled to relief.—This section gives relief to persons in part of Indian blood claimed to be entitled to an allotment of land under any law or treaty. Sully v. U. S. (C. C. 1912) 195 Fed. 113. "Half blood" and "mixed blood" must be given their ordinary meaning, and there is no distinction between those who derive their Indian blood from the mother and those who derive it from the father. Sloan v. U. S. (C. C. 1902) 118 Fed. 283.

Defendant W., a person of Indian blood, made a selection of land in the Umatilla Reservation, after which L., an Indian woman, also attempted to select the same land. L.'s stepsons, who were white persons and not entitled to allotment, were in possession when W. made his selection, and agreed to relinquish the possession to W. on their being permitted to retain the present crop, which was allowed. L. never had any possession of the land until after it was allotted to W. in 1891. Held, that L.'s stepsons held possession at the time of allotment, subject to the claim of W., and that he had the superior right to the allotment. Guyett v. McWhirk (C. C. 1907) 154 Fed. 784.

See Drapeau v. U. S. (C. C. 1912) 195 Fed. 130, holding that a white man, marrying an Indian woman and residing with her on reservations, may not sue.

5. Selection of allotment as condition precedent to suit.—This section contemplates the selection of specific land for allotment by the claimant before the institution of such a suit, upon which the judgment or decree may operate as a complete allotment. Reynolds v. U. S. (1909) 174 Fed. 212, 98 C. C. A. 220.

6. Grounds for relief.—Where the failure to be enrolled and allotted land was due solely to the misconduct of a United States officer, equity had jurisdiction to grant relief. Sully v. U. S. (C. C. 1912) 195 Fed. 113.

7. Jurisdiction and proceedings of courts.—The jurisdiction is not defeated because title to land involved remains in the United States, nor is an adverse decision on the claim by the land department conclusive against the legal rights of the claimant. Sloan v. U. S. (C. C. 1899) 95 Fed. 193. This section was intended to vest United States courts with full authority to hear and determine every question arising in any suit brought by a claimant to an allotment; and the fact that such questions have been decided by the land department adversely to the claimant neither affects the court's jurisdiction nor concludes it on any matter of law or fact. Sloan v. U. S. (C. C. 1902) 118 Fed. 283, appeal dismissed (1904) 24 Sup. Ct. 570, 193 U. S. 614, 48 L. Ed. 814.

The court has jurisdiction of a suit by the only child of a deceased Indian to recover lands allotted to him in the Umatilla reservation under Act March 3, 1885, c. 319, 23 Stat. 341. Patawa v. U. S. (C. C. 1904) 132 Fed. 893.

The jurisdiction of suits by Indians, involving their right to lands allotted under any law or treaty, is exclusive. Parr v. U. S. (C. C. 1904) 132 Fed. 1004.

8. —— State or territorial courts.—State courts were not given jurisdiction of controversies necessarily involving a determination of the title, and incidentally, of the right to the possession, of Indian allotments while the same were held in trust by the United States. McKay v. Kalyton (1907) 27 Sup. Ct. 346, 349, 204 U. S. 458, 51 L. Ed. 566, reversing judgment Kalyton v. Kalyton (1903) 74 Pac. 491, 45 Or. 116.

The district courts of the territory of Oklahoma had jurisdiction of suits brought therein by persons of Indian blood to establish their rights to allotments. Young v. U. S. (C. C. 1910) 176 Fed. 612. And state courts have jurisdiction over a controversy as to possession between the owner of an Indian allotment and a sublessee of the land for oil and gas mining purposes, though the oil and gas did not pass by the allotment, and though the original lease required that royalties be paid to the tribe. Const. Okl. art. 1, § 3, disclaiming any interest on the part of the state in any Indian lands until the title of the United States therein shall have been extinguished, does not prevent the state courts from exercising jurisdiction over controversies as to allotted land, although it may be necessary for such courts to construe acts of Congress, Indian treaties, and departmental leases and conveyances. Kohlmeyer v. Wolverine Oil Co. (1913) 132 P. 497, 37 Okl. 477.

9. —— Pleadings.—See § 4215, post, and notes thereunder.

10. —— Parties.—The United States is not a necessary party to a suit brought prior to amendatory Act Feb. 6, 1901, c. 217, to determine the respective rights of two Indians, each claiming under Allotment Act March 3, 1885, c. 319, 23 Stat. 340. Hy-yu-tse-mil-kin v. Smith (1904) 24 Sup. Ct. 676, 680, 194 U. S. 401, 48 L. Ed. 1039. See Parr v. U. S. (C. C. 1904) 132 Fed. 1004, holding that, in actions by Indians involving their right to lands allotted, the United States must be made a party defendant. See, also,

McKay v. Kalyton (1907) 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566, holding that under the amendatory act of 1901 the United States, the trustee during the trust period, must be made a party. See, also, in accord, Heckman v. U. S. (1912) 32 Sup. Ct. 424, 224 U. S. 413, 56 L. Ed. 820.

An adverse claimant must be joined as a defendant to litigate his rights. U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229, decree affirmed Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 223 U. S. 215, 56 L. Ed. 409. See Oakes v. U. S. (1909) 172 Fed. 305, 97 C. C. A. 139.

11. —— Receiver—Power to appoint.—Courts of the United States have power to appoint a receiver for the lands involved in such a suit, where a proper showing therefor is made. But will not appoint a receiver where the Secretary of the Interior has given instructions that no action shall be taken in respect to leasing the lands in dispute until the rights of the respective claimants have been determined. Smith v. U. S. (C. C. 1905) 142 Fed. 225.

12. —— Nature and extent of relief.—This section as originally enacted confers jurisdiction to decree relief to an Indian, entitled under the law to an allotment of certain lands of which right he has been deprived by the rulings of the land department. Hy-yu-tse-mil-kin v. Smith (1902) 119 Fed. 114, 55 C. C. A. 216, affirming decree Smith v. He-yu-tse-mil-kin (C. C. 1901) 110 Fed. 60, and judgment affirmed (1904) 24 Sup. Ct. 676, 194 U. S. 401, 48 L. Ed. 1039.

Jurisdiction is not restricted to a determination of the right of plaintiff to an allotment; but the right of an adverse claimant may be litigated. U. S. v. Fairbanks (1909) 171 Fed. 337, 96 C. C. A. 229, decree affirmed Fairbanks v. U. S. (1912) 32 Sup. Ct. 292, 223 U. S. 215, 56 L. Ed. 409.

13. Conclusiveness of decision of land department.—The decision of the Land Department, on the question whether or not the plaintiff when a person of mixed blood was recognized as a member of the tribe entitled to the benefit of the act, will not in all cases be followed, since in case of an adverse ruling such rule would leave the plaintiff without the remedy which it was the purpose of the statute to give him. Waldron v. U. S. (C. C. 1905) 143 Fed. 413.

14. Decree binding the United States.—Provision that the decree in favor of a claimant shall have the effect of an allotment allowed and approved by the secretary of the interior, is in effect a consent upon the part of the United States to be bound by such decree; and, where the suit involves simply a question of priority of right between two claimants, the United States is not a necessary party. Hy-yu-tse-mil-kin v. Smith (1902) 119 Fed. 114, 55 C. C. A. 216, judgment affirmed (1904) 24 Sup. Ct. 676, 194 U. S. 401, 48 L. Ed. 1039.

Cited without definite application, U. S. v. Gray (1912) 201 Fed. 291, 119 C. C. A. 529; La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

§ 4215. (Act Feb. 6, 1901, c. 217, § 2.) Actions for allotments; proceedings; service of petition on and defense by district attorney.

The plaintiff shall cause a copy of his petition filed under the preceding section to be served upon the district attorney of the United States in the district wherein suit is brought, and shall mail a copy of same, by registered letter, to the Attorney-General of the United States, and shall thereupon cause to be filed with the clerk of the court wherein suit is instituted an affidavit of such service and the mailing of such letter. It shall be the duty of the district attorney upon whom service of petition is made as aforesaid to appear and defend the interests of the Government in the suit, and within sixty days after the service of petition upon him, unless the time should be extended by order of the court made in the case to file a plea, answer, or demurrer on the part of the Government, and to file a notice of any counterclaim, set-off, claim for damages, or other demand or defense whatsoever of the Government in the premises: Provided, That should the district attorney neglect or refuse to file the plea, answer, demurrer, or defense, as required, the plaintiff may proceed with the case under such rules as the court may adopt in the premises; but the plaintiff shall not have judgment or decree for his claim, or any part thereof,

unless he shall establish the same by proof satisfactory to the court. (31 Stat. 760.)

This section was added to the provisions of Act Aug. 15, 1894, c. 290, § 1, amended by section 1 of this act to read as set forth ante, § 4214, as a further amendment of said provisions.

Notes of Decisions

Right of action.—See § 4214, ante, and notes thereunder.

Pleading.—A complaint alleging that plaintiffs were Indians entitled to an allotment, and that they desired to take the lands in controversy in allotment, and were not possessed of other lands than those in controversy, sufficiently alleged, as against a demurrer, that plaintiffs were holding the land for the purpose of allotment. Thomason v. McLaughlin (Ind. T. 1907) 103 S. W. 595.

§ 4216. (Act May 31, 1902, c. 946.) Limitations of actions for lands patented in severalty under treaties.

In all actions brought in any State court or United States court by any patentee, his heirs, grantees, or any person claiming under such patentee, for the possession or rents or profits of lands patented in severalty to the members of any tribe of Indians under any treaty between it and the United States of America, where a deed has been approved by the Secretary of the Interior to the land sought to be recovered, the statutes of limitations of the States in which said land is situate shall be held to apply, and it shall be a complete defense to such action that the same has not been brought within the time prescribed by the statutes of said State the same as if such action had been brought for the recovery of land patented to others than members of any tribe of Indians. (32 Stat. 284.)

This was the first section of an act entitled "An act providing that the statute of limitations of the several States shall apply as a defense to actions brought in the United States courts for the recovery of lands patented in severalty to members of any tribe of Indians under any treaty between it and the United States of America."

Section 2 of the act provided that it should not apply to any suits brought within one year from and after its passage.

Notes of Decisions

Actions for allotments.—See §§ 4214, 4215, ante, and notes thereunder.

Retroactive effect of statute.—This section is retroactive, and hence under it and Rem. & Bal. Code Wash. §§ 156, 786, 788, an action to quiet title held barred. Little Bill v. Swanson (1911) 64 Wash. 650, 117 Pac. 481; Same v. Dyslin (1911) 64 Wash. 697, 117 Pac. 487.

Laches as barring actions.—Equitable doctrine of laches held applicable, and action barred by inexcusable neglect and laches. Little Bill v. Swanson (1911) 64 Wash. 650, 117 Pac. 481; Same v. Dyslin (1911) 64 Wash. 697, 117 Pac. 487.

§ 4217. (Act May 31, 1900, c. 598, § 1.) Leases of allotted lands where allottee is incapacitated to occupy or improve them.

Whenever it shall be made to appear to the Secretary of the Interior that, by reason of age, disability, or inability, any allottee of Indian lands can not personally, and with benefit to himself, occupy or improve his allotment or any part thereof, the same may be leased upon such terms, regulations, and conditions as shall be prescribed by the Secretary for a term not exceeding five years, for farming purposes only. (31 Stat. 229.)

This was a proviso in the Indian appropriation act for the fiscal year 1901, cited above.

A previous provision for authorizing leases of allotted lands, "for a term not exceeding three years for farming or grazing, or ten years for mining purposes," was made by Act Feb. 28, 1891, c. 383, § 3, 26 Stat. 795. Thereafter provisions authorizing such leases, "for a term not exceeding five years for farming or grazing purposes, or ten years for mining or business purposes," were made by each of the Indian appropriation acts for the fiscal years 1895, 1896, 1897, Act Aug. 15, 1894, c. 290, § 1, 28 Stat. 305, Act March 2, 1895,

c. 188, § 1, 28 Stat. 900, and Act June 10, 1896, c. 398, § 1, 29 Stat. 340. These provisions were superseded by a proviso, containing the word "hereafter," authorizing such leases "for a term not exceeding three years for farming or grazing purposes, or five years for mining or business purposes," of a proviso in the Indian appropriation act for the fiscal year 1898, Act June 7, 1897, c. 3, § 1, 30 Stat. 85. But all said former provisions may be regarded as superseded by those of this act, which are applicable to "any allottee of Indian lands," and authorize leases "for a term not exceeding five years, for farming purposes only."

Subsequent general provisions for leasing allotted lands held in trust were made by Act June 25, 1910, c. 431, § 4, post, § 4221.

Special provisions permitting Indians to whom lands have been allotted on the Yakima Indian reservation in the State of Washington, to lease such lands for agricultural purposes for a term not exceeding five years, or unimproved lands for a term not exceeding ten years were made by Act March 1, 1899, c. 324, § 1, 30 Stat. 941, and Act May 31, 1900, c. 598, § 1, 31 Stat. 246.

Special provisions for leasing allotted lands on certain reservations named in Utah and in Wyoming, for cultivation under irrigation, were made by Act April 30, 1908, c. 153, 35 Stat. 95, 97.

Allotted lands, which are arid, but irrigable, may be leased for not exceeding ten years, under Act May 18, 1916, c. 125, § 1, post, § 4217a.

Notes of Decisions

Right of Indian allottees to make leases.—See § 4201, ante, and §§ 4218–4221, post, and notes thereunder.

Approval by assistant secretary of leases, see R. S. § 439, ante, § 667.

Act Feb. 28, 1891, c. 383, § 3, does not authorize the leasing of lands embraced within an Indian allotment, unless it is made to appear to the Secretary of the Interior that the allottee cannot, by reason of age or other disability personally and with benefit to himself occupy and improve his allotment or any part thereof. Williams v. Steinmetz (1905) 82 Pac. 986, 16 Okl. 104.

A lease of an Indian allotment, which has not been approved by the Secretary of the Interior, is void. Id.

See Lemmon v. U. S. (1901) 106 Fed. 650, 45 C. C. A. 518; Midland Oil Co. v. Turner (1910) 179 Fed. 74, 102 C. C. A. 368; U. S. v. Abrams (C. C. 1910) 181 Fed. 847 (decree affirmed Same v. Noble [1912] 197 Fed. 292, 116 C. C. A. 654); Darnell v. Hume (1914) 140 Pac. 775, 40 Okl. 668; Gladney v. Richardson (Okl. 1914) 143 Pac. 683. See Mosgrove v. Harper (1898) 54 Pac. 187, 33 Or. 252, as to the general authority of the Secretary of the Interior.

Term and validity of leases.—See U. S. v. Abrams (C. C. 1910) 181 Fed. 847, decree affirmed Same v. Noble (1912) 197 Fed. 292, 116 C. C. A. 654; Reeves v. Sheets (1905) 82 Pac. 487, 16 Okl. 342; Whitham v. Lehmer (Okl. 1908) 98 Pac. 351.

Recovery by Indian allottee for trespass on land.—An occupant of land, the title to which is in the government, may maintain trespass against one who wrongfully interferes with his possession to his injury; and so, though the government by Act March 3, 1885, c. 319, 23 Stat. 341, and section 4201, ante, and Act Feb. 28, 1891, c. 383, 26 Stat. 795, re-enacted with modifications by Act 1900, § 1 (this section), holds in trust the legal title to land allotted in severalty to an Indian, the latter, who is in the rightful possession of the land and has the beneficial use therein, may recover damages for an unlawful trespass upon it. Smith v. Mosgrove (1908) 94 P. 970, 51 Or. 495.

—— For rental value from occupant under void lease.—An Indian may recover, in an action for mesne profits, the rental value of lands allotted to him by the government, from a person who has occupied the same under a lease which is void because not sanctioned and approved by the officers of the Interior Department. Phillips v. Reynolds (Neb. 1907) 113 N. W. 234, 235.

Action by lessee under void lease.—A lessee under a void lease cannot recover for cattle of the allottee and another trespassing on the land and destroying crops. Williams v. Steinmetz (1905) 82 Pac. 986, 16 Okl. 104.

Adjudication by secretary of the interior of conditions for re-entry.—Terms of a lease of Indian allotment lands providing that, on nonpayment of rent or on commission of waste, the lessee shall have the right of re-entry, do not authorize the secretary of the interior to adjudge that such contingencies have happened, such questions being for a court of law. Mosgrove v. Harper (1898) 54 P. 187, 33 Or. 252.

§ 4217a. (Act May 18, 1916, c. 125, § 1.) Leases of arid allotted lands where allottee is incapacitated to occupy or improve them.

Whenever it shall appear to the satisfaction of the Secretary of the Interior that the allotted lands of any Indian are arid but sus-

ceptible of irrigation and that the allottee, by reason of old age or other disability, can not personally occupy or improve his allotment or any portion thereof, such lands or such portion thereof, may be leased for a period not exceeding ten years, under such terms, rules, and regulations as may be prescribed by the Secretary of the Interior. (39 Stat.)

This was a provision of the Indian appropriation act for the fiscal year 1917, cited above.

Other allotted lands may be leased for not exceeding five years, under Act May 31, 1900, c. 598, § 1, ante, § 4217.

§ 4218. (Act Feb. 28, 1891, c. 383, § 3.) Leases of lands occupied by Indians, bought and paid for by them, not needed for farming, etc., purposes.

Where lands are occupied by Indians who have bought and paid for the same, and which lands are not needed for farming or agricultural purposes, and are not desired for individual allotments, the same may be leased by authority of the Council speaking for such Indians, for a period not to exceed five years for grazing, or ten years for mining purposes in such quantities and upon such terms and conditions as the agent in charge of such reservation may recommend, subject to the approval of the Secretary of the Interior. (26 Stat. 795.)

This was a proviso annexed to section 3 of the act to amend, etc., the General Allotment Act of Feb. 8, 1887, c. 119.

A subsequent provision for leasing surplus lands of any tribe was made by Act Aug. 15, 1894, c. 290, § 1, post, § 4219.

Notes of Decisions

Words "bought and paid for" as words of limitation.—The words "bought and paid for" are not a limitation to only such lands as have been actually paid for in cash, or to those which have been patented, and the title to which has been actually parted with by the United States; but they include all lands which have been purchased by the Indians, either by the payment of money, or by exchange, or by the surrender of possession of other property. Strawberry Valley Cattle Co. v. Chipman (1896) 13 Utah, 454, 45 Pac. 348.

Power of secretary of interior to authorize leasing.—See Morrison v. Burnette (1907) 154 Fed. 617, 83 C. C. A. 391; Midland Oil Co. v. Turner (1910) 179 Fed. 74, 102 C. C. A. 368 (modifying decree Turner v. Seep [C. C. 1909] 167 Fed. 646); Seep v. Spade (1910) 179 Fed. 77, 102 C. C. A. 371; Coey v. Low (1904) 77 Pac. 1077, 36 Wash. 10.

—— To cancel lease.—A lease of allotment land, entered into by an allottee having power so to do, and pursuant to the terms prescribed by the secretary of the interior, cannot, after its approval by the secretary, be canceled or annulled by him for fraud or imposition, since on such approval the lessee acquires a vested interest, and the courts afford the lessor an adequate remedy. Mosgrove v. Harper (1898) 54 P. 187, 33 Or. 252.

Recovery of possession by landlord after term.—See Sittel v. Wright (1903) 122 Fed. 434, 58 C. C. A. 416.

Indian agent charged with official trust in executing and completing leases.—An Indian agent, in the execution and completion of leases of land not needed for farming or agricultural purposes, was charged with such an official trust that his receiving a bribe to influence his official action thereon rendered him subject to punishment under section 10287. Sharp v. U. S. (1905) 138 Fed. 878, 71 C. C. A. 258, reversing judgment (1904) 76 Pac. 177, 13 Okl. 522.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 398, 232 U. S. 442, 58 L. Ed. 676; Barnsdall Oil Co. v. Leahy (1912) 195 Fed. 731, 115 C. C. A. 521; U. S. v. Gray (1912) 201 Fed. 291, 119 C. C. A. 529.

§ 4219. (Act Aug. 15, 1894, c. 290, § 1.) Leases of surplus lands of tribe.

The surplus lands of any tribe may be leased for farming purposes by the council of such tribe under the same rules and regulations and for the same term of years as is now allowed in the case of leases for grazing purposes. (28 Stat. 305.)

This was a proviso in the Indian appropriation act for the fiscal year 1895, cited above.

Previous provisions, referred to in this proviso, for leasing lands not needed for farming, etc., purposes, for grazing, etc., were made by Act Feb. 28, 1891, c. 383, § 3, ante, § 4218.

§ 4220. (Act March 3, 1909, c. 263.) Leases of allotted lands for mining purposes.

All lands allotted to Indians in severalty, except allotments made to members of the Five Civilized Tribes and Osage Indians in Oklahoma, may by said allottee be leased for mining purposes for any term of years as may be deemed advisable by the Secretary of the Interior; and the Secretary of the Interior is hereby authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this paragraph into full force and effect. (35 Stat. 783.)

This was a provision of the Indian appropriation act for the fiscal year 1910, cited above.

See notes to provisions of Act May 31, 1900, c. 598, § 1, ante, § 4217.

Notes of Decisions

1. Approval of leases by secretary of the interior.
2. —— Removal of restrictions against alienation.
3. Contracts for leases.
4. Validity of leases—Acknowledgment.
5. —— Consideration.
6. —— Statute of frauds.
7. —— Term.
8. Assignments of leases.
9. Regulations by secretary of interior of mining operations.
10. Royalty—Recovery of.
11. —— Assignment of.
12. Government's right to set aside leases for infancy of lessor.
13. Agent as party to suit to determine rights under leases.

1. Approval of leases by secretary of the interior.—See Jennings v. Wood (1911) 192 Fed. 507, 112 C. C. A. 657; Barnsdall v. Owen (1912) 200 Fed. 519, 118 C. C. A. 623; Same v. Delaware Indian Oil Co. (1912) 200 Fed. 522, 118 C. C. A. 626; (1904) 25 Op. Atty. Gen. 168.

2. —— Removal of restrictions against alienation.—An oil and gas lease by an allottee of Indian lands whose restrictions against alienation had been removed need not be approved by the Secretary of the Interior. Kolachny v. Galbreath (1910) 110 Pac. 902, 26 Okl. 772.

3. Contracts for leases.—Where an oil and gas lease, subject to the approval of the Secretary of the Interior, was approved, conditioned on the lessee and its sureties executing certain documents which they rejected, the conditional approval was a new offer; and not having been accepted there was no contract. Davis v. Selby Oil & Gas Co. (1912) 128 Pac. 1083, 35 Okl. 254.

4. Validity of leases—acknowledgment.—That mineral leases were not acknowledged did not affect their validity as between the parties. U. S. v. Noble (1912) 197 Fed. 292, 116 C. C. A. 654, affirming decree U. S. v. Abrams (C. C. 1910) 181 Fed. 847.

5. —— Consideration.—See Moore v. Sawyer (C. C. 1909) 167 Fed. 826.

6. —— Statute of frauds.—Where a mining lease was signed by the lessor only, but was accepted and recorded by the lessees, the government could not set it aside on the theory that it was void under the statute of frauds because not signed by the lessees. U. S. v. Wright (1912) 197 Fed. 297, 116 C. C. A. 659.

7. —— Term.—See U. S. v. Abrams (C. C. 1910) 181 Fed. 847, decree affirmed Same v. Noble (1912) 197 Fed. 292, 116 C. C. A. 654.

8. Assignments of leases.—See Midland Oil Co. v. Turner (1910) 179 Fed. 74, 102 C. C. A. 368 (modifying decree Turner v. Seep [C. C. 1909] 167 Fed. 646); Seep v. Spade (1910) 179 Fed. 77, 102 C. C. A. 371; U. S. v. Noble (1912) 197 Fed. 292, 116 C. C. A. 654 (affirming decree U. S. v. Abrams [C. C. 1910] 181 Fed. 847); Turner v. Seep (C. C. 1909) 167 Fed. 646, decree modified Midland Oil Co. v. Turner (1910) 179 Fed. 74, 102 C. C. A. 368.

9. Regulations by secretary of interior of mining operations.—See U. S. v. McMurray (C. C. 1910) 181 Fed. 723.

10. Royalty—Recovery of.—See Atoka Coal & Mining Co. v. Adams (1900) 104 Fed. 471, 43 C. C. A. 651; U. S. v. Comet Oil & Gas Co. (1913) 202 Fed. 849, 121 C. C. A. 157; U. S. v. Comet Oil & Gas Co. (C. C. 1911) 187 Fed. 674.

11. —— Assignment of.—See U. S. v. Abrams (C. C. 1910) 181 Fed. 847, decree affirmed Same v. Noble (1912) 197 Fed. 292, 116 C. C. A. 654.

12. Government's right to set aside leases for infancy of lessor.—The government had no right to sue to set aside an Indian minor's mineral lease of his allotment where the minor had redated, re-executed, and extended the lease after arriving at majority. U. S. v.

Wright (1912) 197 Fed. 297, 116 C. C. A. 659.

13. Agent as party to suit to determine rights under leases.—An agent of the Interior Department having charge of the affairs of Indian tribes under direction of the Secretary is not exempt from process of the court, and is a proper, although not indispensable, party to a suit to determine rights under leases of Indian lands. Texas Co. v. Central Fuel Oil Co. (1912) 194 Fed. 1, 114 C. C. A. 21.

§ 4221. (Act June 25, 1910, c. 431, § 4.) Leases of allotments held in trust; disposition of proceeds.

Any Indian allotment held under a trust patent may be leased by the allottee for a period not to exceed five years, subject to and in conformity with such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds of any such lease shall be paid to the allottee or his heirs, or expended for his or their benefit, in the discretion of the Secretary of the Interior. (36 Stat. 856.)

This section was part of an act to provide for determining the heirs of, and for the disposition of allotments of, deceased Indians, cited above.

See notes to provisions of Act May 31, 1900, c. 598, § 1, ante, § 4217.

Notes of Decisions

Leases of allotments prior to this section.—See § 4201, ante, and notes thereunder.

An Indian allottee cannot lawfully lease or rent the whole or any part of his allotment, either with or without the approval of the Secretary of the Interior. (1890) 19 Op. Atty. Gen. 559.

Term of lease.—See Tate v. Stone (1913) 130 P. 296, 35 Okl. 369.

Cancellation of leases.—See Wade v. Fisher (1912) 39 App. D. C. 245.

Right to improvements.—See Krull v. Rose (Neb. 1911) 130 N. W. 271.

§ 4222. (Act Feb. 28, 1891, c. 383, § 5.) Determination of descent of land to heirs of deceased allottee.

For the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have cohabited together as husband and wife according to the custom and manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: Provided, That the provisions of this act shall not be held or construed as to apply to the lands commonly called and known as the "Cherokee Outlet." (26 Stat. 795.)

This was part of section 5 of an act to amend and further extend the benefits of the General Allotment Act of 1887, which is the act referred to in the first clause of this section by the words "under the provisions of the fifth section of said act."

A further proviso annexed to this section, that no allotment of land should be made to certain Indians specified, is omitted, as special only.

Subsequent provisions for ascertaining the heirs of deceased allottees, and for the issue to them of patents or other disposition of the lands allotted, and for the disposal of trust allotments by will, etc., were made by Act June 25, 1910, c. 431, §§ 1–3, post, §§ 4226, 4228, 4229.

Notes of Decisions

Applicability and operation of statute.—This section is general in its purpose, and does not repeal or in any way affect the special act of 1885, relating to the allotment of lands to the Umatilla Indians, and enacting that the law of alienation and descent in force in the state of Oregon shall apply thereto. McBean v. McBean (1900) 61 Pac. 418, 37 Or. 195.

Rights of inheritance as to Creek lands in Indian territory were not affected by this section. Porter v. Wilson (1915) 36 S. Ct. 91, affirming

Porter v. Wilson (1913) 135 Pac. 732, 39 Okl. 500.

Prior to the dissolution of the tribal government of the Creek Nation, the United States recognized the right of the Creeks to control the intercourse between the sexes by their own customs and usages. Oklahoma Land Co. v. Thomas (Okl. 1912) 127 Pac. 8, citing Jones v. Meehan (1899) 20 Sup. Ct. 1, 175 U. S. 1, 44 L. Ed. 49.

So long as Indian tribal relations were maintained prior to the Indians becoming citizens of the United States, the rules of descent of Indian property would be governed by the customs of the Indians, if such customs existed, subject, however, to treaty provisions. Meeker v. Kaelin (C. C. 1909) 173 Fed. 216.

Children as heirs.—The child of a white citizen and of an Indian mother, who is abandoned by his father, is nurtured and reared by the Indian mother in the tribal relation, and is recognized by the tribe as a member of it, falls under an exception to the general rule that the offspring follows the status of the father, and becomes a member of the tribe of the mother. A mixed-blooded Indian, who has received an allotment and patent of land as a member of a tribe, whose mother was an Indian of that tribe, and whose father was a half-breed who had been recognized as a member of the tribe, is himself a mixed-blood Indian of that tribe, notwithstanding the fact that his grandfather was a white man and a citizen of the United States. Farrell v. U. S. (1901) 110 Fed. 942, 49 C. C. A. 183.

Where a child was born out of wedlock to an Indian woman to whom Indian reservation lands were allotted, and such child survived her, he was her heir at law. Beam v. U. S. (C. C. 1907) 153 Fed. 474, decree affirmed (1908) 162 Fed. 260, 89 C. C. A. 240. Illegitimate children of an allottee are entitled to inherit and share in the lands allotted to their father the same as though they were legitimate children, and the children of a deceased illegitimate child are entitled to the share of their deceased parent. In re House's Heirs (Wis. 1907) 112 N. W. 27.

Illegitimate child of a male Indian allottee, whether born as the result of cohabitation in accordance with Indian customs or not, is entitled to inherit rights in his father's allotment as his heir. Smith v. Smith (1909) 123 N. W. 146, 140 Wis. 599.

Jurisdiction of courts to determine heirship.—See § 4226, post, and notes thereunder.

Where, in proceedings for the settlement of the estate of an Indian allottee, there being other property than the land which warranted administration, the parties, by stipulation and mutual consent, submitted to the state court the question whether S. was heir of decedent, the court had jurisdiction to determine the question, though the judgment did not transfer the title to, or disturb the possession of, the allotted land held by the United States in trust for decedent and his heirs; the government being entitled to recognize, or refuse to recognize, the order as conclusive or prima facie evidence of the fact. Smith v. Smith (1909) 123 N. W. 146, 140 Wis. 599.

—— Legality of partition in state court.—Where partition was made in a court of Kansas of land inherited from allottees who took the same in severalty as members of the tribe of Shawnee Indians, and the secretary of the interior recognized the proceedings as legal, and approved a deed based thereon, the conveyance was valid. Ingraham v. Ward (1896) 56 Kan. 550, 44 Pac. 14.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 397, 398, 232 U. S. 442, 58 L. Ed. 676.

§ 4223. (Act May 27, 1902, c. 888, § 7.) Sale of allotted lands by heirs of deceased Indian.

The adult heirs of any deceased Indian to whom a trust or other patent containing restrictions upon alienation has been or shall be issued for lands allotted to him may sell and convey the lands inherited from such decedent, but in case of minor heirs their interests shall be sold only by a guardian duly appointed by the proper court upon the order of such court, made upon petition filed by the guardian, but all such conveyances shall be subject to the approval of the Secretary of the Interior, and when so approved shall convey a full title to the purchaser, the same as if a final patent without restriction upon the alienation had been issued to the allottee. All allotted land so alienated by the heirs of an Indian allottee and all land so patented to a white allottee shall thereupon be subject to taxation under the laws of the State or Territory where the same is situate: Provided, That the sale herein provided for shall not apply to the homestead during the life

of the father, mother or the minority of any child or children. (32 Stat. 275.)

This section was part of the Indian appropriation act for the fiscal year 1903, cited above.

Notes of Decisions

Construction in general.—The term "inherited" defined in Shulthis v. MacDougal (C. C. 1907) 162 Fed. 331.

Removal of restrictions.—The effect of a sale is to terminate the trust relation of the United States with respect to such lands, and to leave their proceeds in the hands of the heirs, subject to state and local taxation, the same as other property of citizens. Nor is such right of taxation affected by regulations made by the Secretary of the Interior, imposing conditions to his assent to such sales with respect to the disposition of the proceeds. U. S. v. Thurston County (C. C. 1905) 140 Fed. 456, decree reversed (1906) 143 Fed. 287, 74 C. C. A. 425.

Under this section and sections 4195, 4201, ante, and Act March 1, 1907, c. 2285, 34 Stat. 1034, providing that all restrictions as to the sale, incumbrance, or taxation of allotments in the White Earth reservation in Minnesota held by adult mixed-blood Indians are removed, and that the restrictions shall be removed as to the full-blood Indians when the Secretary of the Interior is satisfied that they are competent to handle their own affairs, all adult mixed-blood Indians acquire the right to transfer their allotments without restriction, whether they have acquired the same by selection or by inheritance from a full or mixed blood adult or minor, and all such restrictions are also removed as to full-blood Indians, on their being able to satisfy the Secretary of Interior that they are able to manage their own affairs. U. S. v. Park Land Co. (C. C. 1911) 188 Fed. 383.

This section removes, on the death of an Indian allottee, a restriction on alienation, and his heirs if adult, may sell the allotment, or, if minors, their guardians may sell it. Egan v. McDonald (1915) 153 N. W. 915, 36 S. D. 92.

See Riley v. Kelsey (D. C. 1914) 218 Fed. 391.

Jurisdiction of court to appoint guardians and order sales.—The probate courts of Oklahoma territory were the proper courts to appoint guardians of minor heirs of a deceased Indian, and had jurisdiction to order a sale of his lands. United States Fidelity & Guaranty Co. v. Hansen (Okl. 1912) 129 P. 60, 67. See Bowling v. U. S. (1914) 34 S. Ct. 659, 233 U. S. 528, 58 L. Ed. 1080, affirming decree (1911) 191 Fed. 19, 111 C. C. A. 561, holding that a conveyance by heirs of Indian allottees, forbidden by law could not be saved by a judgment sustaining the validity of a contract of sale in a suit by such heirs against the purchaser. And see Newsom v. Langford (Tex. Civ. App. 1915) 174 S. W. 1036, as to validity of deed of minor allottees of the Five Civilized Tribes. See, also, Tiger v. Creek County (1915) 146 Pac. 912, 45 Okl. 701.

Approval by secretary of the interior.—As to the nature of the action of the secretary in approving conveyances, see Jennings v. Wood (1911) 192 Fed. 507, 112 C. C. A. 657; Bartlett v. Okla Oil Co. (D. C. 1914) 218 Fed. 380.

The approval of the secretary of the interior is necessary to the validity of any conveyance by an adult or a guardian. U. S. v. Leslie (C. C. 1909) 167 Fed. 670.

Proceeds of sale as trust funds.—Proceeds of sales, which have been deposited by direction of the Secretary of the Interior in a bank selected by the commissioner of Indian affairs to the credit of the heirs, in proper proportions, subject to their checks only when approved by the officer in charge are held in trust by the United States for the same purposes as were the lands, and are exempt from taxation. U. S. v. Thurston County, Neb. (1906) 143 Fed. 287, 74 C. C. A. 425, reversing decree (C. C. 1905) 140 Fed. 456.

The trust attached to the proceeds, which was only payable to such heirs under rules prescribed by the interior department. National Bank of Commerce v. Anderson (1906) 147 Fed. 87, 77 C. C. A. 259.

The price remained a trust fund so long as the United States government retained possession or control, but the trust character ended when the possession was relinquished. The government had the option either to retain control of the money or relinquish control, and the secretary of the interior could exercise the option. United States Fidelity & Guaranty Co. v. Hansen (1912) 129 P. 60, 67, 36 Okl. 459, Ann. Cas. 1915A, 402.

Taxation.—See § 4201, ante, and notes thereunder.

Cited without definite application, U. S. v. Pelican (1914) 34 Sup. Ct. 396, 398, 232 U. S. 442, 58 L. Ed. 676; Same v. Bellm (C. C. 1910) 182 Fed. 161; Same v. Comet Oil & Gas Co. (C. C. 1911) 187 Fed. 674.

§ 4224. (Act May 29, 1908, c. 216.) Sale of allotted lands on petition of allottee or his heirs, etc.; patents to heirs of deceased allottee, or sale of lands allotted to him; use of proceeds of sales; patents to purchasers; exception from section of certain States.

The lands, or any part thereof, allotted to any Indian, or any inherited interest therein, which can be sold under existing law by authority of the Secretary of the Interior, except the lands in Oklahoma, and the States of Minnesota and South Dakota may be sold on the petition of the allottee, or his heirs, on such terms and conditions and under such regulations as the Secretary of the Interior may prescribe; and the lands of a minor, or of a person deemed incompetent by the Secretary of the Interior to petition for himself, may be sold in the same manner, on the petition of the natural guardian in the case of infants, and in the case of Indians deemed incompetent as aforesaid, and of orphans without a natural guardian, on petition of a person designated for the purpose by the Secretary of the Interior. That when any Indian who has heretofore received or who may hereafter receive, an allotment of land dies before the expiration of the trust period, the Secretary of the Interior shall ascertain the legal heirs of such Indian, and if satisfied of their ability to manage their own affairs shall cause to be issued in their names a patent in fee simple for said lands; but if he finds them incapable of managing their own affairs, the land may be sold as hereinbefore provided: Provided, That the proceeds derived from all sales hereunder shall be used, during the trust period, for the benefit of the allottee, or heir, so disposing of his interest, under the supervision of the Commissioner of Indian Affairs: And provided further, That upon the approval of any sale hereunder by the Secretary of the Interior he shall cause a patent in fee to issue in the name of the purchaser for the lands so sold: And provided further, That nothing in section one herein contained shall apply to the States of Minnesota and South Dakota. (35 Stat. 444.)

This was the first section of an act entitled "An act to authorize the Secretary of the Interior to issue patents in fee to purchasers of Indian lands under any law now existing or hereafter enacted, and for other purposes."

Other sections of the act relating to claims of or against individual Indians or particular tribes, or to particular tracts of land or reservations or parts thereof, are omitted, as special only.

Previous provisions, similar to some extent to those of this section, for patents to heirs of deceased allottees or sale of the lands allotted to them, were added by Act May 8, 1906, c. 2348, 34 Stat. 183, to the amendment by that act of section 6 of the General Allotment Act, Act Feb. 8, 1887, c. 119, § 6, incorporated in said section as set forth ante, § 4203. Said added provisions were as follows:

"Hereafter when an allotment of land is made to any Indian, and any such Indian dies before the expiration of the trust period, said allotment shall be cancelled and the land shall revert to the United States, and the Secretary of the Interior shall ascertain the legal heirs of such Indian, and shall cause to be issued to said heirs and in their names, a patent in fee simple for said land, or he may cause the land to be sold as provided by law and issue a patent therefor to the purchaser or purchasers, and pay the net proceeds to the heirs, or their legal representatives, of such deceased Indian. The action of the Secretary of the Interior in determining the legal heirs of any deceased Indian, as provided herein, shall in all respects be conclusive and final."

These provisions may be regarded as superseded by those of this section.

Special provisions for sale of interests of Indian minors in lands of the Yakima Indian reservation, in the State of Washington, whether by direct allotment or by inheritance, were made by Act March 27, 1908, c. 107, 35 Stat. 49.

§ 4225. (Act March 1, 1907, c. 2285.) Sale of allotment, or inherited interest therein, of noncompetent Indian; use of proceeds; title conveyed.

Any noncompetent Indian to whom a patent containing restrictions against alienation has been issued for an allotment of land in severalty, under any law or treaty, or who may have an interest in any allotment by inheritance, may sell or convey all or any part of such allotment or such inherited interest on such terms and conditions and under such rules and regulations as the Secretary of the Interior may prescribe, and the proceeds derived therefrom shall be used for the benefit of the allottee or heir so disposing of his land or interest, under the supervision of the Commissioner of Indian Affairs; and any conveyance made hereunder and approved by the Secretary of the Interior shall convey full title to the land or interest so sold, the same as if fee-simple patent had been issued to the allottee. (34 Stat. 1018.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

Notes of Decisions

Alienation of proceeds of sale of allotment.—Where an allotment of Indian land was sold, and the proceeds invested in personal property, title to which was taken in the name of the United States, held, that such property was not subject to alienation by the Indian, but was subject to the same restrictions as the allotment. Rider v. La Clair (1914) 138 P. 3, 77 Wash. 488.

§ 4226. (Act June 25, 1910, c. 431, § 1.) Ascertainment of heirs of deceased allottee; issue of patent to such heirs, or sale or partition of lands; disposition of proceeds of sale; certificate of competency, and effect to remove restrictions on alienation; deposit of Indian moneys in banks.

When any Indian to whom an allotment of land has been made, or may hereafter be made, dies before the expiration of the trust period and before the issuance of a fee simple patent, without having made a will disposing of said allotment as hereinafter provided, the Secretary of the Interior, upon notice and hearing, under such rules as he may prescribe, shall ascertain the legal heirs of such decedent, and his decision thereon shall be final and conclusive. If the Secretary of the Interior decides the heir or heirs of such decedent competent to manage their own affairs, he shall issue to such heir or heirs a patent in fee for the allotment of such decedent; if he shall decide one or more of the heirs to be incompetent he may, in his discretion, cause such lands to be sold: Provided, That if the Secretary of the Interior shall find that the lands of the decedent are capable of partition to the advantage of the heirs, he may cause the shares of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor. All sales of lands allotted to Indians authorized by this or any other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe, and he shall require a deposit of ten per centum of the purchase price at the time of the sale. Should the purchaser fail to comply with the terms of sale prescribed by the Secretary of the Interior, the amount so paid shall be forfeited; in case the balance of the purchase price is to be paid in deferred payments, a further amount, not exceeding fifteen per centum of the purchase price may be so forfeited for failure to comply with the terms of the sale. All forfeitures shall inure to the benefit of the heirs. Upon payment of the purchase price in full, the Secretary of the Interior shall cause to be issued to the purchaser patent in fee for such land: Provided, That the proceeds of the sale of inherited

lands shall be paid to such heir or heirs as may be competent and held in trust subject to use and expenditure during the trust period for such heir or heirs as may be incompetent, as their respective interests shall appear: Provided further, That the Secretary of the Interior is hereby authorized in his discretion to issue a certificate of competency, upon application therefor, to any Indian, or in case of his death, to his heirs, to whom a patent in fee containing restrictions on alienation has been or may hereafter be issued, and such certificate shall have the effect of removing the restrictions on alienation contained in such patent: Provided further, That hereafter any United States Indian agent, superintendent, or other disbursing agent of the Indian Service may deposit Indian moneys, individual or tribal, coming into his hands as custodian, in such bank or banks as he may select: Provided, That the bank or banks so selected by him shall first execute to the said disbursing agent a bond, with approved surety, in such amount as will properly safeguard the funds to be deposited. Such bonds shall be subject to the approval of the Secretary of the Interior. (36 Stat. 855.)

This was the first section of an act entitled "An act to provide for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, for the leasing of allotments, and for other purposes."

Sections 2 and 3 of the act, relating to disposal of trust allotments by will, and to surrender thereof for the benefit of children of the allottee, are set forth post, §§ 4228, 4229.

Section 4 of the act, authorizing leases of trust allotments, is set forth ante, § 4221.

Section 5 of the act, making it unlawful to induce any Indian to execute any contract, deed, etc., purporting to convey land, etc., held in trust for him, and prescribing the punishment thereof, is set forth under Title LXIX, "The Criminal Code," post, § 10227.

Section 6 of the act, amending sections 50 and 53 of the Criminal Code, is incorporated in the sections so amended, post, §§ 10217, 10220.

Sections 7 and 8 of the act, authorizing the sale of timber on unallotted lands and on trust allotments, are set forth post, §§ 4230, 4231.

Section 9 of the act amended section 3 of the General Allotment Act of Feb. 8, 1887, c. 119, and is incorporated in the section so amended, ante, § 4197.

Section 10 of the act, authorizing patents to Indians for lots occupied by them in villages on reservations in the State of Washington, is set forth post, § 4232.

Sections 11 and 12 of the act, relating to allotments on particular military, etc., reservations, and to individual Indians, are omitted, as special only.

Section 13 of the act provided for withdrawal from location, entry, etc., and for reservation of lands within Indian reservations, for power or reservoir sites, irrigation projects, etc. It is set forth post, § 4526.

Section 15 of the act, authorizing a patent for a particular tract of land, is omitted, as special only.

Section 16 of the act amended section 1 of Act March 2, 1899, c. 374, providing for acquiring rights of way by railroad companies through Indian reservations, etc., by adding thereto a proviso, which is incorporated in the section so amended, as set forth ante, § 4181.

Section 17 of the act repealed a provision for allotments to Indians on the public domain who had not theretofore received allotments, of Act March 3, 1909, c. 263, 35 Stat. 782, and amended section 1 of Act Feb. 28, 1891, c. 383, which had amended section 1 of the General Allotment Act of Feb. 8, 1887, c. 119, and also amended section 4 of said Act Feb. 28, 1891, c. 383. Said amendments are incorporated in the sections so amended, respectively, as set forth ante, §§ 4195, 4199.

Section 18 of the act amending a previous provision as to the use of proceeds of certain lands, is omitted, as special, only.

Sections 19 and 20 of the act repealed R. S. §§ 468, 469, 2091, and Act March 3, 1875, c. 132, § 8, 18 Stat. 450, Act March 2, 1895, c. 188, § 8, 28 Stat. 908, Act March 3, 1901, c. 832, § 8, 31 Stat. 1085, and Act May 27, 1902, c. 888, § 6, 32 Stat. 274, which required various reports and accounts of expenditures, disbursements, distribution of Indian supplies, etc.

Section 21 of the act, relating to the disposition of the proceeds of sale of certain lands, is omitted, as special only.

Section 22 of the act amended Act July 1, 1898, c. 545, § 6, authorizing

removal of Government property not required for use on Indian reservations, and is incorporated in the section so amended, as set forth ante, § 4115.

Section 23 of the act, requiring purchases of Indian supplies to be made in conformity with R. S. § 3709, is set forth post, § 6835.

Sections 24–30 of the act, relating to various particular tracts of land, etc., are omitted, as special only.

Section 31 of the act, authorizing allotments within national forests to Indians occupying, etc., lands therein, is set forth ante, § 4200.

Section 32 of the act, relating to titles under deeds of tribal lands in the Five Civilized Tribes issued to persons deceased, is omitted, as special only.

Section 33 of the act, providing that it shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, except as provided in section 32, is set forth post, § 4234.

Special examiners may administer oaths, and the Secretary of the Interior is empowered to compel the attendance of witnesses, by provisions of Act Aug. 1, 1914, c. 222, § 1, post, §§ 4226a, 4226b.

Trust allotments may be partitioned, although some of the heirs are incompetent, by a provision of Act May 18, 1916, c. 125, § 1, post, § 4227a.

Notes of Decisions

1. Validity of statute.
2. Construction in general.
3. —— Authority of secretary of Interior.
4. —— Judicial questions.
5. —— State court's judgment as estoppel.
6. —— Jurisdiction on appeal.
7. Indian allottees within statute.
8. Heirship according to custom of Indian life.
9. Rights of heirs.
10. Conclusiveness of affidavits of heirship.
11. Restrictions on alienation.

1. Validity of statute.—Congress, under its power over Indians and to control federal courts, could take away, even as to pending cases, as it did by this section, jurisdiction of the federal district courts to establish equitable title of heirs of an Indian allottee and vest the power of ascertaining heirs in the Secretary of the Interior. Hallowell v. Commons (1916) 36 Sup. Ct. 202, 239 U. S. 506, 60 L. Ed. —, affirming Hallowell v. Commons (1914) 210 Fed. 793, 127 C. C. A. 343, holding that the section applied to lands the legal title to which was in the government.

2. Construction in general.—See § 4214, ante, and notes thereunder.

This section restored to the Secretary of the Interior the power taken from him by Act 1894, c. 290, and Act 1901, c. 217 (incorporated into section 4214, ante). Hallowell v. Commons (1916) 36 Sup. Ct. 202, 239 U. S. 506, 60 L. Ed. —; Bond v. U. S. (C. C. 1910) 181 Fed. 613; Pel-ata-yakot v. Same (C. C. 1911) 188 Fed. 387; U. S. v. Lane (1915) 43 App. D. C. 414.

Prior to the act of 1894 the sole authority for settling disputes concerning allotments was in the Secretary of the Interior. McKay v. Kalyton (1907) 27 Sup. Ct. 346, 204 U. S. 458, 51 L. Ed. 566. See Hy-yu-tse-mil-kin v. Smith (1904) 24 Sup. Ct. 676, 194 U. S. 401, 48 L. Ed. 1039.

This section repealed section 4214, ante, in so far as the same might be construed to confer jurisdiction on federal courts to determine heirship. Hallowell v. Commons (1914) 210 Fed. 793, 127 C. C. A. 343; Pel-ata-yakot v. U. S. (C. C. 1911) 188 Fed. 387.

Jurisdiction of the federal courts to establish title of heirs of an Indian allottee dying intestate during the trust period is taken away, even as to pending cases. Hallowell v. Commons (1916) 36 Sup. Ct. 202.

This section operated to repeal Act Feb. 6, 1901 (incorporated into section 4214, ante), and deprived the courts of jurisdiction to determine such heirship and, since it contained no saving clause, the authority of the courts under the repealed act immediately ceased in so far as pending causes were concerned. Bond v. U. S. (C. C. 1910) 181 Fed. 613.

3. —— Authority of secretary of Interior.—This section makes the jurisdiction of the secretary of the interior exclusive. Hallowell v. Commons (1916) 36 Sup. Ct. 202, 239 U. S. 506, 60 L. Ed. —, affirming (1914) 210 Fed. 793, 127 C. C. A. 343, discussing the effect of the statute.

The Secretary of the Interior has no right to ignore the legal heirs, and decide in favor of a collateral heir or a stranger in blood. Where, after the Secretary of the Interior, in a controversy between the adopted children of a deceased holder of trust patents and his natural heirs, found that the adoption was legal, and that the adopted children were the legal heirs of the decedent, the adopted children petitioned the Secretary, to issue them patents in fee simple on the ground that they were competent to manage their own affairs, whereupon one of the natural heirs protested against the issuance of such patents, and also filed a motion for a review and reconsideration of the Secretary's former decision, on the ground of newly discovered evidence, it was held in a suit in equity by the adopted children against the Secretary, that the natural heirs, claiming as they did under the adoptive parent, were estopped to attack the decree of adoption which he had procured, and also that the Secretary was with-

out jurisdiction to reopen his first decision, in the absence of any claim that it was procured by fraud. U. S. v. Lane (1915) 43 App. D. C. 414.

4. —— **Judicial questions.**—If, notwithstanding this section, the courts will interpose and protect the equities and rights of persons to lands, where such rights are infringed because of erroneous procedure of the officers of the Land Department, either upon the facts or upon the law, they would not determine who were the heirs of a deceased allottee, where the Secretary of the Interior had not as yet passed upon that question. Hallowell v. Commons (1914) 210 Fed. 793, 127 C. C. A. 343, decree affirmed (1916) 36 Sup. Ct. 202, 239 U. S. 506, 60 L. Ed. 409.

5. —— **State court's judgment as estoppel.**—Where a state court had no jurisdiction to determine heirship for the purpose of fixing the right of descent to an allotment on the Umatilla reservation, while the land was held in trust by the United States for the heirs of the allottee, the state court's judgment in such proceeding did not operate as an estoppel in a subsequent proceeding by the allottee's surviving husband for curtesy. Parr v. U. S. (C. C. 1907) 153 Fed. 462.

6. —— **Jurisdiction an appeal.**—This section deprives the Circuit Court of Appeals of jurisdiction to entertain an appeal in a proceeding taken after it took effect, though the decree appealed from was entered prior to that time. Parr v. Colfax (1912) 197 Fed. 302, 117 C. C. A. 48.

7. **Indian allottees within statute.**—This section applies to any allottee who dies before the expiration of the trust period, whether the allotment has been made at the time of the passage of the act or is made in the future, and whether the death occurs before or after the passage of the act. Bond v. U. S. (C. C. 1910) 181 Fed. 613.

8. **Heirship according to custom of Indian life.**—See § 4222, ante, and notes thereunder.

9. **Rights of heirs.**—Where the wife of a Puyallup Indian allottee died prior to the approval of the allotment list by the Commissioner of Indian Affairs, the Secretary of the Interior, and the President, her heirs took nothing under the allotment list or patent issued to her surviving husband. Meeker v. Kaelin (C. C. 1909) 173 Fed. 216.

10. **Conclusiveness of affidavits of heirship.**—An affidavit by an Indian, signed by mark, in which he states that others besides himself are heirs of his father and entitled to share with him in the estate, is not conclusive against his right to be the sole heir, when the affidavit was procured from him by the Indian agent, under direction of the secretary of the interior, to show who were entitled to the distribution of certain rents, and was evidently considered by him when he made it as a mere matter of form, with which he was obliged to comply in order to get any part of the rent. Jones v. Meehan (1899) 20 Sup. Ct. 1, 3, 175 U. S. 1, 44 L. Ed. 49.

11. **Restrictions on alienation.**—Where an allotment of Indian land was sold, and the proceeds invested in personal property, title to which was taken in the name of the United States, held, that such property was not subject to alienation by the Indian, but was subject to the same restrictions as the allotment. Rider v. La Clair (1914) 138 P. 3, 77 Wash. 488.

Cited without definite application, U. S. v. Twelve Bottles of Whisky (D. C. 1912) 201 Fed. 191.

§ 4226a. (Act Aug. 1, 1914, c. 222, § 1.) Ascertainment of heirs of deceased allottees; authority to administer oaths in investigations; power to require attendance of witnesses at hearings.

Hereafter any officer or employee appointed or designated by the Secretary of the Interior or the Commissioner of Indian Affairs as special examiner in heirship cases shall be authorized to administer oaths in investigations committed to him. (38 Stat. 586.)

This was a provision of the Indian appropriation act for the fiscal year 1915, cited above. It was accompanied by a proviso that the provisions of the paragraph should not apply to the Osage Indians, nor to the Five Civilized Tribes in Oklahoma.

§ 4226b. (Act Aug. 1, 1914, c. 222, § 1.) Witnesses; compelling attendance.

The authority delegated to judges of the United States courts by section forty-nine hundred and eight of the Revised Statutes is hereby conferred upon the Secretary of the Interior to require the attendance of witnesses at hearings, upon proper showing by any of the parties to determine the heirs of decedents, held in accordance with section one of the Act of June twenty-fifth, nineteen hundred and ten (Thirty-sixth Statutes, page eight hundred and fifty-five), and the amendment of February fourteenth, nine-

teen hundred and thirteen (Thirty-seventh Statutes, page six hundred and seventy-eight), under such rules and regulations as he may prescribe. (38 Stat. 586.)

This was a further provision of the Indian appropriation act for the fiscal year 1915, cited above. It was accompanied by a proviso that the provisions of the paragraph should not apply to the Osage Indians, nor to the Five Civilized Tribes in Oklahoma.

R. S. § 4908, mentioned in this section, is set forth post, § 9453.

Act June 25, 1910, c. 431, § 1, also mentioned in this section, is set forth ante, § 4226.

Act Feb. 14, 1913, c. 55, also mentioned in this section, is set forth post, § 4228.

See ante, § 4226, and notes thereunder

§ 4227. (Act May 18, 1916, c. 125, § 1.) Payment or deduction of cost of determining heirs from proceeds of lands or trust funds of estates; account and report thereof.

Hereafter upon a determination of the heirs to any trust or restricted Indian property of the value of $250 or more, or to any allotment, or after approval by the Secretary of any will covering such trust or restricted property, there shall be paid by such heirs, or by the beneficiaries under such will, or from the estate of the decedent, or from the proceeds of sale of the allotment, or from any trust funds belonging to the estate of the decedent, the sum of $15, which amount shall be accounted for and paid into the Treasury of the United States and a report shall be made annually to Congress by the Secretary of the Interior, on or before the first Monday of December, of all moneys collected and deposited, as herein provided. (39 Stat.)

This was a provision of the Indian appropriation act for the fiscal year 1917, cited above.

This section superseded a provision of Act June 30, 1913, c. 4, § 1, 38 Stat. 80, which read as follows:

"Hereafter upon the determination of the heirs of a deceased Indian by the Secretary of the Interior there shall be paid by such heirs or from the estate of such deceased Indian or deducted from the proceeds from the sale of the land of the deceased allottee or from any trust funds belonging to the estate of the decedent, the sum of $15, to cover the cost of determining the heirs to the estate of the said deceased allottee, which amount shall be accounted for and paid into the Treasury of the United States and a report made annually to Congress by the Secretary of the Interior on or before the first Monday in December of all moneys collected and deposited as herein directed."

This section also superseded a provision of Act Aug. 1, 1914, c. 222, § 1, 38 Stat. 586, which was identical with the provision of said Act June 30, 1913, c. 4, § 1, 38 Stat. 80.

This section was accompanied by a proviso that the provisions of the paragraph should not apply to the Osage Indians, nor to the Five Civilized Tribes of Indians in Oklahoma.

Appropriations for determining the heirs of deceased Indian allottees are made in the annual Indian appropriation acts. The provision for the fiscal year 1917, was by Act May 18, 1916, c. 125, § 1, 39 Stat.

Provisions for determining such heirs were made by Act June 25, 1910, c. 431, § 1, ante, § 4226.

§ 4227a. (Act May 18, 1916, c. 125, § 1.) Partition of allotment among heirs; patents.

If the Secretary of the Interior shall find that any inherited trust allotment or allotments are capable of partition to the advantage of the heirs, he may cause such lands to be partitioned among them, regardless of their competency, patents in fee to be issued to the competent heirs for their shares and trust patents to be issued to the incompetent heirs for the lands respectively or jointly set apart to them, the trust period to terminate in accordance with the terms of the original patent or order of extension of the trust period set out in said patent. (39 Stat.)

This was a further provision of the Indian appropriation act for the fiscal year 1917, cited above.

§ 4228. (Act June 25, 1910, c. 431, § 2, as amended, Act Feb. 14, 1913, c. 55.) Disposal by will of allotments held under trust or other patent containing restrictions, or of moneys, etc., held in trust; approval of will required; trust or restrictive period not terminated thereby; sale of lands, issue of patents in fee to devisees, payment of moneys to legatee, etc.; certain tribes excepted.

Any persons of the age of twenty-one years having any right, title, or interest in any allotment held under trust or other patent containing restrictions on alienation or individual Indian moneys or other property held in trust by the United States shall have the right prior to the expiration of the trust or restrictive period, and before the issuance of a fee simple patent or the removal of restrictions, to dispose of such property by will, in accordance with regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Secretary of the Interior: Provided further, That the Secretary of the Interior may approve or disapprove the will either before or after the death of the testator, and in case where a will has been approved and it is subsequently discovered that there has been fraud in connection with the execution or procurement of the will the Secretary of the Interior is hereby authorized within one year after the death of the testator to cancel the approval of the will, and the property of the testator shall thereupon descend or be distributed in accordance with the laws of the State wherein the property is located: Provided further, That the approval of the will and the death of the testator shall not operate to terminate the trust or restrictive period, but the Secretary of the Interior may, in his discretion, cause the lands to be sold and the money derived therefrom, or so much thereof as may be necessary, used for the benefit of the heir or heirs entitled thereto, remove the restrictions, or cause patent in fee to be issued to the devisee or devisees, and pay the moneys to the legatee or legatees either in whole or in part from time to time as he may deem advisable, or use it for their benefit: Provided also, That sections one and two of this Act shall not apply to the Five Civilized Tribes or the Osage Indians. (36 Stat. 856. 37 Stat. 678.)

This section was part of the act to provide for determining the heirs of, and for the disposition and sale of allotments of, deceased Indians, etc., first cited above.

The section, as originally enacted, was as follows:

"Any Indian of the age of twenty-one years, or over, to whom an allotment of land has been or may hereafter be made, shall have the right, prior to the expiration of the trust period and before the issue of a fee simple patent, to dispose of such allotment by will, in accordance with rules and regulations to be prescribed by the Secretary of the Interior: Provided, however, That no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Secretary of the Interior: Provided further, That sections one and two of this Act shall not apply to the State of Oklahoma."

It was amended by Act Feb. 14, 1913, c. 55, entitled, "An act regulating Indian allotments disposed of by will," also cited above, to read as set forth here.

See notes to section 1 of the act, ante, § 4226.

Notes of Decisions

Disposal by will of trust allotments.—See § 4201, ante, and notes thereunder.

See Wilson v. Greer (Okl. 1915) 151 Pac. 629, as to removal of restrictions against alienation by will.

See, also, Chesnut v. Capey (1915) 146 Pac. 589, 45 Okl. 754, as to state statutes.

§ 4229. (Act June 25, 1910, c. 431, § 3.) Surrender of allotments by relinquishment for benefit of children.

In any case where an Indian has an allotment of land, or any right, title, or interest in such an allotment, the Secretary of the Interior, in his discretion, may permit such Indian to surrender such allotment, or any right, title, or interest therein, by such formal relinquishment as may be prescribed by the Secretary of the Interior, for the benefit of any of his or her children to whom no allotment of land shall have been made; and thereupon the Secretary of the Interior shall cause the estate so relinquished to be allotted to such child or children subject to all conditions which attached to it before such relinquishment. (36 Stat. 856.)

See notes to section 1 of this act, ante, § 4226.

§ 4230. (Act June 25, 1910, c. 431, § 7.) Sale of timber on unallotted lands of reservations; use of proceeds; certain states excepted.

The mature living and dead and down timber on unallotted lands of any Indian reservation may be sold under regulations to be prescribed by the Secretary of the Interior, and the proceeds from such sales shall be used for the benefit of the Indians of the reservation in such manner as he may direct: Provided, That this section shall not apply to the States of Minnesota and Wisconsin. (36 Stat. 857.)

See notes to section 1 of this act, ante, § 4226.

For other acts relative to sale of timber from Indian reservations, see Act March 3, 1883, c. 141, § 1, ante, § 4072, and notes thereunder.

§ 4231. (Act June 25, 1910, c. 431, § 8.) Sale of timber on allotments held under trust or other patents containing restrictions; use of proceeds.

The timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, may be sold by the allottee with the consent of the Secretary of the Interior and the proceeds thereof shall be paid to the allottee or disposed of for his benefit under regulations to be prescribed by the Secretary of the Interior. (36 Stat. 857.)

See notes to section 1 of this act, ante, § 4226.

For other acts relative to sale of timber from Indian reservations, see Act March 3, 1883, c. 141, § 1, ante, § 4072, and notes thereunder.

Notes of Decisions

Sale of timber by Indian allottees.—See U. S. v. Paine Lumber Co. (1907) 27 Sup. Ct. 697, 206 U. S. 467, 51 L. Ed. 1139 (affirming judgment Same v. Torrey Cedar Co. [C. C. 1904] 154 Fed. 263); Starr v. Campbell (1908) 28 Sup. Ct. 365, 208 U. S. 527, 52 L. Ed. 602; Hitchcock v. U. S. (1903) 22 App. D. C. 275; Tomkins v. Campbell (1906) 108 N. W. 216, 129 Wis. 93.

Restrictions on alienation.—See Starr v. Campbell (1908) 28 Sup. Ct. 365, 208 U. S. 527, 52 L. Ed. 602.

§ 4232. (Act June 25, 1910, c. 431, § 10.) Patents with restrictions for lots in Indian villages on reservations in State of Washington.

That the Secretary of the Interior be, and he is hereby, authorized, whenever in his opinion it shall be conducive to the best welfare and interest of the Indians living within any Indian village on any of the Indian reservations in the State of Washington, to issue a patent to each of said Indians for the village or town lot occupied by him, which patent shall contain restrictions against the alienation of the lot described therein to persons other than members of the tribe, except on approval of the Secretary of the Interior; and if any such Indian shall die subsequent to the approval of this Act, and before receiving patent to the lot occupied by him, the lot to which such Indian would have been entitled if

living shall be patented in his name and shall be disposed of as provided for in section one of this Act. (36 Stat. 858.)

See notes to section 1 of this act, ante, § 4226.

§ 4233. (Act June 25, 1910, c. 431, § 14.) Cancellation of trust patents for allotments within power or reservoir sites or reservation for irrigation purposes; reimbursement for improvements; lieu allotments.

The Secretary of the Interior, after notice and hearing, is hereby authorized to cancel trust patents issued to Indian allottees for allotments within any power or reservoir site and for allotments or such portions of allotments as are located upon or include lands set aside, reserved, or required within any Indian reservation for irrigation purposes under authority of Congress: Provided, That any Indian allottee whose allotment shall be so canceled shall be reimbursed for all improvements on his canceled allotment, out of any moneys available for the construction of the irrigation project for which the said power or reservoir site may be set aside: Provided, further, That any Indian allottee whose allotment, or part thereof, is so canceled shall be allotted land of equal value within the area subject to irrigation by any such project. (36 Stat. 859.)

See notes to section 1 of this act, ante, § 4226.

The preceding section of the act, providing for withdrawal from location, entry, etc., and for reservation of lands within Indian reservations, for power or reservoir sites, irrigation projects, etc., is set forth post, § 4526.

Previous provisions for irrigation of allotted lands, in carrying out irrigation projects under the Reclamation Act, of Act March 3, 1909, c. 263, are set forth ante, § 4205.

§ 4234. (Act June 25, 1910, c. 431, § 33.) Provisions of act not to apply to certain tribes.

The provisions of this Act shall not apply to the Osage Indians, nor to the Five Civilized Tribes, in Oklahoma, except as provided in section thirty-two. (36 Stat. 863.)

This was the last section of the act to provide for determining the heirs of, and for disposition and sale of allotments of, deceased Indians, etc., cited above.

See notes to section 1 of the act, ante, § 4226.

§ 4235. (Act June 21, 1906, c. 3504.) Lands acquired under Allotment Act not liable for debts prior to final patent therefor.

No lands acquired under the provisions of this Act shall, in any event, become liable to the satisfaction of any debt contracted prior to the issuing of the final patent in fee therefor. (34 Stat. 327.)

This provision and the three other paragraphs next following were added to the General Allotment Act of Feb. 8, 1887, c. 119, referred to in this provision as "this Act," by amendment by the Indian appropriation act for the fiscal year 1907, cited above.

See, also, Act Feb. 8, 1887, c. 119, § 6, as amended, Act May 8, 1906, c. 2348, ante, § 4203.

Notes of Decisions

Lands subject to payment of debts.—Lands allotted to an Indian after restrictions on alienation were removed are not subject to an execution under a judgment for a tort, recovered theretofore, without violating the statute providing that such lands shall not be affected by any deed, debt, or obligation, contracted prior to the time at which they may be alienated under the act. Mullen v. Simmons (1914) 34 Sup. Ct. 857, 234 U. S. 192, 58 L. Ed. 1274, reversing judgment Simmons v. Mullen (1912) 122 P. 518, 33 Okl. 184.

See Lowry v. Weaver (C. C. 1846) Fed. Cas. No. 8,584; Love v. Pamplin (C. C. 1884) 21 Fed. 755; Brashear v. Williams (1846) 10 Ala. 630.

Injunction against levy.—See Ke-tuc-e-mun-guah v. McClure (1890) 122 Ind. 541, 23 N. E. 1080, 7 L. R. A. 782.

§ 4236. (Act June 21, 1906, c. 3504.) Moneys from lease or sale of lands held in trust not liable for debts contracted during trust period or during minority of Indian.

No money accruing from any lease or sale of lands held in trust

by the United States for any Indian shall become liable for the payment of any debt of, or claim against, such Indian contracted or arising during such trust period, or, in case of a minor, during his minority, except with the approval and consent of the Secretary of the Interior. (34 Stat. 327.)

This was a further provision added to the General Allotment Act of Feb. 8, 1887, c. 119, by amendment by the Indian appropriation act for the fiscal year 1907, cited above.

See note to preceding paragraph so added, ante, § 4235.

See, also, Act Feb. 8, 1887, c. 119, § 6, as amended, Act May 8, 1906, c. 2348, ante, § 4203.

§ 4237. (Act June 21, 1906, c. 3504.) Interest on moneys from proceeds of sale of lands, held for minors.

The shares of money due minor Indians as their proportion of the proceeds from the sale of ceded or tribal Indian lands, whenever such shares have been, or shall hereafter be, withheld from their parents, legal guardians, or others, and retained in the United States Treasury by direction of the Secretary of the Interior, shall draw interest at the rate of three per centum per annum, unless otherwise provided for, from the period when such proceeds have been or shall be distributed per capita among the members of the tribe of which such minor is a member; and the Secretary of the Treasury is hereby authorized and directed to allow interest on such unpaid amounts belonging to said minors as shall be certified by the Secretary of the Interior as entitled to draw interest under this Act. (34 Stat. 327.)

See notes to preceding paragraph of this act, ante, § 4235.

§ 4238. (Act June 21, 1906, c. 3504.) Sale of allotted lands within reclamation projects; use of proceeds.

Any Indian allotted lands under any law or treaty without the power of alienation, and within a reclamation project approved by the Secretary of the Interior, may sell and convey any part thereof, under rules and regulations prescribed by the Secretary of the Interior, but such conveyance shall be subject to his approval, and when so approved shall convey full title to the purchaser the same as if final patent without restrictions had been issued to the allottee: Provided, That the consideration shall be placed in the Treasury of the United States, and used by the Commissioner of Indian Affairs to pay the construction charges that may be assessed against the unsold part of the allotment, and to pay the maintenance charges thereon during the trust period, and any surplus shall be a benefit running with the water right to be paid to the holder thereof. (34 Stat. 327.)

See notes to preceding paragraph of this act, ante, § 4235.

Notes of Decisions

Sale of land required for reclamation project.—Indians held to have power to sell their improvements on tribal lands, and to relinquish their preference right to an allotment of such land in severalty to the United States, reserving their right to select allotments elsewhere, where the land was required for an irrigation project being constructed under the Reclamation Act, section 4700 et seq. Henkel v. U. S. (1912) 196 Fed. 345, 116 C. C. A. 165.

Unlawful occupation of Indian reservation for irrigation projects.—Where the Interior Department had no authority to grant to an irrigation company the right to occupy Indian reservation lands for a reservoir site, the United States could not maintain an action against the company for the value of the lands so occupied under a privilege granted by the Secretary of the Interior. U. S. v. Portneuf-Marsh Valley Irr. Co. (D. C. 1913) 205 Fed. 416.

§ 4239. (Act March 1, 1907, c. 2285.) Payment of taxes on allotted lands from share of allottee in tribal funds.

In any case where the restrictions as to alienation have been re-

moved with respect to any Indian allottee, or as to any portion of the lands of any Indian allottee, and such allottee as an individual, or as a member of any tribe, has an interest in any fund held by the United States beyond the amount by law chargeable to such Indian or tribe on account of advances, the Commissioner of Indian Affairs is hereby authorized, prior to the date at which any penalties for the nonpayment of taxes would accrue under the laws of the State or Territory in which such land is situated, to pay such taxes and charge the amount thereof to such allottee, to be deducted from the share of such allottee in the final distribution or payment to him from such fund: Provided, That no such payment shall be made by said Commissioner where it is in excess of the amount which will ultimately be due said allottee. (34 Stat. 1016.)

This was a provision of the Indian appropriation act for the fiscal year 1908, cited above.

Notes of Decisions

Taxation by states of allotments.—
See notes under § 4201, ante.

§ 4240. (Act March 3, 1901, c. 832, § 3.) Condemnation of allotted lands for public purposes under laws of States, etc.

Lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee. (31 Stat. 1084.)

This was the concluding provision of section 3 of the Indian appropriation act for the fiscal year 1902, cited above.

The preceding provisions of this section, relating to grants of rights of way for telephone and telegraph lines through Indian reservations, etc., are set forth ante, § 4191.

Permission to State or local authorities for the opening, etc., of public highways, through Indian reservations or lands allotted to Indians in several ty, was authorized by section 4 of this act, ante, § 4194.

Notes of Decisions

Compensation to Indian nation or United States for railroad right of way.—See U. S. v. Ft. Smith & W. R. Co. (1912) 195 Fed. 211, 115 C. C. A. 163; Dudley v. Meggs (Okl. 1915) 153 Pac. 1121.

Conflicting state laws.—Laws N. Y. 1902, c. 296, entitled "An act to amend the Indian law in relation to the erection of poles and wires on the Tonawanda reservation," is not unconstitutional. Jemison v. Bell Telephone Co. of Buffalo (1906) 79 N. E. 728, 186 N. Y. 493, affirming judgment (1905) 95 N. Y. S. 1137, 109 App. Div. 911.

TITLE XXIX

IMMIGRATION

(R. S. §§ 2158–2164. In this Title.)

This title, as enacted in the Revised Statutes, was not divided into chapters, and contained only R. S. §§ 2158–2163, post, §§ 4342–4347, which related to the cooly-trade, and R. S. § 2164, post, § 4241, which related to taxation by the States of immigrants from foreign countries. For convenience, the latter section, and subsequent provisions which relate to the regulation and restriction of immigration in general, are placed in Chapter A; provisions which relate to the exclusion of Chinese, in Chapter B; and the provisions of R. S. §§ 2158–2163, and subsequent provisions which relate to the cooly-trade, in Chapter C.

Chap.		Sec.
A.	Regulation and restriction of immigration in general	4241
B.	Exclusion of Chinese	4290
C.	The cooly-trade	4342

CHAPTER A

Regulation and Restriction of Immigration in General

The provisions of various acts relating to immigration subsequent to the enactment of the Revised Statutes and prior to March 3, 1903, were superseded almost entirely by the more comprehensive provisions of the same nature contained in the Immigration Act of March 3, 1903, c. 1012, 32 Stat. 1213. But that act, except section 34 thereof, which related to a different subject, was expressly repealed and the provisions of the repealed sections relating to immigration, with some changes and additions, were re-enacted in sections designated by the same numbers, respectively, by the Immigration Act of Feb. 20, 1907, c. 1134, 34 Stat. 898.

Before said Act March 3, 1903, c. 1012, the provisions for the execution of said previous acts by the Secretary of the Treasury, and for regulations, etc., to be prescribed by him, had been superseded by the transfer of the immigration service, and of jurisdiction and powers over immigration, from the Treasury Department to the Department of Commerce and Labor, by the act establishing that department, Act Feb. 14, 1903, c. 552, §§ 4, 7, 10, ante, §§ 857–859. And the words "Secretary of the Treasury," wherever used in said Act March 3, 1903, or in amendments thereto, or in prior acts in relation to alien immigration, were stricken out, and the words "Secretary of Commerce and Labor" inserted in lieu thereof, by Res. April 28, 1904, No. 84, 33 Stat. 591.

The Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration, and the immigration service at large, were transferred from the Department of the Treasury to the Department of Commerce and Labor, and the jurisdiction, supervision, and control possessed and exercised by the Department of the Treasury over the immigration of aliens were also transferred and vested in the Department of Commerce and Labor, and all duties performed and all power and authority possessed or exercised by the head of any executive department in and over any bureau, office, etc., so transferred, or any business arising therefrom, etc., was to be vested in and exercised by the head of said Department of Commerce and Labor, by the act establishing that department, Act Feb. 14, 1903, c. 552, §§ 4, 7, 10, ante, §§ 857–859.

But thereafter the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large were transferred to the Department of Labor from the Department of Commerce and Labor, and all duties performed and all power and authority possessed or exercised by the head of any executive department in and over any bureau, office, etc., so transferred, or any business arising therefrom, etc., was to be vested in and exercised by the head of

the Department of Labor, by the act establishing that department, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

The immigration laws of the United States in force in the Philippine Islands were to be administered by the officers of the general government thereof, by Act March 18, 1904, c. 716, § 1, 33 Stat. 139, which was superseded by a similar provision in Act Feb. 6, 1905, c. 453, § 6, ante, § 3911.

All laws affecting entry of persons from foreign countries apply to persons coming from Canal Zone, Isthmus of Panama, by Act March 2, 1905, c. 1311, post, § 5223.

This chapter includes, principally, provisions of said Immigration Act of Feb. 20, 1907, c. 1134, relating to regulation of immigration in general and to the Immigration Service, with previous provisions relating thereto which remain in force, and subsequent acts amendatory thereof or additional thereto.

Sec.
4241. No charge upon particular persons immigrating, etc.
4242. Tax on aliens entering United States; immigrant fund; lien on vessels; prevention of use of foreign passports to detriment of labor conditions in continental territory of United States.
4243. Head tax on aliens and other moneys received under immigration laws to be covered into Treasury as miscellaneous receipts.
4244. Classes of aliens excluded.
4245. Contracts for labor or service of aliens, made previous to migration or importation, void.
4246. Payment to informer of share of penalty for violation of contract labor law.
4247. Importation of aliens for prostitution or other immoral purpose forbidden; punishment; jurisdiction; deportation; punishment for attempt to return; deportation after expiration of sentence; testimony of husband or wife admissible.
4248. Prepaying transportation or assisting, etc., importation or migration of contract laborers a misdemeanor.
4249. Foreign exhibitors, etc., at fair or exposition authorized by Congress, not prevented from bringing into United States, under contract, employés for preparation for installing or conducting exhibits or business under concession or privilege.
4250. Penalty for violations of provisions.
4251. Advertisements, etc., promising employment to aliens; penalties.
4252. Solicitation of immigration by transportation companies, owners of vessels, etc.; penalties.
4253. Bringing into or landing in United States aliens not duly admitted or not entitled to enter, punishable.
4254. Bringing into United States aliens subject to disability or afflicted with tuberculosis or loathsome or dangerous contagious disease.
4255. Decision of board of special inquiry final as to aliens affected with tuberculosis, or with loathsome or dangerous contagious disease, or with mental or physical disability.
4256. Exclusion of alien accompanying rejected helpless alien requiring protection.
4257. Posting and notification of immigration laws by agents of steamship companies, etc.; certificate of compliance; penalty.
4258. Lists of alien passengers arriving or departing to be delivered by masters of vessels; description and statements in lists; disposition of lists.
4259. Requirement of outward alien manifests not to apply to passengers by vessels in trade between United States and Canada or Mexico.
4260. Grouping of alien passengers in lists; identification tickets; verification of lists and certificate of medical examination by officer of vessel.
4261. Verification of lists by surgeon of vessel.
4262. Failure to furnish lists of alien passengers; penalty.
4263. Inspection of alien passengers upon arrival.
4264. Expenses of removal and detention of aliens pending inspection to be paid by transportation companies.
4265. Medical examination of alien passengers.
4266. Expenses of medical examination of alien passengers; repeal in part of Act Feb. 20, 1907, c. 1134, § 17.
4267. Owners, officers, etc., of vessel or transportation line bringing alien to prevent landing at time or place other than as designated; negligent failure to comply with requirements punishable; alien unlawfully landed to be deported.
4268. Immediate deportation of alien unlawfully brought to this country; cost of maintenance and return; refusal to receive back on vessel or to pay cost, punishable; suspension of deportation of alien whose testimony is necessary in prosecution; aliens excluded as diseased not to be landed for medical treatment.

Sec.
4269. Deportation of aliens entering United States in violation of law or becoming public charges; payment of expense of deportation; bond for release of alien pending disposal of case.
4270. Deportation of alien found in United States in violation of law, etc.; failure or refusal of masters, agents, owners, or consignees of vessels to comply with order for deportation punishable; aliens requiring personal care and attendance.
4271. Commissioners of immigration; appointment.
4272. Commissioners of immigration; duties.
4273. Immigrant inspectors and other officers, etc., appointment, compensation, etc.; duties and powers of immigration officers; decisions.
4274. Boards of special inquiry; appointment or designation; authority; hearings; records, decisions and appeals.
4275. Admission of aliens liable to be excluded, on giving bond of indemnity against becoming public charge; suits on bonds.
4276. Compromise of suits for violations of act.
4277. Jurisdiction of courts.
4278. Interior immigrant stations.
4279. Disposal of privileges at immigrant stations; sale of intoxicating liquors forbidden.
4280. Jurisdiction of state and local officers and courts over immigrant stations.
Sec.
4281. Rules for entry and inspection of aliens along the borders of Canada and Mexico; contracts with foreign transportation lines.
4281a. Office for Immigration Service at Montreal, Canada.
4282. Construction of term "United States" for purpose of act; aliens coming from Isthmian Canal Zone.
4283. Commissioner of Immigration at New Orleans, La.; appointment, status, and salary; repeal in part of Act Feb. 20, 1907, c. 1134, § 34.
4284. Ports to which aliens to be deported.
4285. Deportation of aliens entering United States except at seaports or places designated by Secretary of Commerce and Labor.
4286. Temporary detention and admission or deportation, in case of contagious disorder, of wife or minor child of alien resident who has filed declaration of intention to become citizen.
4287. Persons disbelieving in or opposed to all organized government, or advocating the unlawful assaulting or killing of officers of government, not to be permitted to enter; aiding, etc., entry of such person, punishable.
4288. Act not to apply to foreign government officials, etc.
4289. Repeal.

§ 4241. (R. S. § 2164.) No charge upon particular persons immigrating, etc.

No tax or charge shall be imposed or enforced by any State upon any person immigrating thereto from a foreign country, which is not equally imposed and enforced upon every person immigrating to such State from any other foreign country.

Act May 31, 1870, c. 114, § 16, 16 Stat. 144.

Notes of Decisions

Power to regulate immigration and construction of laws.—See note under § 4244, post.

"Charge."—"Charge" means any onerous condition. In re Ah Fong (C. C. 1874) Fed. Cas. No. 102.

Enforcement of regulations.—Exclusion of aliens is a matter of legislative policy, the enforcement of which may be committed exclusively to the executive department. Prentis v. Cosmas (1912) 196 Fed. 372, 116 C. C. A. 419.

Who are immigrants.—An alien who has resided in this country without becoming naturalized, and who departs with the intention of returning, is not to be deemed an immigrant upon his return, although he was an alien immigrant when he first entered the country. (1899) 22 Op. Atty. Gen. 353.

Indictment.—An indictment under this section held bad on demurrer, where it did not allege that the person on whom a tax was imposed was a foreign miner and within the state law. U. S. v. Jackson (C. C. 1874) Fed. Cas. No. 15,459.

Cited without definite application, In re Parrott (C. C. 1880) 1 Fed. 481, 485.

§ 4242. (Act Feb. 20, 1907, c. 1134, § 1.) Tax on aliens entering United States; immigrant fund; lien on vessels; prevention of use of foreign passports to detriment of labor conditions in continental territory of United States.

There shall be levied, collected, and paid a tax of four dollars for every alien entering the United States. The said tax shall be paid to the collector of customs of the port or customs district to which said alien shall come, or, if there be no collector at such port or district, then to the collector nearest thereto, by the master, agent, owner, or consignee of the vessel, transportation line, or other conveyance or vehicle bringing such alien to the United States. The money thus collected, together with all fines and rentals collected under the laws regulating the immigration of aliens into the United States, shall be paid into the Treasury of the United States, and shall constitute a permanent appropriation to be called the "immigrant fund," to be used under the direction of the Secretary of [Commerce and] Labor to defray the expense of regulating the immigration of aliens into the United States under said laws, including the contract labor laws, the cost of reports of decisions of the Federal courts, and digest thereof, for the use of the Commissioner-General of Immigration, and the salaries and expenses of all officers, clerks, and employees appointed to enforce said laws. The tax imposed by this section shall be a lien upon the vessel, or other vehicle of carriage or transportation bringing such aliens to the United States, and shall be a debt in favor of the United States against the owner or owners of such vessel, or other vehicle, and the payment of such tax may be enforced by any legal or equitable remedy. The said tax shall not be levied upon aliens who shall enter the United States after an uninterrupted residence of at least one year, immediately preceding such entrance, in the Dominion of Canada, Newfoundland, the Republic of Cuba, or the Republic of Mexico, nor upon otherwise admissible residents of any possession of the United States, nor upon aliens in transit through the United States, nor upon aliens who have been lawfully admitted to the United States and who later shall go in transit from one part of the United States to another through foreign contiguous territory: Provided, That the Commissioner-General of Immigration, under the direction or with the approval of the Secretary of [Commerce and] Labor, by agreement with transportation lines, as provided in section thirty-two of this Act, may arrange in some other manner for the payment of the tax imposed by this section upon any or all aliens seeking admission from foreign contiguous territory: Provided further, That if in any fiscal year the amount of money collected under the provisions of this section shall exceed two million five hundred thousand dollars, the excess above that amount shall not be added to the "immigrant fund:" Provided further, That the provisions of this section shall not apply to aliens arriving in Guam, Porto Rico, or Hawaii; but if any such alien, not having become a citizen of the United States, shall later arrive at any port or place of the United States on the North American Continent the provisions of this section shall apply: Provided further, That whenever the President shall be satisfied that passports issued by any foreign government to its citizens to go to any country other than the United States or to any insular possession of the United States or to the Canal Zone are being used for the purpose of enabling the holders to come to the continental territory of the United States to the detriment of labor conditions therein, the President may refuse to permit such citizens of the country issuing such passports to enter the continental territory of the United States from such other country or from such insular possessions or from the Canal Zone. (34 Stat. 898.)

This was the first section of the Immigration Act of 1907, entitled "An act to regulate the immigration of aliens into the United States."

The words "Commerce and," inclosed in brackets where they occur twice in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Sections 2–21, 23–27, 29–38, 41, and 43 of this act, are set forth post, §§ 4244, 4247, 4248, 4250–4256, 4258, 4260–4263, 4265, 4267–4270, 4272–4277, 4279–4289.

Section 22 of the act, relating to the duties, etc., of the Commissioner General of Immigration, is set forth ante, § 959.

Section 28 of the act, containing saving provisions as to prosecutions, etc., pending at the time of its taking effect, is omitted, as temporary merely.

Section 39 of the act provided for the creation of a commission to inquire into the subject of immigration and report to Congress its conclusions, etc. The commission was required to complete its work and make its final report and cease on the first Monday of December, 1910, by Act March 4, 1909, c. 299, § 1, 35 Stat. 982, and Act Feb. 25, 1910, c. 62, 36 Stat. 215. The provisions relating to it are omitted, as temporary merely.

Section 40 of the act, relating to the Division of Information in the Bureau of Immigration and Naturalization, is set forth ante, § 960.

Section 42 of the act prescribed regulations, to take effect January 1, 1909, for the carriage of immigrant passengers on steamships or other vessels, similar to and superseding those contained in Act Aug. 2, 1882, c. 374, § 1, 22 Stat. 186; but, by section 43 of this act, post, § 4289, said section 1 of Act Aug. 2, 1882, c. 374, was not repealed thereby prior to January 1, 1909. But section 42, and so much of sections 43 and 44 of this act as provided for the repeal of said section 1 of Act Aug. 2, 1882, c. 374, were themselves expressly repealed by Act Dec. 19, 1908, c. 6, § 2, taking effect January 1, 1909, set forth post, § 7998.

Nothing in this act is to be construed as permitting an alien leaving the Isthmian Canal Zone to enter any other place under the jurisdiction of the United States under any other conditions than those applicable to all aliens, by a provision of section 33 of this act, post, § 4282.

All laws affecting entry of persons into the United States from foreign countries were to apply to persons coming from the Canal Zone, Isthmus of Panama, by Act March 2, 1905, c. 1311, post, § 5323.

Previous provisions requiring payment of head-money for each alien passenger, similar to some extent to those of this section, were contained in Act Aug. 3, 1882, c. 376, § 1, 22 Stat. 214, Act June 26, 1884, c. 121, § 22, 23 Stat. 58, and Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 390, but were superseded by the provisions of Act March 3, 1903, c. 1012, § 1, 32 Stat. 1213, which were re-enacted substantially in this section, and were repealed by section 43 of this act, post, § 4289.

The refunding of head tax erroneously collected under said Act March 3, 1903, c. 1012, § 1, was authorized by a provision of Act Feb. 3, 1905, c. 297, § 1, ante, § 958.

The head tax collected under this section, together with all moneys received under the laws regulating the immigration of aliens, were to be covered into the Treasury to the credit of "miscellaneous receipts," instead of constituting the "immigrant fund," established by this section, by a provision of Act March 4, 1909, c. 299, § 1, post, § 4243.

Notes of Decisions

1. Construction and operation.
2. —— Former acts.
3. —— As affected by treaties.
4. Validity of statutes.
5. Alien immigrants affected by statute.
6. —— Seamen.
7. —— Passengers.
8. —— Aliens on diplomatic missions.
9. "Immigrant fund."
10. Shipowners—Liability and lien.
11. Regulations to enforce statute.
12. State legislation.

1. Construction and operation.—Congress, by adopting this act, intended to exercise its jurisdiction, not only in excluding defective and undesirable aliens who might be seeking entry into this country, but also to deport those who, having effected an entry, may be unlawfully in the country, and the act must be construed with reference to the objects which congress had in view and the evils sought to be remedied. Haw Moy v. North (1910) 183 Fed. 89, 105 C. C. A. 381, certiorari denied (1911) 32 Sup. Ct. 522, 223 U. S. 717, 56 L. Ed. 628.

2. —— Former acts.—The Chinese exclusion acts are to be read in pari materia with this act so far as they apply to Chinese aliens seeking to enter the United States; the immigration act being equally applicable to Chinese aliens surreptitiously entering the country as to other aliens. Ex parte Wong You (D. C. 1910) 176 Fed. 933, order reversed Wong You v. U. S. (1910) 181

Fed. 313, 104 C. C. A. 535, which is reversed U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354; Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

The former act (Act Aug. 2, 1882, § 1), providing that, in calculating the number of cubic feet of space to be allowed for each passenger, children under 1 year of age are not included, did not affect Act Aug. 3, 1882, imposing upon the owners of vessels bringing passengers from foreign ports a duty of 50 cents for every such passenger, not a citizen of this country, and each child under one year of age was to be counted as a passenger in fixing the amount of such duty. Edye v. Robertson (1884) 5 Sup. Ct. 247, 112 U. S. 580, 28 L. Ed. 798, judgment affirmed (C. C. 1883) 18 Fed. 135, 147.

The Secretary of the Treasury was authorized, under section 10136, post, to refund the head tax levied in the case of the steamship Russia under the provisions of the former act of August 3, 1882, or so much thereof as he may think proper, if, upon investigation he found that the same was illegally, improperly, or excessively imposed. (1890) 19 Op. Atty. Gen. 660.

3. —— **As affected by treaties.**—Act Aug. 3, 1882, § 1, authorizing the levy of a tax on passengers, was not in violation of the treaties in existence before the act was passed between the United States and the various foreign countries, of which the owners of the vessels bringing the passengers were citizens or subjects, which provided for freedom of commerce or navigation, since it applied to citizens of the United States and their vessels as well. Edye v. Robertson (C. C. 1883) 18 Fed. 135, judgment affirmed (1884) 5 Sup. Ct. 247, 112 U. S. 580, 28 L. Ed. 798.

The exception from the passenger tax of vessels plying between the ports of the United States and those of Canada and Mexico does not entitle Danish vessels to the same exemption by virtue of the most favored nation clause in the treaty. Thingvalla Line v. U. S. (1889) 24 Ct. Cl. 255.

The former Immigration Act of 1882 applied to those brought by Danish ships, notwithstanding the treaty with Denmark (8 Stat. 340; 11 Stat. 720). Id.

The provisions of the Immigration Act, if in conflict with a pre-existing treaty, must prevail in the courts of this country. Id.

4. **Validity of statutes.**—The former act of August 3, 1882, did not impose a tax subject to the limitations imposed by the constitution on the general taxing power of congress. Edye v. Robertson (1884) 5 Sup. Ct. 247, 112 U. S. 580, 28 L. Ed. 798, affirming judgment (C. C. 1883) 18 Fed. 147.

The former provision, imposing upon the owners of vessels who shall bring passengers from a foreign port a duty of 50 cents for every passenger not a citizen, held valid. Edye v. Robertson (C. C. 1883) 18 Fed. 135, judgment affirmed (1884) 5 Sup. Ct. 247, 112 U. S. 580, 28 L. Ed. 798.

This act is constitutional. (C. C. 1908) 161 Fed. 185.

5. **Alien immigrants affected by statute.**—Pursuant to this section, the President, on March 14, 1907, issued an order that such "citizens of Japan or Korea, to wit, Japanese or Korean laborers, skilled and unskilled, who have received passports to go to Mexico, Canada or Hawaii and come therefrom, be refused permission to enter the continental territory of the United States," and directing the Secretary of Commerce and Labor to take such measures and to make and enforce such rules and regulations as may be necessary to carry the order into effect. Held, that neither such statute nor order applies to aliens who have no passports from their governments, nor does the order authorize the exclusion of Japanese or Korean laborers other than those having passports to go to Mexico, Canada, or Hawaii; that a rule, adopted by the commissioner, that if a Japanese or Korean laborer applies for admission and presents no passport it shall be presumed that he did possess a passport limited to Mexico, Canada, or Hawaii, is beyond any power conferred on him by either the act or the President's order, and affords no authority for excluding a Japanese or Korean laborer who presented no passport, the natural presumption in such case being that he had none, and there being no basis for the presumption stated in the rule. U. S. v. Hemet (D. C. 1907) 156 Fed. 285.

An alien who has resided in this country without becoming naturalized, and who departs with the intention of returning, is not to be deemed an immigrant upon his return, although he was an alien immigrant when he first entered the country. (1899) 22 Op. Atty. Gen. 353.

"Immigration" means the act of immigrating, and to immigrate is to come into a country of which one is not a native, and in which one has not acquired a residence or domicile. Id.

An alien immigrant is one who for the first time enters this country with the intention of making it his home. (1900) 23 Op. Atty. Gen. 278.

Citizens of the Philippine Islands coming to the United States from foreign ports are not required to pay the head tax. (1904) 25 Op. Atty. Gen. 131.

6. —— **Seamen.**—This section applies to seamen who are signed by a vessel for a voyage to a port of the United States, but not for the return voyage, and who, in accordance with the contract and intention of the parties, are discharged on the arrival of the vessel and enter the United States. U. S.

v. Atlantic Transport Co. (1911) 188 Fed. 42, 110 C. C. A. 420, writ of certiorari denied Atlantic Transport Co. v. U. S. (1911) 32 Sup. Ct. 525, 223 U. S. 724, 56 L. Ed. 631.

Horsemen, signed for service on a vessel in caring for horses during a voyage, are "seamen," for the purpose of determining the application to them of the immigration acts. Id.

Where two alien seamen at New York did not sign articles for the return voyage, but continued to follow their occupation as seamen, the steamship company was not liable for the head tax imposed on aliens. U. S. v. International Mercantile Marine (D. C. 1915) 219 Fed. 328.

Only such seamen are excepted from the class of passengers upon whom the head money tax is imposed by the former act of August 3, 1882, and from the class of alien immigrants, as are seamen in good faith and have no intention, by reason of their passage, to leave the ship and make entry into this country. (1901) 23 Op. Atty. Gen. 521.

"An alien seaman" is one who, in pursuit of and as a necessary incident of his calling, temporarily enters this country and is awaiting his departure, while an "alien immigrant" is one who enters the country with the intention of remaining in it. Id.

Application of immigration laws to seamen, see, also, note under § 4244, post.

7. —— **Passengers.**—The duty imposed by the former act of August 3, 1882, upon passengers, other than citizens, coming to any port within the United States, was to be exacted of convicts, lunatics, etc., although by the terms of the statute they were not to be permitted to land and were required to be returned to whence they came. (1885) 18 Op. Atty. Gen. 135.

The tax of 50 cents imposed by the former act of August 3, 1882, was applicable to all passengers, not citizens of the United States, who came by steamer or sail vessel from a foreign port to any port within the United States, whether as immigrants or merely as tourists. (1885) 18 Op. Atty. Gen. 185.

The duty of 50 cents a passenger imposed by the former act of August 3, 1882, upon all itinerant persons, not citizens of the United States, coming to our ports in steam or sail vessels from foreign ports, was to be collected on each successive return as often as any such person entered one of our ports. (1885) 18 Op. Atty. Gen. 196.

The passengers subject to the tax provided by the former acts of August 3, 1882, and August 18, 1894, were those who made the United States their place of destination, and not those who touched at our ports en route to some other country. (1897) 21 Op. Atty. Gen. 543.

The mere transfer from one vessel to another in a port of the United States of alien passengers en route to their destination in a foreign country did not subject such persons to the payment of the "head tax" or duty prescribed by section 1 of the former act. (1903) 24 Op. Atty. Gen. 590.

8. —— **Aliens on diplomatic missions.**—The former act of March 3, 1903, which required the payment by transportation companies of a duty of $2 for each and every passenger not a citizen of the United States, or of Canada, Mexico, or Cuba, who shall be brought into the United States by them, applied as well to alien officials coming into the United States on diplomatic missions as to aliens who are private individuals and come here for other purposes. (1905) 25 Op. Atty. Gen. 370.

9. **"Immigrant fund."**—Formerly the Secretary of the Treasury had full authority over the management of immigration affairs and over the proper use and application of all moneys to be used in such affairs, and especially over all moneys of the immigrant fund. (1892) 20 Op. Atty. Gen. 379, 380.

The head tax upon alien passengers brought into ports of Porto Rico should be accounted for and credited to the "immigrant fund," as is done with like collections upon alien passengers arriving at ports in the United States. (1902) 24 Op. Atty. Gen. 86.

10. **Shipowners—Liability and lien.**—This section does not render owner liable for the tax upon an alien seaman who deserted after reaching this country, in the absence of any evidence that the officers of the vessel had reason to suppose that the seaman made the voyage with the intention of so gaining admission, or that such intention in fact existed. U. S. v. International Mercantile Marine Co. (1909) 171 Fed. 841, 96 C. C. A. 420.

Head tax is a lien upon the vessel as well as a debt against the owner thereof, and has no relation to the collection of customs duties. (1890) 19 Op. Atty. Gen. 660.

The duty thus imposed is not a tax upon the officials of foreign governments, but is merely a charge imposed upon the transportation company for every passenger brought into the United States by it. (1905) 25 Op. Atty. Gen. 370.

11. **Regulations to enforce statute.**—Section 3 of the former act of August 3, 1882, invested the Secretary of the Treasury with power to make all necessary regulations for carrying out its provisions, and under this power he might by regulation forbid the landing by the master of any passenger from his vessel until an examination of all the passengers thereon was had, whether cabin or steerage. (1890) 19 Op. Atty. Gen. 706.

The former act of August 3, 1882, known as the immigration act, confer-

red upon the collector of customs, under proper regulations of the Secretary of the Treasury, the power to require the master of a vessel arriving within his collection district from a foreign country to detain all passengers on such vessel until they should have been examined by the customs officers, for the purpose of determining the amount of head money collectible under that act from the master. Id.

A regulation requiring the master or owner of a vessel bringing an alien to a port of the United States, for the professed purpose of proceeding directly therefrom to foreign territory, to deposit the amount of the head tax with the collector before such alien shall be permitted to land, the same to be refunded on proof satisfactory to the immigration officer in charge of said port that such alien has passed by direct and continuous journey through and out of the United States, was not an amendment or addition to the statute of 1903, but was a reasonable and lawful regulation for the purpose of protecting the United States from fraud and loss, and within the power conferred on the commissioner. Stratton v. Oceanic S. S. Co. (1905) 140 Fed. 829, 72 C. C. A. 241.

The fact that a steamship company, which ships in this country horsemen who intend to return, fails to obtain the certificate required by Treasury Circular No. 135, of 1899, does not preclude the admission of such returned horsemen, of whose fundamental right to enter this country under such circumstances, as resident aliens, the Secretary of the Treasury is assured. (1900) 23 Op. Atty. Gen. 278.

The requirement of rule 15 of the Immigration Regulations of August 26, 1903, for the enforcement of the former act of March 3, 1903, requiring a deposit of $2 for each alien passenger arriving at the port of San Francisco on steamers from Sydney, New South Wales, and way ports, seeking admission into the United States and claiming to be in transit through the same, was not invalid. (1904) 25 Op. Atty. Gen. 109.

Officers charged with the enforcement of the above-named regulation must not, however, apply the rule with such strictness or harshness as to render the refunding of the sums paid thereunder, in proper cases, impossible or unreasonably difficult of attainment. Id.

12. State legislation.—It was within the state legislative power to pass St. Mass. 1837, c. 238, § 3, which prohibits the landing of alien passengers, who arrive in any vessel at any port or harbor in this state, until the master, owner, consignee, or agent of the vessel shall pay to the regularly appointed board $2 for each passenger, to be appropriated for the support of foreign paupers. Norris v. Boston (1842) 45 Mass. (4 Metc.) 282.

Formerly the Secretary of the Treasury was vested with power to make and apply such rules relative to the question of immigration as might be shown from time to time to be necessary and convenient. (1899) 22 Op. Atty. Gen. 460.

Cited without definite application, The Head-Money Cases (C. C. 1883) 18 Fed. 135; In re Page (D. C. 1913) 206 Fed. 1004.

§ 4243. (Act March 4, 1909, c. 299, § 1.) Head tax on aliens and other moneys received under immigration laws to be covered into Treasury as miscellaneous receipts.

On and after July first, nineteen hundred and nine, all head tax collected pursuant to the provisions of section one of the said Act of February twentieth, nineteen hundred and seven, together with all fines, rentals collected, and moneys received from other sources under the laws regulating the immigration of aliens into the United States, shall be covered into the Treasury to the credit of miscellaneous receipts. (35 Stat. 982.)

This was a proviso annexed to an appropriation for expenses of regulating immigration in the sundry civil appropriation act for the fiscal year 1910, cited above.

Act Feb. 20, 1907, c. 1134, § 1, mentioned in this provision, is set forth ante, § 4242.

Moneys collected under the immigration laws as duty or head tax on alien immigrants coming into the Philippine Islands were not to be covered into the general fund of the Treasury of the United States, but paid into the treasury of said islands, to be used and expended for the government and benefit of said islands, by Act Feb. 6, 1905, c. 453, § 6, ante, § 3805.

§ 4244. (Act Feb. 20, 1907, c. 1134, § 2, as amended, Act March 26, 1910, c. 128, § 1.) Classes of aliens excluded.

The following classes of aliens shall be excluded from admission into the United States: All idiots, imbeciles, feeble-minded persons, epileptics, insane persons, and persons who have been insane

within five years previous; persons who have had two or more attacks of insanity at any time previously; paupers; persons likely to become a public charge; professional beggars; persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease; persons not comprehended within any of the foregoing excluded classes who are found to be and are certified by the examining surgeon as being mentally or physically defective, such mental or physical defect being of a nature which may affect the ability of such alien to earn a living; persons who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude; polygamists, or persons who admit their belief in the practice of polygamy; anarchists, or persons who believe in or advocate the overthrow by force or violence of the Government of the United States, or of all government, or of all forms of law, or the assassination of public officials; prostitutes, or women or girls coming into the United States for the purpose of prostitution or for any other immoral purpose; persons who are supported by or receive in whole or in part the proceeds of prostitution; persons who procure or attempt to bring in prostitutes or women or girls for the purpose of prostitution or for any other immoral purpose; persons hereinafter called contract laborers, who have been induced or solicited to migrate to this country by offers or promises of employment or in consequence of agreements, oral, written or printed, express or implied, to perform labor in this country of any kind, skilled or unskilled; those who have been, within one year from the date of application for admission to the United States, deported as having been induced or solicited to migrate as above described; any person whose ticket or passage is paid for with the money of another, or who is assisted by others to come, unless it is affirmatively and satisfactorily shown that such person does not belong to one of the foregoing excluded classes, and that said ticket or passage was not paid for by any corporation, association, society, municipality, or foreign government, either directly or indirectly; all children under sixteen years of age, unaccompanied by one or both of their parents, at the discretion of the Secretary of [Commerce and] Labor or under such regulations as he may from time to time prescribe: Provided, That nothing in this Act shall exclude, if otherwise admissible, persons convicted of an offense purely political, not involving moral turpitude: Provided further, That the provisions of this section relating to the payments for tickets or passage by any corporation, association, society, municipality, or foreign government shall not apply to the tickets or passage of aliens in immediate and continuous transit through the United States to foreign contiguous territory: And provided further, That skilled labor may be imported if labor of like kind unemployed can not be found in this country: And provided further, That the provisions of this law applicable to contract labor shall not be held to exclude professional actors, artists, lecturers, singers, ministers of any religious denomination, professors for colleges or seminaries, persons belonging to any recognized learned profession, or persons employed strictly as personal or domestic servants. (34 Stat. 898. 36 Stat. 263.)

See notes to section 1 of this act, ante, § 4242.

This section, as originally enacted, did not contain, in the description of classes of aliens excluded, the words "persons who are supported by or receive in whole or in part the proceeds of prostitution." That clause was inserted by amendment by Act March 26, 1910, c. 128, § 1, last cited above.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization,

and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions defining the classes of aliens, other than Chinese, excluded from admission to the United States, were contained in Act March 3, 1875, c. 141, §§ 3, 5, 18 Stat. 477, Act Aug. 3, 1882, c. 376, § 2, 22 Stat. 214, Act Feb. 26, 1885, c. 164, §§ 1, 5, 6, 23 Stat. 332, 333, and Act March 3, 1891, c. 551, § 1, 26 Stat. 1084, but were superseded by the provisions of Act March 3, 1903, c. 1012, § 2, 32 Stat. 1214, which were re-enacted substantially in this section, and were repealed by section 43 of this act, post, § 4289.

To prepay the transportation or to assist or encourage the importation or migration into the United States of any contract laborer not exempted under the last two provisos of this section, is a misdemeanor, by section 4 of this act, post, § 4248, and a penalty therefor was prescribed by section 5 of this act, post, § 4251.

Any alien coming to this country in consequence of an advertisement of a promise of employment printed and published in a foreign country is to be treated as coming under a promise or agreement as contemplated in this section, by section 6 of this act, post, § 4252.

No person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief or opposition, or who advocates, etc., the unlawful assaulting or killing of officers of government, is to be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof, by section 38 of this act, post, § 4287.

Notes of Decisions

1. History of legislation.
2. Power of congress.
3. Construction, operation, and validity of immigration laws.
4. —— Application to Chinese.
5. —— Validity.
6. State legislation—Validity and effect.
7. "Aliens"—Immigrants and citizens.
8. —— Persons returning to the United States after absence.
9. —— Rights of aliens.
10. Grounds for deportation and persons subject to exclusion.
11. —— Exclusiveness of statutory grounds.
12. —— Persons mentally deficient.
13. —— Persons likely to become public charges.
14. —— Persons in diseased condition.
15. —— Persons convicted of crime involving moral turpitude.
16-17. —— Persons admitting commission of crime involving moral turpitude.
18. —— Anarchists.
19. —— Prostitutes, procurers, and persons imported for immoral purposes.
20. —— Contract laborers in general.
21. —— Aliens excepted from contract labor provisions.
22. —— Persons "assisted by others to come."
23. —— Seaman.
24. Abrogation of three-year time limit for deportation.
25. Administration of law.
26. —— Jurisdiction.
27. —— Evidence.
28. —— Regularity of proceedings and effect of irregularities.
29. —— Review by courts.
30. Opinions under prior law.

1. History of legislation.—This regulation of the immigration of aliens was a re-enactment and extension of prior legislation on the same subject enacted in light of the construction placed on prior acts by the courts. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

A treaty between the United States and China was promulgated October 5, 1881 (22 Stat. 826). With a view to execute the stipulation of this treaty, congress passed an act approved May 6, 1882 (22 Stat. 58), sections 1 and 6 of which provided for a certificate of identity of Chinese laborers. The next legislation on the subject was an act approved July 5, 1884 (23 Stat. 115). By its provisions section 1 of the act of May 6, 1882, was amended so as to suspend the immigration of Chinese laborers for the period of 10 years. Section 6 of the act of 1882, was amended so as to prescribe as an additional requirement in the certificate of identity (in the event the person applying for such certificate claims to be a merchant) that the same shall state "the nature, character and estimated value of the business carried on by him prior to and at the time of his application." The next legislation on the subject was Act Sept. 13, 1888, § 13 (25 Stat. 476). At the time the bill was pending before congress, the treaty before then negotiated between the United States and China was under consideration of the two governments for ratification or rejection, and congress, in the belief doubtless that it finally would be ratified, undertook by the act of 1888 to legislate in a comprehensive way on this subject, and in and by the last section of the act repealed the provisions of the prior acts of May 6, 1882, and July 5, 1884, but in terms provided that such repeal should take effect upon the ratification of the then pending treaty. This treaty was never ratified, and as a result the former acts were not repealed, and the act of September 13, 1888, went into effect unconditionally. As a result the legislation on this subject is somewhat confused. The former acts, in so far as they are not modified or repealed by implication, are in force, and the court must consider them, as well as the act of September 13, 1888, and the sub-

sequent acts of May 5, 1892, and November 3, 1893, in order to ascertain what the law was on the subject in question. U. S. v. Yong Yew (D. C. 1897) 83 Fed. 832, 833, 835.

2. Power of congress.—It is an accepted maxim of international law that every sovereign nation has the power, as inherent in sovereignty and essential to self-preservation, to forbid the entrance of foreigners within its dominions, or to admit them only in such cases and upon such conditions as it may see fit to prescribe. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1018, 149 U. S. 698, 37 L. Ed. 905, following Legal Tender Cases (1870) 12 Wall. 457, 20 L. Ed. 287; Chae Chan Ping v. U. S. (1889) 9 Sup. Ct. 623, 130 U. S. 581, 32 L. Ed. 1068, and Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 142 U. S. 651, 35 L. Ed. 1146.

The power and authority of the United States, as an attribute of its sovereignty, to either prohibit or regulate the immigration of aliens, are plenary, and Congress may choose such agencies as it pleases to carry out whatever policy or rule of exclusion it may adopt, and, so long as such agencies do not transcend the limits of the authority or abuse the discretion reposed in them, their judgment is not open to challenge or review by the courts. Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 613, 189 U. S. 86, 47 L. Ed. 721; U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93; Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646; U. S. v. Rodgers (1911) 191 Fed. 970, 112 C. C. A. 382; Choy Gum v. Backus (1915) 223 Fed. 487, 139 C. C. A. 35; U. S. v. Ngum Lun May (D. C. 1907) 153 Fed. 209.

The power of Congress to prohibit a second or later entrance of aliens and the power originally to exclude them are derived from the same source and are but parts of one and the same power. Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493.

Congress has power to exclude aliens altogether from the United States, or to prescribe the terms and conditions on which they may come into this country. (1899) 22 Op. Atty. Gen. 353.

The granting of control over aliens for the prescribed period in the executive department to enforce the national policy as to immigration is within the power of congress. Prentis v. Stathakos (1911) 192 Fed. 469, 112 C. C. A. 607.

The right of a nation to expel or deport foreigners who have not been naturalized or taken any steps towards becoming citizens of the country rests upon the same grounds, and is as absolute and unqualified as the right to prohibit and prevent their entrance into the country. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1019, 149 U. S. 698, 37 L. Ed. 905.

Congress has an absolute, inherent right to exclude and deport aliens as a part of its sovereign power, and hence the fact that an alien has resided in the United States for a long period and intends to make his residence permanent did not affect the government's right to exclude him, if in the judgment of Congress such exclusion was proper. U. S. v. Williams (D. C. 1910) 183 Fed. 904.

Congress has the undoubted right to regulate the admission of aliens into the United States, whether as immigrants or otherwise, and to exclude altogether any class of aliens whose entrance it might deem contrary to the general welfare of the Union. (1907) 26 Op. Atty. Gen. 180.

Congress has plenary power over aliens, and may expel them from the country at any time and for any reason. U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 185 Fed. 158.

Congress has plenary power to provide for the expulsion of an alien from the territory of the United States. U. S. v. Weis (D. C. 1910) 181 Fed. 860.

The power to exclude or expel aliens is vested in the political department, to be regulated by treaty or by act of Congress, and to be executed by the executive, except so far as the judicial department is authorized by treaty or statute or is required by the constitution to intervene. Fok Young Yo v. U. S. (1902) 22 Sup. Ct. 686, 688, 185 U. S. 296, 46 L. Ed. 917.

The power of Congress to forbid entry of foreigners within the dominions of the United States is well established, whether it be based upon the inherent power of sovereignty or on the provisions of the commerce clause. U. S. ex rel. Turner v. Williams (1904) 24 Sup. Ct. 719, 722, 194 U. S. 279, 48 L. Ed. 979.

Congress may exclude aliens, or prescribe the terms on which they may come in, establish regulations for sending out of the country aliens entering in violation of law, and to commit the enforcement of the conditions and regulations to executive officers, but it may not control all the dealings of citizens with resident aliens. Keller v. U. S. (1909) 29 Sup. Ct. 470, 471, 473, 213 U. S. 138, 53 L. Ed. 737, 16 Ann. Cas. 1066.

The power of Congress to deal with aliens is absolute, under which it may expel those of a particular class and permit others to remain on specified conditions, and under this power a classification which selects alien criminals for deportation is the exercise of a just discrimination. U. S. v. Chew Cheong (D. C. 1894) 61 Fed. 200, 203.

Congress has power to prohibit the importation of aliens for immoral or undesirable purposes, and to punish any person who shall import, or attempt to import, an alien for a pro-

hibited purpose. Ex parte Gouyet (D. C. 1909) 175 Fed. 230.

The matter of importation into the United States of foreigners is exclusively within the power of Congress to control and regulate, and the control and regulation may apply to dealings of those foreigners in the United States when relating to matters of importation. U. S. v. Krsteff (D. C. 1911) 185 Fed. 201.

The right of Congress to regulate the admission of aliens into the United States clearly controls the action of any state agent in this respect. (1907) 26 Op. Atty. Gen. 180, 411.

See, also, note under Const. U. S. art. 1, § 8, cl. 3.

3. **Construction, operation, and validity of immigration laws.**—The general object of the immigration statutes is not only to prevent the admission of undesirable and forbidden classes of aliens, but to remove from this country all such aliens who may have succeeded in effecting an entry. Haw Moy v. North (1910) 183 Fed. 89, 105 C. C. A. 381, certiorari denied (1911) 32 Sup. Ct. 522, 223 U. S. 717, 56 L. Ed. 628.

Act Hawaii April 17, 1911, which authorizes the secretary of the territory, when satisfied that a person was born in the Hawaiian Islands, to issue to such person a certificate showing that fact, which shall be prima facie evidence thereof, cannot affect the laws of the United States in regard to the immigration of aliens. Lee Leong v. U. S. (1914) 217 Fed. 48, 133 C. C. A. 34.

The immigration laws of the United States, like all other statutes, must be given a sensible construction having reference to their purpose, and, as so construed, they apply only to such aliens as enter or are brought to this country with the intention that they shall become residents thereof. U. S. v. Burke (C. C. 1899) 99 Fed. 895.

Courts are inclined to construe statutes against contract alien laborers strictly, and seek to enforce the spirit rather than the letter of such acts. (1909) 27 Op. Atty. Gen. 479. The immigration statutes should be strictly construed. Redfern v. Halpert (1911) 186 Fed. 150, 108 C. C. A. 262.

This section in terms applies only to excluding one who is attempting to get into this country, but is construed to be effective by relation in deporting those who have entered. Lewis v. Frick (C. C. 1911) 189 Fed. 146, judgment reversed (1912) 195 Fed. 693, 115 C. C. A. 493.

The immigration laws apply only to aliens applying for landing within the United States as their destination, so that an alien listed on a ship's manifest and ticketed for Halifax, on being refused admission to enter Canada, not having disavowed any intention to land there, and not having questioned the jurisdiction of the dominion government in directing his deportation, was not entitled to his release on habeas corpus from the custody of the officers of the steamship while temporarily in port in the United States pending his deportation to the place from whence he came in accordance with the direction of the Dominion. U. S. v. Fielding (D. C. 1909) 175 Fed. 290.

Entrance by land, as well as landing from a vessel, is forbidden by the act. (1891) 22 Op. Atty. Gen. 122.

The act of March 3, 1903 (32 Stat. 1213), extended those laws to "any water, territory, or other place now subject to the jurisdiction" of the United States, but the treaty with the Republic of Panama, giving the United States jurisdiction of the Zone, was of a later date. (1906) 26 Op. Atty. Gen. 1.

The immigration laws have not added to the classes of persons incapable in their own right of naturalization. (1909) 27 Op. Atty. Gen. 507.

4. —— **Application to Chinese.**—The Chinese exclusion acts are to be read in pari materia with the immigration act so far as they apply to Chinese aliens seeking to enter the United States; the immigration act being equally applicable to Chinese aliens surreptitiously entering the country as to other aliens. Ex parte Wong You (D. C. 1910) 176 Fed. 933; Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed U. S. v. Wong You (1912) 32 S. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

The statute applies to Chinese aliens. Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

The immigration act applies to Chinese laborers irregularly coming to this country, notwithstanding the special Chinese exclusion acts, and such persons may be proceeded against under the general act. Ex parte Chin Him (D. C. 1915) 227 Fed. 131.

5. —— **Validity.**—Act Feb. 26, 1885, prohibiting the importation of aliens under contract to perform labor within the United States, was within the power of congress to regulate commerce with foreign nations, and constitutional. U. S. v. Craig (C. C. 1886) 28 Fed. 795; In re Florio (C. C. 1890) 43 Fed. 114.

This section does not violate Const. art. 3, § 1, or the first, fifth, or sixth amendments to the constitution. U. S. ex rel. Turner v. Williams (1904) 24 Sup. Ct. 719, 723, 194 U. S. 279, 48 L. Ed. 979.

This section and section 4270, post, apply to an alien entering the United States notwithstanding the fact that he has resided in this country for a number of years, and left for a temporary purpose, and the power to deport exists for three years after such last entry. Frick v. Lewis (1912) 195 Fed.

693, 115 C. C. A. 493, reversing judgment Lewis v. Frick (C. C. 1911) 189 Fed. 146.

This act is constitutional (C. C. 1908) Ex parte Hamaguchi, 161 Fed. 185.

6. State legislation—Validity and effect.—A state statute imposing conditions on Chinese immigrants not imposed on other immigrants is in violation of this act. In re Ah Fong (C. C. 1874) Fed. Cas. No. 102.

No action by any state or by any officer thereof can operate to impair or nullify the effect of a law of congress duly enacted upon this subject. (1907) 26 Op. Atty. Gen. 180.

Immigration, either temporary or permanent, is an essential ingredient of intercourse and traffic, and the power to regulate commerce lodged by the constitution in the general government implies the power to regulate both as to persons and as to goods, and its exercise cannot be interfered with by any state. Lin Sing v. Washburn (1862) 20 Cal. 534.

A state may exclude from its limits, paupers, vagabonds, and criminals, or sick, diseased, infirm, and disabled persons who are likely to become a public charge, or may admit them only on such terms as will prevent the state from being burdened with their support. State v. The Constitution (1872) 42 Cal. 578, 10 Am. Rep. 303.

But the state cannot, even in the absence of legislation of congress upon the subject, exclude from its limits, or admit within its limits upon terms, persons in the full possession of their faculties, sound in body, and neither paupers, vagabonds, nor criminals, and in all respects competent to earn a livelihood. Id.

Section 2 of the Louisiana immigration law of March, 1869, re-enacted in Rev. St. La. 1870, § 1722, requiring a master to report to the commissioners of immigration a list of passengers landed, is not in conflict with the constitution of the United States, which gives to congress the exclusive right to regulate commerce with foreign nations and among the several states and with the Indian tribes. The law is simply a police regulation adopted by the state for the protection of its own citizens. Immigration Com'rs v. Brandt (1874) 26 La. Ann. 29.

Laws N. Y. 1882, c. 145, providing for the raising by the commissioners of emigration of a fund for the expenses of the inspection and care of alien passengers, by contract with carriers of emigrants by vessel to the city of New York, was not enforceable, as the subject is solely within the jurisdiction of the United States congress; and the commissioners were not liable to the city of New York for the care and maintenance by the city of immigrants arriving at that port, where it was not shown that there was any existing fund out of which payment therefor could be made by the commissioners. New York v. Commissioners of Emigration (1891) 59 Hun, 624, 13 N. Y. Supp. 751.

7. "Aliens"—Immigrants and citizens.—A native of Porto Rico, who was an inhabitant of that island at the time of its cession to the United States by the treaty of April 11, 1899 (30 Stat. 1754), with Spain, is not, upon her arrival at the port of New York, an alien immigrant, within the meaning of this section. Gonzales v. Williams (1904) 24 Sup. Ct. 177, 192 U. S. 1, 48 L. Ed. 317, reversing order In re Gonzalez (C. C. 1902) 118 Fed. 941.

An alien minor child who has never dwelt in the United States, is not, when coming to join a naturalized parent, exempt from this provision, on the theory that she was invested with citizenship by virtue of section 4367, post. Zartarian v. Billings (1907) 27 Sup. Ct. 182, 183, 204 U. S. 170, 51 L. Ed. 428.

"Aliens" mean alien immigrants. Moffitt v. U. S. (1904) 128 Fed. 375, 63 C. C. A. 117.

Under section 3962, ante, providing that a child born without the United States of alien parents shall be deemed a citizen by virtue of the naturalization of the parent, taking place during the minority of the child, provided that the citizenship of such child shall begin when he begins to reside permanently in the United States, until a minor child of a naturalized parent has begun to reside permanently in the United States, he is an alien and the naturalization of a father will not permit his minor child born abroad, and remaining in the country of his nativity until after the naturalization, to come into the United States, if prohibited from entering by this section. U. S. v. Rodgers (1911) 185 Fed. 334, 107 C. C. A. 452, affirming judgment (D. C. 1910) 182 Fed. 274.

An alien immigrant to the United States is an alien who comes or removes into the United States for the purpose of permanent residence. U. S. v. Sandrey (C. C. 1891) 48 Fed. 550, 552.

An immigrant does not cease to be an alien merely by declaring his intention of becoming a citizen so as to relieve his wife and minor children from the operation of the law governing the admission of aliens. In re Moses (C. C. 1897) 83 Fed. 995.

Immigration is the entering into a country with the intention of residing in it. U. S. v. Burke (C. C. 1899) 99 Fed. 895, 896.

Where two children were born to a female alien after her entry into the

United States, the children were citizens and not subject to deportation, either in proceedings for the deportation of the mother, or at all. U. S. v. Sibray (C. C. 1910) 178 Fed. 144, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

An alien acquires no rights by a domicile in the country which will relieve her of the effect of a decision of the Department of Commerce and Labor ordering her deportation. Ex parte Crawford (D. C. 1908) 165 Fed. 830.

Petitioner, a citizen of Holland, married an alien in New York, but afterward deserted him and returned to Holland with a paramour. Before she returned to this country her husband became a naturalized citizen. Held, that as, under the law both of Holland and the United States, the wife's citizenship is that of the husband, she became a citizen of the United States on the naturalization of her husband, and that her status and right to enter this country on her return were not affected by the fact of her desertion. U. S. v. Williams (D. C. 1909) 173 Fed. 626, decree affirmed In re Nicola (1911) 184 Fed. 322, 106 C. C. A. 464.

The marriage of a woman who is a subject of the Turkish Empire with an American citizen makes her a citizen of the United States, and the fact that after her marriage, and before she reaches the United States with her husband, she may have contracted some disease which would have excluded her as an alien, will not warrant her exclusion. Id.

An immigrant who has not entered the United States, though not entitled to enjoy the constitutional guaranties of citizens, has rights under the immigration laws which the immigration authorities are bound to respect. U. S. v. Williams (D. C. 1913) 203 Fed. 155.

Where aliens immigrated to the Philippines and thence to the United States, their right to enter the mainland must be determined as though they had applied to enter the United States in the first instance. Ex parte Marshall (D. C. 1914) 213 Fed. 123.

It will be safer and better practice not to attempt a definition of the word "immigrant," but to decide each case with reference to its particular circumstances. (1892) 20 Op. Atty. Gen. 371.

"Immigration" means the act of immigrating, and to immigrate is to come into a country of which one is not a native, and in which one has not acquired a residence or domicile. (1899) 22 Op. Atty. Gen. 353.

It is within the power of the Secretary of the Treasury to make such examination and take such precaution as may be reasonably necessary to prevent an alien immigrant, whether he be a sailor or not, from entering this country in the sense that all immigrants enter it. (1901) 23 Op. Atty. Gen. 521.

8. —— Persons returning to the United States after absence.—The rule has been that an alien, who has acquired a domicile in the United States, cannot thereafter, and while still retaining such domicile, legally be treated as an immigrant on his return to this country after a temporary absence for a specific purpose not involving change of domicile. Rodgers v. U. S. (1907) 152 Fed. 346, 81 C. C. A. 454; U. S. v. Nakashima (1908) 160 Fed. 842, 87 C. C. A. 646; In re Martorelli (C. C. 1894) 63 Fed. 437; In re Maiola (C. C. 1895) 67 Fed. 114; In re Panzara (D. C. 1892) 51 Fed. 275; In re Ota (D. C. 1899) 96 Fed. 487; In re Buchsbaum (D. C. 1905) 141 Fed. 221. But it has been held that the immigration acts as amended in 1903, prescribing the aliens liable to deportation as immigrants, applies to all aliens whether first arriving in the country or returning to the country after a temporary absence. U. S. v. Williams (D. C. 1911) 186 Fed. 354.

The provisions of Immigration Act Feb. 20, 1907, respecting the admission and deportation of aliens, apply to an alien who, having remained in this country for more than three years after first entry, and having gone abroad, although for a temporary purpose, with the intention of returning, again seeks admittance to the United States. U. S. v. Tsurukichi Nakao (1914) 217 Fed. 49, 133 C. C. A. 35; Same v. Tsunezo Kusano (1914) 217 Fed. 50, 133 C. C. A. 36.

Whether or not an alien who has once been admitted into the United States, but who, without being naturalized, afterward returned to the country of his original domicile, upon again coming to this country, is an "alien immigrant," subject to its provisions, depends upon the circumstances of the particular case. If, on his first entry, he left a family in his native country, to which he returned, without any definite intention of again coming to the United States, and leaving neither business nor property here, he cannot be considered to have acquired a domicile here, which takes him out of the operation of the statute when he again applies for admission without his family. U. S. v. Rodgers (1911) 191 Fed. 970, 112 C. C. A. 382.

The language of rule 4 of the regulations of the Bureau of Immigration and Naturalization relating to the admission and exclusion of aliens that "the provisions of the immigration act do not apply to aliens who have once been duly admitted to the United States, or to any waters, territory, or other place subject to the jurisdiction thereof, proceeding to or from the continental territory of the United States," applies only to aliens who have been admitted to the United States or its dependencies, and are proceeding either from the dependencies to the

continent, or from the continent to the dependencies, and has no application to an alien arriving from a foreign country, although he has been previously admitted. U. S. v. Watchorn (C. C. 1908) 164 Fed. 152.

Children of aliens born in the United States are citizens, and not aliens, and hence are not subject to exclusion, under the immigration laws, on their return with their alien parents from a temporary visit abroad. In re Giovanna (D. C. 1899) 93 Fed. 659.

That an alien ordered to be deported had once in good faith acquired a residence prior to her return after a temporary absence in a foreign country did not entitled her to enter on her return and remain in the United States. Ex parte Petterson (D. C. 1908) 166 Fed. 536.

A native of Syria, who was naturalized in the United States and later returned to his native country, where he married a Syrian woman and remained in that country for more than two years, and then came back to the United States, bringing his wife with him, did not thereby cease to be a citizen of the United States. His wife is also to be deemed a citizen, and is not subject to exclusion under the immigration laws, providing she might herself be lawfully naturalized. (1910) 28 Op. Atty. Gen. 504.

The act does not apply to citizens who return to the United States, as the act of returning rebuts the presumption of noncitizenship. Id.

9. —— **Rights of aliens.**—Alien immigrants being permitted to enter the United States, a large majority of whom are uneducated laborers, it is the duty of the government to afford them equal protection under our laws, including the right to combine to improve their condition. Mitchell v. Hitchman Coal & Coke Co. (C. C. A. 1914) 214 Fed. 685.

Although a rule made by the Secretary of Labor under this section is apparently just, yet, if it is so administered as to deprive an alien of his fundamental rights, it is void. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

10. **Grounds for deportation and persons subject to exclusion.**—Where an alien deserted from the vessel on which he was brought to the United States, but there was no evidence that he was either insane, epileptic, a pauper, or a person likely to become a public charge when the vessel arrived in port, or at any other time when he was on board, nor until a month later, when he was arrested, and when he first gave evidence of insanity, the master was not chargeable with bringing an alien not entitled to land into the United States, under former Exclusion Act March 3, 1903, c. 1012, § 2, 32 Stat. 1214, excluding idiots, insane persons, epileptics, paupers, and persons likely to become a public charge. Frank Waterhouse & Co. v. U. S. (1908) 159 Fed. 876, 87 C. C. A. 56.

Minor child of Chinese merchant held lawfully within the United States; he not being afflicted with any moral or physical infirmities justifying deportation, under this act. Lew Ling Chong v. U. S. (1915) 222 Fed. 195, 137 C. C. A. 635.

Relator, an alien, held not a proper person on whom the benefits of American citizenship should be conferred, and was therefore properly excluded on applying to enter a third time under an assumed name. U. S. v. Williams (1911) 192 Fed. 536, 113 C. C. A. 410.

The authority of the board of special inquiry and the Secretary of Commerce and Labor on appeal in immigration proceedings to order the deportation of alien immigrants is confined to such aliens as come within the classes excluded by this section. Ex parte Saraceno (C. C. 1910) 182 Fed. 955.

An alien cannot be deported as having procured his admission by false and misleading statements, where any such statements were made on his return, and not on his entry into the country, and related not to himself, but to a woman accompanying him. Lewis v. Frick (C. C. 1911) 189 Fed. 146, judgment reversed Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493.

The right to exclude depended upon the act of 1887, and the right to deport upon the act of 1888, both of which acts were dependent upon the act of 1885, which made the coming of certain classes of aliens into this country unlawful. (1907) 26 Op. Atty. Gen. 180.

There was, however, no authority to exclude aliens not coming within the prohibition of the law of 1885, although covered by the broader terms of the prohibition in this section, as the latter act contains no provision authorizing the exclusion or deportation of aliens who have been improperly brought to this country. Id.

Under existing law (act of 1903), although their importation is unlawful, and the parties responsible subject to punishment, the aliens themselves are allowed to enter. (1907) 26 Op. Atty. Gen. 199.

11. —— **Exclusiveness of statutory grounds.**—An alien detained for deportation for a reason not within this section is entitled to release on habeas corpus. Geglow v. Uhl (1915) 36 Sup. Ct. 2.

12. —— **Persons mentally deficient.**—Where, on the arrival of an alien, he was examined by the medical officer of the United States public health and marine service, who certified that he was "afflicted with idiocy," and thereafter a board of special inquiry decided

on such certificate that the alien was not entitled to enter, and directed that he be deported, the decision of the board was a conclusive finding as to the existence of the physical disability and that the applicant was within the provision that all idiots shall be excluded. U. S. v. Rodgers (D. C. 1910) 182 Fed. 274, judgment affirmed (1911) 185 Fed. 334, 107 C. C. A. 452.

The federal government is a corporate entity, and as such may receive a bond given by persons desiring temporary custody of a feeble-minded immigrant, who would subsequently be deported. U. S. v. Rubin (D. C. 1915) 227 Fed. 938.

13. —— **Persons likely to become public charges.**—Japanese subjects, who are "paupers or persons likely to become a public charge," and are therefore forbidden to enter the United States by this section, are not given such right of entry by the provision of the treaty of March 21, 1895 (29 Stat. 848), with Japan, that the citizens or subjects of each of the two countries shall have "full liberty to enter, travel, or reside in any part of the territories of the other country," especially since such treaty expressly excepts from its operation any ordinance or regulation relating to "police and public security." Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 613, 189 U. S. 86, 47 L. Ed. 721.

Alien immigrants cannot be deported, as likely to become a public charge, because the labor market is overstocked. Gegiow v. Uhl (1915) 36 Sup. Ct. 2.

Where relator, an actress, came to the United States with her husband, who was an engineer, with property valued at more than $600, and relator had gowns valued at $1,200, a finding that relator was not entitled to enter, because she was likely to become a public charge, was unsustainable. Williams v. U. S. (1913) 206 Fed. 460, 124 C. C. A. 366, affirming order U. S. v. Williams (C. C. 1911) 189 Fed. 915.

Evidence held to authorize the deportation of a Chinese alien on the ground that he was a person likely to become a public charge. Jeung Bow v. U. S. (1915) 228 Fed. 868, 143 C. C. A. 266.

Where relator was married to her husband in Cuba, and he had already entered the United States and was employed, earning daily wages sufficient to prevent himself and wife becoming public charges, and both were strong, healthy, and intelligent, relator was also entitled to enter. U. S. v. Redfern (C. C. 1910) 180 Fed. 500.

Petitioner, having immigrated to the United States in 1899, returned to Italy in January, 1909, and was followed about four months thereafter by his wife and children. He remained there until September, 1910, when he returned to the United States alone. He was a barber by trade and had followed that occupation in New York during his residence there, was 29 years of age, and had $25 when he landed. He intended to go to his brother, and was not subject to any mental or physical disability. On his examination it was shown that he had been twice arrested during his former residence in New York, and on the second occasion was convicted of carrying a concealed weapon, and sentenced to imprisonment for 15 days; his offense being a misdemeanor under the New York law. Held, that petitioner was not a person likely to become a public charge, and was not subject to deportation on such ground. Ex parte Saraceno (C. C. 1910) 182 Fed. 955.

Where a naturalized citizen was married in Russia, but the marriage, though valid there, was illegal in the United States, his alleged wife and their child, who are likely to become public charges, are properly ordered to be deported on their arrival at a port in the United States. U. S. v. Rodgers (D. C. 1901) 109 Fed. 886.

The construction of the provision of the statute for the deportation of aliens likely to become a public charge to include persons likely to become criminals does not conflict with the provision for exclusion of an alien convicted of crime. U. S. v. Williams (D. C. 1910) 175 Fed. 274.

The provision of the statute for the deportation of aliens "likely to become a public charge" is not limited to likelihood to become a pauper, but extends to likelihood to become periodically inmates of prisons as a result of crime. Id.

An alien, sought to be deported on the ground that she is likely to become a public charge, held not subject to deportation because she procured her admission into the United States by false statements as to relationship. U. S. v. Martin (D. C. 1912) 193 Fed. 795.

Where an alien, applying to enter the United States, was under no disability and had quite a sum of money, he could not be excluded, as likely to become a public charge, because he owed the money to another. U. S. v. Williams (D. C. 1913) 204 Fed. 828.

The Secretary of Labor may in his discretion order the deportation of an alien immigrant who is under 16 years of age, an orphan, and without money. United States v. Commissioner of Immigration (D. C. 1913) 209 Fed. 137.

Under immigration rule 14, as amended June 16, 1913, the fact that certain Hindoo aliens had been permitted to land in the Philippines, and had been given the required certificate on their immigration to the United States, did not preclude the immigration officers from refusing to permit them to land, on the ground that they would likely become public charges. In re Bhagat Singh (D. C. 1913) 209 Fed. 700.

Findings of an immigration board that certain alien farm laborers were likely to become public charges because there was no work for them in the United States, and the supply of such labor exceeded the demand, etc., held insufficient to justify their exclusion. Ex parte Gregory (D. C. 1914) 210 Fed. 680.

Provision of section 2 of the former act of Aug. 3, 1882 (22 Stat. 214, c. 376), that if among the passengers of a vessel arriving at one of our ports is found a "convict, lunatic, idiot, or any person unable to take care of himself or herself without becoming a public charge," such person shall not be permitted to land, considered; and held not to apply to the case of a lunatic whose father will engage satisfactorily that he will not become a public charge. (1886) 18 Op. Atty. Gen. 500.

The Secretary of the Treasury is authorized to permit an insane alien immigrant to land in this country upon receiving a satisfactory bond that the immigrant will not become a public charge and that the country shall be protected against loss by reason of her coming here. (1891) 20 Op. Atty. Gen. 79, following (1886) 18 Op. Atty. Gen. 500.

14. —— Persons in diseased condition.—An alien minor child, who has never dwelt in the United States, is not, when coming to join a naturalized parent, exempt from the provision as to dangerous contagious disease, on the theory that she was invested with citizenship by virtue of § 4367. Zartarian v. Billings (1907) 27 Sup. Ct. 182, 183, 204 U. S. 170, 51 L. Ed. 428.

The provision as to "aliens" who are afflicted with a loathsome or with a dangerous contagious disease cannot be construed to apply to aliens who are domiciled in this country, especially in view of the title of the act, which is "An act to regulate the immigration of aliens into the United States," and of its other provisions and prior statutes in pari materia. Rodgers v. U. S. (1907) 152 Fed. 346, 81 C. C. A. 454.

Decision under former act, see U. S. v. Nakashima (1908) 160 Fed. 842, 87 C. C. A. 646.

As to evidence admissible, on habeas corpus to inquire into the right to deport an alien claiming rights of citizenship on the ground that her father and mother were residents of the United States, and her father, before sending for her, had taken out his first citizenship papers, on the ground that she had trachoma, which was "a loathsome or a dangerous contagious disease," see In re Di Simone (D. C. 1901) 108 Fed. 942.

Alien immigrants, pronounced by competent authority under the former act of March 3, 1891, to be suffering from a loathsome or dangerous contagious disease, were not entitled to enter the United States. (1891) 22 Op. Atty. Gen. 122.

A Chinese person suffering from a dangerous contagious disease belongs to one of the classes of aliens which should be excluded from the United States. (1903) 24 Op. Atty. Gen. 706.

15. ——Persons convicted of crime involving moral turpitude.—A certificate from a foreign court showing that an alien immigrant was there convicted of the crime of rape is sufficient to sustain a finding of his conviction of a crime involving moral turpitude, which excludes him from the right to enter into or remain in the United States, under Act Feb. 20, 1907, § 2. Siniscalchi v. Thomas (1912) 195 Fed. 701, 115 C. C. A. 501.

Conviction of an English subject of criminal libel for charging the King with bigamy held not a conviction of a misdemeanor involving moral turpitude sufficient to exclude him from the United States within this section. U. S. v. Uhl (C. C. A. 1914) 210 Fed. 860, affirming order (D. C. 1913) 203 Fed. 152.

Whether an alien seeking to enter the United States has been convicted of a misdemeanor involving moral turpitude, so as to justify his exclusion must be determined by the judgment of conviction, and not from the testimony adduced at the trial. Id.

Where an alien seeking to enter the United States has been convicted of a crime which in its essence does not involve moral turpitude, he cannot be excluded on proof outside the record that he is a depraved person. Id.

An immigrant who has been convicted in the country from which he came of an assault with a deadly weapon and has served the term of imprisonment imposed, is a convict, within the meaning of the act regulating immigration. In re Aliano (C. C. 1890) 43 Fed. 517.

This section, excluding persons "who have been convicted of or admit having committed a felony or other crime or misdemeanor involving moral turpitude," and section 4269, post, requiring the deportation of any alien who shall enter the United States in violation of law, do not authorize deportation because of conviction of a felony in the country from which the alien came after his admission into the United States. Ex parte Koerner (C. C. 1909) 176 Fed. 478.

Proof that an alien, prior to his immigration, committed a single act of fornication or adultery in the country from which he emigrated, was insufficient to justify his deportation as an alien having been convicted of or having admitted committing a felony, or other crime or misdemeanor involving moral turpitude. U. S. v. Sibray (C. C. 1910) 178 Fed. 144, order reversed

Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

Petitioner, having immigrated to the United States in 1899, returned to Italy in January 1909, and was followed about four months thereafter by his wife and children. He remained there until September, 1910, when he returned to the United States alone. He was a barber by trade and had followed that occupation in New York during his residence there, was 29 years of age, and had $25 when he landed. He intended to go to his brother, and was not subject to any mental or physical disability. On his examination it was shown that he had been twice arrested during his former residence in New York, and on the second occasion was convicted of carrying a concealed weapon and sentenced to imprisonment for 15 days; his offense being a misdemeanor under the New York law. Held that petitioner was not a person convicted of an offense involving moral turpitude and was not subject to deportation on such ground. Ex parte Saraceno (C. C. 1910) 182 Fed. 955.

An alien cannot be deported for unlawful entry, where the only complaint relates to an offense committed long after his entry. Lewis v. Frick (C. C. 1911) 189 Fed. 146, judgment reversed Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493.

That an alien was convicted of or pleaded guilty to disorderly conduct on withdrawal of a charge of housebreaking does not show conviction or admission of a crime or misdemeanor involving moral turpitude warranting deportation. Id.

In determining whether an offense of which an alien applying to enter the United States has been convicted involved moral turpitude, the immigration authorities are governed by the question whether the inherent nature of the offense includes it. U. S. v. Uhl (D. C. 1913) 203 Fed. 152, order affirmed (C. C. A. 1914) 210 Fed. 860.

A woman having sexual intercourse with men in her native country and on a vessel en route to another foreign country held not guilty of a "misdemeanor involving moral turpitude," in the absence of showing of jurisdiction of offense denounced by Cr. Code, § 318. Ex parte Isojoki (D. C. 1915) 222 Fed. 151.

This section has no application where the alien has not in fact been convicted of the alleged offense, for the commission of which it is sought to exclude him. U. S. v. Williams (D. C. 1913) 203 Fed. 155.

Where it appeared that an immigrant from a foreign state was convicted of an offense there, sentenced to imprisonment, and after having served a portion of his sentence was given an unconditional pardon, section 4 of the act of August 3, 1882 (22 Stat. 214), relating to the return of foreign convicts, and section 5 of the act of March 3, 1875 (18 Stat. 477), did not forbid his landing in the United States. (1885) 18 Op. Atty. Gen. 239.

Immigrants who formerly resided temporarily in the United States, but took no steps to become citizens thereof, and, returning to Italy, were convicted there of crime and served out a sentence, and upon their discharge were given passports to the United States, are not exempted from the provisions of sections 2 and 4 of the former act of August 3, 1882 (22 Stat. 214), and section 1 of the former act of March 3, 1891 (26 Stat. 1084), and should be returned to Italy. (1892) 20 Op. Atty. Gen. 371.

16-17. —— **Persons admitting commission of crime involving moral turpitude.**—Proof that an alien had committed a crime involving moral turpitude, and was therefore within the excluded class under the Immigration Act, may be furnished by admissions made subsequent, as well as prior, to the alien's entry into the United States. U. S. v. Williams (1912) 200 Fed. 538, 118 C. C. A. 632.

Where an alien applying to enter the United States has not been convicted of an alleged offense claimed to involve moral turpitude in the country where it was alleged to have been committed, he can only be excluded under this section on his admission of having committed such offense, nor can such admission be presumed from his refusal to answer questions. U. S. v. Williams (D. C. 1913) 203 Fed. 155.

Admission of an immigrant from Austria that he had misappropriated partnership funds, and had them with him when he applied to enter, did not show the commission of a crime under the American law, which the court was required to apply, in the absence of proof of the Austrian law. U. S. v. Williams (D. C. 1913) 204 Fed. 828.

18. —— **Anarchists.**—The conclusion of the immigrant inspectors, approved by the Secretary of Commerce and Labor, that an alien came within the provisions of these sections cannot be said, as a matter of law, to be wholly unsupported by the evidence, even though such act be so construed as to include only advocates of the forcible overthrow of the federal government, or of all governments, or of the assassination of officials, where there was evidence that such alien advocated "as an anarchist" a universal strike, and proposed to "lecture upon the legal murder of 1887," and to address mass meetings on that subject, in association with a person who had been convicted of advocating revolution and murder. U. S. ex rel. Turner v. Williams (1904) 24 Sup. Ct. 719, 724, 194 U. S. 279, 48 L. Ed. 979.

The provision excluding alien anarchists from the United States is not

in contravention of article 1 of the amendments to the Constitution, providing that Congress shall make no law abridging the freedom of speech or the free exercise of religion. U. S. v. Williams (C. C. 1903) 126 Fed. 253, order affirmed U. S. ex rel. Turner v. Same (1904) 24 Sup. Ct. 719, 194 U. S. 279, 48 L. Ed. 979.

19. —— Prostitutes, procurers, and persons imported for immoral purposes. —See note under § 4247, post.

20. —— Contract laborers in general. —The bringing of an alien into the United States under contract to work on a farm as a laborer, under the direction of others, was held within the prohibition of former Act Feb. 26, 1885, c. 164, 23 Stat. 332, as amended, which made it unlawful to assist in the immigration of any alien under a contract "to perform service or labor of any kind," with certain exceptions; such employment not being within any of the excepted classes. U. S. v. Parsons (1904) 130 Fed. 681, 66 C. C. A. 129.

Neither Act March 3, 1903, c. 1012, 32 Stat. 1213, nor this section, authorizes the deportation as a contract laborer of an alien who entered the United States before the later act took effect; the former containing no provision whatever in that regard, and the latter, while making such provision, also expressly providing, in its saving clause, that it shall not be construed to affect "any act, thing or matter * * * done or existing" at the time of its taking effect, but that the same shall be governed by prior laws, which are continued in force for that purpose. Botis v. Davies (D. C. 1909) 173 Fed. 996.

Petitioner, who was a Greek boy then 16 years old, wrote to a distant relative in Chicago to know if the latter would give him employment if he came to the United States, and, receiving an affirmative answer, he came; his father paying his passage. On his arrival the relative gave him work at $15 per month and board, where he remained for 14 months, and then bought a horse and wagon and started in business for himself as a fruit peddler. He had no contract for employment before he came, and no wages were mentioned, and he would have come merely on the relative's promise to give him a home until he found employment. Held, that he did not come as a "contract laborer." Id.

An alien who upon promise to employ him on arrival at this country at stipulated wages in a definite occupation, made by one who advanced him money for his passage, secured by mortgage on his property, and who accompanied him on his journey, came to this country, went to work for such person at the stipulated wages, and designated occupation, repaid the advance out of his wages, and continued in the employment of the person who made the promise and advance for a year, was a contract laborer, expressly included by this section. Ex parte George (D. C. 1910) 180 Fed. 785.

See note under § 4249, post.

Clerks, storekeepers, and other persons coming to this country for the sole purpose of aiding the exhibitor to take part in the exposition are outside of and not subject to contract labor laws of the United States. (1891) 20 Op. Atty. Gen. 151.

Certain natives of the Philippine Islands, not being professional actors, artists, or singers, within this section, are properly excluded, unless on other grounds they may be regarded as not within the prohibition of the law. (1899) 22 Op. Atty. Gen. 495.

As the claim of natives of the Philippine Islands for admission appeared meritorious, and no possible competition with American labor would be involved, and as they would be returned to their country in due time, there was no conclusive objection to the Secretary of the Treasury exercising his administrative discretion favorably in admitting them. Id.

"Design" refers to manufactures as well as to the fine arts, and the test of a designer's industrial character may depend upon the nature of his designs or the conditions and methods of its application to manufacture. (1901) 23 Op. Atty. Gen. 381.

The immigration clearly forbidden by section 1 of the former act of February 26, 1885 (23 Stat. 332, c. 164), was that brought under contract to perform manual labor or service; and manual labor included both skilled and unskilled labor. Id.

The case of Church of the Holy Trinity v. United States (1892) 143 U. S. 457, 12 Sup. Ct. 511, 36 L. Ed. 226, considered. The proper distinction, founded on this case, is that between manual labor, including the mechanical trades, on the one side, and the professions on the other. Id.

A "draftsman" who is described as a "lace maker," seems to be one who is so closely connected with that particular trade as to be a member of it, just as a molder or designer of molds appears to belong to the metal-casting trade. (1901) 23 Op. Atty. Gen. 382.

The Canal Commission has authority to enter into an agreement with the International Contracting Company, of Maine, whereby the latter agrees to supply male Chinamen for work upon the Panama Canal, and to feed, clothe, and transport them back to China at the expiration of their respective contracts of employment, notwithstanding said agreement contains a provision that ten hours shall constitute a day's labor. (1906) 26 Op. Atty. Gen. 1.

Aliens who came to the United States during the years 1904–1906 at the suggestion and through the instrumental-

ity of an officer of the state of South Carolina appointed under a statute which expressly permitted him to act as agent for citizens of that state in the procuring of desirable immigrants, which officer, largely or wholly at the expense of such individuals, visited foreign countries, and by advertisement, promises of employment, and prepayment of passage, induced a large number of laborers and artisans to migrate to South Carolina, were introduced into the United States in violation of the acts of 1885, 1887, and 1888, and should have been excluded. (1907) 26 Op. Atty. Gen. 180.

Opinions under former act as to rights of states, see (1907) 26 Op. Atty. Gen. 180, 199.

There is nothing in Act March 3, 1903, c. 1012, or in any previous act, which would authorize their exclusion because the immigration was induced by advertisement, or even by solicitation or promise of employment, unless there was an enforceable contract existing at the time of application for admission requiring them to render service as laborers. (1907) 26 Op. Atty. Gen. 199.

Aliens solicited or induced to migrate by reason of offers or promises may be excluded, even when there is no contract of employment. Id.

The classes of aliens excluded by this section include "aliens solicited or induced to immigrate by reason of offers or promises, even if there is no contract of employment." (1907) 26 Op. Atty. Gen. 410, 411.

The provisions of the statute are limited to manual labor, skilled or unskilled (1909) 27 Op. Atty. Gen. 383.

The course being pursued by the Hawaiian government is strictly within the alien contract labor law and the immigration laws of the United States. (1909) 27 Op. Atty. Gen. 479.

21. —— Aliens excepted from contract labor provisions.—This prohibition does not apply to one who comes to this country under contract to enter the service of a church as its rector. Holy Trinity Church v. U. S. (1892) 12 Sup. Ct. 511, 516, 143 U. S. 457, 36 L. Ed. 226.

A foreigner under contract to come to the United States to work as chemist on a sugar plantation is a person belonging to a recognized profession, within the meaning of Act March 3, 1891, excepting such persons from the operation of Act Feb. 26, 1885, prohibiting the importation of aliens under contract to perform labor. U. S. v. Laws (1896) 163 U. S. 258, 16 Sup. Ct. 998, 41 L. Ed. 151.

An immigrant arriving in this country, under a contract to labor on a dairy farm, the product of which, or a part thereof, forms an article of merchandise that competes with others in a similar business, and whose passage here has been paid by the agent of the employer, is not within the exception of persons employed strictly as personal or domestic servants, etc. In re Cummings (C. C. 1887) 32 Fed. 75.

A woman who is engaged as a milliner is not a "professional artist," within the exception of the act of congress prohibiting the immigration of aliens under contract to perform labor. U. S. v. Thompson (C. C. 1889) 41 Fed. 28.

Defendants contracted with a resident of France to come to this country and work for them in the manufacture of "French silk stockings," which were shown to be articles materially different from ordinary silk stockings. It was shown that there had been manufactured here stockings whereof the feet were the same as those of the "French silk stockings," but the legs were different, and made by different machines. Held, that the manufacture of the complete "French silk stockings" was a new industry, within the exemption of former Act Feb. 26, 1885, c. 164, imposing a penalty on the importation of contract labor. U. S. v. McCallum (C. C. 1891) 44 Fed. 745.

Machines for the manufacture of "French silk stockings" were already in use in this country for knitting the feet, and there was evidence that a skillful workman might learn to run them in a few weeks. It was shown for defendants that their machines stood idle until they imported the Frenchman in question, and that they had advertised for men to run them, but had failed to find any that were competent. Held, that the evidence did not disclose such efforts on defendants' part as to show a necessity to resort to foreign workmen, and they are liable for the penalty. Id.

An "undercoachman," whose duties are, partly, to assist in keeping stables, horses, and carriages in good order, but principally to drive the horses when his employer or any of his family go out in carriages, and to accompany on horseback the younger members of the family when they go out on horseback, and who boards with his employer's coachman, and sleeps in a room over the coach house, held a "personal or domestic servant," within the exception of former Act of Feb. 26, 1885 (chapter 164), prohibiting the immigration of aliens under contracts for labor. In re Howard (C. C. 1894) 63 Fed. 263.

Aliens imported under contract, who were expert accountants, were not members of a recognized learned profession, within the terms of the exception, and were, therefore, not entitled to entry. In re Ellis (C. C. 1903) 124 Fed. 637, appeal dismissed Ellis v. Williams (1906) 26 Sup. Ct. 753, 200 U. S. 623, 50 L. Ed. 625; In re Charalambis (C. C. 1903) 124 Fed. 637,

appeal dismissed (1905) Charalambis v. Williams (1905) 25 Sup. Ct. 795, 196 U. S. 643, 49 L. Ed. 632.

The manufacture of fine lace curtains, which has been carried on in this country for only about three years, and is still confined to two or three establishments, and which was brought into existence by the McKinley tariff law, and will probably disappear if the protection thereby given is withdrawn, is a "new industry," within the exception to the prohibition of the contract labor law of 1885. U. S. v. Bromiley (D. C. 1893) 58 Fed. 554.

Skilled employés of foreign exhibitors at the World's Columbian Exposition, who come in good faith for the purpose of setting up and operating the machinery of such exhibitors, are outside of and not subject to the contract labor laws of the United States. (1891) 20 Op. Atty. Gen. 89.

Ordinary laborers, commonly employed in the construction and maintenance of the tracks of railroads, are not "skilled" laborers within the meaning of this section, and may not be imported into this country under contract in any event. (1906) 26 Op. Atty. Gen. 42.

Two alien lithographic artists, who came to the United States in pursuance of a contract of employment entered into with the American Lithographic Company, of New York, their passage being prepaid by that company, and who have been excluded upon the ground that their admission would be in violation of the acts of February 26, 1885 (23 Stat. 332), and March 3, 1903 (32 Stat. 1213), relating to contract labor, should be admitted; it being shown beyond reasonable doubt that there are not a sufficient number of lithographic artists in the country at the present time to meet the demands of business. (1907) 26 Op. Atty. Gen. 284.

An alien induced to come to the United States by promise of employment as superintendent of a lumbering company, conditioned that he must be a competent woodsman, logger, and mill man, and must be a first-class mechanic, does not come within the provisions of the immigration act, provided the agreement does not require him to perform manual labor. (1909) 27 Op. Atty. Gen. 383.

22. —— **Persons "assisted by others to come."**—Neither the prepaying of transportation, nor the assisting or encouraging, in any wise, the importation, of an alien, is a violation of the contract labor act, without a contract or agreement, made previous to the importation or migration, binding the alien to perform labor or service in the United States, its territories, or the District of Columbia. Moller v. U. S. (1893) 57 Fed. 490, 6 C. C. A. 459.

Under this section a finding by the immigration officers that an immigrant was assisted to come by another warrants his exclusion, unless such disability is removed by affirmative and satisfactory evidence, and unless evidence on that question is offered no further finding is required. U. S. v. Rodgers (1911) 191 Fed. 970, 112 C. C. A. 382.

In the provisions of the former act of February 26, 1885 (chapter 164) and under section 4248, post, in dealing with the payment of passage money or other specific assistance to migration of individual aliens, no exception is made in favor of states, and no exception exists, therefore, in favor of any person because he may act as agent of a state. (1907) 26 Op. Atty. Gen. 180.

The same prohibition does not extend, however, to the payment of passage money by individuals, whether directly or through the agency of a state, provided their action is, and is shown to be, in good faith, individual, and not attended by such combination or concert of action as would make it substantially the act of an association or a society. (1907) 26 Op. Atty. Gen. 199.

The payment of passage money of immigrants by a state with its funds is not prohibited, but its payment with funds contributed by any society or association renders the immigrant liable to exclusion, even though the payment be made through the agency of the state or its officers, and although the immigrant would otherwise be entitled to admission. Id.

Under the act of 1907 a person whose passage money is paid by another must be prepared to show, not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid, directly or indirectly, by a corporation, association, society, municipality, or foreign government. Id.

The effect of the payment of the passage of an alien by another is to throw upon the alien the burden of proof that he is not liable to exclusion for the reasons mentioned in this section, or as a contract laborer under Act Feb. 26, 1885 (23 Stat. 332). Id.

An alien who arrived at New Orleans from Cuba on August 5, 1907, his passage money having been paid by an agent of the Louisiana state board of agriculture and immigration out of funds appropriated by that state, the agent having assured the alien of employment upon his arrival, which assurance operated as a material, if not the principal, inducement to his immigration, the expectation being that the employer will loan the alien the sum so advanced for the reimbursement of the state, is not entitled to admission to the United States. (1907) 26 Op. Atty. Gen. 410.

While the payment of an immigrant's passage out of state funds does not of itself require his exclusion, yet such

payment operates to throw upon the immigrant the burden of showing that he does not come within any of the otherwise excluded classes, such as paupers, etc., specifically excluded by the act. Id.

The merely hypothetical possibility of a condition arising under the indirect method of attempting to eventually secure reimbursement to the state fund of the amount of the alien's passage, which could perhaps be regarded as in effect a payment of his passage by a corporation, society, or association, would not be a ground of exclusion. Id.

23. —— **Seaman.**—The immigration laws have no application to alien seamen who constitute the bona fide crew of a vessel trading in the ports of the United States, and who enter such ports with their ship in the discharge of the duties of their employment, and without any intention of becoming residents of this country; and the master of a vessel cannot be subjected to the fine or refusal of his clearance papers, as a penalty for refusing to return upon his vessel immigrants of the prohibited classes brought into this country, because an alien seaman, who is one of the crew, escapes from his ship while in port, before the expiration of his term of service, without having been discharged or paid, and without the consent or knowledge of the master, and the master is unable to secure his arrest and return to the ship. U. S. v. Burke (C. C. 1899) 99 Fed. 895.

A member of a vessel's crew (not Chinese), though ineligible for admission to the United States as an alien immigrant, is still entitled to land on shore leave and remain within the physical boundaries of the United States until his vessel sails, without being sent to observation quarters of the Bureau of Immigration for inspection as an immigrant. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

Bona fide seamen have always been excepted from the operation of our immigration laws, although not excepted therefrom by express language; their inclusion in the class of alien immigrants can fairly be regarded as beyond the intention of congress. (1901) 23 Op. Atty. Gen. 521.

Opinion under prior law, see (1901) 23 Op. Atty. Gen. 521; (1902) 24 Op. Atty. Gen. 553.

Where a Chinese crew is shipped at Hongkong on a vessel belonging to a company chartered under the laws of the United States, for a trip to San Francisco and return by the same vessel, or any other vessel belonging to that company, and, owing to an accident to the ship, is brought to San Francisco on a vessel belonging to a different company, and transferred to another vessel substituted for the one injured, after having duly signed for that service before a United States shipping commissioner, such transfer would not be a violation of the alien contract labor laws. (1902) 24 Op. Atty. Gen. 111.

The alien contract labor laws have no application to seamen who, in good faith, are engaged in navigation, and who are temporarily within a port of the United States for that purpose. (1902) 24 Op. Atty. Gen. 553.

24. **Abrogation of three-year time limit for deportation.**—The provision abrogating the three-year time limit for deportation of aliens at the expense of the carrier by which they were unlawfully entered, does not operate retroactively, and does not apply to an alien prostitute, where the three-year limit had expired prior to the passage of the act. U. S. v. International Mercantile Marine Co. (D. C. 1913) 204 Fed. 702.

25. **Administration of law.**—Admission of aliens into the Philippines by the immigration authorities there under control of the Secretary of War held not conclusive on the immigration officials in the United States as to their right to enter the mainland. Ex parte Marshall (D. C. 1914) 213 Fed. 123.

As to deportation of aliens unlawfully within the United States, see notes under §§ 4247, 4268 et seq., post.

Questions determinable on habeas corpus, see § 4277, post.

26. —— **Jurisdiction.**—The regulation of the secretary of the treasury declares that the superintendent of immigration at the port of New York shall examine into the condition of passengers arriving at that port, and report to the collector whether any person is within the prohibition of former Act Feb. 26, 1885, c. 164. Act Feb. 23, 1887, c. 220, amending the act of 1885, provides that if, on such examination by the superintendent, any person shall be found within the prohibition of the act, and the same is reported to the collector, such person shall not be permitted to land. Held, that such power of determination is vested in the superintendent of immigration, and not in the collector. In re Bucciarello (C. C. 1891) 45 Fed. 463.

The determination of the existence of the facts justifying the exclusion of immigrants is, in the first instance, vested in the Secretary of Commerce and Labor. (1907) 26 Op. Atty. Gen. 180.

27. —— **Evidence.**—In proceedings before the immigration officers to determine whether an alien is likely to become a public charge, affidavits, letters, and newspaper clippings may be admitted as evidence. Healy v. Backus (1915) 221 Fed. 358, 137 C. C. A. 166.

28. —— **Regularity of proceedings and effect of irregularities.**—Proceedings for the exclusion of an alien are

summary in their nature, and if fairly conducted cannot be objected to because of irregularities or of variance between the application and warrant. Healy v. Backus (1915) 221 Fed. 358, 137 C. C. A. 166.

Proceedings for the exclusion of aliens in which the government was allowed to introduce testimony after the aliens had introduced their testimony, held to be fair, and to show no abuse of discretion. Id.

A Chinese alien held not accorded a fair hearing before the immigration officers, where her counsel was precluded by the inspector from putting any questions on cross-examination to witnesses produced and examined against her. Ex parte Ung King Ieng (D. C. 1914) 213 Fed. 119.

Where immigration authorities had power to exclude certain aliens applying to enter the United States, it was immaterial that such exclusion was done under warrant of arrest. Ex parte Marshall (D. C. 1914) 213 Fed. 123.

Error in excluding the attorney of an alien, in proceedings before immigration officers to exclude him, held not to render the proceedings unfair. In re Madeiros (D. C. 1914) 225 Fed. 90.

29. —— **Review by courts.**—See note under § 4277, post.

30. **Opinions under prior law.**—Act March 3, 1903, c. 1012, §§ 2, 38, forbidding the immigration of alien anarchists, and providing for a hearing before the immigration officers for the deportation of such persons, held not violative of Const. art. 3, § 1. U. S. ex rel. Turner v. Williams (1904) 24 Sup. Ct. 719, 723, 194 U. S. 279, 48 L. Ed. 979.

Act March 3, 1891, § 1, providing for exclusion of certain classes of aliens "in accordance with existing acts regulating immigration other than those concerning Chinese laborers," held not to place Chinese laborers outside the excluded classes. Ex parte Woo Jan (D. C. 1916) 228 Fed. 927.

See (1899) 22 Op. Atty. Gen. 495; (1901) 23 Op. Atty. Gen. 381.

Cited without definite application, Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health (1902) 22 Sup. Ct. 811, 818, 186 U. S. 380, 46 L. Ed. 1209; Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 612, 189 U. S. 86, 47 L. Ed. 721; Grant Bros. Construction Co. v. U. S. (1914) 34 U. S. 452, 453, 232 U. S. 647, 58 L. Ed. 776; Warren v. Same (1893) 58 Fed. 559, 560, 7 C. C. A. 368; Taylor v. Same (1907) 152 Fed. 1, 81 C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130); U. S. v. International Mercantile Marine Co. (1912) 194 Fed. 408, 114 C. C. A. 370; In re Rustigian (C. C. 1908) 165 Fed. 980; Ex parte Durand (D. C. 1908) 160 Fed. 558; U. S. v. Capella (D. C. 1909) 169 Fed. 890; Same v. Fielding (D. C. 1909) 175 Fed. 290.

§ 4245. (Act Feb. 26, 1885, c. 164, § 2.) Contracts for labor or service of aliens, made previous to migration or importation, void.

All contracts or agreements, express or implied, parol, or special, which may hereafter be made by and between any person, company, partnership, or corporation, and any foreigner or foreigners, alien or aliens, to perform labor or service or having reference to the performance of labor or service by any person in the United States, its Territories, or the District of Columbia previous to the migration or importation of the person or persons whose labor or service is contracted for into the United States, shall be utterly void and of no effect. (23 Stat. 332.)

This section was part of an act entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia." It was not directly superseded by the Immigration Act of March 3, 1903, c. 1012, or by the Immigration Act of Feb. 20, 1907, c. 1134.

This act was amended, so as to authorize payment, to an informer of violations of the act, of a share of the penalties recovered in consequence of the information furnished, by a provision of Act Oct. 19, 1888, c. 1210, § 1, post, § 4246.

Notes of Decisions

Contract labor and acts relating thereto.—Under this section and the amendment thereto by Act Feb. 23, 1887, c. 220, post, § 4246, relating to the immigration of aliens under a contract to labor in the United States, the claim that only the persons soliciting or encouraging the immigration are affected by the acts cannot be sustained. In re Cummings (C. C. 1887) 32 Fed. 75.

This statute is penal, and must be strictly construed, and cannot be extended to a case not manifestly within its meaning. U. S. v. Michigan Cent. R. Co. (C. C. 1891) 48 Fed. 365, 366.

The contract labor acts apply only to immigrants not to resident aliens re-

turning to the country. In re Maiola (C. C. 1895) 67 Fed. 114.

The former contract labor acts of Feb. 26, 1885, and March 3, 1891, were highly penal, and were so construed as to bring within their condemnation only those who were shown by direct and positive averments to be embraced within their terms. They were to be construed in the light of the evil to be remedied, and were limited to cases in which the assisted emigrant was brought into this country under a contract to perform manual labor or service. U. S. v. Gay (C. C. 1897) 80 Fed. 254, judgment affirmed (1899) 95 Fed. 226, 37 C. C. A. 46.

This act was designed to keep out cheap, unskilled manual laborers, and not others. U. S. v. McElroy (C. C. 1902) 115 Fed. 252.

Act March 3, 1903, c. 1012, does not cover the case of contract laborers. Botis v. Davies (D. C. 1909) 173 Fed. 996.

This section, and § 4246, post, were not repealed by Act March 3, 1903 (32 Stat. 1213), and immigrants coming to the United States during the years 1904–1906 in violation of the act of 1885 could have been and should have been excluded. (1907) 26 Op. Atty. Gen. 180.

"Labor."—The word "labor," as used in this act, means manual labor as distinguished from that of a professional man, as a clergyman. Holy Trinity Church v. U. S. (1892) 12 Sup. Ct. 511, 513, 143 U. S. 457, 36 L. Ed. 226.

Exclusion of contract laborers.—See note under § 4244, ante.

Cited without definite application, Compagnie Francaise de Navigation a Vapeur v. Louisiana State Board of Health (1902) 22 Sup. Ct. 811, 818, 186 U. S. 380, 46 L. Ed. 1209; Kaoru Yamataya v Fisher (1903) 23 Sup. Ct. 611, 612, 189 U. S. 86, 47 L. Ed. 721; Pearson v. Williams (1906) 26 Sup. Ct. 608, 609, 202 U. S. 281, 50 L. Ed. 1029; In re International Mahogany Co. (1906) 147 Fed. 147, 78 C. C. A. 58.

§ 4246. (Act Oct. 19, 1888, c. 1210, § 1, as amended, Res. April 28, 1904, No. 34.) Payment to informer of share of penalty for violation of contract labor law.

That the act approved February twenty-sixth, eighteen hundred and eighty-five, entitled "An act to prohibit the importation and migration of foreigners and aliens under contract or agreement to perform labor in the United States, its Territories, and the District of Columbia," be, and the same is hereby, amended so as to authorize the Secretary of [Commerce and] Labor to pay to an informer who furnishes original information that the law has been violated such a share of the penalties recovered as he may deem reasonable and just, not exceeding fifty per centum, where it appears that the recovery was had in consequence of the information thus furnished. (25 Stat. 566. 33 Stat. 591.)

This was a provision of the deficiency appropriation act for the fiscal year 1888, and prior years, cited above.

Act Feb. 26, 1885, c. 164, mentioned in and amended by this section, section 2 of which is set forth ante, § 4245, was almost entirely superseded by the Immigration Act of 1903, which was itself repealed by the Immigration Act of 1907, but the provisions of this section were not directly superseded by either of those Acts.

This section was amended by striking out the words "Secretary of the Treasury" as they appeared in the original act, and inserting in lieu thereof the words "Secretary of Commerce and Labor," by Res. April 28, 1904, No. 34, 33 Stat. 591, ante, § 957.

The words "Commerce and," part of the words inserted by said amendment, and inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Notes of Decisions

Application of act.—This act is directed solely against alien immigrants, not against alien residents, when returning after a temporary absence. In re Maiola (C. C. 1895) 67 Fed. 114.

See notes under § 4245, ante.

Recovery of penalty.—See note under § 4250, post.

Cited without definite application, Pearson v. Williams (1905) 136 Fed. 734, 736, 69 C. C. A. 386, affirmed (1906) 26 Sup. Ct. 608, 202 U. S. 281, 50 L. Ed. 1029.

§ 4247. (Act Feb. 20, 1907, c. 1134, § 3, as amended, Act March 26, 1910, c. 128, § 2.) Importation of aliens for prostitution or other immoral purpose forbidden; punishment; jurisdiction; deportation; punishment for attempt to return; deportation after expiration of sentence; testimony of husband or wife admissible.

The importation into the United States of any alien for the purpose of prostitution or for any other immoral purpose is hereby forbidden; and whoever shall, directly or indirectly, import, or attempt to import, into the United States, any alien for the purpose of prostitution or for any other immoral purpose, or whoever shall hold or attempt to hold any alien for any such purpose in pursuance of such illegal importation, or whoever shall keep, maintain, control, support, employ, or harbor in any house or other place, for the purpose of prostitution or for any other immoral purpose, in pursuance of such illegal importation, any alien, shall, in every such case be deemed guilty of a felony, and on conviction thereof be imprisoned not more than ten years and pay a fine of not more than five thousand dollars. Jurisdiction for the trial and punishment of the felonies hereinbefore set forth shall be in any district to or into which said alien is brought in pursuance of said importation by the person or persons accused, or in any district in which a violation of any of the foregoing provisions of this section occur. Any alien who shall be found an inmate of or connected with the management of a house of prostitution or practicing prostitution after such alien shall have entered the United States, or who shall receive, share in, or derive benefit from any part of the earnings of any prostitute; or who is employed by, in, or in connection with any house of prostitution or music or dance hall or other place of amusement or resort habitually frequented by prostitutes, or where prostitutes gather, or who in any way assists, protects, or promises to protect from arrest any prostitute, shall be deemed to be unlawfully within the United States and shall be deported in the manner provided by sections twenty and twenty-one of this Act. Any alien who shall, after he has been debarred or deported in pursuance of the provisions of this section, attempt thereafter to return to or to enter the United States shall be deemed guilty of a misdemeanor, and shall be imprisoned for not more than two years. Any alien who shall be convicted under any of the provisions of this section shall, at the expiration of his sentence, be taken into custody and returned to the country whence he came, or of which he is a subject or a citizen in the manner provided in sections twenty and twenty-one of this Act. In all prosecutions under this section the testimony of a husband or wife shall be admissible and competent evidence against a wife or husband. (34 Stat. 899. 36 Stat. 264.)

See notes to section 1 of this act, ante, § 4242.

The amendment of this section by Act March 26, 1910, consisted in the omission of the words "woman or girl" wherever they occurred after the words "any alien," in the increase of the maximum term of imprisonment from five to ten years, in the addition of the provisions concerning jurisdiction and affecting those receiving the earnings of a prostitute or being employed in resorts frequented by them, and in the addition of the last three sentences of the section, beginning with the words "Any alien who shall, after he has been debarred," making the section read as set forth here.

Previous provisions similar, to some extent, to those of this section, were made by Act March 3, 1875, c. 141, § 3, 18 Stat. 477, but were superseded by the provisions of Act March 3, 1903, c. 1012, § 3, 32 Stat. 1214, which were re-enacted, with some additions, in this section, and were repealed by section 43 of this act, post, § 4289.

For deportation proceedings and warrant generally, see § 4269, post.

Notes of Decisions

1. Construction and operation of statute in general.
2. —— "Alien."
3. —— "Prostitution."
4. Validity of statute.
5. Offense—What constitutes.

6. —— Venue.
7. —— Indictment.
8. —— Defenses.
9. —— Evidence.
10. Deportation—Persons subject.
11. —— Limitations.
12. —— Prior conviction.
13. —— Prior acquittal.
14. —— Proceedings in general.
15. —— Rules of secretary.
16. —— Evidence.
17. —— Defenses.
18. —— Review.
19. —— Warrants.
20. —— Manner of deportation.

1. Construction and operation of statute in general.—Effect of the amendatory act is not changed because it still refers to sections 4269, 4270, of the earlier act as governing deportation, though those sections provide for taking custody of aliens, subject to removal within three years. Bugajewitz v. Adams (1913) 33 Sup. Ct. 607, 228 U. S. 585, 57 L. Ed. 978; Schwartz v. Same (1913) 33 Sup. Ct. 609, 228 U. S. 592, 57 L. Ed. 980; Weiner v. Same, Id.

This regulation of the immigration of aliens provision was a re-enactment and extension of prior legislation on the same subject, enacted in light of the construction placed on prior acts by the courts. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

Offenses under the act of 1903 held saved and subject to prosecution after the act of 1907 became effective. U. S. v. Lair (1912) 195 Fed. 47, 115 C. C. A. 49.

The provision is not retroactive, and does not apply to an alien convicted of such offense under the statute before its amendment. U. S. v. Tsuji Suekichi (1912) 199 Fed. 750, 118 C. C. A. 188.

This section is applicable to women imported for purposes of prostitution from all countries whatsoever. U. S. v. Johnson (C. C. 1881) 7 Fed. 453. It applied to Chinese, notwithstanding section 4289 declares it shall not be construed to repeal, alter, or amend existing laws as to immigration or exclusion of Chinese persons or persons of Chinese descent. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

2. —— "Alien."—A foreign-born Chinese woman, though married to a Chinaman of American birth, is an alien within this section. Low Wah Suey v. Backus (1912) 32 Sup. Ct. 734, 737, 225 U. S. 460, 56 L. Ed. 1165.

The term "aliens" applies only to alien immigrants, and not to alien residents. U. S. v. Tsuji Suekichi (1912) 199 Fed. 750.

3. —— "Prostitution."—Prostitution is the act of permitting illicit intercourse for hire—an indiscriminate intercourse, or what is deemed public prostitution. U. S. v. Bitty (C. C. 1907) 155 Fed. 938, judgment reversed (1908) 28 Sup. Ct. 396, 208 U. S. 393, 52 L. Ed. 543.

4. Validity of statute.—Judicial powers are not unconstitutionally vested in the executive branch of the government by this section, although the inquiry under that statute devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, after a fair though summary hearing, are made conclusive. Zakonaite v. Wolf (1912) 33 Sup. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

The constitutional guaranty of the privilege of habeas corpus is not violated by the provisions of this section, although the inquiry under that statute devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, after a fair though summary hearing, are made conclusive. Id.

Life, liberty, or property are not taken without due process of law, contrary to Const. Amend. 5, by proceedings under this section, resulting in the deportation of an alien found to be practicing prostitution within three years after her entry into the United States, although the inquiry devolves upon the Department of Commerce and Labor, or subordinate officials thereof, and their findings of fact, after a fair though summary hearing, are made conclusive. Id.

Proceedings had conformably to this section are not criminal, within the meaning of the guaranty of Const. Amend. 6, that in all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the state and district wherein the crime shall have been committed. Id.

Congress can prohibit admission of aliens and regulate their entrance as is done by this section. In the exercise of its authority to prohibit the admission of aliens into the United States and to regulate their entrance, it could provide, as was done by this section before the amendment, for the deportation of any alien found practicing prostitution within three years after her entry into the United States. Id.; Bugajewitz v. Adams (1913) 33 Sup. Ct. 607, 228 U. S. 585, 57 L. Ed. 978; Ex parte Hamaguchi (C. C. 1908) 161 Fed. 185.

The present provision for deportation, regardless of the length of time which has elapsed since her entry, is within the constitutional power of Congress, and valid. U. S. v. Weis (D. C. 1910) 181 Fed. 860. It is not unconstitutional as infringing on the police power of the state. Siniscalchi v. Thomas (1912) 195 Fed. 701, 115 C. C. A. 501; U. S. v. Williams (D. C. 1910) 183 Fed. 904.

The police power of the state was not unconstitutionally interfered with by the provision for deportation of aliens for practicing prostitution within three years after entry because giving federal authorities power to try an immigrant for violation of the penal

laws of the state. Nor on the ground that this section vests in the federal authorities the power to try an immigrant for a violation of the penal laws of the state of which she has become a resident. Zakonaite v. Wolf (1912) 33 Sup. Ct. 31, 226 U. S. 272, 57 L. Ed. 218. But congress had no power to provide for the mere keeping, maintaining, supporting, or harboring, for the purposes of prostitution, any alien woman within three years after she shall have entered the United States. Keller v. U. S. (1909) 29 Sup. Ct. 470, 213 U. S. 138, 53 L. Ed. 737, 16 Ann. Cas. 1066.

This section, in so far as it provides for the criminal punishment of the mere keeping, maintaining, supporting, or harboring an alien woman within three years after entry for purpose of prostitution, is unconstitutional; such offense being within the police power of the state and not subject to congressional regulation. Ex parte Gouyet (D. C. 1909) 175 Fed. 230; Ex parte Lair (D. C. 1910) 177 Fed. 789.

The prohibition of Const. art. 1, § 9, against ex post facto laws, has no application to this provision for the deportation of alien women found practicing prostitution after their entry into the United States. Bugajewitz v. Adams (1913) 33 Sup. Ct. 607, 228 U. S. 585, 57 L. Ed. 978.

Immigration Act 1907, amended by Act March 26, 1910, eliminating the three-year limitation for deportation, held not unconstitutional as retroactive. Ex parte Cardonnel (D. C. 1912) 197 Fed. 774.

5. **Offense—What constitutes.**—The importation of an alien woman into the United States in order that she may live with the person importing her as his concubine is for an immoral purpose, within this section. U. S. v. Bitty (1908) 28 Sup. Ct. 396, 208 U. S. 393, 52 L. Ed. 543, reversing judgment (C. C. 1907) 155 Fed. 938.

This section does not make it an offense to attempt to import for such purposes; and where a woman brought other women to this country under an agreement to furnish them with legitimate employment, the mere fact that during the voyage she proposed to them that they engage in prostitution after their arrival, which proposal they at once rejected, does not subject her to prosecution under such statute. In re Guayde (C. C. 1901) 112 Fed. 415.

To warrant conviction where the charge is that of holding a woman so imported by defendant and another for the purposes of prostitution, it must be shown that defendant, either alone or in connection with such other, knowingly and willfully imported, or caused to be imported, such woman for the purposes of prostitution, and thereafter, to effect the object of such illegal importation, knowingly and willfully held such woman for such purposes. It is not necessary that defendant should have detained such woman by physical force, but it is sufficient to constitute a holding within the meaning of the statute if such woman was detained for the purpose of prostitution by physical means applied to her either directly or indirectly by defendant, or by threats, express or implied, directly or indirectly made to her by defendant, or by commands made to her directly or indirectly by defendant and calculated and operating to restrain her freedom of action and will. To warrant a conviction for attempting to hold the same proof is required, except that it is not necessary that the means used should have been successful. U. S. v. Giuliani (D. C. 1906) 147 Fed. 594.

The keeping, maintaining, controlling, or supporting of an alien woman in a house for an immoral purpose, in pursuance of her illegal importation, after the amendment, is violation of the act as amended, and subjects the wrongdoer to indictment. But mere unlawful cohabitation within a district with an alien woman imported for immoral purposes is not in violation of this section; Congress having no jurisdiction to control the morals of alien women within the United States, unless in some manner connected with unlawful importation. U. S. v. Krsteff (D. C. 1911) 185 Fed. 201.

6. —— **Venue.**—A District Court in another state held not entitled to assume that the offense of importing an alien could not have been committed by defendant at Chicago, within the Northern District of Illinois, as against a judgment of the court of the latter district finding that the offense had been so committed. U. S. v. Lair (1912) 195 Fed. 47, 115 C. C. A. 49.

On a prosecution for bringing women into the country for purposes of prostitution, a verdict of guilty will not be disturbed on motion for a new trial on the ground that the court was without jurisdiction, the evidence rendering it doubtful whether the importation was not into another district, where no such objection was taken at the trial or presented by the record. U. S. v. Pagliano (C. C. 1893) 53 Fed. 1001.

The offense of importing a female alien for prostitution, in violation of this section as originally enacted, is committed and is complete the moment the immigrant is landed in the United States at which point the offense is triable, under Const. art. 3, § 2, cl. 3, declaring that the trial of all crimes except cases of impeachment shall be held in the state where the crime has been committed and the sixth amendment, declaring that accused shall enjoy the right to a speedy and public trial in the state and district wherein the crime has been committed. Ex parte Lair (D. C. 1910) 177 Fed. 789.

Accused imported a female alien, who

was a prostitute, from British Columbia into the Northern district of California, in March, 1908, visited her in San Francisco occasionally, where she continued to practice prostitution, but after the spring of 1908 their relations were interrupted until 1910, when defendant again met her in Seattle, in the Western district of Washington, and renewed illicit relations with her. Held that as such relations had in Washington, were not "pursuant to the illegal importation," there being no continuity of association, defendant could not be convicted of keeping or maintaining in the Washington district, but was only guilty of importing for which he was only subject to prosecution in the Northern district of California. U. S. v. Lavoie (D. C. 1910) 182 Fed. 943.

Where an indictment charged an illegal importation into the United States of an alien woman for an immoral purpose, and showed that the importation was complete at the port where the alien was landed, the venue was in that district, and could not be laid in another district to which accused and the alien thereafter went. U. S. v. Krsteff (D. C. 1911) 185 Fed. 201.

7. —— **Indictment.**—An indictment under this section held sufficient as to an offense committed within three years before the indictment was found, though no date is alleged. U. S. v. Lair (1912) 195 Fed. 47, 115 C. C. A. 49.

It is not necessary that the acts constituting the importation should be set forth. U. S. v. Johnson (C. C. 1881) 7 Fed. 453.

An indictment charging that defendants did knowingly and willfully import and bring into the southern district of New York, from Naples, Italy, six women, named, for the purposes of prostitution within the United States, sufficiently charges the offense prescribed by this section. It was not objectionable in alleging that defendants did "import and bring," etc., whereas the statute merely uses "import;" for, when used in this connection, the words are synonymous. Such indictment need not allege that the importation was in pursuance of an agreement made prior thereto. It need not set out the facts constituting the ultimate fact of importation. Nor need it state the place within the United States at which the women were to be used for the purposes of prostitution. Or specify the kind of prostitution referred to; the word "prostitution," as used therein, being sufficiently definite. U. S. v. Pagliano (C. C. 1893) 53 Fed. 1001.

An indictment alleging that petitioner, in connection with another at Chicago in the Eastern division of the Northern district of Illinois, unlawfully, etc., imported into the United States for prostitution and unlawfully, etc., did hold from January 1, 1906, until July 15, 1907, pursuant to such illegal importation, in a house of prostitution in Chicago, for the purpose of prostitution, an alien named P., then a citizen of France, within three years after her entry, and that she came to and entered the United States within three years prior thereto, charged the offense of holding and harboring a female alien for the forbidden purpose within three years after entry, and not her illegal importation for such purpose. Ex parte Lair (D. C. 1910) 177 Fed. 789.

An indictment for keeping, maintaining, controlling, supporting, or harboring an alien female pursuant to an illegal importation for an immoral purpose, alleging that such purpose was unlawful cohabitation and adultery, sufficiently charged that the purpose was immoral, in violation of this section. U. S. v. Krsteff (D. C. 1911) 185 Fed. 201.

Counts in the indictment alleging an illegal importation into the United States, and that thereafter defendant, within the district, kept, maintained, controlled, and supported the female claimed to have been illegally imported for immoral purposes "in pursuance of such illegal importation," were not demurrable. Id.

8. —— **Defenses.**—In a prosecution for the importation of an alien woman for the purpose of prostitution, it is not a defense that such woman had previously been domiciled in the United States and had departed with the intention of returning. U. S. v. Villet (C. C. 1909) 173 Fed. 500.

9. —— **Evidence.**—Evidence of the character of a house of assignation kept by the defendant, and of acts done at such house after the woman was imported, and while she lived there with the defendant, relating to the place named in the indictment as that where the purpose of prostitution was to be carried out, is admissible to show the purpose of prostitution laid in the indictment. U. S. v. Johnson (C. C. 1881) 7 Fed. 453.

On trial of an indictment charging a violation of this section, three of the women alleged to have been imported for such purpose, being called on behalf of the government, testified that they were not prostitutes. Held, that affidavits of such persons, taken before the commissioner of immigration, and their testimony on an examination before the United States commissioner, wherein they swore they were prostitutes, imported for purposes of prostitution, were admissible in evidence, opportunity having been given them to explain their affidavits. U. S. v. Pagliano (C. C. 1893) 53 Fed. 1001.

Evidence that defendants kept a house of prostitution in New York city for three years prior to the indictment

is admissible to prove defendants' occupation, and the intent of the importation. Id.

10. Deportation — Person subject. — An alien woman found an inmate of a house of prostitution within three years after her return to the United States, following a temporary absence abroad, may, notwithstanding her previous residence in the United States for upwards of three years, be deported. Lapina v. Williams (1914) 34 Sup. Ct. 196, 232 U. S. 78, 58 L. Ed. 515.

An alien who, after having been domiciled some six years in the United States, departs from this country, even for a brief period, and on re-entering brings into the country a woman for the purpose of prostitution or other immoral purpose, subjects himself to the operation of this section, the same as if he had no previous residence or domicile in the United States. Lewis v. Frick (1914) 34 Sup. Ct. 488, 233 U. S. 291, 58 L. Ed. 967.

An alien female found practicing prostitution within three years after her entry, was subject to deportation, though her status at time of entry as a citizen's wife entitled her to enter. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

Where an alien was excluded after a finding by a Board of Special Inquiry confirmed by the Secretary of Labor that he was attempting to bring in a woman for an immoral purpose, and thereafter returned to the United States and was duly admitted without such finding having been reversed, his entry was in violation of law and he could be deported. U. S. v. Uhl (1914) 211 Fed. 628, 128 C. C. A. 560.

That an alien is living in adultery within the United States is not ground for deportation; such conduct being solely within the police power of the state. U. S. v. Sibray (C. C. 1910) 178 Fed. 144, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

That an alien committed a single act of fornication abroad before she emigrated, and thereafter was living in fornication within the state of Pennsylvania with a man who was not her husband, contrary to the laws of that state, did not subject her to exclusion. U. S. v. Sibray (C. C. 1910) 178 Fed. 150, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

Where complainant and her husband and children came to the United States, were lawfully admitted, and had resided within the country for nearly three years, complainant was not subject to deportation as within the excluded classes because for a short time, during a temporary separation from her husband, she practiced prostitution. Sprung v. Morton (D. C. 1909) 182 Fed. 330.

Where petitioner, with his wife and infant children, were lawfully permitted to enter the United States, and had resided there for nearly three years, during which he had conducted himself properly, supported his family in suitable style, was engaged in business, and had declared his intention to become a citizen of the United States, he was not subject to deportation because, during a temporary estrangement between himself and his wife, she had been guilty of immorality, on the theory that he was maintaining an alien in the United States for purposes of prostitution. Id.

When an alien prostitute once steps beyond the borders of the United States for any purpose however temporary or transitory, she has no right to return to resume her illegal calling. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

Where petitioner testified that she was an inmate of or connected with a house of prostitution, she was subject to deportation under this section. Ex parte Cardonnel (D. C. 1912) 197 Fed. 774.

Alien employed as cook in house of prostitution held subject to deportation, under this section. Ex parte Loo Shew Ung (D. C. 1914) 210 Fed. 990.

This provision for the deportation of any alien who in any way assists, protects, or promises to protect any prostitute from arrest, is not limited to assisting such persons to escape from arrest, as by furnishing money to escape to one threatened with arrest, etc., but contemplates only assistance furnished to such a person to enable her to continue the practice of prostitution. Ex parte Young (D. C. 1914) 211 Fed. 370.

"Mack," or pimp, residing in house of prostitution, held an "inmate" thereof. In re Psimoules (D. C. 1915) 222 Fed. 118.

Man held connected with management of house of prostitution, within Act March 26, 1910, as to deportation of aliens. Id.

An alien prostitute who entered the United States and was found an inmate of a house of ill fame and practicing prostitution within three years after landing, having been since lawfully married to a native-born citizen of the United States, is to be deemed a citizen, and can not be deported under the immigration laws for her conduct previous to her marriage. (1909) 27 Op. Atty. Gen. 507.

11. —— Limitations.—Where petitioner, an alien, engaged in prostitution after the amendatory act, it was no defense to a deportation proceeding that she had been in the country more than three years prior to her arrest. Sire v. Berkshire (D. C. 1911) 185 Fed. 967; Ladaux v. Same, Id., 971; Ex parte Cardonnel (D. C. 1912) 197 Fed. 774.

There is no limitation of time within which an alien prostitute may be deported to three years from the time of her entry, as was the case under the

section before amendment; it being one of the purposes of the amendment to abolish such limitation as to the class of aliens referred to therein. U. S. v. Weis (D. C. 1910) 181 Fed. 860; U. S. v. Prentis (D. C. 1910) 182 Fed. 894, order affirmed Chomel v. U. S. (1911) 192 Fed. 117, 112 C. C. A. 461, writ of certiorari denied (1911) 32 Sup. Ct. 524, 223 U. S. 723, 56 L. Ed. 630; Lapina v. Williams (1914) 34 Sup. Ct. 196, 232 U. S. 78, 58 L. Ed. 515.

The government may deport an alien prostitute, who arrived in 1906, during the three-year period of probation. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

The amendment striking the time limit from the amended act, within which an alien prostitute might be deported authorized the subsequent deportation of such aliens at any time after entry when they were found practicing prostituton. U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 185 Fed. 158.

The amendatory act does not operate retroactively, and hence does not apply to an alien prostitute, where the three-year limit expired in February, 1908. U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 186 Fed. 672.

An alien female having entered the United States is not subject to deportation after the lapse of three years from the original entry, by the express limitation of the exclusion act. Sprung v. Morton (D. C. 1909) 182 Fed. 330.

Where a female alien residing in the United States practiced prostitution after the amendment of this section, she was subject to deportation without reference to the length of her prior residence in the United States. U. S. v. Williams (D. C. 1910) 183 Fed. 904.

Under this section as amended there is no limitation as to the time within which an alien may be deported for the immoral practices therein specified. Ex parte Garcia (D. C. 1913) 205 Fed. 53.

An alien who has entered the United States unlawfully may be deported without reference to the length of his subsequent residence in the United States. U. S. v. Czeslicki (D. C. 1913) 209 Fed. 496.

12. —— Prior conviction.—An alien may be deported for importing women into the United States for purposes of prostitution without having been convicted of the charge of importation. Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493, reversing judgment Lewis v. Frick (C. C. 1911) 189 Fed. 146; Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

An alien, though not previously convicted of importing an alien for the purpose of prostitution or other immoral purpose under this section, may be deported for bringing a woman into the United States for an immoral purpose under the other provisions of the immigration act, which, in enumerating in section 4244, ante, the classes of aliens which shall be excluded from admission to the United States, specifically includes "persons who procure or attempt to bring in prostitutes, or women or girls for the purpose of prostitution, or for any other immoral purpose," and in sections 4269, 4270, post, provides for the deportation of any alien entering or found in the United States in violation of law. Lewis v. Frick (1914) 34 Sup. Ct. 488, 233 U. S. 291, 58 L. Ed. 967.

That an alien had been previously domiciled here for more than three years prior to his entry with a woman for immoral purposes, and his conviction of such offense did not prevent his deportation, nor was it material that the deportation warrant antedated his conviction. U. S. v. Czeslicki (D. C. 1913) 209 Fed. 496.

13. —— Prior acquittal.—An acquittal under an indictment charging an alien with the importation of another alien for an immoral purpose, contrary to this section, is not res judicata in a proceeding before the Department of Commerce and Labor to deport such alien, under the provisions of section 4244, ante, and section 4270, post, because he had brought a woman into the United States for an immoral purpose. Lewis v. Frick (1914) 34 Sup. Ct. 488, 233 U. S. 291, 58 L. Ed. 967.

14. —— Proceedings in general.—Proceedings resulting in deportation of an alien are not wanting in due process of law because she had no counsel, where the examination was within authority of this section, and before the proceedings were closed she had assistance of counsel. Low Wah Suey v. Backus (1912) 32 Sup. Ct. 734, 736, 225 U. S. 460, 56 L. Ed. 1165.

Proceedings for deportation of aliens for practicing prostitution within three years after entry, are not criminal within guaranty of Const. Amend. 6, providing for trial by jury. Zakonaite v. Wolf (1912) 33 Sup. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

The summary proceeding for the deportation of aliens recently within the United States, who have not acquired a status entitling them to remain, prescribed by these sections, constitutes due process of law; such unnaturalized aliens not being entitled to the rights of citizens. Ex parte Hamaguchi (C. C. 1908) 161 Fed. 185.

Where, in proceedings to deport relator for being found in a house of prostitution after entering the United States, it was conceded that she was found in a raid on a house that was reputed to be a rendezvous for harlots, she was not prejudiced by the failure of the inspector, who participated in the raid, to make a formal record statement of the matters within his own knowledge, by which he was influenced

in directing deportation. Ex parte Kwan So (D. C. 1913) 211 Fed. 772.

15. —— **Rules of secretary.**—Rules of Secretary of Commerce and Labor governing deportation of alien inmates of houses of prostitution are not so arbitrary as to be beyond his power, under this section. Low Wah Suey v. Backus (1912) 32 Sup. Ct. 734, 737, 225 U. S. 460, 56 L. Ed. 1165.

16. —— **Evidence.**—Evidence that an alien female was found practicing prostitution within three years after her entry was evidence that she was a prostitute when she entered, and hence subject to deportation. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

Evidence held to warrant finding of the Immigration Department that appellant was a prostitute, and was found an inmate of a house of prostitution and practicing prostitution subsequent to her entry into the United States. Chu Tai Ngan v. Backus (1915) 226 Fed. 446, 141 C. C. A. 276.

The contents of the baggage of the women so imported being material on the question of their character, evidence that one defendant had possession of the checks for all such baggage was competent to show his connection with the importation, and, in the absence of explanation, justified the conclusion that he committed the offense charged. U. S. v. Pagliano (C. C. 1893) 53 Fed. 1001.

In proceedings to exclude certain aliens, evidence held to warrant a finding that one of them was a prostitute, and that the other profited by such prostitution, and that both were therefore subject to exclusion. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

The competency of evidence on the hearing of an alien arrested for deportation for a violation of this section considered. Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

Evidence held to justify deportation of an alien, because he had been found connected with the management of a house of prostitution and protecting and sharing in the earnings of prostitutes. Ex parte Hidekuni Iwata (D. C. 1915) 219 Fed. 610.

The Secretary of Commerce and Labor has authority to consider the evidence connected with the marriage of an alien prostitute to a citizen of the United States, and, subject to the principle that the validity of the marriage is to be determined by the law of the place where the contract is made, may deport the woman if the facts justify the conclusion that the ceremony was entered into merely for the purpose of evading the immigration law, and with no intention on the part of the parties to live together as husband and wife. (1909) 27 Op. Atty. Gen. 578.

17. —— **Defenses**—In proceedings for the deportation of aliens, under this section, it was no defense that the aliens had been in the country more than three years. Chomel v. U. S. (1911) 192 Fed. 117, 112 C. C. A. 461, affirming order U. S. v. Prentis (D. C. 1910) 182 Fed. 894, and writ of certiorari denied Brion v. Same (1911) 32 Sup. Ct. 524, 223 U. S. 723, 56 L. Ed. 630.

In proceedings to deport certain aliens for assisting, protecting, or promising to protect a prostitute from arrest, it was no defense that such aliens had been acquitted by juries on charges involving the same transaction. Ex parte Young (D. C. 1914) 211 Fed. 370.

18. —— **Review.**—The findings of fact upon which were based an order of the Secretary of Commerce and Labor for the deportation, conformably to this section, of an alien found to be practicing prostitution within three years after her entry into the United States, are not subject to review by the courts, if the evidence was adequate to support the Secretary's conclusions, and the alien was given a fair hearing. Zakonaite v. Wolf (1912) 33 Sup. Ct. 31, 226 U. S. 272, 57 L. Ed. 218.

A return to a writ of habeas corpus on petition of a female alien detained under an order of deportation, alleging that she was arrested under a warrant of the Department of Commerce and Labor as a prostitute having entered the United States for immoral purposes; that proceedings were had according to law, ending in a decree of deportation on the ground that she was an alien prostitute when she entered the United States and had practiced prostitution within three years thereafter; and that the Secretary of Commerce and Labor had reviewed all the evidence and had confirmed the deportation order—showed that she was lawfully in custody, and, without evidence controverting such facts, the court erred in releasing her from custody. Stretton v. Rudy (1910) 176 Fed. 727, 101 C. C. A. 223.

The rule that the Secretary's decision is reviewable on habeas corpus only to determine whether the alien had a proper hearing, was applicable to an alien, or person claiming to be a citizen, who had been admitted into the United States from China, and whom the immigration authorities were seeking to deport because they had since determined that such person was unlawfully within the United States. Haw Moy v. North (1910) 183 Fed. 89, 105 C. C. A. 381 (writ of certiorari denied [1911] 32 Sup. Ct. 522, 223 U. S. 717, 56 L. Ed. 628); Hoo Choy v. Same (1910) 183 Fed. 92, 105 C. C. A. 384 (writ of certiorari denied [1911] 32 Sup. Ct. 522, 223 U. S. 718, 56 L. Ed. 628).

See, also, note under § 4277, post.

19. —— **Warrants.**—Where a deportation warrant stated that the alien

was a member of the excluded classes, in that she entered the United States for an immoral purpose, and admitted having committed a felony or other crime or misdemeanor prior to her entry, it was insufficient, there being no finding that any particular felony, crime or misdemeanor had been so committed, nor as to her purpose in coming to the United States. U. S. v. Sibray (C. C. 1910) 178 Fed. 150, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

An alien woman, who came to this country to marry, and cohabited with intended husband on representation that contract marriage was sufficient, and on discovering deceit left him and obtained judgment for breach of promise of marriage, is not subject to deportation on the ground that she entered the United States for an immoral purpose. U. S. v. Martin (D. C. 1912) 193 Fed. 795.

Where an alien prostitute was arrested in deportation proceedings under this section a variance between the warrant of arrest and the warrant of deportation as to the place of her entry into the United States held not material. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

A warrant ordering deportation of an alien should clearly state whether the alien is being deported under this section or sections 4269, 4270, or 4284, post. Ex parte Yabucanin (D. C. 1912) 199 Fed. 365.

20. —— Manner of deportation.—See notes under §§ 4269, 4270.

Cited without definite application, Saito v. U. S. (1905) 141 Fed. 653, 72 C. C. A. 647; Taylor v. Same (1907) 152 Fed. 1, 81 C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130); U. S. v. Foo Duck (1909) 172 Fed. 856, 97 C. C. A. 204; Same v. Sprung (1910) 187 Fed. 903, 110 C. C. A. 37; Same v. Palan (C. C. 1909) 167 Fed. 991; Same v. Violon (C. C. 1909) 173 Fed. 501; Same v. Chicago, St. P., M. & O. Ry. Co. (D. C. 1907) 151 Fed. 84 (affirmed [1908] 162 Fed. 835, 90 C. C. A. 211, certiorari denied [1909] 29 Sup. Ct. 689, 212 U. S. 579, 53 L. Ed. 659).

§ 4248. (Act Feb. 20, 1907, c. 1134, § 4.) Prepaying transportation or assisting, etc., importation or migration of contract laborers a misdemeanor.

It shall be a misdemeanor for any person, company, partnership, or corporation, in any manner whatsoever, to prepay the transportation or in any way to assist or encourage the importation or migration of any contract laborer or contract laborers into the United States, unless such contract laborer or contract laborers are exempted under the terms of the last two provisos contained in section two of this Act. (34 Stat. 900.)

See notes to section 1 of this act, ante, § 4242.

A previous provision similar to that of this section was made by Act Feb. 26, 1885, c. 164, § 1, 23 Stat. 332, but was superseded by the provision of Act March 3, 1903, c. 1012, § 4, 32 Stat. 1214, which was re-enacted, with some change, in this section, and was repealed by section 43 of this act, post, § 4289.

A penalty for the violation of the provisions of this section was imposed by section 5 of this act, post, § 4251.

Assisting or encouraging the importation or migration of any alien by a promise of employment through advertisement printed and published in any foreign country is to be deemed a violation of this section, and the penalties imposed by section 5, post, § 4251, are applicable to such a case, by section 6 of this act, post, § 4252. And the soliciting of immigration by transportation companies, owners of vessels, etc., except as permitted, was also subjected to the same penalties, by section 7 of this act, post, § 4253.

Notes of Decisions

Construction and operation in general.—No valid objection to construing R. S. § 5440, post, § 10201, providing for the criminal punishment of persons conspiring to commit an offense against the United States as embracing assisting the importation of alien contract laborers, in violation of this section, can be founded upon the fact that a greater punishment may thereby be affixed to the conspiracy to commit the offense than is provided for the offense itself. U. S. v. Stevenson (1909) 30 Sup. Ct. 37, 38, 215 U. S. 200, 54 L. Ed. 157.

This section does not apply to a man who entered the United States as an immigrant from Germany when young and remained continuously domiciled and working in this country for 12 or more years, although without becoming naturalized, and who then went temporarily into Canada, where he had been for two weeks when the contract alleged to be in violation of the statute was made. U. S. v. Aultman Co. (1906) 148 Fed. 1022, 79 C. C. A. 457, affirming judgment (D. C. 1906) 143 Fed. 922.

This is a penal statute, and denounc-

es the prepayment by any person or corporation of the transportation of an immigrant under contract to perform labor in the United States, as well as the assisting or encouraging of his importation or migration, and makes such a contract void. Botis v. Davies (D. C. 1909) 173 Fed. 996.

Under the act of 1907 a person whose passage money is paid by another must be prepared to show, not merely that he does not come within any of the categories of immigrants to be excluded, but also that his passage was not paid, directly or indirectly, by a corporation, association, society, municipality, or foreign government. (1907) 26 Op. Atty. Gen. 199.

The prohibition does not extend to the payment of passage money by individuals, whether directly or through the agency of a state, provided their action is, and is shown to be, in good faith individual, and not attended by such combination or concert of action as would make it substantially the act of an association or a society. Id.

While the payment of an immigrant's passage out of state funds does not of itself require his exclusion, yet such payment operates to throw upon the immigrant the burden of showing that he does not come within any of the otherwise excluded classes, such as paupers, etc., specifically excluded by the act. (1907) 26 Op. Atty. Gen. 410.

The merely hypothetical possibility of a condition arising under the indirect method of attempting to eventually secure reimbursement to the state fund of the amount of the alien's passage, which could perhaps be regarded as in effect a payment of his passage by a corporation, society, or association, would not be a ground of exclusion. Id.

—— **"Person."**—The word "person" does not include a state, but it does include an officer of a state professing to act under its authority. (1907) 26 Op. Atty. Gen. 199.

—— **"Misdemeanor."**—The term "misdemeanor," as used in this section, means a crime, and therefore will permit of a prosecution by indictment, regardless of section 4250, post. U. S. v. Stevenson (1909) 30 Sup. Ct. 35, 37, 215 U. S. 190, 54 L. Ed. 153.

Offense—What constitutes.—The offense of assisting the immigration of an alien laborer under contract to work here is not complete until such alien has entered the territory of the United States. U. S. v. Craig (C. C. 1886) 28 Fed. 795.

A railroad company, under the facts shown, held not chargeable with violation of this section, because of the employment by a section foreman of an alien laborer then in Canada. U. S. v. Chicago, M. & St. P. Ry. Co. (D. C. 1915) 228 Fed. 554.

—— **Conspiracy to commit.**—Assisting the importation of alien contract laborers is an "offense against the United States," within the meaning of R. S. § 5440, post, § 10201, providing for the criminal punishment of persons conspiring to commit such offenses, since Congress, in making it a misdemeanor, by this section to assist the immigration of such persons, has made such action a crime, indictable as such, although, by section 4250, post, of that act, it has provided a remedy in the nature of a civil action for the recovery of a penalty for a violation of the act. U. S. v. Stevenson (1909) 30 Sup. Ct. 37, 38, 215 U. S. 200, 54 L. Ed. 157.

This section defines a criminal offense, and, although the act provides no criminal punishment, an indictment will lie under R. S. § 5440, post, § 10201, for a conspiracy to commit such offense. U. S. v. Tsokas (C. C. 1908) 163 Fed. 129.

—— **Evidence.**—On trial for conspiring to violate immigration laws, testimony of accomplices held sufficiently corroborated, if corroboration was necessary. Lung v. U. S. (1915) 218 Fed. 817, 134 C. C. A. 505.

Penalties for violation of statute.—See note under § 4250, post.

Cited without definite application, U. S. v. Zucker (1896) 16 Sup. Ct. 641, 161 U. S. 475, 40 L. Ed. 777; Regan v. U. S. (1910) 183 Fed. 293, 105 C. C. A. 505, 31 L. R. A. (N. S.) 1073.

§ 4249. (Act April 29, 1902, c. 641, § 3, as amended, Res. April 28, 1904, No. 34.) Foreign exhibitors, etc., at fair or exposition authorized by Congress, not prevented from bringing into United States, under contract, employés for preparation for installing or conducting exhibits or business under concession or privilege.

That nothing in the provisions of this Act or any other Act shall be construed to prevent, hinder, or restrict any foreign exhibitor, representative, or citizen of any foreign nation, or the holder, who is a citizen of any foreign nation, of any concession or privilege from any fair or exposition authorized by Act of Congress from bringing into the United States, under contract, such mechanics, artisans,

agents, or other employees, natives of their respective foreign countries, as they or any of them may deem necessary for the purpose of making preparation for installing or conducting their exhibits or of preparing for installing or conducting any business authorized or permitted under or by virtue of or pertaining to any concession or privilege which may have been or may be granted by any said fair or exposition in connection with such exposition, under such rules and regulations as the Secretary of [Commerce and] Labor may prescribe, both as to the admission and return of such person or persons. (32 Stat. 177. 33 Stat. 591.)

This section was part of an act re-enacting, extending, and continuing all laws in force prohibiting and regulating the coming of Chinese persons and persons of Chinese descent into the United States, and the residence of such persons therein, cited above. Other sections of the act are set forth under Chapter B, "Exclusion of Chinese," post, §§ 4337–4339.

This section as originally enacted was amended by Res. April 28, 1904, No. 34, cited above, by striking out the words "Secretary of the Treasury," used therein, and inserting in lieu thereof the words "Secretary of Commerce and Labor," as set forth here.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

See notes at beginning of this chapter.

Skilled labor may be imported if labor of like kind unemployed cannot be found in this country, by a proviso annexed to Act Feb. 20, 1907, c. 1134, § 2, ante, § 4244.

Notes of Decisions

Employés of foreign exhibitors.—Skilled employés of foreign exhibitors at the World's Columbian Exposition, who come in good faith for the purpose of setting up and operating the machinery of such exhibitors, are outside of and not subject to the contract labor laws of the United States. (1891) 20 Op. Atty. Gen. 89.

Clerks, storekeepers, and other persons coming to this country for the sole purpose of aiding the exhibitor to take part in the exposition are outside of and not subject to contract labor laws of the United States. (1891) 20 Op. Atty. Gen. 151.

§ 4250. (Act Feb. 20, 1907, c. 1134, § 5.) Penalty for violations of provisions.

For every violation of any of the provisions of section four of this Act the persons, partnership, company, or corporation violating the same, by knowingly assisting, encouraging, or soliciting the migration or importation of any contract laborer into the United States shall forfeit and pay for every such offense the sum of one thousand dollars, which may be sued for and recovered by the United States, or by any person who shall first bring his action therefor in his own name and for his own benefit, including any such alien thus promised labor or service of any kind as aforesaid, as debts of like amount are now recovered in the courts of the United States; and separate suits may be brought for each alien thus promised labor or service of any kind as aforesaid. And it shall be the duty of the district attorney of the proper district to prosecute every such suit when brought by the United States. (34 Stat. 900.)

See notes to section 1 of this act, ante, § 4242.

Section 4 of this act, mentioned in this section, is set forth ante, § 4248.

Previous provisions similar to those of this section were contained in Act Feb. 26, 1885, c. 164, § 3, 23 Stat. 333, but were superseded by those of Act March 3, 1903, c. 1012, § 5, 32 Stat. 1214, which were re-enacted, substantially, in this section, and were repealed by section 43 of this act, post, § 4289.

The penalties imposed by this section were made applicable to assisting

or encouraging the importation or migration of any alien by promise of employment through advertisements in any foreign country by section 6 of this act, post, § 4251.

Notes of Decisions

1. Construction and operation in general.
2. Liability for penalty.
3. Action to recover penalty.
4. —— Commencement by capias.
5. —— Parties.
6. —— Jurisdiction.
7. —— Pleadings.
8. —— Elections of remedies.
9. —— Evidence.
10. —— Burden of proof.
11. —— Question for jury.
12. —— Direction of verdict.
13. —— Res judicata.
14. —— Pendency of another action.
15. —— Costs and fees.
16. Compromise of claim and remission of penalty.

1. Construction and operation in general.—This section does not preclude a prosecution by indictment to enforce the penalty. U. S. v. Stevenson (1909) 30 Sup. Ct. 35, 37, 215 U. S. 190, 54 L. Ed. 153.

The immigration laws of the United States, in so far as relates to punishment for their violation, are highly penal, and are to be strictly construed, and their provisions applied only to cases clearly within their terms and their spirit, construed as a whole. Moffitt v. U. S. (1904) 128 Fed. 375, 63 C. C. A. 117.

Neither R. S. § 1044 (see section 1708, ante), limiting prosecutions for the commission of offenses not capital, nor Rev. Laws Mass. c. 202, § 5, limiting actions for the enforcement of penalties, applies to actions for the penalty for importing an alien contract laborer. U. S. v. Dwight Mfg. Co. (D. C. 1914) 213 Fed. 522.

The case of a fine or penalty incurred for violation of the alien immigration law does not fall within the purview of the statutes embraced under title 68, R. S. (title 68, this compilation). (1894) 20 Op. Atty. Gen. 705.

The provision, prescribing a penalty for encouraging immigration of alien contract laborers, being penal, must be strictly construed. Grant Bros. Const. Co. v. U. S. (Ariz. 1911) 114 P. 955.

2. Liability for penalty.—A separate penalty is incurred for each of a number of aliens whose simultaneous migration or importation is knowingly assisted, encouraged, or solicited contrary to the contract labor provisions of the alien immigration act. Grant Bros. Construction Co. v. U. S. (1914) 34 Sup. Ct. 452, 232 U. S. 647, 58 L. Ed. 776.

The former Act Feb. 26, 1885, c. 164, 23 Stat. 333, which made it unlawful to assist the importation or migration of any alien or foreigner under any contract or agreement "to perform labor or service of any kind," was intended to prohibit the importation of foreigners under contract to perform unskilled manual labor, and, being highly penal in its provisions, was to be confined in its construction and application to the effecting of such purpose. An individual agreement to employ a foreigner, resident in another country, as a draper, window dresser, and drygoods clerk in a store in the United States, and, as a part of his compensation, to refund to him the cost of his passage to this country, was not within the spirit of the statute, and did not subject the employer to the penalty thereby imposed. U. S. v. Gay (1899) 95 Fed. 226, 37 C. C. A. 46.

A person is not liable for penalty unless, in addition to assisting, encouraging, or soliciting, it is also charged that the immigration is "by reason" of an offer, solicitation, promise, or agreement to or with him, or that the immigration has been that the immigrant may perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him. Darnborough v. Joseph Benn & Sons (1911) 187 Fed. 580, 109 C. C. A. 270.

Where the immigration of an alien minor was procured by reason of an agreement with him through his father who was the owner of his services, no promises or offers save those made to him "through his father" as the person entitled to his services being shown, his immigration was not obtained by means of any promise or agreement "with him" and was therefore not a violation of the statute. Id.

Payment of an alien's transportation to enable him to come to the United States, though one of the acts declared unlawful by this section, is not an act for which a penalty is incurred under this section unless it amounts to an assistance, encouragement, or solicitation of the alien's immigration with knowledge, etc., or in order that the alien may perform labor or service by reason of an offer, solicitation, promise, or agreement to or with him. Id.

A person or corporation assisting or encouraging a contract laborer other than an alien to migrate to this country by offers of employment is not liable to a penalty. U. S. v. Great Northern Ry. Co. (1914) 214 Fed. 46, 130 C. C. A. 486.

To give a right of action the immigrant must, previous to his becoming a resident of the United States, have entered into a contract to labor in the United States, he must have actually entered into the United States in pursuance of the contract, and defendant must have prepaid his transportation, or otherwise assisted, encouraged, or solicited his migration, with knowledge of the illegal contract. U. S. v. Craig (C. C. 1886) 28 Fed. 795, 799.

A religious corporation, engaged an

alien residing in England to take charge of its church here as pastor, held, not liable to the penalty prescribed. Holy Trinity Church v. U. S. (1892) 12 Sup. Ct. 511, 143 U. S. 457, 36 L. Ed. 226, reversing U. S. v. Church of the Holy Trinity (C. C. 1888) 36 Fed. 303.

A railroad company which knowingly employs at its office in New York, near the Canadian border, a person who resides in Canada, and comes daily to his work in the United States, was not engaged in assisting or encouraging the "importation or migration" of an alien. U. S. v. Michigan Cent. R. Co. (C. C. 1891) 48 Fed. 365.

One who in any way assists or encourages an immigrant to come to this country, pursuant to any offer, solicitation, promise, or agreement, is liable to a penalty of $1,000. Botis v. Davies (D. C. 1909) 173 Fed. 996.

Transportation companies conducting the business of transportation, either by land or by water, are included within the term "person," and are accordingly liable to the penalties prescribed. (1898) 22 Op. Atty. Gen. 122.

The officers or servants of a corporation responsible for or actually engaged in breach of the immigration laws are liable to the penalty, in addition to which the corporation itself is liable for such violations. Id.

The contribution of money by individuals to a state fund, to be used by the state in advertising its inducements to immigrants, which advertisement could not lawfully be published by private persons, and to prepay the passage of aliens attracted by such advertisement, though without promise of employment, express or implied, would amount to encouraging or assisting immigration in the form prohibited by section 4251, post and render the parties contributing liable to the penalties provided by this section. (1907) 26 Op. Atty. Gen. 199.

To warrant recovery of the penalty for encouraging immigration of alien contract laborers, there must have been a conscious violation of the act. Grant Bros. Const. Co. v. U. S. (Ariz. 1911) 114 P. 955. Knowledge of all the essential facts, including knowledge that the contract laborer is an alien, is a necessary condition to liability. U. S. v. Great Northern Ry. Co. (1914) 214 Fed. 46, 130 C. C. A. 486.

3. Action to recover penalty.—An action for debt is the proper form for the recovery of penalty, the sum being certain. Hepner v. U. S. (1909) 29 Sup. Ct. 474, 475, 213 U. S. 103, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960; U. S. v. McElroy (C. C. 1902) 115 Fed. 252.

An action of debt brought by the United States to recover the prescribed penalty for violations of the contract labor provisions of the alien immigration act is civil, and not criminal, in character, so that the trial court may permit the government to read in evidence the depositions of absent witnesses, and may instruct the jury to return a verdict for the government, if the evidence reasonably preponderates in its favor, and in other ways treat the case as civil in substance as well as in form. Grant Bros. Construction Co. v. U. S. (1914) 34 Sup. Ct. 452, 232 U. S. 647, 58 L. Ed. 776.

An action by the United States to recover the statutory penalty was an action for tort, and hence there was no privilege of exemption from arrest therein. U. S. v. Banister (C. C. 1895) 70 Fed. 44.

4. —— Commencement by capias.—A suit in the United States circuit court for the penalty for violation of the provisions of that act relating to alien contracts for labor might be properly begun by capias in accordance with the state law. U. S. v. Banister (C. C. 1895) 70 Fed. 44.

5. —— Parties.—The former alien contract labor law (Act Feb. 26, 1885, c. 164, § 3, 23 Stat. 332), which provided that the penalty thereby imposed for its violation "may be sued for and recovered by the United States or by any person who shall first bring his action therefor, * * * the proceeds to be paid into the treasury of the United States," and, further, that it shall be the duty of the district attorney to prosecute every such suit at the expense of the United States, did not authorize a private individual to maintain an action to recover such penalty for his own use; nor did the amendatory section 4246, ante. Rosenberg v. Union Iron Works (D. C. 1901) 109 Fed. 844.

6. —— Jurisdiction.—The provision that the penalty could be sued for as debts of like amount were recovered in the circuit courts of the United States referred to the form of action not to the forum and did not give exclusive jurisdiction of such actions to the circuit courts. Lees v. U. S. (1893) 14 Sup. Ct. 163, 164, 150 U. S. 476, 37 L. Ed. 1150; U. S. v. Whitcomb Metallic Bedstead Co. (D. C. 1891) 45 Fed. 89.

The district courts had jurisdiction of a suit to recover the penalty imposed for importing a foreign laborer under contract. Lees v. U. S. (1893) 14 Sup. Ct. 163, 164, 150 U. S. 476, 37 L. Ed. 1150; Rosenberg v. Union Iron Works (D. C. 1901) 109 Fed. 844, 845.

An action for the penalty, being criminal in its nature, was within the jurisdiction of the circuit court. U. S. v. Mexican Nat. Ry. Co. (C. C. 1889) 40 Fed. 769.

7. —— Pleadings.—The omission from the petition, in an action of debt brought by the United States to recover the prescribed penalty for violations of the contract labor provisions of the alien immigration act, of any allegation that the acts charged against

the defendant were knowingly done, is not ground for reversal of a judgment entered upon a verdict in favor of the government, where such defect was not pointed out in the trial court, but, on the contrary, the case was tried as if the omitted allegations were in the petition, and the jury were instructed that the defendant's knowledge was an essential factor in the case. Grant Bros. Construction Co. v. U. S. (1914) 34 Sup. Ct. 452, 232 U. S. 647, 58 L. Ed. 776.

In an action to recover a penalty for violating the contract labor law, a complaint alleging that defendant offered to one of its employés in Canada to continue his employment if he would come to the United States, and that in consideration of such promise, and in pursuance of such agreement, he did come to the United States, and work for the defendant, is sufficient to show the acceptance of the offer in Canada, under Comp. St. Mont. div. 1, § 100, providing that pleadings shall be liberally construed, with a view to substantial justice. U. S. v. Great Falls & C. Ry. Co. (C. C. 1892) 53 Fed. 77.

The declaration should contain a particular allegation of a contract between defendant and the alien whose migration is alleged to have been assisted; setting forth categorically in what such contract consisted, a distinct statement that labor was performed under such contract, and a distinct statement of the acts by which defendant assisted the alien to immigrate. U. S. v. River Spinning Co. (C. C. 1895) 70 Fed. 978.

In an action for the penalty for violation of these laws, a declaration is insufficient which fails to show the character of the labor which the immigrant was to perform, or the terms of the contract, at least in substance, under which he came to this country, and which fails to allege definitely that he actually came here pursuant to the contract, or to set forth the acts done by the defendant to assist or procure his immigration. U. S. v. Gay (C. C. 1897) 80 Fed. 254, judgment affirmed (1899) 95 Fed. 226, 37 C. C. A. 46.

A declaration alleging that one was "to perform labor and services as a workman in a certain factory or manufacturing plant of said defendant, and not as private secretary," etc., negativing the various specially excepted classes, but not otherwise showing the character of labor or services in which he was to be employed, is insufficient, being too general. U. S. v. McElroy (C. C. 1902) 115 Fed. 252.

A declaration alleging, in the language of the statute, that defendant "assisted, encouraged, and solicited" the immigrant, without showing what acts of assistance, etc., were rendered is insufficient. Id.

A declaration in debt for the penalty, which failed to allege that the foreign laborer did actually immigrate to this country, and that the defendant when he assisted him to migrate knew that he was under contract, was fatally defective. U. S. v. Borneman (D. C. 1890) 41 Fed. 751, following Same v. Craig (C. C. 1886) 28 Fed. 795.

In an action to recover penalties for importing "contract laborers," the declaration in each count held to sufficiently charge an "offer of employment" to the particular alien in a foreign country, so as to make him a "contract laborer," though the offer was not definite as to terms of the promised employment. U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 74.

Where a declaration alleged that the laborers migrated to the United States, it was not demurrable for failure to charge that they migrated and arrived at the place within the United States referred to in the alleged offers of employment. Where it declared generally that they were not within the exempted class, but that they were contract laborers, it was not demurrable for failure to allege facts showing that each alien was not within the exempted class specified by section 2. Nor was it demurrable for failure to allege whether the offers to the aliens were made by an officer of the corporation or by another by its authority, whether they were oral or in writing, their terms, and the amount prepaid. Id.

Where, pending demurrer to the government's second amended declaration in a suit to recover penalties for importing contract laborers, defendant consented to the addition of 25 causes of action not originally sued on which were barred by limitations, such consent did not authorize the government to allege them in a substituted declaration constituting an entirely different statement of the offense. U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 79.

A declaration merely alleging the immigrant to have been "a certain alien contract laborer," without setting forth facts proving him to have been within that definition, was demurrable. U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 81.

Where a demurrer was filed to a declaration by the government to recover penalties for violation of the immigration law with reference to contract laborers, and the hearing was continued for the mutual accommodation of the parties until after limitations had expired, the government's application to amend its declaration should not be prejudiced by such fact. U. S. v. Dwight Mfg. Co. (D. C. 1913) 210 Fed. 85.

Where an action was brought by the United States to recover penalties, prior to the expiration of the five-year statute of limitations, and demurrer was filed prior to that time, but was not heard until after the time had expired, the government was entitled to

amend, so as not to change the cause of action, on condition that its case should stand or fall on the amendment. Id.

An application by the United States to amend a declaration, in a suit to recover penalties for importation of contract laborers, could not be prejudiced by any laches of government officials in instituting the suit. It was no answer to such application that the amendment would operate to assist a private persecutor in the maintenance of similar suits against defendant. Id.

8. —— **Election of remedies.**—The statute provides a fine of $1,000 for illegally importing contract laborers, and also a civil remedy to collect the penalty as a debt; the government being authorized to prosecute either remedy at its election. Millon v. U. S. (1914) 219 Fed. 186, 134 C. C. A. 560.

9. —— **Evidence.**—An action to collect the penalty prescribed by this act, though civil in form, is criminal in its nature, and the defendant cannot be compelled to become a witness against himself. Lees v. U. S. (1893) 14 Sup. Ct. 163, 164, 150 U. S. 476, 37 L. Ed. 1150.

The violation by the defendant of the contract labor provisions of the alien immigration act need not be established beyond a reasonable doubt in an action of debt brought by the United States to recover the penalty incurred for such violation; but a reasonable preponderance of the proof is sufficient, since the action is civil, and not criminal, although the act penalized is by the statute denominated a misdemeanor. U. S. v. Regan (1914) 34 Sup. Ct. 213, 232 U. S. 37, 58 L. Ed. 494.

A determination by an immigration board that certain persons brought before the board were aliens is admissible in an action of debt brought by the United States to recover the prescribed penalty as furnishing prima facie, though not conclusive, evidence of their alienage. Grant Bros. Construction Co. v. U. S. (1914) 34 Sup. Ct. 452, 232 U. S. 647, 58 L. Ed. 776.

A suit by the United States, although brought to recover a penalty, is a civil suit, and a deposition is admissible in evidence therein against defendant. Moller v. U. S. (1893) 57 Fed. 490, 6 C. C. A. 459.

On the trial of an action against a defendant charged with having prepaid the transportation of a contract laborer into the United States, a proposed manifest for the immigrant on the form prescribed under section 12 of the act filled out by a third person before sailing of the vessel, and which was not used, but which contained the statement that the immigrant's passage was paid by defendant, was incompetent as evidence against him, as the declaration of a third person not made in his presence. Regan v. U. S. (1910) 183 Fed. 293, 105 C. C. A. 505, 31 L. R. A. (N. S.) 1073.

Evidence in connection with act of railroad company in sending pass to applicant for employment, residing in Manitoba, and suggesting that he come to North Dakota, held not to show knowledge on the part of the railroad company that he was an alien so as to subject it to a penalty. U. S. v. Great Northern Ry. Co. (1914) 214 Fed. 46, 130 C. C. A. 486.

In an action to recover the penalty prescribed by former Act Feb. 26, 1885, c. 164, § 3, 23 Stat. 332, for assisting or encouraging the migration of aliens to perform labor or services "under contract or agreement," etc., it appeared that a letter was written by an alien in England to a person in the United States, saying that the writer had heard that the party addressed was in want of men to do a certain kind of work, and, if convenient to send passes, himself and another alien would "come out," but contained no express promise to do work in consideration of receiving passes. To this letter defendant, to whom the same was handed, replied: "I have this day bought two tickets for you; * * * take this letter to R. S. & Co., * * * and get tickets. * * * We can give you steady work. * * * Tickets will not be good after July 18th." The letters were the only evidence of a contract to perform labor or service in the United States, existing when the transportation was prepaid. Held, that they were insufficient to establish a contract existing at that date, and that defendant was not liable for the penalty. U. S. v. Edgar (C. C. 1891) 45 Fed. 44.

Evidence of statements made by the associates and employés of one with whom defendant contracted was admissible to show the acts done under the contract, though the evidence also tended to show defendant's knowledge of the unlawful acts. Grant Bros. Const. Co. v. U. S. (1911) 114 P. 955, 13 Ariz. 388.

A decision of a board of special inquiry of the federal immigration service respecting the status of the particular aliens was properly received in evidence. Id.

10. —— **Burden of proof.**—The burden is on the government to satisfy the jury of defendant's guilt not beyond a reasonable doubt, but only by a fair preponderance of the evidence. U. S. v. Regan, 34 Sup. Ct. 213, 232 U. S. 37, 58 L. Ed. 494, reversing Regan v. U. S. (1910) 183 Fed. 293, 105 C. C. A. 505, 31 L. R. A. (N. S.) 1073; U. S. v. Regan (1913) 203 Fed. 433, 121 C. C. A. 543.

11. —— **Question for jury.**—Whether a construction company, for which alien contract laborers were imported, had such knowledge of the unlawful acts as to warrant assessment of a penalty,

held under the evidence a jury question. Grant Bros. Const. Co. v. U. S. (1911) 114 P. 955, 13 Ariz. 388.

12. —— **Direction of verdict.**—The court may direct a verdict for the government plaintiff in an action for the penalty for inducing an alien to migrate to the United States for the purpose of performing labor there, where undisputed testimony shows that defendant has committed the offense out of which the cause of action arises. Hepner v. U. S. (1909) 29 Sup. Ct. 474, 478, 213 U. S. 103, 53 L. Ed. 720, 27 L. R. A. (N. S.) 739, 16 Ann. Cas. 960.

13. —— **Res judicata.**—A judgment sustaining a demurrer to the declaration in an action by an individual to recover the penalty for importation of an alien contract laborer is not res judicata as to the defendant's liability to the United States for the amount of the penalty for the same offense. U. S. v. Dwight Mfg. Co. (D. C. 1914) 213 Fed. 522.

A judgment in a suit by an individual on the merits would finally bar every action by any other party. Id.

14. —— **Pendency of another action.**—An action by an individual while it was pending would prevent an action by any other person, including the United States, for the same violation. U. S. v. Dwight Mfg. Co. (D. C. 1914) 213 Fed. 522.

15. —— **Costs and fees.**—Costs are properly awarded to the government against the unsuccessful defendants. Grant Bros. Construction Co. v. U. S. (1914) 34 Sup. Ct. 452, 232 U. S. 647, 58 L. Ed. 776.

The United States district attorney is not entitled to fees for services performed in actions instituted by him to recover penalties for alleged violation of the immigration laws by the importation of aliens under a contract to labor, where such suits were eventually compromised and dismissed by the government without any judgment being rendered; there being no statute giving fees in such cases. Bashaw v. U. S. (C. C. 1891) 47 Fed. 40, judgment affirmed U. S. v. Bashaw (1892) 50 Fed. 749, 1 C. C. A. 653.

A successful party is entitled to costs. Grant Bros. Const. Co. v. U. S. (1911) 114 P. 955, 13 Ariz. 388.

16. **Compromise of claim and remission of penalty.**—It is doubtful if the power given to the Secretary of the Treasury by section 6375, post, to compromise "any claim," extends to a judgment recovered by the United States against a corporation in a suit for a penalty for violation of the contract labor law of February 26, 1885 (23 Stat. 332). (1889) 19 Op. Atty. Gen. 345.

Neither section 2 of the act of March 3, 1891 (26 Stat. 1084), nor any other previous law referred to in that section, gives authority to any one to settle or compromise judgments entered under section 3 of the contract labor act of February 26, 1885 (23 Stat. 333). (1893) 20 Op. Atty. Gen. 530.

See, also, note under § 4276, post.

Cited without definite application, Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130).

§ 4251. (Act Feb. 20, 1907, c. 1134, § 6.) Advertisements, etc., promising employment to aliens; penalties.

It shall be unlawful and be deemed a violation of section four of this Act to assist or encourage the importation or migration of any alien by promise of employment through advertisements printed and published in any foreign country; and any alien coming to this country in consequence of such an advertisement shall be treated as coming under promise or agreement as contemplated in section two of this Act, and the penalties imposed by section five of this Act shall be applicable to such a case: Provided, That this section shall not apply to States or Territories, the District of Columbia, or places subject to the jurisdiction of the United States advertising the inducements they offer for immigration thereto, respectively. (34 Stat. 900.)

See notes to section 1 of this act, ante, § 4242.

Sections 2, 4, and 5 of this act, mentioned in this section, are set forth ante, §§ 4244, 4248, and post, § 4256.

Previous provisions similar to those of this section were made by Act March 3, 1891, c. 551, § 3, 26 Stat. 1084, but were superseded by those of Act March 3, 1903, c. 1012, § 6, 32 Stat. 1215, which were re-enacted in this section, and were repealed in section 43 of this act, post, § 4289.

The soliciting of immigration by transportation companies, owners of vessels, etc., except as permitted, was subjected to the penalties imposed by this section, by section 7 of this act, post, § 4252.

Notes of Decisions

"Promise of employment."—An advertisement, in an English newspaper: "Wanted—First-class weavers, on fine combed work. * * * First-class weavers can earn per week, 35s. to £2. * * * Baltic Mills Company, * * *

Baltic, Conn., U. S. A."—was a "promise of employment through advertisements" published in a foreign country. U. S. v. Baltic Mills Co. (1903) 124 Fed. 38, 59 C. C. A. 558, reversing judgment (D. C. 1902) 117 Fed. 959.

The words "promise of employment" are used in a broad sense, meaning not merely an offer of employment which, by acceptance, would create a contract enforceable against some definite person or persons, but any form of words which might be reasonably understood as holding out to a possible immigrant the prospect of assured employment. (1907) 26 Op. Atty. Gen. 200.

—— **Promise by state.**—This section contains no exceptions in favor of a state in reference to specific promises of employment to individual immigrants, nor any requirement that the promises of employment, in order to work exclusion, must be the sole inducement to exclusion. (1907) 26 Op. Atty. Gen. 410.

"Territories."—A territorial government, such as Hawaii, is not a municipality, or a quasi municipality. (1909) 27 Op. Atty. Gen. 479.

Penalties.—See note under § 4250, ante.

—— **Review.**—Section 4277 only refers to actions for penalties under this and the following sections, and indictments for misdemeanors under sections 4253, 4262, 4268, and the federal courts have no jurisdiction to review the decision of an inspector of immigration refusing to allow an alien to land, as one whose entrance is prohibited by the act. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146.

Exclusion of aliens.—There is nothing in the act of 1903, or in any previous act, which would authorize exclusion because the immigration was induced by advertisement, or even by solicitation or promise of employment, unless there was an enforceable contract existing at the time of application for admission requiring them to render service as laborers. (1907) 26 Op. Atty. Gen. 199.

See, also, note under § 4244, ante.

Cited without definite application, Warren v. U. S. (1893) 58 Fed. 559, 560, 7 C. C. A. 368; Moffitt v. Same (1904) 128 Fed. 375, 63 C. C. A. 117; Taylor v. Same (1907) 152 Fed. 1, 81 C. C. A. 197, reversed (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130.

§ 4252. (Act Feb. 20, 1907, c. 1134, § 7.) Solicitation of immigration by transportation companies, owners of vessels, etc.; penalties.

No transportation company or owner or owners of vessels, or others engaged in transporting aliens into the United States, shall, directly or indirectly, either by writing, printing, or oral representation, solicit, invite, or encourage the immigration of any aliens into the United States, but this shall not be held to prevent transportation companies from issuing letters, circulars, or advertisements, stating the sailings of their vessels and terms and facilities of transportation therein; and for a violation of this provision, any such transportation company, and any such owner or owners of vessels, and all others engaged in transporting aliens into the United States, and the agents by them employed, shall be severally subjected to the penalties imposed by section five of this Act. (34 Stat. 900.)

See notes to section 1 of this act, ante, § 4242.

Section 5 of this act, mentioned in this section, is set forth ante, § 4251.

Previous provisions similar to those of this section were contained in Act March 3, 1891, c. 551, § 4, 26 Stat. 1084, but were superseded by those of Act March 3, 1903, c. 1012, § 7, 32 Stat. 1215, which were re-enacted substantially in this section, and were repealed in section 43 of this act, post, § 4289.

Notes of Decisions

Review.—See Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146, and note under section 4251, ante.

Cited without definite application, Warren v. U. S. (1893) 58 Fed. 559, 560, 7 C. C. A. 368; Moffitt v. Same (1904) 128 Fed. 375, 63 C. C. A. 117.

§ 4253. (Act Feb. 20, 1907, c. 1134, § 8.) Bringing into or landing in United States aliens not duly admitted or not entitled to enter, punishable.

Any person, including the master, agent, owner, or consignee of any vessel, who shall bring into or land in the United States, by vessel or otherwise, or who shall attempt, by himself or through another, to bring into or land in the United States, by vessel

or otherwise, any alien not duly admitted by an immigrant inspector or not lawfully entitled to enter the United States shall be deemed guilty of a misdemeanor, and shall, on conviction, be punished by a fine not exceeding one thousand dollars, or by imprisonment for a term not exceeding two years, or by both such fine and imprisonment for each and every alien so landed or brought in or attempted to be landed or brought in. (34 Stat. 900.)

See notes to section 1 of this act, ante, § 4242.

Previous provisions similar to a great extent to those of this section were contained in Act March 3, 1891, c. 551, § 6, 26 Stat. 1085, but were superseded by those of Act March 3, 1903, c. 1012, § 8, which were re-enacted substantially in this section, and were repealed by section 43 of this act, post, § 4289.

Notes of Decisions

"Person."—Transportation companies conducting the business of transportation, either by land or water, are included within the term "person." (1898) 22 Op. Atty. Gen. 122.

Offense—What constitutes.—Where an alien deserted from the vessel on which he was brought to the United States, but there was no evidence that he was either insane, epileptic, a pauper, or a person likely to become a public charge when the vessel arrived in port, or at any other time when he was on board, nor until a month later, when he was arrested, and when he first gave evidence of insanity, the master was not chargeable with bringing an alien not entitled to land into the United States, under section 4244, ante. Frank Waterhouse & Co. v. U. S. (1908) 159 Fed. 876, 87 C. C. A. 56.

—— **Venue.**—The offense of bringing into and landing in the United States an alien not lawfully entitled to admission, made a misdemeanor by this section, can be prosecuted only in the district where he is landed, and that a person who unlawfully brought in a child under 16, unaccompanied by one or both of her parents, afterward took her into another district, does not confer jurisdiction on the court in such district. U. S. v. Capella (D. C. 1909) 169 Fed. 890.

—— **Review.**—Section 4277, post, only refers to actions for penalties under sections 4251, 4252, ante, and indictments for misdemeanors under this section and sections 4263, 4268, post, and the federal courts have no jurisdiction to review the decision of an inspector of immigration refusing to allow an alien to land, as one whose entrance is prohibited by the act. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146.

Cited without definite application, Warren v. U. S. (1893) 58 Fed. 559, 560, 7 C. C. A. 368; Moffitt v. Same (1904) 128 Fed. 375, 63 C. C. A. 117; U. S. v. Fielding (D. C. 1909) 175 Fed. 290.

§ 4254. (Act Feb. 20, 1907, c. 1134, § 9.) Bringing into United States aliens subject to disability or afflicted with tuberculosis or loathsome or dangerous contagious disease.

It shall be unlawful for any person, including any transportation company other than railway lines entering the United States from foreign contiguous territory, or the owner, master, agent, or consignee of any vessel to bring to the United States any alien subject to any of the following disabilities: Idiots, imbeciles, epileptics, or persons afflicted with tuberculosis or with a loathsome or dangerous contagious disease, and if it shall appear to the satisfaction of the Secretary of [Commerce and] Labor that any alien so brought to the United States was afflicted with any of the said diseases or disabilities at the time of foreign embarkation and that the existence of such disease or disability might have been detected by means of a competent medical examination at such time, such person or transportation company, or the master, agent, owner, or consignee of any such vessel shall pay to the collector of customs of the customs district in which the port of arrival is located the sum of one hundred dollars for each and every violation of the provisions of this section; and no vessel shall be granted clearance papers pending the determination of the question of the liability to the payment of such fine, and in the event such fine is imposed, while it remains unpaid, nor shall such fine be remitted or refunded: Provided, That clearance may be granted prior to the determination of such questions upon the deposit of a sum sufficient to cover

such fine and costs, such sum to be named by the Secretary of [Commerce and] Labor. (34 Stat. 901.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions similar to those of this section were contained in Act March 3, 1903, c. 1012, § 9, 32 Stat. 1215, repealed by section 43 of this act, post, § 4289.

The decision of the board of special inquiry provided for by section 25 of this act, post, § 4274, was made final as to the rejection of aliens under this section, by section 10 of this act, post, § 4297.

Notes of Decisions

Purpose of statute.—The sole purpose of this section was to impose a penalty based on the medical examination for which the statute provided, thus tending, by avoidance of controversy and delay, to secure performance of the steamship company and examination in the foreign country, and thereby aid in carrying out the policy of congress to exclude aliens afflicted with loathsome and contagious diseases as defined in this act. Oceanic Steam Nav. Co. v. Stranahan (1909) 29 Sup. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013.

Construction and operation.—This section sufficiently guards the transportation lines from an unjust and hasty imposition of the penalty, insures a careful observation of the law and leaves in their own hands to escape even a risk of the fine being imposed. Oceanic Steam Nav. Co. v. Stranahan (1909) 29 Sup. Ct. 671, 679, 214 U. S. 320, 53 L. Ed. 1013.

The provisions excluding alien immigrants afflicted with certain diseases, etc., are applicable to Chinese immigrants otherwise entitled to admission. In re Lee Sher Wing (D. C. 1908) 164 Fed. 506.

Liability for penalty.—This section is intended to apply only to a case where a diseased person is brought in by a vessel as a passenger or voluntarily, and when the vessel owner or transportation company has an opportunity to discover the existence of the disease by means of a medical examination before the alien is taken on board; and a vessel owner cannot be subjected to the penalty for bringing into port an alien who has stolen his passage, and whose presence on the vessel was not discovered before her sailing. Cunard S. S. Co. v. Stranahan (C. C. 1904) 134 Fed. 318.

Transportation companies, bringing into the United States aliens afflicted with disease pronounced to be "loathsome or dangerous contagious," are liable to the penalties prescribed by section 6 of the act of March 3, 1891 (26 Stat. 1085). (1898) 22 Op. Atty. Gen. 122.

A corporation is liable for the acts of its officers, agents, or servants done by its authority, and for every wrong it commits, or for quasi criminal acts, and in such case the doctrine of ultra vires has no application. Id.

Corporation officers or servants responsible for or actually engaged in such breach of the immigration laws are liable to fine and imprisonment under that act. Id.

Procedure to enforce penalty.—The enforcement of the exaction of $100 which the Secretary of Commerce and Labor is authorized by this section to impose for violations of its provisions against bringing into the United States aliens afflicted with loathsome or dangerous contagious diseases, is not necessarily governed by the rules controlling in criminal prosecutions merely because such exaction is a penalty. Oceanic Steam Nav. Co. v. Stranahan (1909) 29 Sup. Ct. 671, 676, 214 U. S. 320, 53 L. Ed. 1013; International Mercantile Marine Co. v. Same (1909) 29 Sup. Ct. 678, 214 U. S. 344, 53 L. Ed. 1024, affirming judgment International Mercantile Marine Co. v. Stranahan (C. C. 1907) 155 Fed. 428.

Cited without definite application, Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197, reversed (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130.

§ 4255. (Act Feb. 20, 1907, c. 1134, § 10.) Decision of board of special inquiry final as to aliens affected with tuberculosis, or with loathsome or dangerous contagious disease, or with mental or physical disability.

The decision of the board of special inquiry, hereinafter provided for, based upon the certificate of the examining medical officer, shall be final as to the rejection of aliens affected with tuberculosis or with a loathsome or dangerous contagious disease, or

with any mental or physical disability which would bring such aliens within any of the classes excluded from admission to the United States under section two of this Act. (34 Stat. 901.)

See notes to section 1 of this act, ante, § 4242.

Previous provisions similar to those of this section were contained in Act March 3, 1903, c. 1012, § 10, 32 Stat. 1216, repealed by section 43 of this act, post, § 4289.

The appointment or designation of the board of special inquiry mentioned in this section, their authority and proceedings, and the review of their decisions, were provided for and prescribed by section 25 of this act, post, § 4274, but nothing contained therein is to be construed to admit of any appeal in the case of an alien rejected as provided for in this section, by a proviso to said section, set forth below.

Notes of Decisions

Conclusiveness of board's decision.—In this section the word "final" is not used in such broad sense as to deprive an alien so rejected of the right of appeal unqualifiedly given by section 4274, or of the right to invoke section 4286, relating to the wife and children of a naturalized alien, in a case to which such section is applicable. Rodgers v. U. S. (1907) 157 Fed. 381, 85 C. C. A. 79.

Under this section the only jurisdictional fact necessary to the conclusiveness of such decision is the alienage of the immigrant, and when that is shown the decision cannot be reviewed by the courts on the question of the existence or character of the disease. In re Neuwirth (C. C. 1903) 123 Fed. 347.

—— **Habeas corpus.**—Jurisdiction of the immigration authorities to determine the right of aliens to enter the United States is exclusive and final; their decisions not being reviewable by the federal courts, unless it appears either that the alien has not been accorded a fair hearing, or that the action of the authorities has been arbitrary, or that discretion has been abused. Ex parte Petkos (D. C. 1913) 212 Fed. 275.

The fact that cogent evidence was not submitted to the board, that its decision was believed to be erroneous, or that its rulings transgressed the ordinary rules of evidence as applied in the courts, did not justify an application to the District Court to retry the case upon habeas corpus proceedings, as it must appear that the hearing was essentially unfair, or that it violated some fundamental principle of law, without the observance of which no just determination of the question at issue was possible. Ex parte Joyce (D. C. 1913) 212 Fed. 282.

The courts have no jurisdiction to review the action of the immigration authorities in rejecting an alien, unless he has been denied a fair hearing by such authorities. Id.

In a hearing on the merits of a habeas corpus proceeding by an alien, excluded by a board of special inquiry, evidence held to show that such alien was not a feeble-minded person, nor liable on account of feeble-mindedness to become a public charge. Ex parte Sitner (D. C. 1914) 212 Fed. 572.

Under this section, a physician's report to the contrary could not be considered on habeas corpus. U. S. v. Williams (D. C. 1913) 203 Fed. 292.

An alien having been excluded because of feeble-mindedness, it was not material that she was not personally produced in court in response to a writ of habeas corpus that the court might determine the question from personal inspection in view of this section. Id.

Where an alien, applying to enter, was found by a board of special inquiry to be a feeble-minded person, on report of official medical officers, such exclusion was conclusive, as provided by this section; the court having no authority to determine an issue raised thereon by affidavits of other physicians. U. S. v. Williams (D. C. 1913) 204 Fed. 844.

Findings of a board of special inquiry that certain aliens, applying to enter, were liable to become public charges, and excluding them on that ground, were conclusive, and could not be reviewed on habeas corpus. U. S. v. Williams (D. C. 1913) 204 Fed. 846.

A finding by the board of special inquiry, on examination of surgeons, that an alien lacked physical development for his age, which affected his ability to earn a living, and was liable to become a public charge, is conclusive, and not reviewable on habeas corpus. U. S. v. Williams (D. C. 1913) 204 Fed. 847.

A certificate of medical officers of the Immigration Department that an alien applying to enter had valvular heart disease, that would affect his ability to earn a living, on which he was excluded as liable to become a public charge, held conclusive on the courts. U. S. v. Williams (D. C. 1913) 204 Fed. 848.

Hearing before board of special inquiry.—See note under § 4274, post.

Cited without definite application, In re Lee Sher Wing (D. C. 1908) 164 Fed. 506; Ex parte Li Dick (D. C. 1909) 174 Fed. 674; U. S. v. Rodgers (D. C. 1910) 182 Fed. 274 (affirmed [1911] 185 Fed. 334, 107 C. C. A. 452); Ex parte Gregory (D. C. 1914) 210 Fed. 680.

§ 4256. (Act Feb. 20, 1907, c. 1134, § 11.) Exclusion of alien accompanying rejected helpless alien requiring protection.

Upon the certificate of a medical officer of the United States Public Health and Marine Hospital Service to the effect that a rejected alien is helpless from sickness, mental or physical disability, or infancy, if such alien is accompanied by another alien, whose protection or guardianship is required by such rejected alien, such accompanying alien may also be excluded, and the master, agent, owner, or consignee of the vessel in which such alien and accompanying alien are brought shall be required to return said alien and accompanying alien in the same manner as vessels are required to return other rejected aliens. (34 Stat. 901.)

See notes to section 1 of this act, ante, § 4242.

Provisions similar to those of this section were contained in Act March 3, 1903, c. 1012, § 11, 32 Stat. 1216, repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Exclusion of aliens.—The action of the immigration authorities in deporting an imbecile child and directing the stepfather to accompany the child as authorized by this section, and in ordering the deportation of the mother and her other minor children, held within the discretion of the authorities, and the court would not interfere in habeas corpus. Ex parte Barbarossa (D. C. 1912) 195 Fed. 654.

§ 4257. (Act March 3, 1893, c. 206, § 8.) Posting and notification of immigration laws by agents of steamship companies, etc.; certificate of compliance; penalty.

All steamship or transportation companies, and other owners of vessels, regularly engaged in transporting alien immigrants to the United States, shall twice a year file a certificate with the Secretary of the Treasury that they have furnished to be kept conspicuously exposed to view in the office of each of their agents in foreign countries authorized to sell emigrant tickets, a copy of the law of March third, eighteen hundred and ninety-one, and of all subsequent laws of this country relative to immigration, printed in large letters, in the language of the country where the copy of the law is to be exposed to view, and that they have instructed their agents to call the attention thereto of persons contemplating emigration before selling tickets to them; and in case of the failure for sixty days of any such company or any such owners to file such a certificate, or in case they file a false certificate, they shall pay a fine of not exceeding five hundred dollars, to be recovered in the proper United States court, and said fine shall also be a lien upon any vessel of said company or owners found within the United States. (27 Stat. 570.)

This section was part of an act entitled "An act to facilitate the enforcement of the immigration and contract labor laws of the United States." It was not directly superseded by the provisions of the Immigration Act of 1903, or the Immigration Act of 1907.

Notes of Decisions

"Alien immigrants."—"Alien immigrants" held those who come to the United States to remain. U. S. v. Atlantic Fruit Co. (1914) 212 Fed. 711, 129 C. C. A. 321.

Alien passengers brought by a steamship company on fruit boats, who were its own employés or planters with whom it had dealings, and who in most cases were transported gratuitously, but in some cases paid passage money, held not alien immigrants. Id.

Immigrants cannot be classed as such according to the parts of the vessel they occupy, as the word "immigrant" undoubtedly embraces persons who may be, and sometimes are, in the cabins. (1899) 22 Op. Atty. Gen. 460.

An alien domiciled and residing in the United States who ships on a vessel for a round voyage from a port in this country is an alien resident and not an alien immigrant. (1900) 23 Op. Atty. Gen. 278.

See, also, notes under §§ 4242, 4244.

"Regularly engaged."—In a proceeding against a steamship company for failure to file certificates whether defendant was "regularly engaged" held for the jury. U. S. v. Atlantic Fruit Co. (1914) 212 Fed. 711, 129 C. C. A. 321.

"Fine."—The word "fine" held equivalent to the word "penalty," and the government was not limited to the enforcement of the statute by criminal proceedings, but was entitled to maintain a civil action to recover such penalty. U. S. v. Atlantic Fruit Co. (1913) 206 Fed. 440, 124 C. C. A. 322.

§ 4258. (Act Feb. 20, 1907, c. 1134, § 12.) Lists of alien passengers arriving or departing to be delivered by masters of vessels; description and statements in lists; disposition of lists.

Upon the arrival of any alien by water at any port within the United States it shall be the duty of the master or commanding officer of the steamer, sailing or other vessel having said alien on board to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation of such alien on board such steamer or vessel, which shall, in answer to questions at the top of said list, state as to each alien the full name, age, and sex; whether married or single; the calling or occupation; whether able to read or write; the nationality; the race; the last residence; the name and address of the nearest relative in the country from which the alien came; the seaport for landing in the United States; the final destination, if any, beyond the port of landing; whether having a ticket through to such final destination; whether the alien has paid his own passage, or whether it has been paid by any other person or by any corporation, society, municipality, or government, and if so, by whom; whether in possession of fifty dollars, and if less, how much; whether going to join a relative or friend, and if so what relative or friend, and his or her name and complete address; whether ever before in the United States, and if so, when and where; whether ever in prison or almshouse or an institution or hospital for the care and treatment of the insane or supported by charity; whether a polygamist; whether an anarchist; whether coming by reason of any offer, solicitation, promise or agreement, express or implied, to perform labor in the United States, and what is the alien's condition of health, mental and physical, and whether deformed or crippled, and if so, for how long and from what cause; that it shall further be the duty of the master or commanding officer of every vessel taking alien passengers out of the United States, from any port thereof, to file before departure therefrom with the collector of customs of such port a complete list of all such alien passengers taken on board. Such list shall contain the name, age, sex, nationality, residence in the United States, occupation, and the time of last arrival of every such alien in the United States, and no master of any such vessel shall be granted clearance papers for his vessel until he has deposited such list or lists with the collector of customs at the port of departure and made oath that they are full and complete as to the name and other information herein required concerning each alien taken on board his vessel; and any neglect or omission to comply with the requirements of this section shall be punishable as provided in section fifteen of this Act. That the collector of customs with whom any such list has been deposited in accordance with the provisions of this section, shall promptly notify the Commissioner-General of Immigration that such list has been deposited with him as provided, and shall make such further disposition thereof as may be required by regulations to be issued by the Commissioner-General of Immigration with the approval of the Secretary of [Commerce and] Labor: Provided, That in the case of vessels making regular trips to ports of the United States the Commissioner-General of Immigration, with the approval of the Secretary of [Commerce and] Labor, may, when expedient, arrange for the delivery of such lists of outgoing aliens at a later date: Provided further, That it shall be the duty of the master or commanding officer of any vessel sailing from ports in the Philippine Islands, Guam, Porto Rico, or Hawaii to any port of the United States on the

North American Continent to deliver to the immigration officers at the port of arrival lists or manifests made at the time and place of embarkation, giving the names of all aliens on board said vessel. (34 Stat. 901.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions similar to those of the first part of this section relating to lists of passengers arriving by water were contained in Act March 3, 1893, c. 206, § 1, 27 Stat. 569, but were superseded by those of Act March 3, 1903, c. 1012, § 12, 32 Stat. 1216, which were re-enacted, with additions, in this section, and were repealed by section 43 of this act, post, § 4289.

Further provisions relating to the lists or manifests required by this section were contained in sections 13 and 14 of this act, post, §§ 4260, 4261, and a penalty for failure to deliver such lists or manifests was prescribed by section 15 of this act, mentioned in this section, post, § 4262.

Until the provisions of this section are made applicable to passengers going to Canada by land carriage, they are not to apply to passengers going by vessels employed exclusively in trade between the United States and Canada and Mexico, by Act March 4, 1909, c. 305, post, § 4259.

Notes of Decisions

Power of congress.—Under its constitutional power to regulate commerce, Congress may lawfully impose conditions upon the granting of clearance to vessels as a means of enforcing immigration regulations. International Mercantile Marine Co. v. Stranahan (C. C. 1907) 155 Fed. 428, judgment affirmed Oceanic Steam Nav. Co. v. Stranahan (1909) 29 Sup. Ct. 671, 214 U. S. 320, 53 L. Ed. 1013, and International Mercantile Marine Co. v. Stranahan (1909) 29 Sup. Ct. 678, 214 U. S. 344, 53 L. Ed. 1024.

Power of secretary.—The secretary is vested with power to make and apply such rules relative to the question of immigration as may be shown from time to time to be necessary and convenient. (1899) 22 Op. Atty. Gen. 460.

The separation of those who should and who should not be subjected to the examination and listing was a matter of practical administration intended to be regulated by the secretary. Id.

It is within the power of the secretary to detain and examine all seamen of a given vessel if, in his judgment, the execution of the immigration statutes requires it, and to take such precaution as may be reasonably necessary to prevent any alien immigrant, whether he be a sailor or not, from entering this country in the sense that all immigrants enter it. (1901) 23 Op. Atty. Gen. 521.

Lists or manifests.—A verified copy of a ship's manifest containing a list of its alien immigrant passengers, and giving their names, nationality, last residence, and destination, delivered to the inspection officers of a port of the United States as a report, and preserved in the immigration office, is a public record, and when produced by the proper custodian is admissible as evidence of the facts stated therein. McInerney v. U. S. (1906) 143 Fed. 729, 74 C. C. A. 655.

Master of a vessel importing aliens held subject to the penalty imposed for failure to fill up the manifest with reference to each alien's eligibility to enter the United States at the place of embarkation. U. S. v. Coombes (1912) 200 Fed. 400, 118 C. C. A. 552.

Where an alien endeavored in Europe to secure passage to New York, and was told that, if he purchased a ticket to Halifax and wished to continue to New York, he could do so without extra charge, and was thereupon ticketed by the steamship officers and entered on the manifest as destined to Halifax, N. S., when, in fact, his destination was New York, such acts by the officers of the steamship would constitute a violation of this section. U. S. v. Fielding (D. C. 1909) 175 Fed. 290.

The list of immigrants should be made by masters of vessels before departure from a foreign country. (1899) 22 Op. Atty. Gen. 460.

In case an alien domiciled and residing in the United States ships on a vessel for a round voyage from a port in this country in a capacity other than that of seaman, no fine is incurred by the vessel or master, if on such alien's return he is not entered on an immigrant list as provided in the statute. Such persons are alien residents and not alien immigrants, within the meaning of that act. (1900) 23 Op. Atty. Gen. 278.

As to penalty, see, also, note under § 4262, post.

Cited without definite application, Moffitt v. U. S. (1904) 128 Fed. 375, 63 C. C. A. 117; Taylor v. Same

(1907) 152 Fed. 1, 81 C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130); Rodgers v. Same (1907) 152 Fed. 346, 81 C. C. A. 454; U. S. v. Williams (1911) 192 Fed. 536, 113 C. C. A. 410.

§ 4259. (Act March 4, 1909, c. 305.) Requirement of outward alien manifests not to apply to passengers by vessels in trade between United States and Canada or Mexico.

Until the provisions of section twelve of the immigration Act of February twentieth, nineteen hundred and seven, relating to outward alien manifests, shall be made applicable to passengers going out of the United States to Canada by land carriage, said provisions shall not apply to passengers going by vessels employed exclusively in the trade between the ports of the United States and the Dominion of Canada and the Republic of Mexico. (35 Stat. 1060.)

This was an act entitled "An act relative to outward alien manifests on certain vessels."

Act Feb. 20, 1907, c. 1134, § 12, mentioned in this act, is set forth ante, § 4258.

§ 4260. (Act Feb. 20, 1907, c. 1134, § 13.) Grouping of alien passengers in lists; identification tickets; verification of lists and certificate of medical examination by officer of vessel.

All aliens arriving by water at the ports of the United States shall be listed in convenient groups, and no one list or manifest shall contain more than thirty names. To each alien or head of a family shall be given a ticket on which shall be written his name, a number or letter designating the list in which his name, and so forth, is contained, and his number on said list, for convenience of identification on arrival. Each list or manifest shall be verified by the signature and the oath or affirmation of the master or commanding officer, or the first or second below him in command, taken before an immigration officer at the port of arrival, to the effect that he has caused the surgeon of said vessel sailing therewith to make a physical and oral examination of each of said aliens, and that from the report of said surgeon and from his own investigation he believes that no one of said aliens is an idiot, or imbecile, or a feeble-minded person, or insane person, or a pauper, or is likely to become a public charge, or is afflicted with tuberculosis or with a loathsome or dangerous contagious disease, or is a person who has been convicted of, or who admits having committed a felony or other crime or misdemeanor involving moral turpitude, or is a polygamist or one admitting belief in the practice of polygamy, or an anarchist, or under promise or agreement, express or implied, to perform labor in the United States, or a prostitute, or a woman or girl coming to the United States for the purpose of prostitution, or for any other immoral purpose, and that also, according to the best of his knowledge and belief, the information in said lists or manifests concerning each of said aliens named therein is correct and true in every respect. (34 Stat. 902.)

See notes to section 1 of this act, ante, § 4242.

Previous provisions similar to those of this section were contained in Act March 3, 1893, c. 206, § 2, 27 Stat. 569, but were superseded by those of Act March 3, 1903, c. 1012, § 13, which were re-enacted, with additions, in this section, and were repealed by section 43 of this act, post, § 4289.

Verification of the lists or manifests by the surgeon of the vessel was also required by section 14 of this act, post, § 4261.

Notes of Decisions

As to penalty, see note under § 4262, post.

Cited without definite application, Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130); Rodgers v. Same (1907) 152 Fed. 346, 81 C. C. A. 454; U. S. v. Williams (1911) 192 Fed. 536, 113 C. C. A. 410.

§ 4261. (Act Feb. 20, 1907, c. 1134, § 14.) Verification of lists by surgeon of vessel.

The surgeon of said vessel sailing therewith shall also sign each of said lists or manifests and make oath or affirmation in like manner before an immigration officer at the port of arrival, stating his professional experience and qualifications as a physician and surgeon, and that he has made a personal examination of each of the said aliens named therein, and that the said list or manifest, according to the best of his knowledge and belief, is full, correct, and true in all particulars relative to the mental and physical condition of said aliens. If no surgeon sails with any vessel bringing aliens the mental and physical examinations and the verifications of the lists or manifests shall be made by some competent surgeon employed by the owners of the said vessel. (34 Stat. 903.)

See notes to section 1 of this act, ante, § 4242.

Previous provisions similar to those of this section were contained in Act March 3, 1893, c. 206, § 3, 27 Stat. 569, but were superseded by those of Act March 3, 1903, c. 1012, § 14, 32 Stat. 1217, which were re-enacted in this section, and were repealed by section 43 of this act, post, § 4289.

Notes of Decisions

As to penalty, see note under § 4262, post.

§ 4262. (Act Feb. 20, 1907, c. 1134, § 15.) Failure to furnish lists of alien passengers; penalty.

In the case of the failure of the master or commanding officer of any vessel to deliver to the said immigration officers lists or manifests of all aliens on board thereof as required in sections twelve, thirteen, and fourteen of this Act, he shall pay to the collector of customs at the port of arrival the sum of ten dollars for each alien concerning whom the above information is not contained in any list as aforesaid: Provided, That in the case of failure without good cause to deliver the list of passengers required by section twelve of this Act from the master or commanding officer of every vessel taking alien passengers out of the United States, the penalty shall be paid to the collector of customs at the port of departure and shall be a fine of ten dollars for each alien not included in said list; but in no case shall the aggregate fine exceed one hundred dollars. (34 Stat. 903.)

See notes to section 1 of this act, ante, § 4242.

Sections 12, 13, and 14 of this act, mentioned in this section, are set forth ante, §§ 4258, 4260, 4261.

Previous provisions similar in part to those of this section were contained in Act March 3, 1893, c. 206, § 4, 27 Stat. 570, but were superseded by those of Act March 3, 1903, c. 1012, § 15, 32 Stat. 1217, which were re-enacted in this section with the addition of the proviso at the end of the section, and were repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Imposition and collection of penalty.—The provision that the master of any vessel bringing aliens into the United States who shall fail to deliver to the immigration officers at the port of arrival lists or manifests of all aliens on board as required by sections 4258, 4260, ante, and containing the information therein specified, "shall pay to the collector of customs at the port of arrival the sum of ten dollars for each alien concerning whom the above information is not contained in any list as aforesaid," is penal in its nature, and must be strictly construed, and so construed it does not impose such penalty for the giving of incorrect or false information in such list, where it includes all the aliens on board, and purports to give the required information as to each. U. S. v. Four Hundred and Twenty Dollars (D. C. 1908) 162 Fed. 803.

A collector of customs has no authority to impose a fine or to collect a sum of less than that amount for each such violation of the statute. (1905) 25 Op. Atty. Gen. 336.

The proper method of enforcing collection of the penalty, where payment is refused, is by a prosecution for the offense or an action to recover the penalty. Id.

Remission of penalty.—See note under § 4276, post.

Review.—Section 4277, post, only refers to actions for penalties under sections 4251, 4252, ante, and indictments for misdemeanors under this section and section 4253, ante, and section 4268, post, and the federal courts have no jurisdiction to review the decision of an inspector of immigration refusing to allow an alien to land, as one whose entrance is prohibited by the act. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146.

§ 4263. (Act Feb. 20, 1907, c. 1134, § 16.) Inspection of alien passengers upon arrival.

Upon the receipt by the immigration officers at any port of arrival of the lists or manifests of incoming aliens provided for in sections twelve, thirteen, and fourteen of this Act it shall be the duty of said officers to go or send competent assistants to the vessel to which said lists or manifests refer, and there inspect all such aliens, or said immigration officers may order a temporary removal of such aliens for examination at a designated time and place, but such temporary removal shall not be considered a landing, nor shall it relieve the transportation lines, masters, agents, owners, or consignees of the vessel upon which such aliens are brought to any port of the United States from any of the obligations which, in case such aliens remain on board, would, under the provisions of this Act, bind the said transportation lines, masters, agents, owners, or consignees: Provided, That where a suitable building is used for the detention and examination of aliens the immigration officials shall there take charge of such aliens, and the transportation companies, masters, agents, owners, and consignees of the vessels bringing such aliens shall be relieved of the responsibility for their detention thereafter until the return of such aliens to their care. (34 Stat. 903.)

See notes to section 1 of this act, ante, § 4242.

Sections 12, 13, and 14, of this act, mentioned in this section, are set forth ante, §§ 4258, 4260, 4261.

The transportation lines were required to pay the expenses of the removal and detention of aliens under this section, by Act Oct. 22, 1913, c. 32, post, § 4264.

Previous provisions similar to those of this section and the two sections of this act next following were contained in Act March 3, 1891, c. 551, § 8, 26 Stat. 1085, but were superseded by those of Act March 3, 1903, c. 1012, §§ 16–18, 32 Stat. 1217, which were re-enacted substantially in sections 16–18 of this act, and were repealed by section 43 of this act, post, § 4289.

Notes of Decisions

"Landing."—A removal of immigrants from a ship and detention by commissioners of emigration for purposes of examination do not constitute a landing. In re Palagano (C. C. 1889) 38 Fed. 580.

In the provision that the temporary removal of aliens from the vessel for examination "shall not be considered a landing," the word "landing" is used as denoting an act equivalent to a lawful entry. U. S. v. Holland-America Line (D. C. 1913) 205 Fed. 943.

Detention pending examination and determination of rights.—The placing of an alien immigrant in a mission house as a more suitable place than the steamship, pending the decision of the question of her right to land, upon habeas corpus, left her in the same position, as far as regarded her right to land, as if she had never been removed from the steamship. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 339, 142 U. S. 651, 35 L. Ed. 1146.

The fact that an alien has been removed from the vessel, and committed by the collector to the custody of a sheriff, does not affect his rights. In re Way Tai (C. C. 1899) 96 Fed. 484.

—— **Habeas corpus.**—Under the act of congress prohibiting the importation of aliens under contract to perform labor, which directs the secretary of the treasury not to permit such aliens to land, the fact that the refusal of a permit to land is to confine the immigrant to the ship on which he came while she remains in port, does not authorize him to be released under habeas corpus when it clearly appears that he is within the purview of the act. In re Florio (C. C. 1890) 43 Fed. 114.

Where the immigration authorities were not parties to a writ of habeas corpus by an alien seaman to procure his discharge from a hospital to which he had been admitted for treatment for an injury sustained on board his vessel, the fact that he had never been admitted to the United States by such immigration authorities, and that under the immigration laws of the United States it was the duty of the master of the vessel

to return him to the port from which he came, was no ground for refusing to discharge petitioner from detention at such hospital. In re Carlsen's Petition (D. C. 1904) 130 Fed. 379.

Where, on the arrival of a British ship, petitioner, a seaman, was admitted to a hospital through the intervention of the British consul, to be treated for an injury received on the vessel, allegations in a return to a writ of habeas corpus that he was not fully cured at the time he applied for his discharge from the hospital; that, if discharged, he would be likely to become a public charge; and that the master of the vessel had directed that he be detained until he might be returned to the port from which he came, were insufficient to justify the hospital authorities in restraining petitioner of his liberty. Id.

The secretary may, by regulation, forbid the landing by the master of any passenger from his vessel until an examination of the passengers thereon is had, whether cabin or steerage. (1857) 9 Op. Atty. Gen. 706.

Detention of passengers for purposes of quarantine or tax charge is clearly within the power and duty of the master, where it is required of him by law, or by regulation pursuant to law. (1890) 19 Op. Atty. Gen. 706.

Treaty rights.—The provision in the treaty of commerce and navigation between Italy and the United States, ratified April 29, 1871 (17 Stat. 856, art. 23), giving citizens of either party free access to the courts of justice of the other, with the right to employ counsel in all trials at law, has no application to the examination by the board of immigration inspectors of incoming Italian aliens with respect to their qualifications. U. S. v. Williams (C. C. 1911) 190 Fed. 897.

Cited without definite application, Gonzales v. Williams (1904) 24 Sup. Ct. 177, 192 U. S. 1, 48 L. Ed. 317; Warren v. U. S. (1893) 58 Fed. 559, 560, 7 C. C. A. 368; Rodgers v. Same (1907) 152 Fed. 346, 81 C. C. A. 454; U. S. v. Williams (1911) 192 Fed. 536, 113 C. C. A. 410; Same v. Fielding (D. C. 1909) 175 Fed. 290.

§ 4264. (Act Oct. 22, 1913, c. 32.) Expenses of removal and detention of aliens pending inspection to be paid by transportation companies.

Whenever aliens arriving at any port of the United States are temporarily removed from a vessel in accordance with the provisions of section sixteen of the immigration Act approved February twentieth, nineteen hundred and seven, the transportation lines which brought them and the masters, owners, agents, and consignees of the vessel on which they arrive shall pay all expenses of such removal and all expenses arising during subsequent detention pending decision of the eligibility of such aliens to enter the United States and until they are either allowed to land or returned to the care of the line or to the vessel which brought them, and such expenses shall include those of maintenance, medical treatment in hospital or elsewhere, burial in the event of death, and charges for transfer to the vessel in the event of deportation, excepting only where such expenses arise under the terms of any of the provisos of section nineteen of the said immigration Act; and aliens shall not be temporarily removed from any vessel unless the master, owner, agent, or consignee thereof shall guarantee in a manner prescribed by and to the satisfaction of the Secretary of Labor that said expenses will be paid. (38 Stat. 226.)

This was a provision of the urgent deficiency appropriation act for the fiscal year 1913, cited above.

Act Feb. 20, 1907, c. 1134, § 16, mentioned in this section, is set forth ante, § 4263.

Notes of Decisions

Expenses pending examination.—Suitable buildings having been constructed at Ellis Island in New York Harbor for the examination of incoming aliens, which buildings are supported by the immigration head tax, where aliens are landed at such island and are detained for treatment either in hospitals there or in private hospitals on shore pending determination of their right to enter and are subsequently admitted, the aliens during such time are not "in charge" of the steamship companies, which are not liable for their maintenance during such period. U. S. v. Holland-America Line (1914) 212 Fed. 116, 128 C. C. A. 632.

The immigration commissioners having threatened to cause the alien immigrants arriving at New York to be inspected on board their respective vessels in order to compel defendant steamship company to comply with a rule requiring it to pay expenses of aliens pending examination and entry or deportation, defendant wrote the commis-

sioner that "until the matter was decided differently by proper authority it would continue to pay the cost of maintenance pending examination." After this the question was submitted to the Secretary of Commerce and Labor in another case, and he decided in favor of the steamship company and against the United States. Held, that such determination was a different decision by proper authority within defendant's letter, and it was therefore under no contract liability to continue to pay such expenses. Id.

§ 4265. (Act Feb. 20, 1907, c. 1134, § 17.) Medical examination of alien passengers.

The physical and mental examination of all arriving aliens shall be made by medical officers of the United States Public Health and Marine-Hospital Service, who shall have had at least two years' experience in the practice of their profession since receiving the degree of doctor of medicine and who shall certify for the information of the immigration officers and the boards of special inquiry hereinafter provided for, any and all physical and mental defects or diseases observed by said medical officers in any such alien, or, should medical officers of the United States Public Health and Marine-Hospital Service be not available, civil surgeons of not less than four years' professional experience may be employed in such emergency for such service, upon such terms as may be prescribed by the Commissioner-General of Immigration under the direction or with the approval of the Secretary of [Commerce and] Labor. The United States Public Health and Marine-Hospital Service shall be reimbursed by the immigration service for all expenditures incurred in carrying out the medical inspection of aliens under regulations of the Secretary of [Commerce and] Labor. (34 Stat. 903.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

The detail of surgeons, in accordance with the provisions of this section, for service in foreign countries, was authorized by section 22 of this act, ante, § 959.

The provision of this section requiring reimbursement by the immigration fund for expenses of medical inspection of aliens was repealed by a provision of Act March 4, 1909, c. 299, § 1, post, § 4266.

Notes of Decisions

Medical examination.—A medical inspector, who examined an alien in the first instance and certified that she was feeble-minded, was not thereby disqualified from sitting as a member of the medical board, as that board is not an appellate tribunal to correct the errors of the medical inspector, but merely furnishes information to the board of special inquiry, which is to decide the case. Ex parte Joyce (D. C. 1913) 212 Fed. 282.

Rules.—An alien, who received a certificate on entering the Philippines which entitled him to enter the mainland without further examination, has no vested right which prevents the amendment of the rules so as to require such examination. Healy v. Backus (1915) 221 Fed. 358, 137 C. C. A. 166.

The commissioner general had authority, to promulgate rule 14, providing for a re-examination of aliens who came to the mainland after a sojourn in the Philippines. Id.

§ 4266. (Act March 4, 1909, c. 299, § 1.) Expenses of medical examination of alien passengers; repeal in part of Act Feb. 20, 1907, c. 1134, § 17.

Public Health and Marine-Hospital Service: Expenses of Public Health and Marine-Hospital Service, * *

In all, * * dollars, which shall include the amount necessary for the medical inspection of aliens, as required by section seventeen of the Act of Congress approved February twentieth, nineteen hundred and seven, and the provision of said section of said Act requiring the

reimbursement by the immigration fund for said expenses is hereby repealed. (35 Stat. 969.)

This was a provision accompanying an appropriation for expenses of the Public Health and Marine-Hospital Service, in the sundry civil appropriation act for the fiscal year 1910, cited above. Appropriations for the same purpose were made in the similar acts for subsequent years.

Act Feb. 20, 1907, c. 1134, § 17, repealed in part by this provision, is set forth ante, § 4265.

Notes of Decisions

Expense of medical examination.—Immigration Act held not to make a steamship company liable for the care of alien immigrants who on arrival are suffering from contagious diseases until they can be properly examined, where on such examination they are admitted; but such expense is payable under this section and subsequent appropriation acts. U. S. v. Holland-America Line (D. C. 1913) 205 Fed. 943.

§ 4267. (Act Feb. 20, 1907, c. 1134, § 18.) Owners, officers, etc., of vessel or transportation line bringing alien to prevent landing at time or place other than as designated; negligent failure to comply with requirements punishable; alien unlawfully landed to be deported.

It shall be the duty of the owners, officers, or agents of any vessel or transportation line, other than those railway lines which may enter into a contract as provided in section thirty-two of this Act, bringing an alien to the United States to prevent the landing of such alien in the United States at any time or place other than as designated by the immigration officers, and the negligent failure of any such owner, officer, or agent to comply with the foregoing requirements shall be deemed a misdemeanor and be punished by a fine in each case of not less than one hundred nor more than one thousand dollars or by imprisonment for a term not exceeding one year, or by both such fine and imprisonment; and every such alien so landed shall be deemed to be unlawfully in the United States and shall be deported as provided in sections twenty and twenty-one of this Act. (34 Stat. 904.)

See notes to sections 1 and 16 of this act, ante, §§ 4242, 4263.

Aliens who enter the United States except at seaports or places which the Secretary of Labor may designate are to be adjudged to have entered the country unlawfully, and to be deported, by provisions of section 36 of this act, post, § 4285.

Notes of Decisions

"Landing".—The words "landing from vessel" mean "to go ashore," the landing being complete the moment the vessel is left and the shore is reached. Niven v. U. S. (1909) 169 Fed. 782, 95 C. C. A. 248.

Alien seaman.—The ordinary case of a sailor deserting while on shore leave is not within this section. Taylor v. U. S. (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130; Schrotter v. Same (1908) 157 Fed. 1005, 85 C. C. A. 679.

The fact that an alien seaman deserting while on shore leave was a stowaway under order of deportation does not bring the case within this section. Id.

When defendant's ship was anchored off shore at a Mexican port a number of native peddlers came on board to sell their wares. When one of them came on deck to go ashore he found that the vessel had started and proceeded some distance. Defendant refused his request that he be taken back and landed, but promised to stop and leave him on the return trip, and thereupon put him at work, but without placing him on the crew list. On arriving at San Francisco an immigration officer notified defendant not to land the Mexican without permission, but the latter stated he did not wish to land, but wanted to be taken back home, and he was not confined. Just before the vessel sailed, however, he left it without the consent or knowledge of defendant or any of his officers, and had not returned when she left the port. Held, that such facts were not sufficient to warrant defendant's conviction, the alien not being an immigrant within the meaning and intent of the act, whom defendant was required to put in irons or keep under guard to secure his return on the vessel, and there being no evidence or claim that he did not act in good faith. Moffit v. U. S. (1904) 128 Fed. 375, 63 C. C. A. 117.

The master of a vessel on trial for permitting an alien member of his crew to leave his vessel in New York, in violation of this section, was properly

allowed to be asked on his cross-examination as a witness whether a number of other alien members of his crew did not also desert in that port, as material to the question whether or not he took due precautions to prevent aliens from leaving the vessel, as required by the statute. Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197, judgment reversed (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130.

The word "aliens" is used in its broad and full meaning and is not restricted to alien immigrants, but includes as well aliens who are members of the ship's crew. While the master of a vessel is not required to prevent officers or members of his crew who are aliens from going on shore in a port of the United States in every case, such section requires him to take reasonable precautions suited to the nature of the case to prevent them from deserting and remaining in this country. Id.

Where an alien lawfully came into the country as a member of the crew of a foreign vessel, his subsequent desertion of the vessel did not make his arrival unlawful, unless such desertion was permitted or in some way aided or connived at by an officer or agent of the vessel. Frank Waterhouse & Co. v. U. S. (1908) 159 Fed. 876, 87 C. C. A. 56.

Where there was no evidence that any one connected with a vessel from which an alien escaped into the United States permitted or in any way connived at the alien's desertion, neither the master nor the agents of the vessel were guilty of an offense under this section. Id.

This section does not apply to seamen landed and placed in a hospital because of illness who were unable to return to their home port with the vessel. Niven v. U. S. (1909) 169 Fed. 782, 95 C. C. A. 248.

Where a stowaway, found upon a British vessel soon after leaving Liverpool, is in good faith regularly enrolled as a member of the crew for the voyage to New Orleans and return, his status is thereby fixed as a British sailor, and he cannot be regarded as a destitute alien immigrant, so as to charge the master, upon arrival at New Orleans, with the duties and penalties in respect to the immigration and importation of aliens; and the fact that such sailor deserts while in port does not affect the master's responsibility. U. S. v. Sandrey (C. C. 1891) 48 Fed. 550.

The immigration laws have no application to alien seamen who constitute the bona fide crew of a vessel trading in the ports of the United States, and who enter such ports with their ship in the discharge of the duties of their employment, and without any intention of becoming residents of this country; and the master of a vessel cannot be subjected to the fine or refusal of his clearance papers, as a penalty for refusing to return upon his vessel immigrants of the prohibited classes brought into this country, because an alien seaman, who is one of the crew, escapes from his ship while in port, before the expiration of his term of service, without having been discharged or paid, and without the consent or knowledge of the master, and the master is unable to secure his arrest and return to the ship. U. S. v. Burke (C. C. 1899) 99 Fed. 895.

A "stowaway," as used in rule 23 of the Commissioner General of Immigration, defined. U. S. v. Williams (D. C. 1909) 193 Fed. 228.

Elements of offense.—The master of a ship cannot be held liable for the unlawful landing of an alien from his vessel, if he adopted due precautions to prevent it. Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197, judgment reversed (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130.

The duty imposed on the owners, masters, and agents of ships bringing alien immigrants to a port of the United States to "adopt due precautions to prevent the landing of any alien immigrant at any place or time other than that designated by the inspection officers," and to detain such immigrants as may be rejected on board until they are returned, does not make a shipowner, master, or agent an insurer of the safe-keeping of alien immigrants while detained for inspection in the custody of inspection officers at a place on land designated by such officers, and they cannot be convicted of a violation of such provisions, because of the escape of immigrants while so held without their fault or negligence. H. Hackfeld & Co. v. U. S. (1905) 141 Fed. 9, 72 C. C. A. 265.

Steamship companies are responsible for the custody of immigrants pronounced to belong to the prohibited classes by the commissioner of immigration at Ellis Island, and awaiting deportation, or pending proceedings on appeal or habeas corpus. (1892) 20 Op. Atty. Gen. 415.

To constitute offense, there must be a refusal on the part of the master to receive back on board his vessel such aliens, or a neglect to detain them thereon, or a refusal or neglect to return them to the port from which they came. (1900) 23 Op. Atty. Gen. 271.

But where the master has taken every precaution to detain in safe custody and to prevent an escape, and yet in some real and unforeseen emergency an escape has occurred, there is no such neglect as the act contemplates. In such case no fine has been incurred, and therefore none can be imposed. Id.

—— **Negligent failure.**—In a prosecution under this act, it was stipulated that in returning Japanese immigrants defendant's steamship arrived at Hon-

olulu; that the immigrants were locked in a room, and between midnight and 5 o'clock effected their escape through a porthole nearly 25 feet from the water; that this method of escape could not have been reasonably anticipated by the master or officers; and that the escape did not occur by reason of any negligence or lack of proper care on their part. The court below made no finding of fact further than that defendant was guilty as charged. Held, that the stipulation as to absence of negligence was binding on the court. H. Hackfeld & Co. v. U. S. (1905) 25 Sup. Ct. 456, 197 U. S. 442, 49 L. Ed. 826, reversing (1903) 125 Fed. 596, 60 C. C. A. 428.

What is care or negligence is a question which varies with the particular cases; it does not depend upon the master's discretion, but may be brought by the alien to the determination of the courts. (1902) 24 Op. Atty. Gen. 531.

—— **Burden of proof.**—Upon an indictment against the master of a vessel for knowingly or negligently landing or permitting to land any alien immigrants, the burden of proving such willful or negligent permission is upon the prosecution. U. S. v. Spruth (D. C. 1896) 71 Fed. 678, criticising Warren v. U. S. (1893) 58 Fed. 559, 7 C. C. A. 368.

Power to prevent unlawful landing.—Shipowners, chargeable with the safe custody of aliens, may detain them at some suitable place off the ship until the time of sailing, provided the permission of inspection officers be first obtained in every case. (1892) 20 Op. Atty. Gen. 415.

The master of a foreign vessel has a right, under the laws of the United States, to put in irons an alien on board his ship who is not allowed by law to enter the United States, in order to prevent such person from unlawfully landing; but this may be done only in exceptional cases and where nothing less will prevent the landing of such person. (1902) 24 Op. Atty. Gen. 531.

Whether such officer should put irons upon an alien immigrant is a question of care and good faith. He must, in good faith, be careful to prevent the landing; but when he has exercised reasonable care to that end, he neither must nor may do more. Id.

By the comity of nations, masters are permitted to exercise the same power, practically, in port as at sea, so far as matters within their vessels, and not disturbing the peace of the port, are concerned. Id.

Compromise and remission of fines.—See note under § 4276, post.

Cited without definite application, U. S. v. Atlantic Transport Co. (1911) 188 Fed. 42, 110 C. C. A. 420 (certiorari denied [1911] 32 Sup. Ct. 525, 223 U. S. 724, 56 L. Ed. 631); Same v. Fielding (D. C. 1909) 175 Fed. 290.

§ 4268. (Act Feb. 20, 1907, c. 1134, § 19.) Immediate deportation of alien unlawfully brought to this country; cost of maintenance and return; refusal to receive back on vessel or to pay cost, punishable; suspension of deportation of alien whose testimony is necessary in prosecution; aliens excluded as diseased not to be landed for medical treatment.

All aliens brought to this country in violation of law shall, if practicable, be immediately sent back to the country whence they respectively came on the vessels bringing them. The cost of their maintenance while on land, as well as the expense of the return of such aliens, shall be borne by the owner or owners of the vessels on which they respectively came; and if any master, person in charge, agent, owner, or consignee of any such vessel shall refuse to receive back on board thereof, or on board of any other vessel owned or operated by the same interests, such aliens, or shall fail to detain them thereon, or shall refuse or fail to return them to the foreign port from which they came, or to pay the cost of their maintenance while on land, or shall make any charge for the return of any such alien, or shall take any security from him for the payment of such charge, such master, person in charge, agent, owner, or consignee shall be deemed guilty of a misdemeanor and shall, on conviction, be punished by a fine of not less than three hundred dollars for each and every such offense; and no vessel shall have clearance from any port of the United States while any such fine is unpaid: Provided, That the Commissioner-General of Immigration, with the approval of the Secretary of [Commerce and] Labor, may suspend, upon conditions to be prescribed by the Commissioner-General of Immigration, the deportation of any alien found to have come in violation of any provision of this Act, if, in his judgment, the testimony of such alien is necessary

on behalf of the United States Government in the prosecution of offenders against any provision of this Act: Provided, That the cost of maintenance of any person so detained resulting from such suspension of deportation shall be paid from the "immigrant fund" but no alien certified, as provided in section seventeen of this Act, to be suffering from tuberculosis or from a loathsome or dangerous contagious disease other than one of quarantinable nature shall be permitted to land for medical treatment thereof in any hospital in the United States, unless with the express permission of the Secretary of [Commerce and] Labor: Provided, That upon the certificate of a medical officer of the United States Public Health and Marine-Hospital Service to the effect that the health or safety of an insane alien would be unduly imperiled by immediate deportation, such alien may, at the expense of the "immigrant fund," be held for treatment until such time as such alien may, in the opinion of such medical officer, be safely deported. (34 Stat. 904.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Provisions similar to those of this section preceding the three provisos annexed thereto were contained in Act March 3, 1891, c. 551, § 10, 26 Stat. 1086, but were superseded by those of Act March 3, 1903, c. 1012, § 19, 32 Stat. 1218, which were re-enacted, with additions, in this section, and were repealed by section 43 of this act, post, § 4289.

A previous provision for payment of expenses incident to the detention of aliens ordered deported, whose attendance as witnesses for the United States in prosecutions under the immigration laws is required, contained in Act March 3, 1905, c. 1484, § 1, 33 Stat. 1244, may be regarded as superseded by the second proviso of this section.

Notes of Decisions

Deportation of aliens and cost thereof.—Where an alien lawfully entitled to enter under the act of 1903, then in force, not being within one of the prohibited classes, arrived on February 14, 1905, and was arrested on July 29, 1910, and ordered deported as a person practicing prostitution in the United States, the steamship company by which she was brought to the United States was not liable under this act for the cost of her deportation from the port of entry, since the provision of that act for deportation at the expense of the steamship companies should be construed as prospective and only applicable to aliens brought to the United States after its adoption, since if otherwise construed it would be unconstitutional as depriving such companies of their property without due process of law. U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 185 Fed. 158.

Where certain steamship companies disputed the validity of the Treasury Department's regulations, holding them liable for the maintenance and transportation to the seaboard of certain alien immigrants who had reached the interior of the country, it was held, that as there was no way of enforcing the statute against the steamship companies except through the courts, the question is not one arising in the administration of that Department, the Attorney General cannot properly express his opinion thereon. (1894) 21 Op. Atty. Gen. 6.

Duty of shipowner and agents.—Shipowners who have wrongfully brought aliens into the United States, and have received them back on board the vessel for deportation, are not made absolute insurers of the return of the immigrants to the port from whence they came, but nothing more is required than a faithful and careful effort to carry out the duty so imposed. H. Hackfeld & Co. v. U. S. (1905) 25 Sup. Ct. 456, 458, 197 U. S. 442, 49 L. Ed. 826, reversing judgment (1903) 125 Fed. 596, 60 C. C. A. 428.

The agent of a vessel, who is ordered to detain on board and return immigrants unlawfully brought to this country, is bound to so detain them at all hazards, and will only be relieved therefrom by vis major, or inevitable accident. Warren v. U. S. (1893) 58 Fed. 559, 7 C. C. A. 368.

A shipowner must carry back at its own expense the insane person, or the person afflicted with some contagious disease, or the prostitute, or the convict, though the most rigid inspection failed to disclose the situation when it

brought them to this country, and need not bring any alien woman to the country, who will not first deposit a sum to cover her return passage, in the event through her own fault or misfortune she may become liable to deportation. U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 185 Fed. 158.

—— **Directions and conclusiveness thereof.**—The direction of the Secretary that an alien should be deported on defendant's vessel, by which he was brought to the United States was not conclusive on the officers and agents of the vessel, neither of whom had been a party to the proceedings before the Secretary. Frank Waterhouse & Co. v. U. S. (1908) 159 Fed. 876, 87 C. C. A. 56.

The superintendent or inspector of immigration may, at any time within one year after his landing, take into custody, and return to the country from which he came, an alien immigrant arriving in violation of law, even though he may have been previously passed and allowed to land. In re Lifieri (D. C. 1892) 52 Fed. 293.

Criminal responsibility and prosecution.—A foreign steamship company lawfully collecting in Germany return passage money from emigrants embarking for New York violates this section. U. S. v. Nord Deutscher Lloyd (1912) 32 Sup. Ct. 244, 223 U. S. 512, 56 L. Ed. 531, reversing judgment (C. C. 1911) 186 Fed. 391.

Selling of return ticket to aliens found liable to exclusion by a board of special inquiry, but admitted under bond held not an unlawful charging for return of excluded aliens. Nord Deutscher Lloyd v. U. S. (1914) 213 Fed. 10, 130 C. C. A. 85.

The provision that if the owner of any vessel bringing an alien not entitled to enter shall make any charge for the return of such alien, or shall take any security from him for the payment of such charge, he shall be guilty of a misdemeanor applies only to acts done within the United States, since to construe it as applicable to acts occurring wholly within foreign territory would render it violative of international law. U. S. v. Nord Deutscher Lloyd (C. C. 1911) 186 Fed. 391, judgment reversed (1912) 32 Sup. Ct. 244, 223 U. S. 512, 56 L. Ed. 531.

The master of a vessel is not subject to the penalty prescribed for failing to detain on board his vessel and return thereon to their own country aliens brought by him to the United States and who are not entitled to enter under the law, in a case where such aliens were shipped by him in a foreign port as seamen for the round voyage, and after being refused admission to the United States and returned to his vessel they escaped notwithstanding all reasonable efforts made by him in good faith to detain them, short of putting them in irons. U. S. v. Hemet (D. C. 1907) 156 Fed. 285.

The captain of a ship, to which an alien, ordered to be deported, was delivered, held not subject to prosecution for violation of the deportation laws because of the alien's escape. U. S. v. Pavy (D. C. 1912) 193 Fed. 1006.

—— **Indictment.**—An indictment alleged that defendant steamship company at Bremen collected return passage money from proposed immigrants who were within the excluded classes, and that it afterwards brought them to New York, and knowing of their proposed deportation, holds the money as security for a charge to be made for deportation. Held, that the word "charge" as so used did not import a continuing act, but meant an overt act, by which the charging party manifested his purpose to demand the money charged from the person charged, excluding the subsequent relations which were consequences of the act, and that the indictment was therefore fatally defective for failure to allege that the forbidden "charge" was made with the intent to apply the amount so collected to the return of the aliens under deportation. U. S. v. Nord Deutscher Lloyd (C. C. 1911) 186 Fed. 391, judgment reversed (1912) 32 Sup. Ct. 244, 223 U. S. 512, 56 L. Ed. 531.

An indictment alleging that defendant at Bremen collected return passage from certain proposed immigrants who were within the excluded classes, and held the money as security for a charge to be made for deportation, did not charge the taking of the money as security within the United States, since to retain money taken in a foreign country was not a continuous repetition of the "taking" within the United States by reason of the fact that the aliens were brought to the United States and ordered deported because not entitled to enter. Id.

—— **Burden of proof.**—In prosecution for charging for return of aliens, burden held to be on government to prove that they were brought to this country in violation of law and were ordered deported by competent authority. Nord Deutscher Lloyd v. U. S. (1914) 213 Fed. 10, 130 C. C. A. 85.

—— **Review.**—Section 4277, post, only refers to actions for penalties under sections 4251, 4252, ante, and indictments for misdemeanors under this section and sections 4253, 4262, ante, and the federal courts have no jurisdiction to review the decision of an inspector of immigration refusing to allow an alien to land, as one whose entrance is prohibited by the act. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146.

Cited without definite application, Gonzales v. Williams (1904) 24 Sup.

Ct. 177, 192 U. S. 1, 48 L. Ed. 317; U. S. v. Yamasaka (1900) 100 Fed. 404, 405, 40 C. C. A. 454; Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130); Rodgers v. Same (1907) 152 Fed. 346, 81 C. C. A. 454; U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 186 Fed. 672; Same v. Fielding (D. C. 1909) 175 Fed. 290.

§ 4269. (Act Feb. 20, 1907, c. 1134, § 20.) Deportation of aliens entering United States in violation of law or becoming public charges; payment of expense of deportation; bond for release of alien pending disposal of case.

Any alien who shall enter the United States in violation of law, and such as become public charges from causes existing prior to landing, shall, upon the warrant of the Secretary of [Commerce and] Labor, be taken into custody and deported to the country whence he came at any time within three years after the date of his entry into the United States. Such deportation, including one-half of the entire cost of removal to the port of deportation, shall be at the expense of the contractor, procurer, or other person by whom the alien was unlawfully induced to enter the United States, or, if that can not be done, then the cost of removal to the port of deportation shall be at the expense of the "immigrant fund" provided for in section one of this Act, and the deportation from such port shall be at the expense of the owner or owners of such vessel or transportation line by which such aliens respectively came: Provided, That pending the final disposal of the case of any alien so taken into custody he may be released under a bond in the penalty of not less than five hundred dollars with security approved by the Secretary of [Commerce and] Labor, conditioned that such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody, and for deportation if he shall be found to be unlawfully within the United States. (34 Stat. 904.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions similar to some extent to those of this section were contained in Act March 3, 1891, c. 551, § 11, 26 Stat. 1086, but were superseded by those of Act March 3, 1903, c. 1012, § 20, 32 Stat. 1218, which were re-enacted, with alterations and additions, in this section, and were repealed by section 43 of this act, post, § 4289.

Further provisions for deportation, as provided in this section, of an alien found in the United States in violation of law, within three years after arrival, are contained in the next following section.

Notes of Decisions

1. Construction and operation in general.
2. —— "Alien."
3. —— Entering "in violation of law."
4. Deportation of aliens in general.
5. —— Nature of proceeding.
6. —— Jurisdiction.
7. —— "Deported to country whence he came."
8. —— Place to which Chinese deported.
9. —— Aliens subject to deportation.
10. —— Warrants.
11. —— Three-year limitation period.
12. —— Hearing.
13. —— Evidence.
14. —— Defenses.
15. —— Res judicata.
16. Review by courts.
17. —— Fair hearing and dependency of right of review thereon.
18. —— Scope of review in general.
19. —— Jurisdictional questions.
20. —— Weight of evidence.
21. —— Findings of fact.
22. —— Decisions of the secretary.
23. —— Questions of law.
24. —— Presumptions on review.
25. —— Right to discharge on habeas corpus.
26. Detention of alien pending deportation.
27. Bond for release pending investigation.
28. Cost of deportation.

1. Construction and operation in general.—Where an alien has had an established residence and occupation in the United States for six years, and he crosses the border into a foreign country not his native country for a mere temporary purpose, and returns within an hour, especially at a point like the Detroit-Windsor crossing, the return cannot be deemed an entry within the immigration laws. Lewis v. Frick (C.

C. 1911) 189 Fed. 146, judgment reversed Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493.

Section 4284, post, qualifies and limits this section and section 4270, post. Ex parte Wong You (D. C. 1910) 176 Fed. 933, reversed (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

2. —— **"Alien."**—The word "alien" was not synonymous with "immigrant," but was intended as a broader term, and included a Russian unmarried woman, who entered the United States in 1897 or 1898, and remained therein continuously until March, 1908, when she returned to Russia, after having engaged in prostitution for a considerable time, and who attempted to re-enter the United States in June, 1908, she being within three years thereafter an alien of the excluded classes and subject to deportation. Ex parte Hoffman (1910) 179 Fed. 839, 103 C. C. A. 327.

3. —— **Entering "in violation of law."**—An alien, who falsely represents himself to be a citizen, and by such artifice and fraud secures admission to the United States, is guilty of "entering in violation of law," and is subject to deportation. Williams v. U. S. (1911) 186 Fed. 479, 108 C. C. A. 457.

4. **Deportation of aliens in general.**—Where an alien, rejected by the board of special inquiry, was by mistake of the janitor at the detention station allowed to go at large, and was arrested under a departmental warrant, his rights were not changed and since he was within the control of the immigration authorities, and it not being disputed that he was never legally allowed to land, irregularities in the warrant proceedings were immaterial. Ex parte Sitner (D. C. 1913) 212 Fed. 571.

Aliens subject to deportation held not entitled to complain that immigration officers were rigidly enforcing the law because of acts not rendering them subject to deportation. Ex parte Greaves (D. C. 1915) 222 Fed. 157.

5. —— **Nature of proceeding.**—Proceedings for the deportation of an alien under the immigration statutes are in no proper sense a trial for a crime or offense nor governed by the rules of such trials as to pleadings or evidence. Siniscalchi v. Thomas (1912) 195 Fed. 701, 115 C. C. A. 501; U. S. v. Martin (D. C. 1912) 193 Fed. 795. Therefore an order of deportation is not a punishment for crime so as to entitle the alien to the constitutional guaranties and safeguards accorded to a citizen accused of crime. Sire v. Berkshire (D. C. 1911) 185 Fed. 967; Ladaux v. Same, Id. 971.

Proceedings for deportation are not "causes," within section 1583, ante, declaring that the trial of issues of fact in the United States District Courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, etc., shall be by jury. Toy Tong v. U. S. (1906) 146 Fed. 343, 76 C. C. A. 621.

Const. Amend. 5, providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb, applies only to criminal proceedings, and hence has no application to proceedings for the deportation of an alien. Sire v. Berkshire (D. C. 1911) 185 Fed. 967; Ladaux v. Same, Id. 971.

6. —— **Jurisdiction.**—In Re Yamasaka (D. C. 1899) 95 Fed. 652, it was held that neither the act of March 3, 1891 (26 Stat. c. 551), nor any prior act of congress, conferred authority on ministerial officers of the United States to arrest and deport an immigrant who has become domiciled in this country, on the ground that he has become a public charge from causes existing prior to his landing; that such person is within the protection of the fifth constitutional amendment, and can only be deprived of his liberty by judicial proceedings, of which the circuit and district courts are by such act given concurrent jurisdiction.

Congress has given to the Department of Labor full authority to determine whether aliens have so violated the laws of the United States as to justify and require deportation. Ex parte Hidekuni Iwata (D. C. 1915) 219 Fed. 610.

7. —— **"Deported to country whence he came."**—Russia, not Canada, is the country to which should be deported an alien who, some six years after coming to the United States from Russia, his native land, enters Canada and immediately re-enters the United States, bringing a woman for an immoral purpose, the three years' period prescribed by these sections for the return of the alien to "the country whence he came" manifestly limiting only the authority to deport, and not affecting the determination of the country to which the alien is to be deported, and the legislative intent, as indicated by section 4284, post, being that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. Lewis v. Frick (1914) 34 Sup. Ct. 488, 233 U. S. 291, 58 L. Ed. 967.

The provisions authorizing the Secretary to deport any alien entering or found in the United States in violation of the act "to the country whence he came" were intended to refer to the place of his nativity or citizenship, and not to the country from which he may have immediately entered the United States. Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493, reversing judg-

ment Lewis v. Frick (C. C. 1911) 189 Fed. 146.

The Secretary of Commerce and Labor has no discretion as to the place to which an alien must be deported; and hence a warrant attempting to deport the alien to a country other than that whence he came was illegal and void. U. S. v. Redfern (C. C. 1911) 186 Fed. 603.

Under section 1289, ante, which authorizes the court in habeas corpus proceedings to dispose of the party "as law and justice require" an alien may be ordered deported to a country other than that named in the order under which he is held. Ex parte Gytl (D. C. 1914) 210 Fed. 918.

The phrase the "country whence he came," authorizing deportation of an alien to the country whence he came, means the country in which the alien last had his domicile prior to his unlawful entry. Id.

Aliens unlawfully entering the United States from Canada, where they were domiciled, held required to be deported to that country, and an order for their deportation to the country from which they emigrated to Canada held unauthorized. Id.

Under the Immigration Act, the Department of Labor may order the deportation of an alien immigrant to the country from which he originally came, notwithstanding his immediate entry into this country was from Canada. Ex parte Chin Him (D. C. 1915) 227 Fed. 131.

8. —— **Place to which Chinese deported.**—Where alien immigrants unlawfully came into the country from France, are then temporarily absent in British Columbia, and return within a year from their arrival from France, they are properly deported to France. Lavin v. Le Fevre (1903) 125 Fed. 693, 60 C. C. A. 425.

Where certain Chinese persons, proceeded against under this section, were shown to have come to the United States from Canada and there was no evidence that they were born or had ever been in China, the court was required to order their return to Canada, instead of China. The proceeding will not be dismissed, but the order must be amended to require a return to Canada. U. S. v. Sisson (1913) 206 Fed. 450, 124 C. C. A. 356.

Chinese person coming to Canada with intent to enter the United States held properly deported to China. Ung Bak Foon v. Prentis (1915) 227 Fed. 406, 142 C. C. A. 102.

Chinese person, coming to the United States through Canada, held properly deported to China; the presumption being and the facts showing that he left China, intending to come to the United States. Id.

Where Chinese embarked from Hong Kong, China, for a Canadian port, remaining in Canada for various lengths of time, their original intention being to enter the United States, which they ultimately did from Canada illegally and surreptitiously, they were properly returned to Hong Kong, and not to Canada. Ex parte Wong You (D. C. 1910) 176 Fed. 933, order reversed Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

Where an alien of any nationality, including a Chinaman, is found in the United States in violation of the immigration laws, and is found to have gained entry by violating those laws and rules duly made, which have the force of law, he entered the country unlawfully, and may be deported on the warrant of the Secretary of Commerce and Labor to the country whence he came. Id.

Under this section a Chinese person entering the country from Mexico, after being temporarily domiciled there, should be deported to China. Ex parte Bun Chew (D. C. 1915) 220 Fed. 387.

Under the Immigration Act, held that Chinese aliens, who sought to enter the United States by way of Canada, might be returned to China. Ex parte Jung Sew (D. C. 1914) 221 Fed. 500.

See, also, note under § 4270, post.

9. —— **Aliens subject to deportation.**—The fact that an alien entering is a resident of the United States and left temporarily is immaterial, and the legality of the last entry is to be determined as though there had been no previous entry, with the right to deport within three years thereafter if such entry is unlawful. U. S. v. Sprung (1910) 187 Fed. 903, 110 C. C. A. 37; Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483 (reversing order U. S. v. Sibray [C. C. 1910] 178 Fed. 144, 150).

Intended concubinage is a ground of exclusion, though not a crime under the laws of the United States, the laws of the particular state, or the laws of the country from which the aliens come. U. S. v. Uhl (1914) 211 Fed. 628, 128 C. C. A. 560.

Deportation because of conviction of a felony in the country from which the alien came after his admission into the United States is not authorized. Ex parte Watchorn (C. C. 1908) 160 Fed. 1014; Ex parte Koerner (C. C. 1909) 176 Fed. 478.

Where a Japanese laborer, excluded by executive order March 14, 1907, came to Canada destined to the United States, or came destined to Canada and thereafter surreptitiously entered the United States, passing through Blaine at night, without presenting himself to the inspecting officers, he was unlawfully in the United States and subject to deportation. Ex parte Hamaguchi (C. C. 1908) 161 Fed. 185.

This section and section 4270, post.

authorize the deportation of any alien who shall enter or be found in the United States in violation of law or the act of which these sections are a part. Id.

Where an alien has once lawfully entered the United States and is an inhabitant of the country, a re-entry after a temporary absence does not make her subject to deportation. Sprung v. Morton (D. C. 1909) 182 Fed. 330.

Where an alien female has once been lawfully admitted into the United States, she is no longer an alien seeking admission, but is a resident within the country, and as such is entitled to the rights, privileges, and benefits properly appertaining and accruing to her under the guaranties of the Constitution and laws of the land. Id.

This section does not authorize deportation of an alien innocently brought into the country through the ship's master's unlawful act in omitting his name from the manifest. U. S. v. Williams (D. C. 1909) 193 Fed. 228.

For three years following an alien's entry, her right to remain is conditional only and subject to termination by proper action on the part of the immigration authorities. Ex parte Kaprielian (D. C. 1910) 188 Fed. 694.

Where relator, an alien of the excluded classes, having been in the United States more than three years, shortly before his arrest as an alien not entitled to enter, while in Niagara Falls, passed from the American to the Canadian side to view the falls, and, after staying there an hour or more, came back to New York, and shortly thereafter was arrested, his return to the United States after going into Canada constituted a re-entry, after which he was subject to deportation. U. S. v. Williams (D. C. 1911) 187 Fed. 470.

Aliens, permitted to enter the United States without inspection because of their misstatements as to their citizenship, are subject to deportation, whether such misstatements are fraudulently or mistakenly made. Ex parte Greaves (D. C. 1915) 222 Fed. 157.

10. —— Warrants.—Aliens held in custody by immigrant inspectors for deportation under the contract labor laws, and by virtue of a warrant from the secretary of the treasury, which does not contain the names of the prisoners, or any names idem sonans, are held without authority, and may be released by habeas corpus. U. S. v. Amor (1895) 68 Fed. 885, 16 C. C. A. 60.

Where the warrant of arrest charged alone a violation of this act, but the findings of the inspector before whom the hearing was had showed that accused arrived in this country in 1906, such proceedings do not authorize a warrant of deportation for violation of Act March 3, 1903, c. 1012, 32 Stat. 1213, then in force, without a hearing on such charge, and the accused taken into custody on a warrant so issued is entitled to discharge on habeas corpus. Davies v. Manolis (1910) 179 Fed. 818, 103 C. C. A. 310.

That a warrant of deportation of an alien was based in part on a fact not charged in the warrant of arrest is not a fatal objection where it appears that the alien was given a fair hearing on the charge. Siniscalchi v. Thomas (1912) 195 Fed. 701, 115 C. C. A. 501.

Where an alien belonging to one of the excluded classes was a native of Spain, but a citizen of Panama, from whence he came to the United States, a warrant for his deportation to Spain was insufficient to warrant his detention on habeas corpus. U. S. v. Ruiz (1913) 203 Fed. 441, 121 C. C. A. 551.

Irregularities in the order of arrest do not affect the status of an alien held upon a warrant of deportation after a fair hearing, nor does the fact that the warrant of deportation is based in part upon a charge not stated in the warrant of arrest. U. S. v. Uhl (1914) 211 Fed. 628, 128 C. C. A. 560.

The warrant of arrest for the deportation of an alien need not have the formality and particularity of an indictment, but must give the alien sufficient information of the acts relied on to bring him within the excluded classes to enable him to offer testimony in refutation at the hearing. Id.

Where, in proceedings for the deportation of a Japanese alien not entitled to enter the United States, the facts developed at the hearing, at which the alien was represented by counsel, from the alien's own testimony, showed that he was unlawfully within the United States and was subject to deportation, it was no objection to an order of deportation that he was charged with "having entered United States without inspection," instead of "being unlawfully within the United States." Ex parte Hamaguchi (C. C. 1908) 161 Fed. 185.

Though a warrant for the arrest of an alien in deportation proceedings is not required to have the formality and particularity of an indictment, a warrant charging that relator was an alien who was a member of the excluded classes, in that he imported a woman for immoral purposes, and that he had been convicted of or had admitted having committed a felony or other crime or misdemeanor involving moral turpitude prior to his entry into the United States, was fatally defective for failure to specify the specific act or acts which it was claimed brought relator within the excluded classes. U. S. v. Sibray (C. C. 1910) 178 Fed. 144, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

Immigration Rule 35, par. "b," providing that a warrant for the arrest of an alien in deportation proceedings must be based upon a full statement of

the facts showing the alien's presence in the United States in violation of law, the warrant must state facts constituting the illegal residence, and not mere conclusions. Id.

A warrant for the deportation of an alien charged to be unlawfully in the country is not insufficient because signed by the Assistant Secretary of Commerce and Labor instead of the Secretary. U. S. v. Redfern (C. C. 1910) 180 Fed. 506.

Neither the immigration act nor the promulgated regulations require that a warrant of arrest in deportation proceedings shall state the alleged grounds on which deportation will be demanded. U. S. v. Williams (D. C. 1910) 175 Fed. 274.

A warrant of arrest of an alien for deportation, charging that he had been induced or solicited to migrate to this country by an offer or promise of employment or in consequence of an oral agreement to perform unskilled labor in this country, was sufficient, especially where unobjected to on the hearing and criticised for the first time after deportation was ordered and collaterally on a writ of habeas corpus. Ex parte George (D. C. 1910) 180 Fed. 785.

A letter written by a United States immigration commissioner in Canada to a commissioner at Boston, requesting the issuance of a warrant for an alien's arrest in Massachusetts, and stating facts tending to a conclusion that when the alien was admitted at Halifax she must have been diseased, was insufficient to show, as a basis for the secretary's warrant for the alien's arrest, an application therefor complying with Immigration Regulations, rule 35, par. 3b. Ex parte Avakian (D. C. 1910) 188 Fed. 688.

Where a warrant to arrest an alien alleged to be illegally in the United States was issued on an application made to the department by the immigration commissioner at Montreal, accompanied by a certificate as to the landing of the alien, and a letter transmitting the application and certificate, the warrant was issued on an application duly made in substantial conformity with the rules of the department, and was valid. Id.

A deportation warrant charged that the alien was a member of the excluded classes, in that he was a contract laborer and had been induced to migrate by an offer or promise of employment under an agreement to perform manual labor in the United States. Held, that the charge was sufficiently set forth in the warrant. Ex parte Michele (D. C. 1911) 188 Fed. 449.

A warrant for the arrest or deportation of an alien need only comply substantially with the law. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

A warrant of arrest and deportation warrant, charging that an alien was found unlawfully in the United States, that he was a member of the excluded classes, and had imported a girl for the purpose of prostitution, etc., held sufficient. Id.

A deportation warrant, failing to name the country to which the alien was to be deported, held fatally defective. Ex parte Yabucanin (D. C. 1912) 199 Fed. 365.

Where, in proceedings to deport petitioners as aliens unlawfully within the United States, it appeared from their testimony on the deportation hearing that they knew with what they were charged, it was immaterial that the warrant of arrest was defective in not alleging the time and place of the alleged offense and the prostitute alleged to have been assisted and protected or promised protection from arrest, which constituted the offense. Ex parte Young (D. C. 1914) 211 Fed. 370.

A warrant for the deportation of an alien cannot be sustained on a ground concerning which he has been accorded no hearing. Ex parte Wong Tuey Hing (D. C. 1914) 213 Fed. 112.

Where a warrant in deportation proceedings recited that it canceled a prior warrant, the alien was not bound to search the record on which such prior warrant was issued to ascertain evidence to be used against him in the present proceeding. Ex parte Keisuki Sata (D. C. 1914) 215 Fed. 173.

The detention of an alien under a warrant of deportation is illegal, unless the warrant provides for deportation to the port required by law. U. S. v. Sisson (D. C. 1914) 220 Fed. 538.

Warrant for deportation of a Chinese person held properly issued. U. S. ex rel Haum Pon v. Sisson (D. C. 1915) 222 Fed. 693.

Under a warrant charging that Chinese persons were in and had entered the United States in violation of this and the following section, Chinese laborers may be deported. Ex parte Lee Ying (D. C. 1915) 225 Fed. 335.

11. —— Three-year limitation period. —The three-year period within which an alien may be deported begins to run from the date of his first entrance into the country; and a temporary absence, with the intention to return, cannot interfere with his status as a resident, nor give the immigration authorities the right to deport him. Redfern v. Halpert (1911) 186 Fed. 150, 108 C. C. A. 262.

Petitioner, a Japanese alien, was convicted of importing an alien prostitute into the United States, sentenced to imprisonment, and on investigation by the acting Secretary of Commerce and Labor was found to belong to the excluded class and ordered deported. Held that, since domiciliary rights could not grow for the benefit of petitioner during the period of his incarceration, the deportation writ was in abeyance during such

period, and on its expiration was subject to immediate execution, though petitioner then had been in the United States more than three years. Matsumura v. Higgins (1911) 187 Fed. 601, 109 C. C. A. 431; Suzuki v. Same (1911) 187 Fed. 603, 109 C. C. A. 433.

Where an alien was arrested in deportation proceedings within three years after his entry, but was not offered to the steamship company for deportation within that time, the latter was not bound to deport him at its own expense. International Mercantile Marine Co. v. U. S. (1912) 192 Fed. 887, 113 C. C. A. 365, reversing judgment U. S. v. International Mercantile Marine Co. (C. C. 1911) 186 Fed. 669.

This section applies to an alien entering the United States, notwithstanding the fact that he has resided in this country for a number of years, and left for a temporary purpose, and the power to deport exists for three years after such last entry. Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493, reversing judgment Lewis v. Frick (C. C. 1911) 189 Fed. 146.

Where an alien who has been a resident of the United States leaves it, even for a temporary purpose, and returns, the power of the Secretary to deport him exists for three years after his last entry. Siniscalchi v. Thomas (1912) 195 Fed. 701, 115 C. C. A. 501.

Where an alien was excluded for attempting to bring in a woman for an immoral purpose, and thereafter returned to the United States and was admitted, and subsequently made a business trip abroad, he could be deported within three years from the time of his return from such trip. U. S. v. Uhl (1914) 211 Fed. 628, 128 C. C. A. 560.

An alien does not cease to be an alien by declaring his intention to become a citizen and taking out his "first papers," but remains such until naturalization is complete. Id.

Where an alien was not tendered to the steamship line by which he entered the United States for deportation within the three-year period, the line was not bound to deport him without expense to the United States, though the reason why he was not deported within the time was that he was serving an indeterminate sentence in the state reformatory. U. S. v. Oceanic Steam Navigation Co. (1914) 211 Fed. 967, 128 C. C. A. 465.

A Chinese prostitute may be deported, though proceedings against her were not begun within three years after her entry. Choy Gum v. Backus (1915) 223 Fed. 487, 139 C. C. A. 35.

Deportation need not be completed within the three years, the government having the whole of the last day of the three years in which to make the arrest, and prescription being interrupted by the arrest, the government is entitled to a reasonable time in which to carry out the sentence of deportation. U. S. v. Redfern (C. C. 1910) 180 Fed. 506.

The three-year period within which an alien unlawfully in the country may be deported governs deportation of an alien who landed March 3, 1907. Id.

The government is entitled to the whole of the last day of the three years in which to make the arrest, prescription being interrupted by the arrest, and to a reasonable time in which to carry out the sentence of deportation. U. S. v. International Mercantile Marine Co. (C. C. 1911) 186 Fed. 669, judgment reversed International Mercantile Marine Co. v. U. S. (1912) 192 Fed. 887, 113 C. C. A. 365.

Petitioner, a Canadian by birth and citizenship, entered the United States in 1901 and was an inmate of houses of prostitution in various cities until 1905, when she went to Philadelphia to care for an invalid sister. She remained there two years, when she resumed life as a prostitute, and in the fall of 1907, returned to Canada, where she stayed four days, when she returned to the United States and continued her misconduct until she was arrested. Held, that the three-year period within which she was subject to deportation dated from her return from Canada, and that she was therefore unlawfully within the country. U. S. v. Hook (D. C. 1908) 166 Fed. 1007.

Under this section and section 4270, post, providing that the Secretary of Commerce and Labor shall deport aliens found in the United States "in violation of this act" within three years after landing, a "deportation" for entering in violation of any prior law can only be made within two years, which means the actual deportation, and not merely the commencement of proceedings. Botis v. Davies (D. C. 1909) 173 Fed. 996.

12. —— Hearing.—Executive officers of the United States government were not invested with the power arbitrarily to deport an alien who has entered the country and has become subject in all respects to its jurisdiction and a part of its population, without giving him an opportunity to be heard upon the question involving his right to be and remain in the United States. Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 614, 189 U. S. 86, 47 L. Ed. 721.

This section does not confer authority on the Secretary of the Treasury to arbitrarily order the deportation of an alien who has entered this country and become a part of its population, without giving such alien an opportunity to be heard on the questions involving his or her right to be and remain in the United States in such manner as is consistent with the principles that inhere in due process of law. Hopkins v. Fachant (1904) 130 Fed. 839, 65 C. C. A. 1.

Where an alien had deserted from the crew of a vessel from which he was brought into the United States, and had been at large in the country for a month before he developed insanity, when he was arrested and ordered deported by the Secretary of Commerce and Labor, the Secretary's decision was not conclusive on the alien; the Secretary, as an executive officer, being without power within the year limited by statute to order the deportation of an alien without giving him an opportunity to be heard on the questions involving his right to remain in the United States. Frank Waterhouse & Co. v. U. S. (1908) 159 Fed. 876, 87 C. C. A. 56.

Where certain alien prostitutes on being arrested in deportation proceedings were each granted a hearing on the question of deportation, and there voluntarily testified, and each admitted facts essential to authorize an order of deportation, an objection that they were not accorded a fair trial was untenable. U. S. v. Williams (D. C. 1910) 183 Fed. 904.

The requisites of a fair hearing in proceedings for deportation of an alien held to include notice of hearing, opportunity to be heard and to examine witnesses and to produce refuting evidence, and a decision based on and supported by the evidence introduced. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

Deportation proceedings held not to afford an alien a fair hearing, where the inspector chooses or controls the witnesses or prevents the defendant's witnesses from appearing or testifying. Id.

Where the inspector exercised such control over important witnesses that they would not testify without his request, held that his refusal to request their testimony prevented defendant from having a fair hearing. Id.

The act of the inspector in fixing the time when an alien might inspect the warrant or have counsel, so late as to deprive him of his rights in respect thereto, held an abuse of discretion such as rendered unfair the hearing in deportation proceedings. Id.

A hearing, wherein the inspector's finding and recommendation of deportation was based on hearsay and rumor regarding which there was no evidence, and which defendant had no notice of and opportunity to refute, held not a fair hearing. Id.

Immigration inspector held to have abused his discretion and denied an alien arrested for deportation due process of law in connection with his arrest on a telegraphic application and the subsequent hearing. Jouras v. Allen (1915) 222 Fed. 756, 138 C. C. A. 210.

Hearings in deportation proceedings of which the alien had no notice and was given no opportunity to be present, at which witnesses were sworn and examined, were improper. U. S. v. Sibray (C. C. 1910) 178 Fed. 150, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

Evidence held to show that aliens detained pending proceedings for their deportation by the influence of the inspector who was hearing their case were persuaded and intimidated from exercising their right to be represented by counsel, under the rules prescribed by the Secretary of Commerce and Labor, providing that in such cases the alien arrested shall be given a hearing before the Commissioner of Immigration or an immigration inspector, and that in such stage of the hearing as the commissioner or inspector shall deem proper the alien shall be apprised that he may thereafter be represented by counsel, who, if selected, shall be permitted to be present during the further conduct of the hearing, so that the proceedings were fatally irregular and the order of the Secretary of Commerce and Labor deporting such aliens based upon the proceedings was invalid, and the detention of the aliens thereunder illegal. U. S. v. Williams (D. C. 1911) 185 Fed. 598.

Where an alien in deportation proceedings did not deny her alienage, nor that at the time of her arrest she was engaged in immoral business, and it appeared that she was represented by counsel on a hearing before the Secretary, the deportation was pursuant to due process of law, though she was not permitted to consult an attorney before she was first examined by the immigration officers. Sire v. Berkshire (D. C. 1911) 185 Fed. 967; Ladaux v. Same, Id. 971.

Proceedings for the deportation of an alien charged with violation of the immigration laws are not invalid, because his counsel is not given an opportunity to see the recommendations forwarded by the officer in charge with the record to the Secretary of Commerce and Labor. Ex parte Garcia (D. C. 1913) 205 Fed. 53.

Where the most important evidence to establish that an alien was afflicted with a contagious disease was a letter written by a hospital surgeon, a hearing at which the alien was not confronted with the letter or given an opportunity to controvert its statements, was not a fair one sufficient to support a deportation order. Ex parte Keisuki Sata (D. C. 1914) 215 Fed. 173.

An alien can only be deported on grounds developed in the course of the proceeding other than those specified in the warrant, after he has been advised of the new charge and given an opportunity to meet it. Id.

In deportation proceeding against Chinese person, held, that he was not accorded a fair and impartial hearing,

where he was not allowed counsel until after he had been examined, and where the warrant charged a violation of this section, though no such violation was shown. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

Administrative hearing for deportation need not be conducted according to procedure and rules of evidence of courts, if there is an honest effort to establish the truth by fair and reasonable methods. Ex parte Chin Loy You (D. C. 1915) 223 Fed. 833.

Evidence held to show that a Chinese was not given a fair hearing before the Secretary of Labor before he was ordered deported as an alien unlawfully within the country. Id.

13. —— Evidence. — Original examination of a Chinese person, when arrested in deportation proceedings, held a part of the hearing contemplated; and hence his statements at that time may be considered in determining the truthfulness of a subsequent conflicting statement as to the place of his birth. Prentis v. Seu Leung (1913) 203 Fed. 25, 121 C. C. A. 389.

A departmental warrant of deportation cannot be rightfully issued without some evidence to support it; but, if there is a proper hearing and any evidence to sustain the charge, the decision of the Secretary of Labor as to the weight of the proof must be accepted by the courts as conclusive. U. S. v. Uhl (1914) 211 Fed. 628, 128 C. C. A. 560.

Administrative findings and orders of the immigration officers, when judicial in character, are void if not supported by substantial evidence, or if contrary to indisputable evidence. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

An alien detained for deportation, who admits that his passage into the country was paid for by and that he was assisted by others, must show affirmatively and satisfactorily that he does not belong to one of the excluded classes of aliens. U. S. v. Williams (D. C. 1909) 193 Fed. 228.

Where, in a habeas corpus proceeding to determine the legality of an alien's detention, it did not appear that a letter written by the commissioner requesting petitioner's arrest was ever transmitted to the department, or was before the department when the warrant of arrest was issued, it could not have constituted evidence on which the warrant was issued which the immigration officers were required to disclose to relator or her counsel during the hearing, by immigration rule 35e. Ex parte Avakian (D. C. 1910) 188 Fed. 688.

Evidence on which a warrant of arrest in deportation proceedings is issued may not be considered as evidence on subsequent hearings, unless it is called to the alien's attention, and he has been given an opportunity to meet it. Ex parte Keisuki Sata (D. C. 1914) 215 Fed. 173.

Evidence used to obtain a warrant against an alien in deportation proceedings held admissible at the hearing, under Immigration Rule 22, subd. 4. Ex parte Hidekuni Iwata (D. C. 1915) 219 Fed. 610.

In determining sufficiency of evidence to warrant deportation, evidence used as basis of warrant of arrest held to be considered. In re Psimoules (D. C. 1915) 222 Fed. 118.

14. —— Defenses.—Aliens of the excluded class are not protected from deportation by the executive officers of the government, because they have effected an entry into the United States, in view of the power given the Secretary, if satisfied that an immigrant has been allowed to land contrary to law, to cause his deportation at any time within a year after the landing. Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 614, 189 U. S. 86, 47 L. Ed. 721.

The deportation of an alien unlawfully in this country is not illegal merely because the country of which he is a subject desired and requested his return thereto. Siniscalchi v. Thomas (1912) 195 Fed. 701, 115 C. C. A. 501.

Where an alien arrived by water at the port of New York, and was subject to deportation, as belonging to one of the classes of aliens whose entry is prohibited, it was no defense to his deportation that he had three years before arrived in the United States by water, and had remained for four months, during which he bought a farm, took out his first naturalization papers, and since his second arrival he had contracted marriage in the United States. In re Kleibs (C. C. 1904) 128 Fed. 656.

A passport from a foreign government to its citizen is merely written permission from the government to travel, and does not affect his status in the United States, in the absence of treaty provision, and hence is no defense to proceedings to deport him. U. S. v. Redfern (C. C. 1910) 180 Fed. 506.

Since the issue on which the power to deport aliens depends may itself be determined by the executive officers of the government as an incident to the exercise of the power, it is not material whether the alien is taken at the borders of the country or within it: the right of a citizen to enter the country being entitled to the same protection as his right not to be deported. U. S. v. Too Toy (D. C. 1911) 185 Fed. 838.

That Chinese aliens were not permitted, after crossing the boundary line, to return to Canada, to which they first came after leaving China, held no defense against deportation to China. Ex parte Jung Sew (D. C. 1914) 221 Fed. 500.

15. —— Res judicata. — The second hearing before a board of special in-

quiry, as a result of which a deportation of certain British aliens was ordered, could be directed by the Secretary, although the first decision of the board of inquiry, at the time of landing, was unanimously in favor of the immigrants, and such decision is, by the express provisions of section 4274, post, declared to be final. Pearson v. Williams (1906) 26 Sup. Ct. 608, 609, 202 U. S. 281, 50 L. Ed. 1029, affirming judgment (1905) 136 Fed. 734, 69 C. C. A. 386.

A decision of a board of inquiry that an alien was not a contract laborer and was entitled to land was not res adjudicata of such question, and did not prevent the secretary from instituting new proceedings within a year thereafter for a retrial of such question. Pearson v. Williams (1905) 136 Fed. 734, 69 C. C. A. 386, judgment affirmed (1906) 26 Sup. Ct. 608, 202 U. S. 281, 50 L. Ed. 1029.

An order discharging an alien from detention under a deportation warrant, because it provided for his return to the wrong country, was not conclusive against the government's right to institute further proceedings to return the alien to the country from whence he came. U. S. v. Ruiz (1913) 203 Fed. 441, 121 C. C. A. 551.

A judgment of acquittal in a criminal prosecution of an alien for falsely claiming citizenship, entered on a directed verdict, is not a bar to proceedings for his deportation for having obtained admission to the United States in violation of law by falsely representing himself to be a citizen. Williams v. U. S. (1911) 186 Fed. 479, 108 C. C. A. 457.

The decision of the secretary finding that an immigrant arrested for deportation is not subject to deportation does not render that question res judicata, nor prevent a second arrest of the alien to try the same question again. Ex parte Stancampiano (C. C. 1908) 161 Fed. 164.

An order of deportation under the immigration law is not conclusive, so as to preclude inquiry by a court into its validity on habeas corpus proceedings, where the petitioner was denied the right of appeal given him by the law; and he cannot be deprived of such right on the ground that the case has been heard by the appellate court, where it was taken there on an appeal by a dissenting member of the board of inquiry from a decision in petitioner's favor, and was heard in his absence, and without his knowledge. In re Gottfried (D. C. 1898) 89 Fed. 9.

Since immigration officials are administrative officers and their decisions are those of the executive department of government, an order discharging an alien in deportation proceedings cannot operate as res judicata in a subsequent proceeding against the same alien. Sire v. Berkshire (D. C. 1911) 185 Fed. 967; Ladaux v. Same, Id. 971.

16. Review by courts.—See, also, note under § 4274, post, dealing particularly with admission and exclusion of alien immigrants.

The court will not exercise its option to notice an error, notwithstanding the failure of the briefs to comply with rule 24 of the eighth circuit, in habeas corpus by an alien ordered deported, where there is no effort to comply with the rule, no evidence of the ground for deportation alleged, and the alien is unrepresented. Whitfield v. Krawza (1914) 214 Fed. 83, 130 C. C. A. 523.

A petition for habeas corpus to obtain petitioner's release from detention under a deportation warrant, because of illegal or insufficient evidence, should make the evidence a part of the petition. Ex parte Yabucanin (D. C. 1912) 199 Fed. 365.

17. —— Fair hearing and dependency of right of review thereon.—Federal courts will not intervene by habeas corpus to prevent the deportation by the executive officers of the government of an alien found to be one of the excluded class, where such alien had notice, though not a formal one, of the investigation instituted for the purpose of ascertaining whether she was legally in the United States, and was not denied an opportunity to be heard, although she pleads a want of knowledge of the English language, preventing her from understanding the nature and import of the questions propounded to her, and that the investigation made was a "pretended" one, and that she did not at the time know that it had reference to her deportation. Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 615, 189 U. S. 86, 47 L. Ed. 721.

Where a Chinese person, defendant in a deportation proceeding, alleges citizenship, a determination of such question by the Secretary is conclusive, subject only to the jurisdiction of the federal courts to review on habeas corpus whether the person had been accorded a proper hearing. Haw Moy v. North (1910) 183 Fed. 89, 105 C. C. A. 381 (writ of certiorari denied [1911] 32 Sup. Ct. 522, 223 U. S. 717, 56 L. Ed. 628); Hoo Choy v. Same (1910) 183 Fed. 92, 105 C. C. A. 384 (writ of certiorari denied [1911] 32 Sup. Ct. 522, 223 U. S. 718, 56 L. Ed. 628).

While the record of proceedings before the immigration officers must show a regular procedure in accordance with the requirements of the law to justify an order for the deportation of an immigrant when attacked in habeas corpus proceedings, it is only a substantial conformity of the procedure to such requirements that is demanded, and a technical precision in the exemplification of the record is not to be expected. U. S. v. Rodgers (1911) 191 Fed. 970, 112 C. C. A. 382.

The hearing in the case of an alien woman arrested for deportation, who was led to believe that it was unneces-

sary for her to employ counsel, held not full and fair, as intended by the statute and rules of the department. Roux v. Commissioner of Immigration at Port of San Francisco (1913) 203 Fed. 413, 121 C. C. A. 523.

An alien, about to be deported through the arbitrary action of an immigration inspector without a fair hearing, is entitled to relief by habeas corpus. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

Deportation proceedings and orders held not reviewable, unless it appears that the proceedings were manifestly unfair, that there was no fair investigation, or that there was a manifest abuse of the discretion of the immigration officers. Ung Bak Foon v. Prentis (1915) 227 Fed. 406, 142 C. C. A. 102.

Basing order of deportation on alien's admissions on preliminary investigation, when not represented by counsel, though repudiated on subsequent hearing, held not the denial of a fair hearing. Id.

Alien ordered deported held properly discharged on habeas corpus, but order should be conditional and effective only if fair hearing is not given within reasonable time. Billings v. Sitner (1915) 228 Fed. 315. 142 C. C. A. 607.

The court on habeas corpus in deportation proceedings can interfere only where the immigrant has been denied a right accorded to him by the statute itself, or when it appears as matter of law that the relator is not an alien; but, if it appears that he is an alien and has been accorded the right to call witnesses, to be represented by counsel, to have a hearing before a designated tribunal, and a chance to present his side, his exclusion cannot be set aside. U. S. ex rel. Glavas v. Williams (C. C. 1911) 190 Fed. 686.

The immigration officials have exclusive power to determine whether an alien shall be deported as liable to become a public charge, and, so long as the procedure prescribed by such acts and the rules established for their administration are substantially followed, the courts cannot interfere. U. S. v. Williams (D. C. 1911) 186 Fed. 354.

On habeas corpus in deportation proceedings, the first inquiry is, has a fair hearing been accorded petitioner by the executive officers, and, if so, all further inquiry is foreclosed. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

The trial of the right of an alien charged with violation of the immigration laws to remain in this country on ex parte affidavits does not amount to a denial of a fair hearing, nor does the fact that affidavits were taken by the government without notice to the accused or his counsel. Ex parte Garcia (D. C. 1913) 206 Fed. 53.

While courts are not authorized to interfere with a deportation order if there is any evidence to support it, yet if the alien has not been accorded a fair hearing, it is the court's duty to intervene. Ex parte Keisuki Sata (D. C. 1914) 215 Fed. 173.

A deportation order held not reviewable on habeas corpus, where the proceeding followed the rules of the Department of Labor, and a full opportunity was given the alien to show cause why he should not be deported. Ex parte Hidekuni Iwata (D. C. 1915) 219 Fed. 610.

18. —— Scope of review in general. —After an order of deportation has been entered in deportation proceedings against an alleged undesirable alien, the only issue reviewable on a writ of habeas corpus is whether the alien had been given a fair hearing by executive officers on an order to show cause why she should not be deported, and it was therefore error to refer the proceeding to a commissioner to take testimony on a new issue as to the alien's alleged marriage and whether her alleged husband was a citizen. De Bruler v. Gallo (1911) 184 Fed. 566, 106 C. C. A. 546.

Proceedings for deportation of aliens are reviewable by the courts only so far as to determine whether the department officials acted within the scope of their authority and the fairness of their proceedings. Sibray v. U. S. (1915) 227 Fed. 1, 141 C. C. A. 555.

While Congress has conferred on executive officials of the United States the exclusive right to determine questions pertaining to the admission and deportation of aliens, the courts are not thereby deprived of jurisdiction to inquire into the cause of detention of persons held in deportation proceedings who claim not to be amenable to the immigration laws, to determine whether they are lawfully within the country and whether they belong to the inhibited classes. Sprung v. Morton (D. C. 1909) 182 Fed. 330.

On habeas corpus to determine the legality of the detention of an alien in deportation proceedings, the only question for review is the legality of the alien's detention on the return day of the writ, and matters subsequent thereto are not proper in a traverse to the return. Ex parte Avakian (D. C. 1910) 188 Fed. 688.

In habeas corpus proceedings brought by an alien held for deportation, the court cannot consider the sufficiency of the evidence on which he is held, but may consider its competency, and whether he was given a fair and impartial hearing. Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

In habeas corpus proceedings to review a judgment directing the deportation of certain aliens, the court is limited to ascertaining whether the petitioners were denied a hearing and whether the facts found constituted a statutory ground for exclusion; the immigration officers being unauthorized to exercise a mere arbitrary power,

free from judicial review. In re Gregory (D. C. 1914) 210 Fed. 680.

The propriety of deporting aliens who had long resided in the United States, because of misstatements upon their return after an absence abroad, held not open to consideration on habeas corpus. Ex parte Greaves (D. C. 1915) 222 Fed. 157.

The courts have the right to scrutinize freely the fairness of administrative proceedings for deportation. Ex parte Chin Loy You (D. C. 1915) 223 Fed. 833.

19. —— Jurisdictional questions.—Habeas corpus affords an efficient remedy against the action of immigration officers, where they exceed their power or authority, although their decisions on questions of fact are final, and not reviewable. United States v. Tsuji Suekichi (1912) 199 Fed. 750, 118 C. C. A. 188.

The determination of the immigration authorities on all questions of fact affecting the right of an alien to enter or remain in the United States is final, even if made on incompetent or inconclusive evidence; but, when the proceedings before them show indisputably that they are acting without jurisdiction, relief may be had by writ of habeas corpus. Ex parte Watchorn (C. C. 1908) 160 Fed. 1014.

The question of the time of entry of an alien arrested and held for deportation involves the jurisdiction of the officers assuming to exercise such authority, and may be inquired into on habeas corpus. In re Lea (D. C. 1903) 126 Fed. 231, 234.

Whether a person held by immigration officers for deportation is within a class amenable to a particular jurisdiction may be reviewed by the courts on habeas corpus. Sprung v. Morton (D. C. 1909) 182 Fed. 330.

In deportation proceeding, fairly conducted, finding of secretary, if sustained by evidence, held conclusive; but the court, on habeas corpus, may determine whether there was evidence giving the secretary jurisdiction. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

20. —— Weight of evidence.—Whether the weight of conflicting evidence sustains the charges against an alien is exclusively for the immigration officers, and not reviewably by the courts. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

The evidence on which the immigration officer acted cannot be re-examined by the courts. In re Way Tai (C. C. 1899) 96 Fed. 484.

21. —— Findings of fact.—An alien was arrested September 19, 1909, and accorded a hearing before the immigration officers on the next day, at which she was informed of her right to be represented by counsel; but, waiving such right, she was sworn and examined at length. She was again examined by the officers a few days later, when she was represented by counsel, who also examined three other witnesses before the officers, and she was again examined before one of the immigration inspectors on November 23, 1909. Held, that she was accorded a fair trial before the department, which precluded a review of their conclusions of fact, reached on conflicting evidence, by the courts. De Bruler v. Gallo (1911) 184 Fed. 566, 106 C. C. A. 546.

Findings and order of deportation of an alien as having entered the United States in violation of this section held not reviewable by the courts. Prentis v. Stathakos (1911) 192 Fed. 469, 112 C. C. A. 607.

The courts cannot review an order of the department for the deportation of an alien if a hearing was given, and there was any evidence to sustain the charge upon which the order was based. Frick v. Lewis (1912) 195 Fed. 693, 115 C. C. A. 493, reversing judgment Lewis v. Frick (C. C. 1911) 189 Fed. 146.

Where immigrants have been prevented from entering the country on the ground that they have come contrary to the provisions of the contract labor law, the finding as to the facts by the superintendent of immigration, appointed by the secretary when confirmed by the collector, acting pursuant to the regulations of the secretary of the treasury, is a finding of a tribunal duly constituted by law, and is not subject to review by the circuit court. In re Vito Rullo (C. C. 1890) 43 Fed. 62.

In deportation proceedings, findings of fact by the executive department after a fair hearing are binding on the courts as to questions of fact. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

Where aliens were represented by counsel in deportation proceedings, and afforded an opportunity to present all the facts bearing on their qualifications to enter the United States, the court, on habeas corpus, could not re-examine the issues, on the theory that the conclusions of the immigration officers, based on the testimony, are erroneous. Ex parte Moola Singh (D. C. 1913) 207 Fed. 780.

In deportation proceedings, credibility of witnesses and other questions of fact held for the immigration authorities, and the only question on habeas corpus is whether such officers exceeded their authority. Ex parte Greaves (D. C. 1915) 222 Fed. 157.

22. —— Decisions of the secretary.—The findings of the secretary, in proceedings for the deportation of an alien, that the latter imported and brought into the United States a woman for an immoral purpose, is binding on the courts, if there was evidence to

support it and the hearing was fairly conducted. Lewis v. Frick (1914) 34 Sup. Ct. 488, 233 U. S. 291, 58 L. Ed. 967.

The action of the secretary in ordering the deportation of immigrants who have arrived within a year, on the ground that they were landed in violation of the contract labor laws could not be reviewed or questioned in the courts. U. S. v. Arteago (1895) 68 Fed. 883, 16 C. C. A. 58.

The decision of the Secretary in proceedings to deport an alien is not final; but the court, on habeas corpus, may inquire into the whole case. Redfern v. Halpert (1911) 186 Fed. 150, 108 C. C. A. 262.

A finding by the secretary that an alien has entered the United States in violation of law, and an order of deportation based thereon within three years after the alien's entry, are not subject to judicial review by habeas corpus or otherwise, except where a fair hearing has been denied. Prentis v. Di Giacomo (1911) 192 Fed. 467, 112 C. C. A. 605.

The determination of the secretary as to whether or not the immigrant is a prohibited person is conclusive, and will not be reviewed by the courts. In re Howard (C. C. 1894) 63 Fed. 263.

In deportation proceeding fairly conducted, finding of secretary if sustained by evidence, held conclusive; but the court on habeas corpus may determine whether there was evidence giving the secretary jurisdiction. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

The courts cannot review the weight or admissibility of the evidence on the question whether an alien was unlawfully in the country, and a decision to that effect by the Department supported by any evidence, is conclusive. Ex parte Chin Him (D. C. 1915) 227 Fed. 131.

23. —— **Questions of law.**—Whether the executive officers of the government, in deporting an alien emigrant, are proceeding according to law. is a judicial question, which may be inquired into on habeas corpus. Lavin v. Le Fevre (1903) 125 Fed. 693, 60 C. C. A. 425.

Mistakes of law committed by executive officers are subject to re-examination by the courts. De Bruler v. Gallo (1911) 184 Fed. 566, 106 C. C. A. 546.

A deportation order, though having been entered after a fair trial, may nevertheless be void, and subject to a vacation on habeas corpus, if it is not supported by any evidence, or if it is the result of errors of law. U. S. v. Williams (1912) 200 Fed. 538, 118 C. C. A. 632.

Whether a finding, order, or report of an immigration officer that an alien is guilty of certain charges is supported by any substantial evidence is a question of law, reviewable by the courts. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

In proceedings to deport alien immigrants, while the courts are bound by the findings of the executive department, they cannot refuse relief, where on the admitted facts it appears as a matter of law that the person sought to be deported is not within the inhibition of the statute. Ex parte Koerner (C. C. 1909) 176 Fed. 478.

While habeas corpus cannot perform the function of a writ of error or appeal, federal courts may thereon grant relief to a party aggrieved by action of officials of the department directing the deportation of an alien, when the evidence before such official and on which he acts is uncontradicted and establishes, as a matter of law, that the case is not within the statute. Ex parte Petterson (D. C. 1908) 166 Fed. 536.

There is no provision making the decision of the immigration officers conclusive as to the right of an alien domiciled in this country to remain, and where such decision involves a question of law, as well as of fact, it will be reviewed by the courts. Botis v. Davies (D. C. 1909) 173 Fed. 996.

24. —— **Presumptions on review.**—Where an appeal from a deportation order was heard and decided by the acting secretary, it would be presumed, the contrary not appearing, that he was at the time lawfully exercising the secretary's powers. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

Where the evidence taken at a hearing in deportation proceedings is not certified, filed, and attached to a petition for habeas corpus, the findings of the secretary will be presumed correct. Ex parte Yabucanin (D. C. 1912) 199 Fed. 365.

25. —— **Right to discharge on habeas corpus.**—An alien detained for deportation for a reason not within the Immigration Act is entitled to release on habeas corpus. Gegiow v. Uhl (1915) 36 Sup. Ct. 2, 239 U. S. 3, 60 L. Ed. 114.

A court is not precluded from discharging an alien held for deportation on a writ of habeas corpus because of the pendency of an appeal from order of deportation before the secretary, where on the admitted facts there is no warrant of law for his deportation and he is unlawfully restrained of his liberty. Ex parte Koerner (C. C. 1909) 176 Fed. 478.

An alien who is subject to deportation, and who has been taken into custody for that purpose, cannot be discharged by a court on a writ of habeas corpus, notwithstanding any illegality in the proceedings. In re Lea (D. C. 1903) 126 Fed. 231.

Where neither the application for the warrant of arrest, nor any of the papers on which it was issued, were

shown to an alien or her counsel during the hearing, and before the passing of an order for deportation, as required by immigration rule 35e, she was entitled to a writ of habeas corpus to determine the validity of her detention. Ex parte Avakian (D. C. 1910) 188 Fed. 688.

An alien in deportation proceedings held entitled to avail himself of habeas corpus, where denied due process of law. U. S. v. Martin (D. C. 1912) 193 Fed. 795.

Where petitioner was subject to deportation and had been legally sentenced, he would not be discharged on habeas corpus because the warrant was defective, until the government had been afforded an opportunity to prepare a valid warrant. Ex parte Yabucanin (D. C. 1912) 199 Fed. 365.

Irregularities in an order for the arrest of an alien held on warrant of deportation after a fair trial do not entitle him to discharge on habeas corpus. U. S. v. Williams (D. C. 1912) 200 Fed. 538.

Application by an alien, ordered deported, for habeas corpus, because his counsel was not allowed to argue before the board, held to be denied, where the facts were not disputed. In re Madeiros (D. C. 1914) 225 Fed. 90.

Where an alien is unlawfully in the country, he cannot procure discharge on habeas corpus, because the original order of his arrest was unauthorized. Ex parte Chin Him (D. C. 1915) 227 Fed. 131.

26. Detention of alien pending deportation.—Where a writ of habeas corpus was sued out by an alien retained by the officers of a steamship pending deportation under an order of the Dominion of Canada while the ship was temporarily in New York on her return voyage to the country from which the alien embarked, the cost of the alien's detention under the writ must be paid by the steamship company before the alien can be redelivered to it on dismissal of the writ, though the costs may be recovered by the steamship company from the petitioner. U. S. v. Fielding (D. C. 1909) 175 Fed. 290.

Detention of alien, ordered deported to Germany, to which country there is no regular passenger service, held not illegal. U. S. v. Howe (D. C. 1915) 222 Fed. 96.

27. Bond for release pending investigation.—A proceeding for the deportation of an alien is "pending," within the law, until the alien is actually deported. Becharias v. U. S. (1913) 208 Fed. 143, 125 C. C. A. 359.

Where the court tries de novo the question whether an alien is guilty of the charges against him, it may admit him to bail. Whitfield v. Hanges (1915) 222 Fed. 745, 138 C. C. A. 199, modifying order Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

Where, after a family of immigrants had been excluded by the government for a contagious disease, the steamship company agreed to become responsible for them on proper security being furnished, in accordance with a modified order by the government, but thereafter deported them without giving a reasonable time to furnish such security, the steamship company could not defend an action for damages so caused, on the ground that the deportation was an act of the law. Kahaner v. International Nav. Co. (C. C. 1902) 117 Fed. 979.

Where alien ordered deported is discharged on habeas corpus, the court may provide for bail pending an appeal, but not where the writ is dismissed. U. S. v. Sisson (D. C. 1914) 220 Fed. 538.

In a suit for breach of one of several conditions of a bond given by persons to procure custody of a feeble-minded immigrant, who was awaiting deportation, the single forfeiture provided for will be considered as a penalty, and the question of damage should be submitted to the jury; equitable defenses being admissible. U. S. v. Rubin (D. C. 1915) 227 Fed. 938.

A bond given by friends of a feeble-minded immigrant who could not then be deported held not an indemnity bond to secure his entrance into the country, but one for liquidated damages to enable such persons to have custody over him during the time he was awaiting deportation. Id.

28. Cost of deportation.—The term "transportation" should be given its ordinary meaning, viz., carriage from one place to another, and that the phrase "cost of inland transportation" therefore only included the cost of carrying the alien from the inland place where he was found to the port of deportation, and that the government was therefore not entitled to recover under such section from the steamship company bringing the deported alien into the United States any part of the traveling expenses of an officer sent to bring the alien to the port of deportation. U. S. v. Hamburg-American Line (1908) 159 Fed. 104, 86 C. C. A. 294.

The provision of the immigration act declaring that an alien woman who subsequent to landing commits a specified offense shall be deported is a proper exercise of police power; but the provision that the cost of her deportation shall be imposed on another person who had nothing to do with the commission of such offense is not an exercise of such power. U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 185 Fed. 158.

Cited without definite application, Gonzales v. Williams (1904) 24 Sup. Ct. 177, 192 U. S. 1, 48 L. Ed. 317; Taylor v. U. S. (1907) 152 Fed. 1, 81

C. C. A. 197 (reversed [1907] 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130); International Mercantile Marine Co. v. Same (1912) 192 Fed. 887, 113 C. C. A. 365; Ex parte Li Dick (C. C. 1910) 176 Fed. 998.

§ 4270. (Act Feb. 20, 1907, c. 1134, § 21.) Deportation of alien found in United States in violation of law, etc.; failure or refusal of masters, agents, owners, or consignees of vessels to comply with order for deportation punishable; aliens requiring personal care and attendance.

In case the Secretary of [Commerce and] Labor shall be satisfied that an alien has been found in the United States in violation of this Act, or that an alien is subject to deportation under the provisions of this Act or of any law of the United States, he shall cause such alien within the period of three years after landing or entry therein to be taken into custody and returned to the country whence he came, as provided by section twenty of this Act, and a failure or refusal on the part of the masters, agents, owners, or consignees of vessels to comply with the order of the Secretary of [Commerce and] Labor to take on board, guard safely, and return to the country whence he came any alien ordered to be deported under the provisions of this Act shall be punished by the imposition of the penalties prescribed in section nineteen of this Act: Provided, That when in the opinion of the Secretary of [Commerce and] Labor the mental or physical condition of such alien is such as to require personal care and attendance, he may employ a suitable person for that purpose, who shall accompany such alien to his or her final destination, and the expense incident to such service shall be defrayed in like manner. (34 Stat. 905.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Section 19 of this act, mentioned in this section, is set forth ante, § 4268.

Provisions similar to some extent to those of this section which precede the proviso at the end thereof were contained in Act March 3, 1903, c. 1012, § 21, 32 Stat. 1218, repealed by section 43 of this act, post, § 4289.

Provisions for deportation of any alien found an inmate, etc., of a house of prostitution, or practicing prostitution, after entering the United States, or receiving, etc., any part of the earnings of any prostitute, or employed by or in, etc., any house of prostitution, or music or dance hall, etc., frequented by prostitutes, were made by section 3 of this act, as amended by Act March 26, 1910, c. 128, § 2, ante, § 4247.

Provisions for deportation of any alien landed at any time or place other than as designated by the immigration officers were made by section 18 of this act, ante, § 4267.

Further provisions for deportation of aliens entering the United States except at seaports or places which the Secretary of Labor may designate were contained in section 36 of this act, post, § 4285.

The ports to which aliens arrested within the United States after entry, and found to be illegally therein, may be deported, were prescribed by section 35 of this act, post, § 4284.

Notes of Decisions

Construction and operation in general.—This provision does not extend to aliens who entered the country before its passage. In re Lea (D. C. 1903) 126 Fed. 231, 234.

See note under § 4269, ante.

Deportation of Chinese.—See, also, note under § 4269, ante.

Deportation of Chinese under Chinese exclusion act, see § 4313, post.

This and the preceding section are applicable to Chinese persons. U. S. v. Prentis (1912) 202 Fed. 65, 120 C. C. A. 381.

Chinese laborers unlawfully in the country and held for deportation under a warrant issued by the Department of Commerce and Labor pursuant to Immigration Act Feb. 20, 1907, held not entitled to discharge and trial under

the Chinese Exclusion Acts. Billings v. Ham (1913) 202 Fed. 914, 121 C. C. A. 272.

A Chinese alien who enters the United States unlawfully may be summarily deported by order of the secretary at any time within three years. Prentis v. Seu Leung (1913) 203 Fed. 25, 121 C. C. A. 389.

Chinese person coming to Canada with intent to enter the United States held properly deported to China. Ung Bak Foon v. Prentis (1915) 227 Fed. 406, 142 C. C. A. 102.

A Chinese alien, entering the United States from Canada surreptitiously in the night, avoiding inspection and examination at a designated place of entry, enters in violation of this section, and, like any other alien so entering, is subject to arrest on a warrant issued by the Commissioner of Commerce and Labor and to be deported to Canada, or to China, the "country whence he came," without regard to the provisions of the Chinese exclusion acts. And it is no defense that he is a domiciled merchant in the United States, entitled to enter under such acts; the deportation in such case being without prejudice to his right to subsequently apply for admission in a lawful way. Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

Chinese persons who had been in the country three years were not subject to deportation under the immigration laws. United States v. Redfern (D. C. 1914) 210 Fed. 548.

Where a Chinese person had established his right to depart from and return to the United States on a preinvestigation, under the exclusion laws, he could not thereafter be lawfully deported on returning to the United States, for alleged violation of the Immigration Act, without a hearing before a justice, judge, or commissioner. Ex parte Wong Tuey Hing (D. C. 1914) 213 Fed. 112.

The immigration authorities may deport a Chinaman under this section as well as under the Chinese exclusion laws; but if they proceed under such act, they must proceed strictly in conformity with its provisions. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

A Chinese duly admitted into the country is prima facie a legal resident, but is nevertheless subject to deportation on administrative proceedings for the deportation of an alien. Ex parte Chin Loy You (D. C. 1915) 223 Fed. 833.

A Chinese person who entered in violation of the Chinese exclusion acts, may be deported on an order of the acting secretary of labor in accordance with this section. Ex parte Woo Shing (D. C. 1915) 226 Fed. 141.

Chinese laborers held deportable only by judicial department and not by immigration authorities. Ex parte Woo Jan (D. C. 1916) 228 Fed. 927.

To construe this section as authorizing deportation of Chinese laborers by immigration authorities held to bring it into conflict with section 4289, post. Id.

Rule as to giving effect to every sentence, clause, and word of statutes held not to require this section to be construed to authorize deportation of Chinese laborers by immigration authorities. Id.

Power of immigration authorities to deport Chinese laborers under this section, held sufficiently doubtful to require the doubt to be resolved against such power. Id.

Deportation of prostitutes and procurers.—See note under § 4247, ante.

Person accompanying alien.—A regulation of the department which provides that "attendants will accompany aliens to official destination and will, when proceeding abroad, be required to travel under the same conditions as the alien," is appropriate, if in nearly all cases the usefulness of the attendants would be seriously impaired unless they went in the same class as the alien; but the second part of the regulation, providing that all attendants, "when returning, shall travel second class," in not binding upon the vessel owners. (1907) 26 Op. Atty. Gen. 381.

The interests of the steamship company are, so far as may be consistent with the reasonably successful working of the scheme of sending these attendants, may be allowed to prevail over the mere pleasure or convenience of the persons sent. Id.

The steamship company, on the other hand, cannot nullify the law by insisting that attendants travel in the steerage, when they are not needed there and are persons who could not be reasonably expected to accept employment upon such conditions. Id.

If there are, as suggested, a variety of cases properly admitting of the separate classification of the two persons, the Department of Commerce and Labor cannot determine arbitrarily to what class the attendant is to be consigned. Id.

If the attendant in going has traveled in a class in which he would not naturally travel, by reason of the necessity for his constant attendance upon the disordered alien, his ticket may be changed on the return trip. Id.

The steamship companies are required to furnish such attendants transportation to and from the alien's destination and to defray all expenses incident to such employment. Id.

The "expense incident to such service" is all the expense directly and incidentally caused by the fact that such service has been required. This includes the return trip of the attendant and also his compensation. The expression, "all the expenses incident to the employment and detail of at-

tendants," comes under the same head. Id.

The steamship or transportation companies by which such aliens came to this country are required to receive the attendants so selected, at the same time that they receive the aliens to be deported, and convey them, with the aliens, to the foreign place of destination. Id.

The Secretary of Commerce and Labor is empowered by sections 20 and 21, Act Feb. 20, 1907 (34 Stat. 898, 904), to select attendants to accompany aliens ordered to be deported, where they are mentally or physically diseased in such a manner as to require attendance and care during the voyage. Id.

Cited without definite application, International Mercantile Marine Co. v. U. S. (1912) 192 Fed. 887, 113 C. C. A. 365; U. S. v. Uhl (1914) 211 Fed. 628, 629, 128 C. C. A. 560; U. S. v. Oceanic Steam Navigation Co. (1914) 211 Fed. 967, 968, 128 C. C. A. 465; Ex parte Li Dick (C. C. 1910) 176 Fed. 998; U. S. v. Sibray (C. C. 1910) 178 Fed. 144, reversed (1911) 185 Fed. 401, 107 C. C. A. 483; U. S. v. North German Lloyd S. S. Co. (C. C. 1911) 186 Fed. 672; U. S. v. Williams (D. C. 1909) 193 Fed. 228; Sire v. Berkshire (D. C. 1911) 185 Fed. 967.

§ 4271. (Act Aug. 18, 1894, c. 301, § 1.) Commissioners of immigration; appointment.

The commissioners of immigration at the several ports shall be appointed by the President, by and with the advice and consent of the Senate, to hold their offices for the term of four years, unless sooner removed, and until their successors are appointed; and nominations for such offices shall be made to the Senate by the President as soon as practicable after the passage of this Act. (28 Stat. 390.)

This was a provision of the sundry civil appropriation act for the fiscal year 1895, cited above.

The mode of appointing commissioners of immigration provided by this act was not altered by Act March 3, 1903, c. 1012, by a provision of section 24 of that act, 32 Stat. 1219, or by Act Feb. 20, 1907, c. 1134, by a provision of section 24 thereof, post, § 4273.

§ 4272. (Act Feb. 20, 1907, c. 1134, § 23.) Commissioners of immigration; duties.

The duties of the commissioners of immigration shall be of an administrative character, to be prescribed in detail by regulations prepared, under the direction or with the approval of the Secretary of [Commerce and] Labor. (34 Stat. 906.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

A provision in the same language as that of this section was contained in Act March 3, 1903, c. 1012, § 23, 32 Stat. 1219, repealed by section 43 of this act, post, § 4289.

The mode of appointment of commissioners of immigration was prescribed by a provision of Act Aug. 18, 1894, c. 301, § 1, ante, § 4271, and is not altered by anything contained in this act, by a provision of the next following section.

Notes of Decisions

Rules and regulations.—The department of labor may make rules and regulations to carry out the statutes and facilitate the exclusion and return of persons whose immigration congress has forbidden, but no mere rule can operate to exclude a person not excluded by the statutes. In re Kornmehl (C. C. 1898) 87 Fed. 314.

Rule 24, providing that any alien who enters the United States across the Canadian border at any other point than those designated shall be deemed to have entered the country unlawfully, does not exceed the scope of this section, and is valid, though no penalty is prescribed for violation thereof. Ex parte Hamaguchi (C. C. 1908) 161 Fed. 185.

Immigration rule 35, par. "e," provides that, after the arrest of an alien in deportation proceedings, he shall have full opportunity to show cause why he should not be deported; that he shall be apprised of his right to counsel, and he and his counsel may inspect all evidence on which he was arrested and be given an opportunity to offer evidence and submit an argument and to inspect and copy the record and the findings. Held, that such provision contemplates a hearing at which the

alien must be present and be confronted with the witnesses against him, and have a full opportunity for cross-examination. U. S. v. Sibray (C. C. 1910) 178 Fed. 144, order reversed Sibray v. U. S. (1911) 185 Fed. 401, 107 C. C. A. 483.

Rules and regulations in pursuance of this section have been established for the enforcement of the law and such rules and regulations have the force and effect of the act itself. Id.

The Secretary of the Treasury is vested with power to make and apply such rules relative to the question of immigration as may be shown from time to time to be necessary and convenient. (1899) 22 Op. Atty. Gen. 460.

Due process of law.—The Supreme Court of the United States has decided what facts must exist to constitute a Chinese person born within the United States a citizen thereof, and as the Department of Commerce and Labor is charged by the Constitution with the regulation of interstate and foreign commerce, including the coming of persons into the United States, Congress may devolve on the officers of that department the power to determine the existence or nonexistence of the facts on which the right to enter the United States depends. As such persons have a tribunal in which to be heard, a hearing on notice, with opportunity to present evidence, a judgment, and the right of appeal, all according to the law of the land, they are not denied due process of law. In re Sing Tuck (C. C. 1903) 126 Fed. 386, order reversed Sing Tuck v. U. S. (1904) 128 Fed. 592, 63 C. C. A. 199, which judgment was reversed U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 194 U. S. 161, 48 L. Ed. 917.

Cited without definite application, Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

§ 4273. (Act Feb. 20, 1907, c. 1134, § 24.) Immigrant inspectors and other officers, etc.; appointment, compensation, etc.; duties and powers of immigration officers; decisions.

Immigrant inspectors and other immigration officers, clerks, and employees shall hereafter be appointed, and their compensation fixed and raised or decreased from time to time by the Secretary of [Commerce and] Labor, upon the recommendation of the Commissioner-General of Immigration and in accordance with the provisions of the civil-service Act of January sixteenth, eighteen hundred and eighty-three: Provided, That said Secretary, in the enforcement of that portion of this Act which excludes contract laborers, may employ, without reference to the provisions of the said civil service Act, or to the various Acts relative to the compilation of the official register, such persons as he may deem advisable and from time to time fix, raise, or decrease their compensation. He may draw from the "immigrant fund" annually fifty thousand dollars or as much thereof as may be necessary, to be expended for the salaries and expenses of persons so employed and for expenses incident to such employment; and the accounting officers of the Treasury shall pass to the credit of the proper disbursing officer expenditures from said sum without itemized account whenever the Secretary of [Commerce and] Labor certifies that an itemized account would not be for the best interests of the Government: Provided further, That nothing herein contained shall be construed to alter the mode of appointing commissioners of immigration at the several ports of the United States as provided by the sundry civil appropriation Act approved August eighteenth, eighteen hundred and ninety-four, or the official status of such commissioners heretofore appointed. Immigration officers shall have power to administer oaths and to take and consider evidence touching the right of any alien to enter the United States, and, where such action may be necessary, to make a written record of such evidence; and any person to whom such an oath has been administered under the provisions of this Act who shall knowingly or willfully give false evidence or swear to any false statement in any way affecting or in relation to the right of an alien to admission to the United States shall be deemed guilty of perjury and be punished as provided by section fifty-three hundred and ninety-two, United States Revised Statutes. The decision of any such officer, if favorable to the admission of any alien, shall be subject to challenge by any other immigration officer, and such challenge shall operate to take the alien

whose right to land is so challenged before a board of special inquiry for its investigation. Every alien who may not appear to the examining immigrant inspector at the port of arrival to be clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry. (34 Stat. 906.)

See note to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

The Civil Service Act of Jan. 16, 1883, c. 27, mentioned in this section, is set forth ante, §§ 3271–3282.

The provision of the sundry civil appropriation act of Aug. 18, 1894, c. 301, § 1, as to the mode of appointing commissioners of immigration, mentioned in this section, is set forth ante, § 4271.

The provisions of Rev. St. § 5392, mentioned in this section, defining and punishing perjury, were in great part re-enacted in the Criminal Code, in section 125 thereof, post, § 10295, and the section was repealed by section 341 of said Code, post, § 10515.

Previous provisions for inspection of immigrants by inspecting officers were made by Act March 3, 1875, c. 141, § 5, 18 Stat. 477, Act March 3, 1891, c. 551, § 8, 26 Stat. 1085, Act March 3, 1893, c. 206, §§ 1–5, 27 Stat. 569, 570, and Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 390.

Previous provisions relating to decisions of inspection officers and other immigration officers, and review thereof, were made by Act March 3, 1891, c. 551, § 8, 26 Stat. 1085, and Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 390.

Previous provisions similar to those of this section, except the first proviso thereto, were made by Act March 3, 1903, c. 1012, § 24, 32 Stat. 1219, repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Immigration officers—When disqualified.—An immigration inspector was not disqualified to hear a deportation proceeding against relator, an alien, charged with being found in a house of prostitution, because he participated in a so-called raid of the house in which petitioner was found, and had such personal knowledge of the facts as was so acquired. Ex parte Kwan So (D. C. 1913) 211 Fed. 772.

—— **Delegation of power.**—The board of commissioners of immigration, who by Act Aug. 3, 1882, were required to examine into the condition of immigrants, could not delegate to a committee the power to determine whether such immigrants shall be permitted to land. In re Murnane (C. C. 1889) 39 Fed. 99.

—— **Administering of oaths.**—Section 24 of the Immigration Act only authorizes immigration officers to administer oaths, and take and consider evidence touching the right of aliens to enter the United States, and does not authorize such officers to administer oaths in proceedings to banish aliens from the United States for causes arising after they have been rightly admitted thereto. Hanges v. Whitfield (D. C. 1913) 209 Fed. 675.

—— **Decision and basis thereof.**—Inspectors of immigration and their assistants are not required to take testimony. They may decide the question of the right to land upon their own inspection and examination. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146.

A decision of a board of inquiry that an alien was not a contract laborer and was entitled to land was not res judicata of such question, and did not prevent the secretary from instituting new proceedings within a year thereafter for a retrial of such question. Pearson v. Williams (1905) 136 Fed. 734, 69 C. C. A. 386, judgment affirmed (1906) 26 Sup. Ct. 608, 202 U. S. 281, 50 L. Ed. 1029.

Under Act Aug. 3, 1882, § 2 (22 Stat. 214), requiring the state commission, board, or officers to examine immigrants and make a report, and providing that, if they fell in certain classes, they should be excluded, immigrants could not be detained or sent back except on an adverse report made to the collector by the commissioners themselves, or by some person by them authorized; and where a report was made by the secretary of the board on the action of a subordinate not authorized to act finally in the matter, and without further authority from the commissioners, or either of them, and, on subsequent examination by one of the commissioners, the immigrants were found not within either of the prohibited classes, they should be discharged, and allowed to land. In re Bracmadfar (C. C. 1889) 37 Fed. 774.

An immigration officer is given plenary power to exclude an alien from ad-

mission to the United States, subject to review only by the secretary of the treasury. He is not required to hear evidence under oath, or to make written findings, but it is sufficient if he makes an examination and a decision. His order of exclusion constitutes due process of law. In re Way Tai (C. C. 1899) 96 Fed. 484.

In order to lawfully debar and return an alien immigrant on the ground of his being a person likely to become a public charge, there must be a determination by the inspection officer that the immigrant is likely to become a public charge, such determination being made upon competent evidence tending to show such to be the fact; hence, where the record showed a determination that an immigrant was likely to become a public charge, made by the inspector without any evidence to prove the fact, and contrary to evidence adduced by the immigrant, which evidence was disbelieved by the inspector, held, that there had been no such determination as the statute contemplates, and no valid order for the return of the immigrant can be made. In re Feinknopf (D. C. 1891) 47 Fed. 447.

Review by courts.—See note under § 4277, post.

Special inspector.—The Secretary of the Treasury has power to appoint or designate a supervising inspector or special inspector to perform such duties as he shall direct and to serve at such places as will, in the judgment of the Secretary, best promote the administration of the Immigrant Inspection Service, and such appointee may properly be paid from the immigrant fund. (1892) 20 Op. Atty. Gen. 259.

Employment of counsel.—The Secretary of the Treasury was empowered by Act Aug. 3, 1882 (22 Stat. 214), to employ counsel for the purpose of advising and defending boards of immigration and pay for such services out of the immigrant fund. (1885) 18 Op. Atty. Gen. 108.

Cited without definite application, U. S. v. Yamasaka (1900) 100 Fed. 404, 405, 40 C. C. A. 454; Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197, reversed (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130; Ex parte Gregory (D. C. 1914) 210 Fed. 680.

§ 4274. (Act Feb. 20, 1907, c. 1134, § 25.) Boards of special inquiry; appointment or designation; authority; hearings; records, decisions, and appeals.

Such boards of special inquiry shall be appointed by the commissioner of immigration at the various ports of arrival as may be necessary for the prompt determination of all cases of immigrants detained at such ports under the provisions of law. Each board shall consist of three members, who shall be selected from such of the immigrant officials in the service as the Commissioner-General of Immigration, with the approval of the Secretary of [Commerce and] Labor, shall from time to time designate as qualified to serve on such boards: Provided, That at ports where there are fewer than three immigrant inspectors, the Secretary of [Commerce and] Labor, upon the recommendation of the Commissioner-General of Immigration, may designate other United States officials for service on such boards of special inquiry. Such boards shall have authority to determine whether an alien who has been duly held shall be allowed to land or shall be deported. All hearings before boards shall be separate and apart from the public, but the said board shall keep a complete permanent record of their proceedings and of all such testimony as may be produced before them; and the decision of any two members of a board shall prevail, but either the alien or any dissenting member of the said board may appeal through the commissioner of immigration at the port of arrival and the Commissioner-General of Immigration to the Secretary of [Commerce and] Labor, and the taking of such appeal shall operate to stay any action in regard to the final disposal of any alien whose case is so appealed until the receipt by the commissioner of immigration at the port of arrival of such decision which shall be rendered solely upon the evidence adduced before the board of special inquiry: Provided, That in every case where an alien is excluded from admission into the United States, under any law or treaty now existing or hereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of [Commerce and] Labor; but nothing in this section shall be construed to admit of any appeal in

the case of an alien rejected as provided for in section ten of this Act. (34 Stat. 906.)

See notes to section 1 of this act, ante, § 4242.

The word "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions for review of decisions of immigration officers were made by Act March 3, 1891, c. 551, § 8, 26 Stat. 1085, and Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 390.

Previous provisions similar to those of this section, except those contained in the proviso thereto, were made by Act March 3, 1903, c. 1012, § 25, 32 Stat. 1220, repealed by section 43 of this act, post, § 4289.

Notes of Decisions

1. Application of statute.
2. Members of boards of special inquiry.
3. Hearing on right to admission.
4. Res judicata.
5. Appeal to secretary.
6. Conclusiveness of decision and review by courts.
7. —— Conclusiveness in general.
8. —— Fair hearing and dependency of right of review thereon.
9. —— Scope of review in general.
10. —— Jurisdictional questions.
11. —— Questions of law.
12. —— Questions of fact.
13. —— Decision of secretary.
14. —— Burden of proof.
15. —— Right to discharge on habeas corpus.
16. Duty of officers.

See note under § 4269, ante, dealing particularly with deportation of aliens.

1. Application of statute.—This section does not apply to a decision of the commissioner excluding a citizen of Porto Rico, since such citizen is not within the immigration act, and the commissioner had no jurisdiction to detain or deport her. Gonzales v. Williams (1904) 24 Sup. Ct. 177, 180, 192 U. S. 1, 48 L. Ed. 317, reversing (C. C. 1902) 118 Fed. 941.

2. Members of boards of special inquiry.—Where there were only three immigration inspectors at a port where an alien attempted to land, the inspector who had examined her and had denied her right to enter was not competent to sit on a board of special inquiry and a board consisting of three inspectors, of which such inspector was one, was illegal and without jurisdiction. U. S. v. Redfern (C. C. 1910) 180 Fed. 500.

3. Hearing on right to admission.—The immigration inspector need not hear sworn testimony, but may decide the question on his own inspection and examination. Lee Sim v. U. S. (1914) 218 Fed. 432, 134 C. C. A. 232.

It was not necessary to swear official interpreter to do his duty faithfully in the particular case. Id.

Taking of ex parte statements by immigrant inspector of witnesses who saw Chinese claiming status as merchant ironing in cousin's laundry held not such fair hearing as necessarily precedes deportation. McDonald v. Siu Tak Sam (1915) 225 Fed. 710, 140 C. C. A. 584.

That additional testimony as to the qualifications of an alien immigrant to enter the United States was taken pending an appeal by him to the secretary and submitted to the secretary does not affect the validity of his decision. U. S. v. Williams (C. C. 1911) 191 Fed. 1001.

An alien immigrant is not entitled to be represented by counsel at a hearing as to his qualifications for admission. U. S. v. Williams (C. C. 1911) 190 Fed. 897; Id., 191 Fed. 1001.

In determining whether aliens are entitled to admission, the immigration authorities act in an administrative and not in a judicial capacity, and must follow definite standards and apply general rules. U. S. v. Uhl (D. C. 1913) 203 Fed. 152, order affirmed (C. C. A. 1914) 210 Fed. 860.

In determining whether immigrants, who were unskilled laborers, seeking to enter the United States, were liable to become a charge on the public, the immigration authorities may consider the personal equation of each alien and the conditions which confront him. U. S. v. Uhl (D. C. 1914) 211 Fed. 236.

Immigration officials cannot disregard the fundamental principles insuring fairness to an alien in establishing their rules of evidence for hearings in proceedings to deport aliens. Id.

4. Res judicata.—A decision of a board of inquiry that an alien was not a contract laborer and was entitled to land was not res judicata of such question, and did not prevent the Secretary from instituting new proceedings within a year thereafter for a retrial of such question. Pearson v. Williams (1905) 136 Fed. 734, 69 C. C. A. 386, judgment affirmed (1906) 26 Sup. Ct. 608, 202 U. S. 281, 50 L. Ed. 1029.

The Secretary of Labor is not concluded by a ruling in favor of the admission of an alien immigrant, but may reverse such ruling. U. S. v. Commissioner of Immigration (D. C. 1913) 209 Fed. 137.

A board of special inquiry in admitting or rejecting an alien is not bound by the opinion of the medical board, and in reaching a decision should consider all the evidence brought to its attention. Ex parte Joyce (D. C. 1913) 212 Fed. 282.

5. **Appeal to secretary.**—A Chinese person, excluded from entry into the United States by local officers, is entitled to have his appeal from such order determined by the Secretary of Labor, unless, because of his absence or sickness, another is authorized to perform the duties of his office. Ex parte Tsuie Shee (D. C. 1914) 218 Fed. 256.

A citizen of Porto Rico, to whom this act does not apply, is not obliged to appeal to the superintendent or the secretary from a decision of the commissioner excluding her, since the commissioner had no jurisdiction to detain or deport her. Gonzales v. Williams (1904) 24 Sup. Ct. 177, 180, 192 U. S. 1, 48 L. Ed. 317.

In section 4255, ante, the word "final" is not used in such broad sense as to deprive an alien so rejected of the right of appeal unqualifiedly given by this section. Rodgers v. U. S. (1907) 157 Fed. 381, 85 C. C. A. 79.

On an appeal to the Secretary of Labor from an order deporting a Chinese, the applicant has no right to appear by counsel or to introduce further evidence in his own behalf. Ex parte Ching Hing (D. C. 1915) 224 Fed. 261.

6. **Conclusiveness of decision and review by courts.**—Congress has plenary power to exclude aliens from entry into the United States, or to provide for their admission subject to such restrictions as it may prescribe; and, where it has given discretionary power to executive officers or agencies to determine the right of entry under such restrictions, the ground of such determination cannot be inquired into by the courts in habeas corpus proceedings instituted by an alien, who is restrained of his liberty for the purpose of deportation by such officers. The question, however, whether the law does vest such officers with power of final decision is necessarily one for judicial inquiry, and an alien given by the law a right of appeal may invoke the powers of a court for the enforcement of such right. Rodgers v. U. S. (1907) 157 Fed. 381, 85 C. C. A. 79.

Act Aug. 3, 1882, did not authorize the detention of an immigrant for the purpose of being returned, unless, after examination, he be found by the commissioners to be a "convict, lunatic, idiot, or person unable to take care of himself without becoming a public charge." There was no authority to forbid a final landing, except upon a finding by the commissioners of some one of those four facts, and a report thereof to the collector. Payment of the passage money by a foreign government was only evidence of inability, not necessarily conclusive; and upon a traverse to the return on habeas corpus, it being proved that the commissioners had not found or reported either of the above statutory facts, and voted that the person "be not allowed to land," held insufficient. In re O'Sullivan (C. C. 1887) 31 Fed. 447.

Permission given an immigrant to go on shore temporarily while awaiting the action of the board of special inquiry, does not release such immigrant from the obligation of satisfying the board of the right to land; and its adverse determination, where the immigrant is conceded to be an alien, is not reviewable by the courts. In re Gayde (C. C. 1901) 113 Fed. 588.

7. —— **Conclusiveness in general.**—The second hearing before a board of special inquiry, as a result of which a deportation of certain British aliens was ordered, could be directed by the secretary, acting under the authority conferred by section 4270, ante, although the first decision of the board of inquiry, at the time of landing was unanimously in favor of the immigrants, and such decision is, by the express provisions of this section, declared to be final. Pearson v. Williams (1906) 26 Sup. Ct. 608, 609, 202 U. S. 281, 50 L. Ed. 1029, affirming judgment (1905) 136 Fed. 734, 69 C. C. A. 386.

The executive officers of the government have exclusive jurisdiction to determine the right of an alien immigrant to land. Lavin v. Le Fevre (1903) 125 Fed. 693, 60 C. C. A. 425.

An immigrant who on examination by a board of special inquiry has been denied the right to enter the United States has the right to be informed that he has a right of appeal therefrom, and the fact that he has been so informed must be entered of record in the minutes of the board's proceedings, and the withholding of that right precludes finality in the decision of the board which may in such case be reviewed by the courts on a writ of habeas corpus. Rodgers v. U. S. (1907) 152 Fed. 346, 81 C. C. A. 454.

A decision that a Chinese person applying to enter was entitled to enter as a native-born citizen was not conclusive in her favor for three years. Haw Moy v. North (1910) 183 Fed. 89, 105 C. C. A. 381, writ of certiorari denied (1911) 32 Sup. Ct. 522, 223 U. S. 717, 56 L. Ed. 628; Hoo Choy v. Same (1910) 183 Fed. 92, 105 C. C. A. 384, writ of certiorari denied (1911) 32 Sup. Ct. 522, 223 U. S. 718, 56 L. Ed. 628.

The decision of the appropriate immigration officers adverse to the admission of an alien is conclusive, unless reversed on appeal by the Secretary of Commerce and Labor, and cannot be reviewed by the courts on writ

of habeas corpus. U. S. v. Watchorn (C. C. 1908) 164 Fed. 152.

Whether an alien shall be admitted to the United States is a political question which Congress may dispose of as it chooses, and having provided by this section that a decision of the proper immigration officers, if adverse to the admission of an alien, shall be final unless reversed on appeal to the Secretary of Labor, the decision cannot be reviewed by the courts when the prescribed procedure has been complied with. U. S. v. Uhl (D. C. 1914) 211 Fed. 236.

8. —— **Fair hearing and dependency of right of review thereon.**—Where an immigrant desiring to enter is accorded a fair trial, the determination of the immigration officers of his right to enter is conclusive on habeas corpus; but it is otherwise if a fair trial has not been accorded, and he does not belong to the excluded classes. U. S. v. Ruiz (1913) 203 Fed. 441, 121 C. C. A. 551.

Facts held to sufficiently show that an alien about to enter the United States was not accorded a fair hearing before the immigration officers, and hence he was entitled to a hearing on habeas corpus on the merits of his right to enter. Id.

Habeas corpus held to lie to procure the release of an alien immigrant detained as an alleged stowaway without hearing. United States ex rel. D'Amato v. Williams (D. C. 1909) 193 Fed. 228.

Exclusive jurisdiction to determine the qualification of aliens to enter the United States, or their deportation, is in the officers of the immigration department, subject to review by the Secretary of Labor, and hence jurisdiction of the court was limited to ascertaining whether a fair and full hearing was accorded. Ex parte Moola Singh (D. C. 1913) 207 Fed. 780.

Admission of additional proof in alien exclusion proceedings after petitioners had been advised that the cases were closed, they having been informed that they would be permitted to inspect the proof and offer further evidence, held not to deprive them of a fair trial. In re Rhagat Singh (D. C. 1913) 209 Fed. 700.

Fair hearing of an alien's right to enter the United States means a hearing before the immigration officers in accordance with the fundamental principles that inhere in due process of law, and implies that the alien shall not only have a fair opportunity to present evidence in his favor, but shall be apprised of the evidence against him, so that at the conclusion of the hearing he may be in a position to know all of the evidence on which the matter is to be decided; it being not enough that the immigration officials meant to be fair. Ex parte Petkos (D. C. 1913) 212 Fed. 275.

Jurisdiction of the immigration authorities to determine the right of aliens to enter the United States is exclusive and final; their decisions not being reviewable by the federal courts unless it appears either that the alien has not been accorded a fair hearing, or that the action of the authorities has been arbitrary or that discretion has been abused. Id.

Relator, an alien, who was denied right to enter the United States and ordered deported, held not accorded a fair hearing before the immigration authorities, and was entitled to habeas corpus and to have a hearing on the merits before the court. Id.

The fact that cogent evidence was not submitted to the board, that its decision was believed to be erroneous, or that its rulings transgressed the ordinary rules of evidence as applied in the courts, did not justify an application to the district court to retry the case upon habeas corpus proceedings, as it must appear that the hearing was essentially unfair, or that it violated some fundamental principle of law, without the observance of which no just determination of the question at issue was possible. Ex parte Joyce (D. C. 1913) 212 Fed. 282.

The hearing before a board of special inquiry, which rejected an alien was not so manifestly unfair as to justify a review of the board's action on habeas corpus, because the members of the medical board who certified that she was feeble-minded were unable to converse with her on account of her ignorance of the English language, or because one of such members was the medical inspector who examined her in the first instance and certified that she was feeble-minded. Id.

The courts have no jurisdiction to review the action of the immigration authorities in rejecting an alien, unless he has been denied a fair hearing by such authorities. Id.

The final decision upon applications of aliens for admission rests with the board of special inquiry, subject to appeal where an appeal is allowed, and the board is not bound to act in accordance with the medical certificate, and hence it was fundamental error to exclude other evidence, and a fair hearing had not been had. Ex parte Joyce (D. C. 1913) 212 Fed. 285.

The assumption by a board of special inquiry that it was absolutely bound by the medical certificate in determining whether an alien should be excluded as a feeble-minded person was such a fundamental error of law as prevented a fair hearing. Ex parte Sitner (D. C. 1914) 212 Fed. 572.

9. —— **Scope of review in general.**—Returns to writs of habeas corpus obtained on behalf of immigrants upon petitions alleging their illegal detention by an inspector, which allege no facts, but merely as a conclusion of law that

the respondent had the right to detain the petitioners, held insufficient. Stretton v. Shaheen (1910) 176 Fed. 735, 100 C. C. A. 389.

The government, in its return to a writ of habeas corpus to review an alien's detention under a deportation warrant, having objected to a hearing de novo, waived its right to insist on such objection by itself introducing evidence in its own behalf on the merits. U. S. v. Ruiz (1913) 203 Fed. 441, 121 C. C. A. 551.

Where board of special inquiry decided that aliens were likely to become a public charge, and its decision was approved by the secretary, the court could only determine whether the aliens were given a hearing, and could not inquire into the sufficiency of probative facts, or consider the reasons for the conclusion reached. White v. Gregory (1914) 213 Fed. 768, 130 C. C. A. 282.

Act Aug. 3, 1882, vested in the commissioner exclusive power to determine whether or not immigrants were likely to become a public charge, and therefore not entitled to land. Their decision, made upon competent evidence, could not be reviewed on habeas corpus, but could be reconsidered by them at any time before the return of the passengers. Additional evidence, tending to show that the passengers were not likely to become a public charge, could not be considered upon habeas corpus, but must be presented to the commissioners. In re Day (C. C. 1886) 27 Fed. 678.

The federal courts have no power to pass on the acts of the commissioners of immigration when in the exercise of the right of excluding an alien on the ground of poverty. U. S. v. Rogers (C. C. 1895) 65 Fed. 787; Same v. American Steamship Co., Id.

The status of any alien and the question of his right to enter the United States are exclusively vested in the executive department of the government, and where it has been legitimately exercised the courts cannot interfere in behalf of the alien. U. S. v. Burke (C. C. 1899) 99 Fed. 895, 899.

A federal district judge held required in habeas corpus proceedings to dispose of a question as to an alien's right to freedom from detention by immigration authorities. United States ex rel. D'Amato v. Williams (D. C. 1909) 193 Fed. 228.

Where a return to a writ of habeas corpus to review the exclusion of an alien for feeble-mindedness alleged that the board of special inquiry was duly constituted and that the certificate of the examining medical officers was duly made, it was not defective for failure to show in detail the facts on which the certificate was based. U. S. v. Williams (D. C. 1913) 203 Fed. 292.

A petition for habeas corpus, merely charging that the acts and proceedings of the board of special inquiry by which relator, an alien, was excluded, were illegal, null, void, and wanting in jurisdiction, and contrary to the rules, regulations, and statutes of the United States, held to state mere conclusions, and insufficient for want of facts. U. S. v. Williams (D. C. 1913) 204 Fed. 844.

Exclusive jurisdiction to determine the qualification of aliens to enter the United States, or their deportation, is in the officers of the immigration department, subject to review by the Secretary of Labor, and hence jurisdiction of the court was limited to ascertaining whether a fair and full hearing was accorded. Ex parte Moola Singh (D. C. 1913) 207 Fed. 780.

A Chinese person, excluded from entry into the United States by local officers, may raise the question by petition for a writ of habeas corpus whether an appeal taken by him was determined by one having legal authority. Ex parte Tsuie Shee (D. C. 1914) 218 Fed. 256.

10. —— Jurisdictional questions.—The determination of the immigration authorities on all questions of fact affecting the right of an alien to enter or remain in the United States is final, even if made on incompetent or inconclusive evidence, but, when the proceedings before them show indisputably that they are acting without jurisdiction, relief may be had by writ of habeas corpus. Ex parte Watchorn (C. C. 1908) 160 Fed. 1014.

The power of the federal superintendent of immigration to return passengers is confined to "alien immigrants," and the question whether persons ordered to be returned are of that description is jurisdictional, and may be determined by the courts on habeas corpus. In re Panzara (D. C. 1892) 51 Fed. 275.

The finality and conclusiveness of a decision of immigration officers refusing a person entry into the United States, and ordering his deportation, depend upon the jurisdictional question whether such person is in law and fact an alien immigrant; and, where he claims a status of citizenship under the naturalization laws of the United States, the courts have jurisdiction to determine such claim, notwithstanding its adverse determination by the executive officers of the government. In re Di Simone (D. C. 1901) 108 Fed. 942.

The question of the time of entry of an alien arrested and held for deportation involves the jurisdiction of the officers assuming to exercise such authority, and may be inquired into on habeas corpus. In re Lea (D. C. 1903) 126 Fed. 234.

No express power having been conferred and no duty imposed on the courts to review the proceedings of immigration officials in excluding aliens, the courts cannot and should not inter-

fere unless a judicial question fairly arises. U. S. v. Greenawalt (D. C. 1914) 213 Fed. 901.

The partial exclusion of counsel from hearings held by immigration authorities pursuant to the general regulations of the department did not present a judicial question justifying the courts in reviewing the acts of the immigration officials in excluding an alien. Id.

11. —— Questions of law.—The conclusiveness of decisions of immigration officers is conclusiveness on matters of fact, not on questions of law. Gegiow v. Uhl (1915) 36 S. Ct. 2, 239 U. S. 3, 60 L. Ed. —.

Congress has power either to exclude aliens or to prescribe terms upon which they may come to this country, and to have its declared policy in that regard enforced exclusively through executive officers whose decisions on questions of fact are conclusive; but their decisions on questions of law are not conclusive on the courts which have power to grant relief to an individual aggrieved by their erroneous decision of a legal question. Davies v. Manolis (1910) 179 Fed. 818, 103 C. C. A. 310.

In proceedings under the immigration laws, the final determination of the statute applicable to the case and interpretation of the grant of power therein cannot rest with the executive officers under our system of government; but the ultimate decision of such questions must remain with the courts. Id.

If there is no evidence that an alien immigrant is within one of the excluded classes, the immigration authorities have no power to exclude him, an order for his deportation is a nullity, and he is entitled to discharge from detention thereunder on a writ of habeas corpus. U. S. v. Williams (C. C. 1911) 189 Fed. 915.

Where the right to enter the United States, claimed on the ground of citizenship, is denied by the immigration officers, and depends wholly on a question of law, such question may be reviewed on a writ of habeas corpus. U. S. v. Williams (D. C. 1909) 173 Fed. 626, decree affirmed In re Nicola (1911) 184 Fed. 322, 106 C. C. A. 464.

A board of special inquiry may, in rejecting an alien, rely solely on the medical report and certificate if it chooses to do so; but, if it so relies, because it feels obliged to follow such report without considering other evidence, it commits an error of law of such a fundamental character that its decision is unfair to the alien and ought not to stand. Ex parte Joyce (D. C. 1913) 212 Fed. 282.

12. —— Questions of fact.—Congress has by the immigration statutes lawfully conferred upon executive officers final and exclusive jurisdiction to hear and determine whether any particular individual is an alien or a citizen in so far at least as such determination depends upon conclusions which may be reached upon disputed questions of fact. U. S. v. Sprung (1910) 187 Fed. 903, 110 C. C. A. 37.

Where an alien immigrant was before the board of inspectors, so that they had an opportunity to inspect and examine him in person, and he was given a fair hearing and full opportunity to present evidence, an order denying him admission on the ground that he is likely to become a public charge cannot be reviewed by the courts in habeas corpus proceedings as not supported by evidence. U. S. v. Rodgers (1911) 191 Fed. 970, 112 C. C. A. 382.

A finding of the board of inquiry that an alien was likely to become a charge and hence should be excluded, will not be disturbed, if supported by evidence, though a different conclusion might be reached. U. S. v. International Mercantile Marine Co. (1912) 194 Fed. 408, 114 C. C. A. 370.

Where the administrative officers give the hearings required by the statute, their finding that an alien is within the excluded classes is conclusive, and cannot be reviewed by the courts. Prentis v. Cosmas (1912) 196 Fed. 372, 116 C. C. A. 419.

A finding by immigration officers that alien immigrants were likely to become a public charge, and a consequent order excluding them, cannot be reviewed by the courts, if there is any evidence to support such finding, and the evidence need not be such as would be admissible in a court in formal legal proceedings. U. S. ex rel. Gegiow v. Uhl (1914) 215 Fed. 573, 131 C. C. A. 641, affirming order (D. C. 1914) 211 Fed. 236.

Findings of immigration officers as to admission of alien immigrants are final and conclusive, in the absence of unfairness or abuse of discretion. Healy v. Backus (1915) 221 Fed. 358, 137 C. C. A. 166.

The decision of the collector upon the status of an immigrant whose right to land in the United States is challenged on the ground that he is under a contract to labor is conclusive, and not open to review in the courts on habeas corpus, if there was competent evidence before the collector on which to exercise his judgment; and if habeas corpus proceedings are resorted to, and facts not previously placed before the collector are therein disclosed, the whole case may afterwards be again presented to the collector. In re Cummings (C. C. 1887) 32 Fed. 75.

On preliminary inquiry by the inspection officers, certain immigrants stated that their passage was paid for them, and that they came under an engagement to work on a railroad in Ohio for seven francs a day, but on a subsequent

special inquiry they retracted these statements. Held, that there was competent evidence tending to show that they had come in violation of the restriction act, and the court had no jurisdiction to review the commissioner's decision ordering them to be taken back. In re Didfirri (C. C. 1891) 48 Fed. 168.

If there is any evidence, competent or otherwise, to sustain the findings of a board of special inquiry, and of the secretary in immigration proceedings, on which an alien applying to enter the United States is ordered deported, the court on a petition for habeas corpus, though of a different opinion, will not disturb the same. Ex parte Saraceno (C. C. 1910) 182 Fed. 955.

Whether an admission was obtained from an alien on which he was excluded through plying him with liquor and by threats was wholly a question of fact for the executive authorities, with whose decision this court would have no right to interfere. U. S. ex rel. Glavas v. Williams (C. C. 1911) 190 Fed. 686.

Where the board of immigration inspectors have an alien immigrant before them so that they may themselves inspect and examine him there is sufficient evidence to warrant his exclusion on the ground that he is liable to become a public charge if in their discretion they reach such conclusion, and their order to that effect cannot be set aside by the courts as unsupported. U. S. v. Williams (C. C. 1911) 190 Fed. 897.

The immigrant has the right to demand a special inquiry, and at such inquiry to show affirmatively, by any competent testimony, that he does not belong to any of the excluded classes. When such inquiry has been had, the decision of the inspection officers is conclusive upon the courts. The remedy, if the decision is wrong, is by an appeal to the superintendent of immigration, and then to the secretary of the treasury. In re Hirsch Berjanski (D. C. 1891) 47 Fed. 445.

A finding of the board of special inquiry, based on the report of medical officers that an alien was feeble-minded, and hence subject to deportation, held conclusive. U. S. v. Williams (D. C. 1913) 204 Fed. 844, 845.

A finding by immigration officers that certain alien Hindoo laborers applying to enter the United States were likely to become public charges held not reviewable on habeas corpus. In re Rhagat Singh (D. C. 1913) 209 Fed. 700.

This section does not preclude a review where an alien is excluded on facts found which are in themselves insufficient to authorize deportation. Ex parte Gregory (D. C. 1914) 210 Fed. 680.

In a hearing on the merits of a habeas corpus proceeding by an alien, excluded by a board of special inquiry, evidence held to show that such alien was not a feeble-minded person nor liable on account of feeble-mindedness to become a public charge. Ex parte Sitner (D. C. 1914) 212 Fed. 572.

A finding that an alien is likely to become a public charge, rendered by executive officers, after a hearing provided by the statute, will not be disturbed on habeas corpus. Ex parte Isojoki (D. C. 1915) 222 Fed. 151.

13. —— **Decision of secretary.**—The decision of the secretary, affirming the denial by the immigration officers, after examination, of the right of a person of Chinese descent to enter the United States, is no less conclusive on the federal courts, in habeas corpus proceedings, when citizenship is the ground on which the right of entry is claimed, than when the ground is domicile and the belonging to a class excepted from the exclusion acts. U. S. v. Ju Toy (1905) 25 Sup. Ct. 644, 645, 198 U. S. 253, 49 L. Ed. 1040.

Where an alien, seeking to enter the United States, was ordered deported by the secretary, a district judge has no jurisdiction to set aside such order on habeas corpus, unless the secretary violated the statute in respect to all of the grounds on which the deportation was based. U. S. v. Williams (D. C. 1910) 175 Fed. 274.

The decision of the secretary, based on substantial evidence, that an alien immigrant, at the time of entering the United States, was a person likely to become a public charge is not reviewable by the courts in habeas corpus proceedings. Ex parte Pugliese (D. C. 1913) 209 Fed. 720.

14. —— **Burden of proof.**—An alien detained for deportation, who admits that his passage into the country was paid for by and that he was assisted by others, must show affirmatively and satisfactorily that he does not belong to one of the excluded classes of aliens. U. S. v. Williams (D. C. 1909) 193 Fed. 228.

Aliens being entitled to enter the United States unless excluded by the immigration acts, the burden is on the immigration authorities to show that an excluded alien is within one of the exceptions to the general privilege. U. S. v. Williams (D. C. 1913) 203 Fed. 155.

An alien petitioning for a writ of habeas corpus is bound to show that the hearing before the immigration authorities, by whom she was rejected, was not fair, and this burden was not met, where the record and evidence left it uncertain whether the board of special inquiry excluded her because it understood that the law required it to do so on account of the medical certificate, or because, after considering all the evidence and exercising its own judgment, it concluded that she was

feeble-minded. Ex parte Joyce (D. C. 1913) 212 Fed. 282.

The refusal of an alien's request to appear at the hearing by counsel, though not contrary to Const. Amend. 6, places on the immigration officers the burden of showing the fairness of the proceedings. Ex parte Chin Loy You (D. C. 1915) 223 Fed. 833.

15. —— **Right to discharge on habeas corpus.**—Where an alien, not entitled to enter the United States, was held under an illegal warrant directing his deportation to a country other than that whence he came, he was entitled to release on habeas corpus, under the rule that a prisoner is entitled to his liberty where the sentence is illegal. U. S. ex rel. Ruiz v. Redfern (C. C. 1911) 186 Fed. 603.

The petitioner, an immigrant from Switzerland, arrived at Castle Garden October 18, 1889. On examination by the proper officers, he stated, and signed an affidavit, in substance, that he was engaged by contract to work for a silk manufacturer at Paterson, N. J., which being reported to the collector, he was directed to be sent back in accordance with the provisions of Act Feb. 23, 1887, c. 220, 24 Stat. 414. Held that, the proceedings being regular in every respect, the petitioner could not be released on habeas corpus, on the mere ground that his statements in regard to the contract were untrue. In re Dietze (D. C. 1889) 40 Fed. 324.

Unlawful deprival of an alien's right to enter the country constitutes unlawful imprisonment to obtain freedom from which habeas corpus lies. U. S. ex rel. D'Amato v. Williams (D. C. 1909) 193 Fed. 228.

In proceedings to exclude certain aliens, they were not entitled to release on habeas corpus because the inspector took certain affidavits ex parte, and reported certain facts communicated to him by third persons, to the department. Ex parte Pouliot (D. C. 1912) 196 Fed. 437.

Exclusion of alien by immigration officer will not be disturbed by the courts, where essential justice was attained. In re Madeiros (D. C. 1914) 225 Fed. 90.

Duty of officers.—It is not the duty of a United States attorney to advise or defend boards of immigration. (1885) 18 Op. Atty. Gen. 108.

Cited without definite application, Saito v. U. S. (1905) 141 Fed. 653, 72 C. C. A. 647; Sire v. Berkshire (D. C. 1911) 185 Fed. 967.

§ 4275. (Act Feb. 20, 1907, c. 1134, § 26.) Admission of aliens liable to be excluded, on giving bond of indemnity against becoming public charge; suits on bonds.

Any alien liable to be excluded because likely to become a public charge or because of physical disability other than tuberculosis or a loathsome or dangerous contagious disease may, if otherwise admissible, nevertheless be admitted in the discretion of the Secretary of [Commerce and] Labor upon the giving of a suitable and proper bond or undertaking, approved by said Secretary in such amount and containing such conditions as he may prescribe, to the people of the United States, holding the United States or any State, Territory, county, municipality, or district thereof harmless against such alien becoming a public charge. The admission of such alien shall be a consideration for the giving of such bond or undertaking. Suit may be brought thereon in the name and by the proper law officers either of the United States Government or of any State, Territory, district, county, or municipality in which such alien becomes a public charge. (34 Stat. 906.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

A previous provision relating to bonds of indemnity against aliens becoming public charges was made by Act March 3, 1893, c. 206, § 7, 27 Stat. 570, but was superseded by Act March 3, 1903, c. 1012, § 26, which was repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Right to admit alien under bond.—The Secretary of the Treasury is authorized to permit an insane alien immigrant to land in this country upon receiving a satisfactory bond that the immigrant will not become a public charge and that the country shall be protected against loss by reason of her coming

here. (1891) 20 Op. Atty. Gen. 79, following (1886) 18 Op. Atty. Gen. 500. See Norddeutscher Lloyd v. U. S., 213 Fed. 10, 130 C. C. A. 85; note under § 4268, ante.

—— **Discretion and review of exercise thereof.**—The exercise by the secretary of the discretionary power conferred on him to admit alien immigrants after a finding that they are likely to become a public charge, if otherwise admissible, on the giving of a suitable bond, or his refusal to exercise such power, is not reviewable by the courts. U. S. ex rel. Chanin v. Williams (1910) 177 Fed. 689, 101 C. C. A. 315.

Where an alien was ordered deported because of liability to become a public charge, an affidavit by a cousin, who was responsible, offering to give bond that the alien would not become a public charge, could not be considered on habeas corpus; its acceptance being discretionary with the Secretary of Labor, under this section. U. S. v. Williams (D. C. 1913) 204 Fed. 847.

Action on bond—Right of action.—On the arrival of an immigrant woman in this country a bond was exacted by the government, conditioned that she or her children should not within five years become a public charge. Within six months she became insane, and was sent to the public asylum. Held that, while the insanity of the woman might not have been contemplated when the bond was taken, the evidence as to the poverty of her husband showed the liability of the family to become at any time a public charge, and as it was on that account that the bond was exacted, and for that reason that the woman became a public charge as soon as her derangement arose, the government was entitled to judgment on the bond. U. S. v. Lipkis (D. C. 1893) 56 Fed. 427.

—— **Defenses.**—Where an alien gave bond for hospital treatment of his daughter, who was denied admission because she was suffering with a contagious disease, the alien's naturalization would not avoid the penalty of the bond. In re Camaras (D. C. 1913) 202 Fed. 1019.

Where an immigration bond, given for the admission of a minor alien, recited that he was then 15 years old, and provided as a condition that he should attend school until he was 16, or until April 1, 1913, and also required quarterly reports, the sureties were estopped to claim in defense that he was 16 years old when admitted, and were liable on proof of his failure to attend school and failure to make reports as required. U. S. v. Rosenthal (D. C. 1914) 210 Fed. 555.

§ 4276. (Act Feb. 20, 1907, c. 1134, § 27.) Compromise of suits for violations of act.

No suit or proceeding for a violation of the provisions of this Act shall be settled, compromised, or discontinued without the consent of the court in which it is pending, entered of record, with the reasons therefor. (34 Stat. 907.)

See notes to section 1 of this act, ante, § 4242.

A previous similar provision, relating to violations of Act Feb. 26, 1885, c. 164, 23 Stat. 332, 333, was made by Act March 3, 1891, c. 551, § 2, 26 Stat. 1084, but was superseded by Act March 3, 1903, c. 1012, § 27, 32 Stat. 1220, which was re-enacted in the same language in this section, and was repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Compromise and settlement.—The secretary is not authorized to remit a fine or penalty incurred for violation of the alien immigration laws. (1893) 20 Op. Atty. Gen. 530; (1894) 20 Op. Atty. Gen. 705; (1908) 26 Op. Atty. Gen. 624. He has no authority, under section 6375, post, to compromise a suit to recover a penalty incurred under the alien contract labor law. It is doubtful if the power given to the Secretary of the Treasury by section 6375, post, to compromise "any claim," extends to a judgment recovered by the United States against a corporation in a suit for a penalty for violation of the contract labor law. (1889) 19 Op. Atty. Gen. 344; (1909) 27 Op. Atty. Gen. 241.

The Secretary cannot remit fines imposed on a vessel or her master for allowing the escape of alien immigrants whose deportation has been ordered. (1900) 23 Op. Atty. Gen. 271. The fact that it might be equitable or desirable to include in the power of remission, under existing laws relative to this power, new cases not contemplated when those laws were adopted, cannot overcome and enlarge the defined and restricted language and application of the law. (1900) 23 Op. Atty. Gen. 271.

The fines imposed after a verdict of guilty of the statutory misdemeanor of allowing certain foreign pauper immigrants to land after being ordered to detain them cannot be compromised. (1893) 20 Op. Atty. Gen. 685.

The secretary has authority to return a deposit to cover a fine which might be due, but which turns out not to have been incurred. Such return would not be a remission of a fine or penalty, but the restitution of an

amount to which the government was never justly entitled. (1900) 23 Op. Atty. Gen. 271.

The secretary has no authority to remit or to reduce a fine or penalty imposed for failure to comply with the provisions in regard to the manifests or lists of alien passengers required to be furnished by masters of vessels arriving within the United States, such power not having been specifically conferred by Congress. (1905) 25 Op. Atty. Gen. 336.

Cited without definite application, Warren v. U. S. (1893) 58 Fed. 559, 560, 7 C. C. A. 368.

§ 4277. (Act Feb. 20, 1907, c. 1134, § 29.) Jurisdiction of courts. The [Circuit and] district courts of the United States are hereby invested with full [and concurrent] jurisdiction of all causes, civil and criminal, arising under any of the provisions of this Act. (34 Stat. 907.)

See notes to section 1 of this act, ante, § 4242.

The words "circuit and" and "and concurrent," inclosed in brackets in this section, were superseded by the abolition of the circuit courts and the transfer of their powers and duties to the district courts by Jud. Code, §§ 289, 291, ante, §§ 1264–1266.

A similar provision relating to causes arising under Act March 3, 1891, c. 551, was contained in section 13 of that act, 26 Stat. 1086, but was superseded by Act March 3, 1903, c. 1012, § 29, 32 Stat. 1220, relating to causes arising under that act, which was repealed by section 43 of this act, post, § 4289.

Jurisdiction of all suits and proceedings arising under any law regulating the immigration of aliens or under the contract labor laws was conferred on the district courts, on the abolition of the circuit courts, by Jud. Code, § 24, par. 22, ante, § 991 (22).

Notes of Decisions

Review by courts.—See notes under §§ 4244, 4247, 4269, ante.

This section only refers to actions for penalties under sections 4251, 4252, post, and indictments for misdemeanors under sections 4253, 4262, 4268, post, and the federal courts have no jurisdiction to review the decision of an inspector of immigration refusing to allow an alien to land, as one whose entrance is prohibited by the act. Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 340, 142 U. S. 651, 35 L. Ed. 1146.

Cited without definite application, U. S. v. Yamasaka (1900) 100 Fed. 404, 407, 40 C. C. A. 454; Mercantile Nat. Bank of City of New York v. Barron (D. C, 1908) 165 Fed. 831.

§ 4278. (Act Feb. 25, 1913, c. 73, § 1.) Interior immigrant stations. For the purpose of making effective the power of establishing rules and regulations for protecting the United States and aliens migrating thereto from fraud and loss, conferred upon the Commissioner General of Immigration, subject to the direction and with the approval of the Secretary of [Commerce and] Labor, by section twenty-two of an Act entitled "An Act to regulate the immigration of aliens into the United States," approved February twentieth, nineteen hundred and seven, the Secretary of [Commerce and] Labor shall establish and maintain immigrant stations at such interior places as may be necessary, and, in the discretion of the said Secretary, aliens in transit from ports of landing to such interior stations shall be accompanied by immigrant inspectors: Provided, That nothing in this Act shall be construed as authorizing the Commissioner General of Immigration to pay the cost of transportation of any arriving alien. (37 Stat. 682.)

This was the first section of an act entitled, "An act to extend the power of the Commissioner General of Immigration, subject to the approval of the Secretary of Commerce and Labor."

The words "Commerce and," inclosed in brackets where they occur twice in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Section 22 of Act Feb. 20, 1907, c. 1134, mentioned in this section, is set forth ante, § 959.

Section 2 of this act authorized and made an appropriation for the establishment in the city of Chicago of such a station as is described in this section. It is omitted as temporary merely.

The Secretary of Labor was authorized to lease office quarters at Montreal, Canada, for four years, by Act Aug. 1, 1914, c. 222, § 1, post, § 4281a.

§ 4279. (Act Feb. 20, 1907, c. 1134, § 30.) Disposal of privileges at immigrant stations; sale of intoxicating liquors forbidden.

All exclusive privileges of exchanging money, transporting passengers or baggage, or keeping eating houses, and all other like privileges in connection with any United States immigrant station, shall be disposed of after public competition, subject to such conditions and limitations as the Commissioner-General of Immigration, under the direction or with the approval of the Secretary of [Commerce and] Labor, may prescribe: Provided, That no intoxicating liquors shall be sold in any such immigrant station; that all receipts accruing from the disposal of such exclusive privileges as herein provided shall be paid into the Treasury of the United States to the credit of the "immigrant fund" provided for in section one of this Act. (34 Stat. 907.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

The provision of this section that the receipts from the disposal of the privileges should be paid into the Treasury to the credit of the "immigrant fund" was superseded by the provision that all moneys received from sources under the immigration laws should be covered into the Treasury to the credit of miscellaneous receipts, contained in Act March 4, 1909, c. 299, § 1, ante, § 4243.

A similar provision relating to the Ellis Island immigrant station was made by Act March 3, 1893, c. 206, § 9, 27 Stat. 571, but was superseded by the more general provisions of Act March 3, 1903, c. 1012, § 30, 32 Stat. 1220, which were re-enacted in this section, and were repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Exclusive privileges granted under former statute and revocation thereof.—The secretary is authorized to contract both as to ferriage to and from Ellis Island, and subsistence of immigrants and employés, for a reasonable term, subject to the rights of the officers and agents of the government, to any legislation that congress may enact, and to such rules and regulations as the secretary may adopt. The contract may confer the exclusive privilege of transportation and the collection of a reasonable compensation therefor. (1891) 20 Op. Atty. Gen. 217.

The express stipulation in certain contracts with reference to rentals at Ellis Island that they may be annulled by the Secretary of the Treasury for cause implies some facts or state of facts inducing or justifying an abrogation of the contract for the benefit of the United States. (1895) 21 Op. Atty. Gen. 115.

The secretary could grant a license, revocable at his will, to use a portion of Ellis Island, an immigrant station, for the purpose of erecting and maintaining an exhibiting hall and conducting a land and labor bureau. (1897) 21 Op. Atty. Gen. 473. He could grant exclusive privileges in connection with Ellis Island immigrant station, after public competition, under such limitations and conditions as he might prescribe. (1897) 21 Op. Atty. Gen. 476.

The secretary has no power to lease for a term of years, or for any length of time, the property of the government placed in his charge without express authority of law, and no authority exists under which he can lease any part of Ellis Island. Id.

In the contract for ferry service between Ellis Island immigrant station and the barge office, New York, to continue for 3 years, and thereafter from year to year, until terminated by notice from either party, given 60 days before the end of the original period or any one year thereafter, and in which it was also covenanted that the contract might be annulled and terminated at any time by the Secretary of the Treasury for good and sufficient cause. Held, that the burning of the buildings on Ellis Island, the removal of the immigrant station from that place, and the discontinuance of the ferry service, supplied a good and sufficient

cause for the termination of the contract by the Secretary of the Treasury. (1897) 21 Op. Atty. Gen. 585.

What one party to a contract may have personally understood a provision to mean at the time the contract was made cannot avail. What both parties understood controls, and that is to be ascertained from the language of the contract itself. Id.

A stipulation in a contract between the government and a certain firm granting to the latter the money exchange privilege at the Ellis Island immigrant station, New York Harbor, which provides that the contractors shall "cash all checks and drafts drawn on banks and banking houses in the city of New York of well-known standing" presented by aliens arriving at that station, cannot be construed to refer to domestic drafts only. (1904) 25 Op. Atty. Gen. 133.

The understanding between the officers of the government and the contractors prior to the making of the contract that drafts drawn upon a certain individual need not be cashed, was equivalent to an agreement that his establishment was not of the standing referred to in the stipulation. Id.

§ 4280. (Act Feb. 20, 1907, c. 1134, § 31.) Jurisdiction of state and local officers and courts over immigrant stations.

For the preservation of the peace and in order that arrests may be made for crimes under the laws of the States and Territories of the United States where the various immigrant stations are located, the officers in charge of such stations, as occasion may require, shall admit therein the proper State and municipal officers charged with the enforcement of such laws, and for the purpose of this section the jurisdiction of such officers and of the local courts shall extend over such stations. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

A previous similar provision was made by Act March 3, 1891, c. 551, § 9, 26 Stat. 1086, but was superseded by Act March 3, 1903, c. 1012, § 31, 32 Stat. 1220, which was re-enacted in this section, and was repealed by section 43 of this act, post, § 4289.

§ 4281. (Act Feb. 20, 1907, c. 1134, § 32.) Rules for entry and inspection of aliens along the borders of Canada and Mexico; contracts with foreign transportation lines.

The Commissioner-General of Immigration, under the direction or with the approval of the Secretary of [Commerce and] Labor, shall prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico, so as not to unnecessarily delay, impede, or annoy passengers in ordinary travel between the United States and said countries, and shall have power to enter into contracts with transportation lines for the said purpose. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

A previous provision similar to that of this section was made by Act March 3, 1891, c. 551, § 8, 26 Stat. 1085, but was superseded by Act March 3, 1903, c. 1012, § 32, 32 Stat. 1221, which was re-enacted in this section, and repealed by section 43 of this act, post, § 4289.

Agreements with transportation lines, as provided in this section, for the payment of the head-money duty on aliens seeking admission overland, were authorized by a proviso annexed to section 1 of this act, ante, § 4242.

The Secretary of Labor was empowered to lease office quarters at Montreal, Canada, for four years, by Act Aug. 1, 1914, c. 223, § 1, post, § 4281a.

Notes of Decisions

Application of statute.—The statute applies to Chinese aliens. Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

§ 4281a. (Act Aug. 1, 1914, c. 223, § 1.) Office for Immigration Service at Montreal, Canada.

The Secretary of Labor is authorized to execute a lease for office quarters for the United States Immigration Service at Montreal,

Canada, for a period of four years from July first, nineteen hundred and fourteen, at a rate of rental not exceeding $4,500 per annum.

This was a provision of the sundry civil appropriation act for the fiscal year 1915, cited above.

The Secretary of Labor was given power to establish and maintain immigrant stations at interior points by Act Feb. 25, 1913, c. 76, § 1, ante, § 4278.

§ 4282. (Act Feb. 20, 1907, c. 1134, § 33.) Construction of term "United States" for purpose of act; aliens coming from Isthmian Canal Zone.

For the purpose of this Act the term "United States" as used in the title as well as in the various sections of this Act shall be construed to mean the United States and any waters, territory, or other place subject to the jurisdiction thereof, except the Isthmian Canal Zone: Provided, That if any alien shall leave the canal zone and attempt to enter any other place under the jurisdiction of the United States, nothing contained in this Act shall be construed as permitting him to enter under any other conditions than those applicable to all aliens. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

A previous provision, similar to that part of this section preceding the words "except the Isthmian Canal Zone," was made by Act March 3, 1903, c. 1012, § 33, 32 Stat. 1221, repealed by section 43 of this act, post, § 4289.

The provisions of section 1 of this act, which imposes a tax on every alien entering the United States, do not apply to aliens arriving in Guam, Porto Rico, or Hawaii, by a proviso annexed to that section, ante, § 4242.

Notes of Decisions

Canal Zone—Contract labor laws.—The contract labor laws do not extend to the Canal Zone. Act March 3, 1903 (32 Stat. 1213), extended those laws to "any water, territory, or other place now subject to the jurisdiction" of the United States; but the treaty with the Republic of Panama, giving the United States jurisdiction of the Zone, was of a later date. (1906) 26 Op. Atty. Gen. 1.

Cited without definite application, Gonzales v. Williams (1904) 24 Sup. Ct. 177, 180, 192 U. S. 1, 48 L. Ed. 317.

§ 4283. (Act Aug. 1, 1914, c. 223, § 1.) Commissioner of Immigration at New Orleans, La.; appointment, status, and salary; repeal in part of Act Feb. 20, 1907, c. 1134, § 34.

The Commissioner of Immigration to discharge at New Orleans, Louisiana, the duties now required of other commissioners of immigration at the respective ports of the United States shall be appointed in the same manner and for the same term as the said other commissioners, and shall have the same official status as they; and that section thirty-four of the immigration Act approved February twentieth, nineteen hundred and seven, is hereby repealed in so far as it conflicts with the foregoing provision: Provided further, however, That the salary of the said commissioner of immigration at New Orleans, Louisiana, shall be reduced to the sum of $2,900 per annum. (38 Stat. 609.)

This was a provision of the sundry civil appropriation act for the fiscal year 1915, cited above.

It supersedes a provision in Act Feb. 20, 1907, c. 1134, § 34, 34 Stat. 908, which empowered the Commissioner-General of Immigration, with the approval of the Secretary of Labor, to appoint such commissioner, and, by virtue of Act Aug. 18, 1894, c. 301, § 1, ante, § 4271, vests such appointment power in the President, subject to confirmation by the Senate.

§ 4284. (Act Feb. 20, 1907, c. 1134, § 35.) Ports to which aliens to be deported.

The deportation of aliens arrested within the United States after entry and found to be illegally therein, provided for in this Act, shall be to the trans-Atlantic or trans-Pacific ports from which said aliens embarked for the United States; or, if such embarkation was for

foreign contiguous territory, to the foreign port at which said aliens embarked for such territory. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

A previous provision, identical in language with this section, was contained in Act March 3, 1903, c. 1012, § 35, repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Operation of statute in general.—This section qualifies and limits sections 4269, 4270, ante. Ex parte Wong You (D. C. 1910) 176 Fed. 933, reversed (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

Aliens to whom statute applies.—This section applies to all aliens coming within its provisions found to be illegally in the United States, because of the fact that they entered in violation of the immigration laws. Ex parte Wong You (D. C. 1910) 176 Fed. 933, reversed (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

To come within the provisions of this section the alien person or persons must have embarked for the United States from some trans-Atlantic or trans-Pacific port and from one of such ports of foreign territory contiguous to the United States, and must after landing have entered the United States in violation of immigration laws and have been found therein within three years of his entry. Id.

Places to which aliens deported.—Russia, not Canada, is the country to which should be deported an alien who, some six years after coming to the United States from Russia, his native land, enters Canada and immediately re-enters the United States, bringing a woman for an immoral purpose; the three-year period prescribed by these sections for the return of the alien to "the country whence he came" manifestly limiting only the authority to deport, and not affecting the determination of the country to which the alien is to be deported, and the legislative intent, as indicated by this section, being that aliens subject to deportation shall be taken to trans-Atlantic or trans-Pacific ports if they came thence, rather than to foreign territory on this continent, although it may have been crossed on the way to this country. Lewis v. Frick (1914) 34 Sup. Ct. 488, 233 U. S. 291, 58 L. Ed. 967.

A Chinese alien who came from China to Canada, and from there was smuggled into the United States, held properly deported to China. Lee Sim v. U. S. (1914) 218 Fed. 432, 134 C. C. A. 232; Ung Bak Foon v. Prentis (1915) 227 Fed. 406, 142 C. C. A. 102; Jeung Bow v. U. S. (1915) 228 Fed. 868, 143 C. C. A. 266.

Where aliens come to the United States by sea from trans-Atlantic or trans-Pacific ports, this section fixes the place, on their illegal entry, to which they shall be returned, namely, to the trans-Atlantic or trans-Pacific port from which they embarked for the United States or contiguous territory, regardless of their native country or the country of their former residence. Ex parte Li Dick (C. C. 1910) 176 Fed. 998.

Deportation is regulated and determined as to the country to which made by this section. Ex parte Wong You (D. C. 1910) 176 Fed. 933, reversed (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

Ex parte Yabucanin (D. C. 1912) 199 Fed. 365. See note to § 4247, ante.

Nothing short of an actual domicile in Canada or Mexico will prevent deportation of aliens entering therefrom to the European or Asiatic port of original embarkation, and the alien must show such domicile. U. S. v. Sisson (D. C. 1914) 220 Fed. 538.

Under this section, a Chinese person may be deported to the port in China nearest the place where he was born and has his family, where the port of embarkation does not appear. Id.

Place to which Chinaman returned.—A convicted Chinaman need not be returned to the country of which he is a "subject"; and one who acquired a domicile in Canada before coming into the United States must be returned to that country, and not to China. U. S. v. Chong Sam (D. C. 1891) 47 Fed. 878.

§ 4285. (Act Feb. 20, 1907, c. 1134, § 36.) Deportation of aliens entering United States except at seaports or places designated by Secretary of Commerce and Labor.

All aliens who shall enter the United States except at the seaports thereof, or at such place or places as the Secretary of [Commerce and] Labor may from time to time designate, shall be adjudged to have entered the country unlawfully and shall be deported as provided by sections twenty and twenty-one of this Act: Provided, That nothing contained in this section shall affect the power conferred by section thirty-two of this Act upon the Commissioner-General of

Immigration to prescribe rules for the entry and inspection of aliens along the borders of Canada and Mexico. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Sections 20, 21, and 32 of this act, mentioned in this section, are set forth ante, §§ 4269, 4270, 4281.

Aliens landed at any time or place other than as designated by the immigration officers are to be deemed to be unlawfully in the United States and to be deported, by provisions of section 18 of this act, ante, § 4267.

Notes of Decisions

Unlawful entry.—Failure of an alien to enter at a port of entry and submit to examination and inspection and entering surreptitiously is an "entry in violation of law," so that an alien so entering is found in the United States in violation of this section, and is subject to deportation. Ex parte Li Dick (C. C. 1910) 176 Fed. 998.

Chinese.—A Chinese alien entering the United States from Canada surreptitiously in the night, avoiding inspection and examination at a designated place of entry, enters in violation of this section, and, like any other alien so entering, is subject to arrest on a warrant issued by the Commissioner of Commerce and Labor and to be deported to Canada, or to China, the "country whence he came," without regard to the provisions of the Chinese exclusion acts. And it is no defense that he is a domiciled merchant in the United States entitled to enter under such acts; the deportation in such case being without prejudice to his right to subsequently apply for admission in a lawful way. Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

Appellate proceedings.—Where Chinese persons, arrested for being unlawfully within the United States, are conditionally discharged on habeas corpus, under recognizance, to await the mandate of the appellate court, on the sole ground that the act proceeded under was not applicable to the case, the appellate court, on reversal, is without authority to order their deportation, and can only remand the case to the court below, to be disposed of on the merits. Frick v. Lee Tung Jung (1913) 205 Fed. 88, 123 C. C. A. 311.

Validity of rule.—Rule 24, providing that any alien who enters the United States across the Canadian border at any other point than those designated shall be deemed to have entered the country unlawfully, does not exceed the scope of this section, and is valid, though no penalty is prescribed for violation thereof. Ex parte Hamaguchi (C. C. 1908) 161 Fed. 185.

§ 4286. (Act Feb. 20, 1907, c. 1134, § 37.) Temporary detention and admission or deportation, in case of contagious disorder, of wife or minor child of alien resident who has filed declaration of intention to become citizen.

Whenever an alien shall have taken up his permanent residence in this country, and shall have filed his declaration of intention to become a citizen, and thereafter shall send for his wife, or minor children to join him, if said wife or any of said children shall be found to be affected with any contagious disorder, such wife or children shall be held, under such regulations as the Secretary of [Commerce and] Labor shall prescribe, until it shall be determined whether the disorder will be easily curable, or whether they can be permitted to land without danger to other persons; and they shall not be either admitted or deported until such facts have been ascertained; and if it shall be determined that the disorder is easily curable or that they can be permitted to land without danger to other persons, they shall, if otherwise admissible, thereupon be admitted. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all powers and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization,

and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions similar to a great extent to those of this section were made by Act March 3, 1903, c. 1012, § 37, 32 Stat. 1221, repealed by section 43 of this act, post, § 4289.

Persons afflicted with a dangerous contagious disease are among the classes of aliens excluded from admission by sections 2 and 9 of this act, ante, §§ 4244, 4254.

Notes of Decisions

Wife and children of alien.—In section 4255, ante, the word "final" is not used in such broad sense as to deprive an alien so rejected of the right to invoke this section, relating to the wife and children of alien, in a case to which it is applicable. Rodgers v. U. S. (1907) 157 Fed. 381, 85 C. C. A. 79.

An immigrant does not cease to be an alien merely by declaring his intention of becoming a citizen so as to relieve his wife and minor children from the operation of the law governing the admission of aliens. In re Moses (C. C. 1897) 83 Fed. 995.

Cited without definite application, In re Rustigiari (C. C. 1908) 165 Fed. 980.

§ 4287. (Act Feb. 20, 1907, c. 1134, § 38.) Persons disbelieving in or opposed to all organized government, or advocating the unlawful assaulting or killing of officers of government, not to be permitted to enter; aiding, etc., entry of such person, punishable.

No person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, shall be permitted to enter the United States or any Territory or place subject to the jurisdiction thereof. This section shall be enforced by the Secretary of [Commerce and] Labor under such rules and regulations as he shall prescribe. Any person who knowingly aids or assists any such person to enter the United States or any Territory or place subject to the jurisdiction thereof, or who connives or conspires with any person or persons to allow, procure, or permit any such person to enter therein, except pursuant to such rules and regulations made by the Secretary of [Commerce and] Labor, shall be fined not more than five thousand dollars, or imprisoned for not more than five years, or both. (34 Stat. 908.)

See notes to section 1 of this act, ante, § 4242.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer to the head of the Department of Labor of all duties performed and all power and authority possessed by the Secretary of Commerce and Labor over the Commissioner General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization, and the Immigration Service at large, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Previous provisions nearly identical in language with those of this section were made by Act March 3, 1903, c. 1012, § 38, 32 Stat. 1221, repealed by section 43 of this act, post, § 4289.

Notes of Decisions

Validity of statute.—This section does not violate Const. art. 3, § 1, or the first, fifth, or sixth amendments to the Constitution. U. S. ex rel. Turner v. Williams (1904) 24 Sup. Ct. 719, 723, 194 U. S. 279, 48 L. Ed. 979.

Decision of inspectors.—The conclusion of the immigrant inspectors, approved by the Secretary of Commerce and Labor, that an alien came within the provisions of this section cannot be said, as a matter of law, to be wholly unsupported by the evidence, even though such act be so construed as to include only advocates of the forcible overthrow of the federal government or of all governments, or of the assassination of officials, where there was evidence that such alien advocated "as an anarchist" a universal strike, and proposed to lecture upon "the legal murder of 1887," and to address mass meetings on that subject, in association

with a person who had been convicted of advocating revolution and murder. U. S. ex rel. Turner v. Williams (1904) 24 Sup. Ct. 719, 724, 194 U. S. 279, 48 L. Ed. 979.

Cited without definite application, Taylor v. U. S. (1907) 152 Fed. 1, 81 C. C. A. 197, reversed (1907) 28 Sup. Ct. 53, 207 U. S. 120, 52 L. Ed. 130.

§ 4288. (Act Feb. 20, 1907, c. 1134, § 41.) Act not to apply to foreign government officials, etc.

Nothing in this Act shall be construed to apply to accredited officials of foreign governments nor to their suites, families, or guests. (34 Stat. 910.)

See notes to section 1 of this act, ante, § 4242.

The provisions of Act March 3, 1903, c. 1012, §§ 1–33, 35–38, 32 Stat. 1213–1221, amended by Act March 22, 1904, c. 749, 33 Stat. 144, repealed by this section, were almost entirely re-enacted, with some changes and additions, in the sections of this act designated by the same numbers, respectively, as said repealed sections.

Section 34 of said Act March 3, 1903, c. 1012, which forbids the sale of intoxicating liquors within the limits of the Capitol building, and was excepted from the repeal of that act by this section, is set forth ante, § 3391.

The laws relating to the immigration or exclusion of Chinese, excepted from the general repealing provision of this section, by the proviso annexed thereto, are set forth post, under Chapter B, "Exclusion of Chinese."

So much of this section and of section 44 of this act as provided for the repeal of Act Aug. 2, 1882, c. 374, § 1, 22 Stat. 186, was repealed, with section 42 of this act, by Act Dec. 19, 1908, c. 6, § 2, post, § 7998. See note to that section.

§ 4289. (Act Feb. 20, 1907, c. 1134, § 43.) Repeal.

The Act of March third, nineteen hundred and three, being an Act to regulate the immigration of aliens into the United States, except section thirty-four thereof, and the Act of March twenty-second, nineteen hundred and four, being an Act to extend the exemption from head tax to citizens of Newfoundland entering the United States, and all Acts and parts of Acts inconsistent with this Act are hereby repealed: Provided, That this Act shall not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese persons or persons of Chinese descent, nor to repeal, alter, or amend section six, chapter four hundred and fifty-three, third session Fifty-eighth Congress, approved February sixth, nineteen hundred and five, or, prior to January first, nineteen hundred and nine, section one of the Act approved August second, eighteen hundred and eighty-two, entitled "An Act to regulate the carriage of passengers by sea." (34 Stat. 911.)

See notes to section 1 of this act, ante, § 4242.

Notes of Decisions

Exclusion and deportation of Chinese.—Chinese laborers held not tacitly exempted from the general provisions of Immigration Act Feb. 20, 1907, for deportation of any alien unlawfully entering the United States, because of Chinese exclusion acts of an earlier date, though by this section its provisions are not to be construed to alter or amend the laws relating to the Chinese. U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354, reversing judgment Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which reverses order Ex parte Wong You (D. C. 1910) 176 Fed. 933.

The provision excluding alien prostitutes (sections 4244, 4247, ante) applied to Chinese, notwithstanding this section declares it shall not be construed to repeal, alter, or amend existing laws as to immigration or exclusion of Chinese persons or persons of Chinese descent. Looe Shee v. North (1909) 170 Fed. 566, 95 C. C. A. 646.

This section is to be construed in connection with the Chinese exclusion laws, so that a Chinese person entering the United States surreptitiously and without right to enter may be deported in accordance with the regulations of the Department of Commerce and Labor under the immigration act, and is not entitled to trial and examination before a justice, judge, or commissioner under the exclusion laws. Ex parte Li Dick (C. C. 1910) 176 Fed. 998.

A Chinese person who entered in violation of the Chinese exclusion acts, may be deported on an order of the Acting Secretary of Labor in accordance with Immigration Act; this section showing that the Immigration Act

was applicable to Chinese persons. Ex parte Woo Shing (D. C. 1915) 226 Fed. 141.

Chinese laborers held deportable only by Judicial Department and not by immigration authorities. Ex parte Woo Jan (D. C. 1916) 228 Fed. 927.

The object of the proviso in section 36 of the immigration act of March 3, 1903 (32 Stat. 1221), providing that that act should not be construed to repeal, alter, or amend existing laws relating to the immigration or exclusion of Chinese, was to prevent a misinterpretation of the repealing clause in that section and to forestall any attempt to secure the admission of Chinese theretofore prohibited from entering the United States under a claim that this act was intended to contain all provisions regulating the immigration of aliens, and that it expressly repealed the Chinese exclusion laws. (1903) 24 Op. Atty. Gen. 706.

Repeal of statute.—Act March 3, 1903, c. 1012, § 3, 32 Stat. 1214, in so far as it placed no limitation on the length of the holding of a female alien for prostitution for which the holder might be prosecuted, was repealed by this section. Ex parte Lair (D. C. 1910) 177 Fed. 789.

Cited without definite application. In re Lee Sher Wing (D. C. 1908) 164 Fed. 506.

CHAPTER B

Exclusion of Chinese

This chapter includes the provisions of the several Chinese exclusion acts, beginning with Act May 6, 1882, c. 126, 22 Stat. 58, which, as being then in force, were re-enacted, extended, and continued by Act April 29, 1902, c. 641, 32 Stat. 176, with the further provisions of that act and those of subsequent acts relating to the subject which remain in force, and also the treaty with China of Dec. 8, 1894, 28 Stat. 1210, relating to the coming of Chinese laborers to and their residence in the United States, which by its terms was to continue in force for a period of ten years, and if not then terminated by notice, for a further period of ten years.

Sec.
4290. Coming of Chinese laborers to United States suspended.
4291. Masters of vessels landing Chinese laborers, punishable.
4292. Exemptions from application of two foregoing sections.
4293. Chinese other than laborers; certificates of identity.
4294. Altering name in or forging certificate, or false personation of person named therein, punishable.
4295. Lists of Chinese passengers to be delivered by masters of vessels arriving from foreign ports; contents; penalty for failure.
4296. Comparison of lists with certificates.
4297. Forfeitures of vessels for violations of act.
4298. Bringing or landing Chinese laborers not entitled to enter, punishable.
4299. Chinese not to enter United States by land without certificate; deportation of Chinese unlawfully within United States; expenses.
4300. Diplomatic and other officers, their servants, etc., exempted from application of act.
4301. Persons to whom act is applicable; "Chinese laborers" defined.
4302. Violations of act punishable.
4303. Return to United States of Chinese laborers after departure therefrom, unlawful.
4304. Certificates of identity not to be issued, and those issued void.
4305. Duties, liabilities, penalties, and forfeitures under previous act extended.
4306. Return of Chinese laborers after departure not permitted, except under conditions stated.
4307. Conditions under which Chinese laborers may return.
4308. Identification of Chinese laborers claiming right to leave and return; certificates; limitation of time for return; ports at which Chinese may enter.
4309. Regulations, etc., to be prescribed by Secretary of Treasury.
4310. Masters of vessels landing Chinese in contravention of act, punishable.
4311. Masters of vessels in distress excepted from foregoing section.
4312. Altering name in or forging certificate, or false personation of person named therein, punishable.
4313. Arrest and removal of Chinese unlawfully in United States.
4314. Chinese diplomatic and consular officers excepted from preceding sections.
4315. Laws prohibiting coming of Chinese continued.
4316. Removal of Chinese not entitled to be or remain in United States.

Sec.
4317. Chinese person arrested must prove right to remain.
4318. Chinese unlawfully in United States punishable.
4319. Habeas corpus proceedings by Chinese denied landing; bail not allowed.
4320. Certificates of residence; arrest and deportation of Chinese laborers not having certificate.
4321. Regulations, etc., to be prescribed for execution of act.
4322. Altering name in or forging certificate, or false personation of person named therein, punishable.
4323. Compensation to officers for services under act.
4324. "Laborer" and "merchant" defined; proof required for entrance of merchant; deportation; certificate of residence to contain photograph.
4325. Decisions of immigration officers excluding from admission final unless reversed on appeal.
4326. Coming of Chinese laborers to United States to be prohibited.
4327. Preceding article not to apply to return to United States of certain laborers; certificates of right to return; limitation of time for return.
4328. Classes of Chinese permitted to enter; privilege of transit of laborers.
4329. Protection of Chinese in United States.
4330. Registration of Chinese laborers in United States, and of citizens of United States in China.
4331. Time convention to remain in force; notice of termination.
4332. Commissioner for hearing on arrest of Chinese person unlawfully in United States.
4333. Fees of commissioners in cases under Chinese exclusion laws.
4334. Warrants of arrest for violations of Chinese exclusion laws.
4335. Exclusion of Chinese from Hawaii; entry into United States from Hawaii prohibited.
4336. Certificates of residence for Chinese in Hawaii at time of annexation; such Chinese not entitled to enter other parts of United States.
4337. Laws prohibiting and regulating coming and residence of Chinese re-enacted, extended, and continued, and made applicable to island territory.
4338. Regulations for execution of provisions of acts and of treaty.
4339. Certificates of residence in insular territory; regulations for enforcement of section in Philippine Islands.
4340. Use of Bertillon system of identification to prevent unlawful entry of Chinese into United States.
4341. Officer to be designated to deport Chinese.

§ 4290. (Act May 6, 1882, c. 126, § 1, as amended, Act July 5, 1884, c. 220.) Coming of Chinese laborers to United States suspended.

That from and after the passage of this act, and until the expiration of ten years next after the passage of this act, the coming of Chinese laborers to the United States be, and the same is hereby, suspended, and during such suspension it shall not be lawful for any Chinese laborer to come from any foreign port or place, or having so come to remain within the United States. (22 Stat. 58. 23 Stat. 115.)

This was the first section of the Chinese Exclusion Act of 1882, entitled "An act to execute certain treaty stipulations relating to Chinese."

The act was preceded by a preamble, as follows:

"Whereas in the opinion of the Government of the United States the coming of Chinese laborers to this country endangers the good order of certain localities within the territory thereof: Therefore,"

The treaty stipulations referred to in the title of this act were contained in the treaty with China of November 17, 1880, 22 Stat. 826, by which it was agreed that the United States might regulate, limit, or suspend the coming or residence of Chinese laborers, but should not prohibit it, and that other Chinese subjects, as well as Chinese laborers then in the United States, should be allowed to go and come of their own free will, and should have all the privileges of citizens and subjects of the most favored nation. A treaty relating to the same subject was signed March 12, 1888, but was not ratified. A convention between the two nations, ratified December 7, 1894, prohibiting, for a period of 10 years, with a provision for its extension for another 10 years, the coming of Chinese laborers to the United States, except under conditions specified, is set forth post, §§ 4326–4331.

Before the expiration of the time for the ratification of the proposed treaty signed March 12, 1888, mentioned above, Act Sept. 13, 1888, c. 1015, 25 Stat. 476, parts of which are set forth post, §§ 4306–4314, was passed, which fur-

ther restricted immigration of Chinese, and section 15 of which repealed this act and Act July 5, 1884, c. 220, 23 Stat. 115, amendatory thereof, the repeal "to take effect upon the ratification of the pending treaty"; and thereafter Act Oct. 1, 1888, c. 1064, 25 Stat. 504, was passed, making unlawful the return of Chinese laborers in the United States after departure therefrom, and extending the application of certain provisions of this act, without referring to the proposed repeal thereof by Act Sept. 13, 1888, c. 1015, § 15. The treaty was never ratified, and the repeal of this act and other provisions of Act Sept. 13, 1888, c. 1015, dependent on such ratification, never became operative.

This section and most of the following sections of this act were amended, and at the end of the act, by amendment of section 15 thereof, sections 16 and 17 were added thereto, by Act July 5, 1884, c. 220, 23 Stat. 115; the several amendments being incorporated in the respective sections as set forth here.

Such amendments of this section consisted in the insertion, after the words at the beginning of the section, "That from and after," of the words "the expiration of ninety days next after"; in the striking out, after the words "any Chinese laborer to come," of the words "from any foreign port or place"; and in the insertion, after the words "or, having so come," of the words "after the expiration of said ninety days."

The suspension for 10 years of the coming of Chinese laborers into the United States by this section, and other provisions of this and other acts remaining in force at that time, were continued for a period of ten years by Act May 5, 1892, c. 60, § 1, post, § 4315.

The provisions of this act, and all laws prohibiting and regulating the coming of Chinese into the United States and their residence therein, in force at the time, were re-enacted, extended, and continued, and were also made applicable to the island territory under the jurisdiction of the United States, by Act April 29, 1902, c. 641, § 1, post, § 4337.

On the establishment of the Department of Commerce and Labor and the transfer thereto from the Treasury Department of the Immigration Service, by Act Feb. 14, 1903, c. 552, ante, §§ 853–861, the authority, power and jurisdiction possessed and exercised by the Secretary of the Treasury by virtue of any law in relation to the exclusion from and the residence within the United States, its territories, and the District of Columbia, of Chinese and persons of Chinese descent, were transferred to and conferred upon the Secretary of Commerce and Labor, and the authority, power, and jurisdiction in relation thereto vested by law or treaty in the collectors of customs and collectors of internal revenue, were conferred upon and vested in such officers under the control of the Commissioner-General of Immigration, as the Secretary of Commerce and Labor might designate therefor, by provisions of section 7 of that act, ante, § 858.

On the creation of the Department of Labor, the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration, and Naturalization and the Immigration Service at large, were transferred to that department, and the duties and powers of the Secretary of Commerce and Labor with reference thereto were transferred and conferred to the Secretary of Labor, by Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Sections 2, 3, 6–13, 15, and 16 of this act are set forth post, §§ 4291–4302.

Section 4 of this act, as amended by Act July 5, 1884, c. 220, 23 Stat. 115, provided that the collector of the customs for the proper district should make lists of all Chinese laborers about to depart by water from the United States and having the right to re-enter, stating the individual, family, and tribal name in full, the age, occupation, when and where followed, last place of residence, physical marks or peculiarities, and all facts necessary for the identification of each of such laborers, said lists to be entered in registers to be kept in the custom-house; that every Chinese laborer departing from the United States should be entitled to receive free of charge a certificate, the contents of which were to correspond with the lists; that the certificates should be forfeited in certain cases; and that said certificates should entitle the laborer to whom it had been issued to return to the United States. It was superseded by Act Oct. 1, 1888, c. 1064, post, §§ 4303–4305, which provided that no Chinese laborer whatever should be entitled to return to the United States, that no certificates of identity should thereafter be issued, that every such certificate heretofore issued was declared void, and that Chinese laborers seeking admission by virtue of such certificates should be refused entrance.

Section 5 of this act provided for the issuance of certificates to Chinese laborers about to depart from the United States by land similar to those provided for by section 4 of this act. It was superseded by Act Oct. 1, 1888, c. 1064, post, §§ 4303–4305. See, also, the preceding paragraph of this act.

Section 14 of this act provided that no State court or court of the United States should admit Chinese to citizenship, and repealed all laws in conflict therewith. It is set forth, post, § 4359.

Section 17, added, with section 16, to this act by amendment by Act July 5,

1884, c. 220, 23 Stat. 118, provided that that act should not affect any prosecution or other proceeding begun under the act of which it was amendatory. The section is omitted as temporary in its nature, merely.

Notes of Decisions

1. Construction and operation of Chinese exclusion laws in general.
2. —— Immigration acts.
3. Admission and exclusion of Chinese.
4. —— Detention and arrest.
5. —— Citizens of the United States.
6. —— "Chinese laborers."
7. —— Children of Chinese.
8. —— Wife of Chinaman.
9. —— Rights of returning Chinese.
10. —— Chinese passing through the United States.
11. —— Seamen.
12. Treaties and rights of Chinese thereunder.

1. Construction and operation of Chinese exclusion laws in general.—The object of the Chinese exclusion act was to prevent further immigration of Chinese laborers, not to expel those already here. Case of the Chinese Cabin Waiter (C. C. 1882) 13 Fed. 286.

The act of May 6, 1882, was not intended to interfere with the commercial relations between China and this country. Its purpose must be held to be to put a restriction upon the immigration of laborers, including those skilled in any art or trade. Case of the Chinese Merchant (C. C. 1882) 13 Fed. 605.

A Chinese laborer, born at Hong Kong after its cession to Great Britain, is within the provisions of this act, the purpose of which was to exclude laborers coming from China subject to the stipulations of the treaty of 1880 with that country, and Chinese laborers coming from any other part of the world. In re Ah Lung (C. C. 1883) 18 Fed. 28.

The general purpose of the regulations for the exclusion of Chinese is to prevent persons of Chinese descent who are aliens from entering the United States, unless within the privileged classes. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

The act of congress of 1882 must be construed as referring to Chinese laborers who might leave the United States, and to Chinese persons who might leave China, after the law went into effect, and not to Chinese laborers who might leave this country before that period. The case of such laborers was not provided for, and was probably overlooked. In re Chin A On (D. C. 1883) 18 Fed. 506; In re Teong Yick Dew (C. C. 1884) 19 Fed. 490.

Under the Chinese exclusion act only laborers are included, and those who come to engage, in good faith, in mercantile occupations, are entitled to land. In re Tung Yeong (D. C. 1884) 19 Fed. 184.

The expressed object of this act is to suspend for 10 years the coming of Chinese laborers to the United States and the persons prohibited from coming within the United States are throughout the act described by the phrase "Chinese laborers." In re Ah Kee (D. C. 1884) 22 Fed. 519, 520.

The restriction on immigration of Chinamen is confined to Chinese laborers, and persons other than Chinese laborers are not prohibited from landing. In re Jung Ah Lung (D. C. 1885) 25 Fed. 141, 143.

The jurisdiction of the federal courts to issue the writs of habeas corpus, on petition of a Chinese immigrant held in custody on board a vessel by the master under directions from the customs authorities, is not taken away by the Chinese restriction act. U. S. v. Chung Shee (D. C. 1895) 71 Fed. 277, judgment affirmed (1896) 76 Fed. 951, 22 C. C. A. 639.

The mode and manner of ascertaining the fact of citizenship, as a means for excluding or expelling aliens, is exclusively within the power of congress, acting within its constitutional limitations, to determine; and it may vest the power to determine such fact exclusively in executive officers. U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442.

The true theory of the Federal law is not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed. (1898) 22 Op. Atty. Gen. 130.

2. —— Immigration acts.—Chinese laborers held not tacitly exempted from the general provisions of Immigration Act Feb. 20, 1907, for deportation of any alien unlawfully entering the United States, because of Chinese exclusion acts of an earlier date, though by section 43 of the later act (section 4289, ante) its provisions are not to be construed to alter or amend the laws relating to the Chinese. U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354, reversing judgment Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which reverses order Ex parte Wong You (D. C. 1910) 176 Fed. 933.

Chinese laborers are excluded by this act as extended, and all other Chinese persons not excluded are subject to the immigration act, and a Chinese laborer, with or without a loathsome disease, cannot enter, for the Chinese act governs, while a Chinese merchant will not be excluded by that act, but will be excluded by the immigration act, if he has a loathsome disease or other disability prescribed therein. Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, reversed (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

The Chinese exclusion acts do not exclude the application of the general im-

migration act to Chinese aliens seeking to enter the United States, and rules 3 and 49 of the regulations, governing the admission of Chinese aliens adopted pursuant to such act, which provide for the examination of such aliens under that act as well as the exclusion acts, and that they shall be subject to arrest and deportation thereunder for entry in violation of its terms, are valid. Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

The Chinese exclusion acts are to be read in pari materia with the immigration act, so far as they apply to Chinese aliens seeking to enter the United States; the immigration act being equally applicable to Chinese aliens surreptitiously entering the country as to other aliens. Ex parte Wong You (D. C. 1910) 176 Fed. 933; Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

3. Admission and exclusion of Chinese.—Chinese laborers who came to this country after the making of the Chinese treaties of July 28, 1868, and November 17, 1880, acquired no right thereunder, or under the acts of congress in relation to the Chinese, as denizens or otherwise, to remain in this country, except by the license, permission, and sufferance of congress, to be withdrawn whenever, in its opinion, the public welfare might require it. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1023, 149 U. S. 698, 37 L. Ed. 905, following Chae Chan Ping v. U. S. (1889) 9 Sup. Ct. 623, 130 U. S. 581, 32 L. Ed. 1068.

The power to exclude or expel aliens, being one affecting our international relations, is vested in the political departments of the government, and is to be regulated by treaty or act of congress, and executed by the executive authority, except so far as the judicial department has been authorized or is required by the constitution to intervene. U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442.

An alien has no right to require the courts of the United States to adjudicate questions as to the constitutionality of laws enacted by Congress. Ex parte Lung Wing Wun (D. C. 1908) 161 Fed. 211.

4. —— Detention and arrest.—The detention of a Chinese person in a place provided within the United States pending final determination of his application to enter is legal. Ex parte Jong Jim Hong (C. C. 1907) 157 Fed. 447.

The denial to Chinese who are unlawfully in the United States of the privilege of entering this country, and their refusal to leave pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion act, is neither detention nor arrest. (1898) 22 Op. Atty. Gen. 51.

5. —— Citizens of the United States.—Evidence held insufficient to establish citizenship of a Chinese person 16 years of age, who claimed the right to enter the United States because he was born here. Quock Ting v. U. S. (1891) 11 Sup. Ct. 733, 851, 140 U. S. 417, 35 L. Ed. 501.

A person born in this country of Chinese parents, who are permanently domiciled here, though aliens, is a citizen of the United States, and cannot be excluded therefrom or denied the right of entry. Lee Sing Far v. U. S. (1899) 94 Fed. 834, 35 C. C. A. 327.

A passport issued to a Chinese person by the Secretary of State is not evidence of the citizenship of such person in the United States. Edsell v. Mark (1910) 179 Fed. 292, 103 C. C. A. 121.

The exclusion acts are not applicable to a person born within the United States, of Chinese parents residing therein, and not engaged in any diplomatic or official capacity under the emperor of China, as such person is a citizen of the United States. In re Look Tin Sing (C. C. 1884) 21 Fed. 905; In re Wy Shing (C. C. 1888) 36 Fed. 553; Ex parte Chin King (C. C. 1888) 35 Fed. 354; In re Yung Sing Hee (C. C. 1888) 36 Fed. 437.

A child born in the United States of Chinese parents is a citizen of the United States, and not subject to exclusion therefrom. Ex parte Chin King (C. C. 1888) 35 Fed. 354.

A Chinaman may be entitled to land on the ground that he was born in this country and has, therefore, the full rights of an American citizen. In re Jung Ah Lung (D. C. 1885) 25 Fed. 141, 143.

Although the claim of one of Chinese parentage, who is seeking admittance to this country, that he was born here, is corroborated by another Chinese witness, and uncontradicted, yet their testimony may be discredited if contradictory as to other matters. In re Jew Wong Loy (D. C. 1898) 91 Fed. 240.

As to proof of citizenship, see U. S. v. Lee Pon (D. C. 1899) 94 Fed. 827; U. S. v. Wong Quong Wong (D. C. 1899) 94 Fed. 832; Gee Fook Sing v. U. S. (1892) 49 Fed. 146, 1 C. C. A. 211; Lem Hing Dun v. U. S. (1892) 49 Fed. 148, 1 C. C. A. 210; Woey Ho v. U. S. (1901) 109 Fed. 888, 48 C. C. A. 705; Lee Ah Yin v. U. S. (1902) 116 Fed. 614, 54 C. C. A. 70.

The Chinese exclusion act does not apply to persons of that race born in the United States of parents there living; Const. Amend 14, cl. 1, making them citizens. U. S. v. Chin Hing (D. C. 1915) 225 Fed. 794.

6. —— "Chinese laborers."—A Chinese person owning a $500 interest in a general merchandise store, but oper-

ating a fruit farm as a tenant and selling the fruit grown thereof by his own labor, was a "laborer," and not entitled to enter or remain in the United States. Lew Quen Wo v. U. S. (1911) 184 Fed. 685, 106 C. C. A. 639.

The term "Chinese laborers" must be held to mean the subjects of the government of China to which the provisions of the treaty relate; and the inhibitions of the act cannot be construed to exclude from our shores laborers who are Chinese by race and language, but who are not, and never were, subjects of the emperor of China, or resident within his dominions. U. S. v. Douglas (C. C. 1883) 17 Fed. 634; U. S. v. Ah Fawn (D. C. 1893) 57 Fed. 591; Lee Ah Yin v. U. S. (1902) 116 Fed. 614, 54 C. C. A. 70.

A Chinese actor or theatrical performer is not a "laborer." In re Ho King (D. C. 1883) 14 Fed. 724. Nor is the owner of a restaurant. (1893) 20 Op. Atty. Gen. 602.

The Attorney General cannot state as a basis for future departmental action, the classes of Chinese persons whose occupations would place them within the category of laborer. He can only answer as to each case when it arises. (1893) 20 Op. Atty. Gen. 602.

7. —— **Children of Chinese.**—The purpose of the Chinese exclusion acts is to prohibit the entry into the United States of Chinese laborers as a class, and the status of minor children of a laborer is that of their father. U. S. v. Chu Chee (1899) 93 Fed. 797, 35 C. C. A. 613.

Since there is no statutory provision that a decision of the appropriate immigration or customs officer favorable to the admission of a Chinese alien is conclusive on the United States, the admission of a Chinese alien as a merchant is not conclusive against the United States on the application of the alleged merchant's son to enter, and did not prevent the son's exclusion on the ground that the father, while having a financial interest in a mercantile establishment, was in fact a laborer engaged in fruit culture as a tenant. Lew Quen Wo v. U. S. (1911) 184 Fed. 685, 106 C. C. A. 639.

The Chinese exclusion act does not prevent parents living in the United States from sending for their children who are too young to be classed as laborers. In re Tung Yeong (D. C. 1884) 19 Fed. 184.

A Chinese merchant domiciled in the United States has the right to bring into this country with his wife minor children legally adopted by him in China, where it is shown that the adoption was bona fide, and that the children have lived as members of his family and have been supported by him for several years. Ex parte Fong Yim (D. C. 1905) 134 Fed. 938.

A Chinese minor lawfully entering the United States as the son of a Chinese merchant domiciled in this country lost such status on the return of his father to China to remain permanently, leaving the son, who was still a minor, in this country, and his status thereafter was determined by his own occupation. U. S. v. Joe Dick (D. C. 1905) 134 Fed. 988.

8. —— **Wife of Chinaman.**—Upon the marriage of a Chinese woman, who was not before a laborer, to a Chinese laborer, she takes upon herself the status of the husband as one of the class who are not now permitted to enter the United States, without reference to her former status. Case of the Chinese Wife (C. C. 1884) 21 Fed. 785.

Where a woman, married according to Chinese laws to a Chinaman then in the United States, is brought to the United States by direction of her husband, both acting in good faith, she is entitled to land, there being no evidence that she is a prostitute. In re Lum Lin Ying (D. C. 1894) 59 Fed. 682.

9. —— **Rights of returning Chinese.**—A Chinaman who left this country, after the passage of the first act restricting Chinese immigration (Act May 6, 1882, c. 126, 22 Stat. 58), and before the amendment thereof (Act July 5, 1884, c. 220, 23 Stat. 115), was passed, and who returned after the passage of the latter act, is entitled to land upon complying with the requirements of the first act; the provisions of the amending act relating to evidence of identity not being retroactive. U. S. v. Jung Ah Lung (1888) 8 Sup. Ct. 663, 666, 124 U. S. 621, 31 L. Ed. 591.

Under the Chinese exclusion act, a laborer who leaves the United States temporarily may return on obtaining a certificate of identification. Case of the Chinese Waiter (C. C. 1882) 13 Fed. 286.

A Chinese laborer, claiming to be one Tom Mun, who left the United States before the passage of the restriction act (Act May 6, 1882), showed by the books of a steamer that Tom Mun sailed from this country March 15, 1882, and also by the books of a shoe factory that an employé of that name had been paid off a few days prior to that date. A white Chinese collector testified that he knew such laborer at the shoe factory as Tom Mun, and "guessed" that he left in 1878 or 1879. Chinese witnesses also testified as to his identity. It appeared, however, that the court had already allowed another person to re-enter the United States as the Tom Mun mentioned. Held, that the identity was not established, and such laborer was not entitled to land. In re Tom Mun (D. C. 1888) 47 Fed. 722.

A Chinaman who formerly resided in the United States, and acquired an interest in a firm long established and doing business here, although he re-

turned to China, and remained over six years, retaining his interest in the firm, and receiving his share of the profits, has a "commercial domicile" in the United States, and cannot be sent back to China under the exclusion act. U. S. v. Chin Quong Look (D. C. 1892) 52 Fed. 203, following Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 144 U. S. 47, 36 L. Ed. 340.

Where a Chinese resident left the country for China, notwithstanding a certificate fixing his status as a merchant was denied him on a preinvestigation, his right to re-enter was for the determination of the Immigration Department, and not by justice, judge, or commissioner, under the exclusion laws. Ex parte Chin Fong (D. C. 1914) 213 Fed. 288.

See, also, note under § 4306, post.

10. —— Chinese passing through the United States.—A Chinese laborer, who comes to this country merely to pass through it, is not within the prohibition of this section. (1882) 17 Op. Atty. Gen. 483. This section deals with Chinese as immigrants to this country. Id., overruling opinion of July 18, 1882 (17 Op. Atty. Gen. 416).

The remedy for the alleged evil of Chinese laborers passing through the territory of the United States to, and returning from, China and other foreign countries, is proper matter for the consideration of Congress. (1886) 18 Op. Atty. Gen. 388.

Opinion of December 26, 1882 (17 Op. Atty. Gen. 483), touching the right of Chinese laborers to pass through the United States in the course of their journey to and from other countries, reaffirmed. (1889) 19 Op. Atty. Gen. 369. The application of that opinion to the case presented is unaffected by the acts of July 5, 1884 (23 Stat. 115), and October 1, 1888 (25 Stat. 504). Id.

Chinese laborers coming to this country merely en route to some other country may lawfully be permitted to pass through the United States. (1894) 20 Op. Atty. Gen. 693.

The question of the right of transit of Chinese persons from a port of the United States to the territory of Mexico, or from a port of the United States directly by sea to a foreign port, being now before the courts, it would not be proper for the Attorney General to express an opinion thereon. (1901) 23 Op. Atty. Gen. 585.

11. —— Seamen.—A Chinese seaman is a "laborer," and cannot, therefore, leave his vessel to come ashore even for temporary purposes. In re Fook (1882) 65 How. Prac. 404.

The Chinese exclusion acts do not apply to Chinese seamen serving on board vessels touching at American ports while on a voyage to a foreign port; such seamen being authorized to land on giving bond to depart within 30 days as required by commerce and labor regulation rule 32. U. S. v. Ah Fook (1910) 183 Fed. 33, 105 C. C. A. 325.

Where a Chinese laborer has acquired a residence, he does not lose the same by shipping as one of the crew on an American vessel at an American port for a voyage to a foreign port and return, though he may land at such foreign port with permission of the master of the vessel. Case of the Chinese Cabin Waiter (C. C. 1882) 13 Fed. 286.

The status of a person employed on an American vessel is not changed by the fact that he is permitted by the captain to land for a few hours at a foreign port or place, and a Chinese laborer on an American vessel cannot be held to lose his residence here, so as to come within the purview of the prohibitory act of congress, by a temporary entry upon a foreign country. Case of Chinese Laborers on Shipboard (C. C. 1882) 13 Fed. 291.

Chinese Exclusion Act May 6, 1882, does not apply to one who entered a port of the United States as a member of the crew of a vessel arriving from a foreign port with the intention of returning or proceeding to another foreign port in the ordinary course of navigation. In re Moncan (C. C. 1882) 14 Fed. 44.

Chinese laborers within this act have no reference to seamen in the ordinary pursuit of their vocation on the high seas, who may land temporarily for the purpose only of obtaining a chance to ship for some other foreign voyage as soon as possible, and who do not intend to make any stay in this country or enter any of the occupations on land within this country. In re Ah Kee (D. C. 1884) 22 Fed. 519, 520.

A Chinese seaman who lands at a port of the United States for the purpose of reshipping as soon as shipment can be obtained, must give bond to the collector of the port to ship within 30 days, and to produce to the collector a certificate of the shipping commissioner to that effect. In re Jam (D. C. 1900) 101 Fed. 989.

The transfer of the Chinese crew of the Danish steamer Arab to the Danish steamer Stanley Dollar, and of a Chinese crew from a vessel of the Pacific Mail Steamship Line to the steamer Siberia, of the same line, in a port of the United States, would not involve a violation of the Chinese exclusion laws. Those laws have no application to seamen who, in good faith, are engaged in navigation, and who are temporarily within a port of the United States for that purpose. (1902) 24 Op. Atty. Gen. 553.

The Chinese exclusion laws have no application to seamen who in good faith are engaged in navigation, and who are temporarily within a port of the United States for that purpose. The transfer of the Chinese crew of the

Danish steamer Arab to the Danish steamer Stanley Dollar, and of a Chinese crew from a vessel of the Pacific Mail Steamship Line to the steamer Siberia, of the same line, under the conditions named, would not involve a violation of either of those laws. Id.

12. Treaties and rights of Chinese thereunder.—A state statute or constitutional provision prohibiting corporations from employing Chinese, and requiring the legislature to pass such laws as may be necessary to enforce the provision, is in conflict with articles 5 and 6 of the treaty with China of July 28, 1868, which recognizes the rights of citizens of China to immigrate to the United States for the purposes of curiosity, trade, and permanent residence, and which provides that Chinese subjects residing in the United States shall enjoy the same privileges, etc., in respect to travel and residence, as may be enjoyed by the citizens or subjects of the most favored nations. In re Parrott (C. C. 1880) 1 Fed. 481, 507.

The privileges and immunities which, under the treaty, the Chinese are entitled to enjoy to the same extent as enjoyed by the subjects of the most favored nations, are all those rights which are fundamental, and of right belong to the citizens of all free governments; and among them is the right to labor, and to pursue any lawful employment in a lawful manner. Id.

The policy of the government being against the admission of Chinese laborers, treaty provisions making exceptions should not be extended by construction to cases not falling within the plain scope of the language used. (1896) 21 Op. Atty. Gen. 425.

The Chinese subjects referred to in the clause in the treaty with China, which declared that Chinese subjects visiting or residing in the United States shall enjoy the same privileges, immunities, and exemptions in respect to travel or residence as are enjoyed by the citizens or subjects of the most favored nation, were those traveling for instruction or curiosity, or engaged in some legitimate avocation, and whose ingress might not lawfully be prohibited by reason of some objection personal to themselves, and not dependent on their nationality. Ex parte Ah Fook (1874) 49 Cal. 402.

Article 6 of our treaty with China of February 5, 1870 (16 Stat. 739), did not grant to Chinese immigrants any greater privileges than were guarantied by the laws of congress to other aliens. Territory v. Lee (1874) 2 Mont. 124.

Cited without definite application, U. S. v. Gue Lim (1900) 20 Sup. Ct. 415, 418, 176 U. S. 459, 44 L. Ed. 544; Lui Lum v. U. S. (1909) 166 Fed. 106, 92 C. C. A. 90; U. S. v. Illinois Cent. R. Co. (1909) 170 Fed. 542, 95 C. C. A. 628; Lim Jew v. U. S. (1912) 196 Fed. 736, 116 C. C. A. 364.

§ 4291. (Act May 6, 1882, c. 126, § 2, as amended, Act July 5, 1884, c. 220.) Masters of vessels landing Chinese laborers, punishable.

The master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer, from any foreign port or place, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by a fine of not more than five hundred dollars for each and every such Chinese laborer so brought, and may also be imprisoned for a term not exceeding one year. (22 Stat. 59. 23 Stat. 115.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by inserting, after the words "and land," the words "or attempt to land," as set forth here, by Act July 5, 1884, c. 220, cited above.

The application of the provisions of this section was extended by Act Oct. 1, 1888, c. 1064, § 3, post, § 4305.

Provisions somewhat similar to those of this section were made by Act Sept. 13, 1888, c. 1015, § 9, post, § 4310.

Notes of Decisions

Enactment, amendment, and repeal.—This section was impliedly repealed by section 4310, post, which covers substantially the same offense, but prescribes a different punishment. U. S. v. Durie (D. C. 1909) 170 Fed. 624; U. S. v. Wood (D. C. 1909) 168 Fed. 438.

As to landing of Chinese in violation of Act Sept. 13, 1888, c. 1015, § 9, see post, § 4310.

Construction and operation of statute.—The word "knowingly" referred to knowledge of the fact of landing, and not knowledge that the Chinese landed were not legally entitled to enter the United States. Sims v. U. S. (1903) 121 Fed. 515, 58 C. C. A. 92.

The prohibition of the act of congress upon any master of a vessel bringing into the United States any Chinese laborer from any foreign port or

place means from bringing any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. Case of the Chinese Cabin Waiter (C. C. 1882) 13 Fed. 286.

Where a Chinese laborer escaped from the custody of the master of the vessel in which he was brought to a port of the United States, after being transferred to a detention shed pending determination of his right to enter, without the permission, connivance, knowledge, or negligence of such master, the latter was not guilty of knowingly permitting such Chinese person to land in the United States. U. S. v. Seabury (D. C. 1904) 133 Fed. 983.

—— **What persons are masters within meaning of act.**—A vessel stolen from its owner, and used, while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of law, does not become liable to seizure and forfeiture. To work a forfeiture of a vessel, the master must knowingly violate the statute. A person in control of a stolen vessel is not master of the vessel in the sense in which the term is applied to an officer in the statute. U. S. v. The Geo. E. Wilton (D. C. 1890) 43 Fed. 606.

The owner of a one-sixth interest in a gasoline launch, who without the consent of the owner of the remaining interest had himself enrolled as master and used the vessel to bring Chinese, who were not entitled to enter, to a port of the United States, where she was seized under the Chinese Exclusion Act as amended in 1884, held not the master as against the principal owner, whose interest was not subject to forfeiture thereunder because of his co-owner's unauthorized acts. The Calypso (D. C. 1914) 217 Fed. 669.

—— **What constitutes the landing of Chinese.**—The transfer of a Chinese person from the vessel in which he was brought to the United States to a detention shed maintained by the owners of the vessel on their dock, where he was detained under guard pending determination of his right to enter the United States, did not constitute a "landing" of such person. U. S. v. Seabury (D. C. 1904) 133 Fed. 983.

Application to seamen.—The landing of the crew, temporarily, for the purpose of transfer, would not violate the treaty with China and the laws of the United States in relation to the exclusion of Chinese. (1902) 24 Op. Atty. Gen. 111.

A Chinese crew which shipped at Hongkong on a vessel belonging to a company chartered under the laws of the United States, for a trip to San Francisco and return by the same vessel or any other vessel belonging to that company, which crew, owing to an accident to the ship, was brought to San Francisco on a vessel belonging to a different company, may be transferred to another vessel substituted for the one injured, after having duly signed for that service before a United States shipping commissioner. Id.

The Chinese exclusion laws and alien contract labor laws have no application to seamen who in good faith are engaged in navigation and who are temporarily within a port of the United States for that purpose. The transfer of the Chinese crew of the Danish steamer Arab to the Danish steamer Stanley Dollar, and of a Chinese crew from a vessel of the Pacific Mail Steamship Line to the steamer Siberia, of the same line, within a port of the United States, would not involve a violation of either of those laws. (1902) 24 Op. Atty. Gen. 553.

Sufficiency of indictment.—An indictment under this section must aver that accused knowingly permitted a Chinese person to be landed. U. S. v. Rout (D. C. 1909) 170 Fed. 201.

Sufficiency of bail bond or undertaking.—Under Hill's Ann. Laws Or. § 1470, relating to bail, a charge in an undertaking taken under R. S. § 1014, ante, § 1647, by a United States commissioner in Oregon, that defendant "unlawfully aided and abetted the landing of Chinese laborers in the United States," is a sufficient statement of his offense. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

Cited without definite application, Ex parte Lau Ow Bew (1891) 12 Sup. Ct. 43, 45, 141 U. S. 583, 35 L. Ed. 868; Case of the Unused Tag (C. C. 1884) 21 Fed. 701; In re Ho King (D. C. 1883) 14 Fed. 724; U. S. v. Wong Chung (D. C. 1899) 92 Fed. 141, 145.

§ 4292. (Act May 6, 1882, c. 126, § 3, as amended, Act July 5, 1884, c. 220.) Exemptions from application of two foregoing sections.

The two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, nor shall said sections apply to Chinese laborers, who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in

the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: Provided: That all Chinese laborers brought on such vessel shall not be permitted to land except in case of absolute necessity, and must depart with the vessel on leaving port. (22 Stat. 59. 23 Stat. 115.)

See notes to section 1 of this act, ante, § 4290.

This section was amended, by striking out, after the words "the passage of," the words "this act, and," and inserting instead thereof the words "the act to which this act is amendatory, nor shall said sections apply to Chinese laborers, who," and by inserting in the proviso, after the words "That all Chinese laborers brought on such vessel shall," the words "not be permitted to land except in case of absolute necessity, but must," making the section read as set forth here, by Act July 5, 1884, c. 220, cited above.

So much of this section as permitted Chinese laborers who were in the United States on the 17th day of November, 1880, or who came into the United States before the expiration of ninety days next after May 6, 1882, to return to the United States, was superseded by Act Oct. 1, 1888, c. 1064, § 1, post, § 4303, which prohibited the return of any Chinese laborer whatever.

The provisions of the latter act were in turn superseded in part by provisions permitting the return of a Chinese laborer who had a wife, child, or parent in the United States or who had property of the value of $1,000 or debts of like amount and pending settlement, by the Convention with China of Dec. 8, 1894, art. 2, post, § 4327. Provisions somewhat similar to those of said convention, made by Act Sept. 13, 1888, c. 1015, § 6, post, § 4307, were re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337.

An exception relating to the landing of vessels in distress, similar to the provisions of this section, was contained in Act Sept. 13, 1888, c. 1015, § 10, post, § 4311, also re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337.

Notes of Decisions

Repeal of statute.—This section was repealed by implication by section 4310, post, which covers the same offense, but provides a different punishment. U. S. v. Wood (D. C. 1909) 168 Fed. 438.

As to landing of Chinese in violation of Act Sept. 13, 1888, c. 1015, § 9, see post, § 4310.

Laborers within exemption.—Under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges, and immunities of subjects of the most favored nations with which this country has treaty relations; and, where he was a resident here before the passage of the act of congress restricting immigration of Chinese, he has a right to remain and follow any of the lawful ordinary trades and pursuits of life, and his liberty so to do cannot be restrained by invalid legislation. In re Quong Woo (C. C. 1882) 13 Fed. 229.

A Chinese resident, here before the passage of the act of congress restricting immigration of Chinese, has a right to remain and follow any lawful trade or pursuit, and his liberty so to do cannot be restrained by invalid legislation. Id.

While on board an American vessel a Chinese laborer is within the jurisdiction of the United States, and retains his right of residence here previously acquired by treaty with China. Case of the Chinese Cabin Waiter (C. C. 1882) 13 Fed. 286; Case of the Chinese Laborers on Shipboard, Id. 291.

A person on board of a vessel of the United States or any one of them is in contemplation of law within the territory and jurisdiction of the United States, and therefore a Chinese laborer who shipped on an American vessel at London, prior to the passage of the act aforesaid, and continued on her until her arrival in the United States, although after the expiration of the 90 days next following the passage of said act, is entitled to reside therein. In re Moncan (C. C. 1882) 14 Fed. 44.

The act of May 6, 1882, restricting Chinese immigration, permits all laborers who were in this country at any time before the expiration of 90 days after the passage of the act, and who shall produce the certificate provided for by the act, to go and come at pleasure, and no evidence of previous residence, except the prescribed certificate, can be received from those laborers who quitted the country since the certificates were obtainable; but those who went away before the act was passed, or before certificates were to be had, must be allowed (as was held in the case of Chin A On [D. C. 1883] 18

place means from bringing any Chinese laborer embarking at a foreign port or place, and does not apply to the bringing of a laborer already on board of the vessel when it touches at a foreign port. Case of the Chinese Cabin Waiter (C. C. 1882) 13 Fed. 286.

Where a Chinese laborer escaped from the custody of the master of the vessel in which he was brought to a port of the United States, after being transferred to a detention shed pending determination of his right to enter, without the permission, connivance, knowledge, or negligence of such master, the latter was not guilty of knowingly permitting such Chinese person to land in the United States. U. S. v. Seabury (D. C. 1904) 133 Fed. 983.

—— **What persons are masters within meaning of act.**—A vessel stolen from its owner, and used, while out of his control, without his knowledge or consent, in bringing Chinese laborers into the United States in violation of law, does not become liable to seizure and forfeiture. To work a forfeiture of a vessel, the master must knowingly violate the statute. A person in control of a stolen vessel is not master of the vessel in the sense in which the term is applied to an officer in the statute. U. S. v. The Geo. E. Wilton (D. C. 1890) 43 Fed. 606.

The owner of a one-sixth interest in a gasoline launch, who without the consent of the owner of the remaining interest had himself enrolled as master and used the vessel to bring Chinese, who were not entitled to enter, to a port of the United States, where she was seized under the Chinese Exclusion Act as amended in 1884, held not the master as against the principal owner, whose interest was not subject to forfeiture thereunder because of his co-owner's unauthorized acts. The Calypso (D. C. 1914) 217 Fed. 669.

—— **What constitutes the landing of Chinese.**—The transfer of a Chinese person from the vessel in which he was brought to the United States to a detention shed maintained by the owners of the vessel on their dock, where he was detained under guard pending determination of his right to enter the United States, did not constitute a "landing" of such person. U. S. v. Seabury (D. C. 1904) 133 Fed. 983.

Application to seamen.—The landing of the crew, temporarily, for the purpose of transfer, would not violate the treaty with China and the laws of the United States in relation to the exclusion of Chinese. (1902) 24 Op. Atty. Gen. 111.

A Chinese crew which shipped at Hongkong on a vessel belonging to a company chartered under the laws of the United States, for a trip to San Francisco and return by the same vessel or any other vessel belonging to that company, which crew, owing to an accident to the ship, was brought to San Francisco on a vessel belonging to a different company, may be transferred to another vessel substituted for the one injured, after having duly signed for that service before a United States shipping commissioner. Id.

The Chinese exclusion laws and alien contract labor laws have no application to seamen who in good faith are engaged in navigation and who are temporarily within a port of the United States for that purpose. The transfer of the Chinese crew of the Danish steamer Arab to the Danish steamer Stanley Dollar, and of a Chinese crew from a vessel of the Pacific Mail Steamship Line to the steamer Siberia, of the same line, within a port of the United States, would not involve a violation of either of those laws. (1902) 24 Op. Atty. Gen. 553.

Sufficiency of indictment.—An indictment under this section must aver that accused knowingly permitted a Chinese person to be landed. U. S. v. Rout (D. C. 1909) 170 Fed. 201.

Sufficiency of bail bond or undertaking.—Under Hill's Ann. Laws Or. § 1470, relating to bail, a charge in an undertaking taken under R. S. § 1014, ante, § 1647, by a United States commissioner in Oregon, that defendant "unlawfully aided and abetted the landing of Chinese laborers in the United States," is a sufficient statement of his offense. U. S. v. Dunbar (1897) 83 Fed. 151, 27 C. C. A. 488.

Cited without definite application, Ex parte Lau Ow Bew (1891) 12 Sup. Ct. 43, 45, 141 U. S. 583, 35 L. Ed. 868; Case of the Unused Tag (C. C. 1884) 21 Fed. 701; In re Ho King (D. C. 1883) 14 Fed. 724; U. S. v. Wong Chung (D. C. 1899) 92 Fed. 141, 145.

§ 4292. (Act May 6, 1882, c. 126, § 3, as amended, Act July 5, 1884, c. 220.) Exemptions from application of two foregoing sections.

The two foregoing sections shall not apply to Chinese laborers who were in the United States on the seventeenth day of November, eighteen hundred and eighty, or who shall have come into the same before the expiration of ninety days next after the passage of the act to which this act is amendatory, nor shall said sections apply to Chinese laborers, who shall produce to such master before going on board such vessel, and shall produce to the collector of the port in

the United States at which such vessel shall arrive, the evidence hereinafter in this act required of his being one of the laborers in this section mentioned; nor shall the two foregoing sections apply to the case of any master whose vessel, being bound to a port not within the United States, shall come within the jurisdiction of the United States by reason of being in distress or in stress of weather, or touching at any port of the United States on its voyage to any foreign port or place: Provided: That all Chinese laborers brought on such vessel shall not be permitted to land except in case of absolute necessity, and must depart with the vessel on leaving port. (22 Stat. 59. 23 Stat. 115.)

See notes to section 1 of this act, ante, § 4290.

This section was amended, by striking out, after the words "the passage of," the words "this act, and," and inserting instead thereof the words "the act to which this act is amendatory, nor shall said sections apply to Chinese laborers, who," and by inserting in the proviso, after the words "That all Chinese laborers brought on such vessel shall," the words "not be permitted to land except in case of absolute necessity, but must," making the section read as set forth here, by Act July 5, 1884, c. 220, cited above.

So much of this section as permitted Chinese laborers who were in the United States on the 17th day of November, 1880, or who came into the United States before the expiration of ninety days next after May 6, 1882, to return to the United States, was superseded by Act Oct. 1, 1888, c. 1064, § 1, post, § 4303, which prohibited the return of any Chinese laborer whatever.

The provisions of the latter act were in turn superseded in part by provisions permitting the return of a Chinese laborer who had a wife, child, or parent in the United States or who had property of the value of $1,000 or debts of like amount and pending settlement, by the Convention with China of Dec. 8, 1894, art. 2, post, § 4327. Provisions somewhat similar to those of said convention, made by Act Sept. 13, 1888, c. 1015, § 6, post, § 4307, were re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337.

An exception relating to the landing of vessels in distress, similar to the provisions of this section, was contained in Act Sept. 13, 1888, c. 1015, § 10, post, § 4311, also re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337.

Notes of Decisions

Repeal of statute.—This section was repealed by implication by section 4310, post, which covers the same offense, but provides a different punishment. U. S. v. Wood (D. C. 1909) 168 Fed. 438.

As to landing of Chinese in violation of Act Sept. 13, 1888, c. 1015, § 9, see post, § 4310.

Laborers within exemption.—Under the treaty with China, a Chinese resident of this country is entitled to all the rights, privileges, and immunities of subjects of the most favored nations with which this country has treaty relations; and, where he was a resident here before the passage of the act of congress restricting immigration of Chinese, he has a right to remain and follow any of the lawful ordinary trades and pursuits of life, and his liberty so to do cannot be restrained by invalid legislation. In re Quong Woo (C. C. 1882) 13 Fed. 229.

A Chinese resident, here before the passage of the act of congress restricting immigration of Chinese, has a right to remain and follow any lawful trade or pursuit, and his liberty so to do cannot be restrained by invalid legislation. Id.

While on board an American vessel a Chinese laborer is within the jurisdiction of the United States, and retains his right of residence here previously acquired by treaty with China. Case of the Chinese Cabin Waiter (C. C. 1882) 13 Fed. 286; Case of the Chinese Laborers on Shipboard, Id. 291.

A person on board of a vessel of the United States or any one of them is in contemplation of law within the territory and jurisdiction of the United States, and therefore a Chinese laborer who shipped on an American vessel at London, prior to the passage of the act aforesaid, and continued on her until her arrival in the United States, although after the expiration of the 90 days next following the passage of said act, is entitled to reside therein. In re Moncan (C. C. 1882) 14 Fed. 44.

The act of May 6, 1882, restricting Chinese immigration, permits all laborers who were in this country at any time before the expiration of 90 days after the passage of the act, and who shall produce the certificate provided for by the act, to go and come at pleasure, and no evidence of previous residence, except the prescribed certificate, can be received from those laborers who quitted the country since the certificates were obtainable; but those who went away before the act was passed, or before certificates were to be had, must be allowed (as was held in the case of Chin A On [D. C. 1883] 18

Fed. 506) to prove their previous residence by any competent evidence. In re Leong Yick Dew (C. C. 1884) 19 Fed. 490.

Chinese laborers whose coming to the United States is not suspended by the act of 1884, are (1) those who were in this country at the date of the treaty of November 17, 1880, or have come before August 6, 1882; and (2) those who, having departed after the passage of the act of 1882, shall produce the evidence required by the act of 1884. In re Shong Toon (D. C. 1884) 21 Fed. 386.

Vessel "touching at any port."—A vessel touches at a port of the United States, within the meaning of this section, when she calls there for orders, or a cargo for a foreign port, and Chinese laborers who are on board of her as passengers or crew are not unlawfully in the country, contrary to said act, during her stay for such purpose; but, if such Chinese leave the vessel while in an American port, their presence becomes unlawful. In re Moncan (C. C. 1882) 14 Fed. 44.

Custom house certificate.—There is nothing in 22 Stat. 58, and 23 Stat. 115, or in the treaty on which they are based, making the decision of the customs officers final, or ousting the courts of jurisdiction. U. S. v. Jung Ah Lung (1888) 8 Sup. Ct. 663, 666, 124 U. S. 621, 31 L. Ed. 591, affirming judgment In re Jung Ah Lung (D. C. 1885) 25 Fed. 141; In re Chow Goo Pool (C. C. 1884) 25 Fed. 77.

By the treaty of 1880, Chinese laborers then in the United States were accorded the privilege of coming and going at pleasure. The restriction act of 1882 extends this liberty to all who arrive before the expiration of 90 days after the passage of the act. This law also requires incoming Chinamen to produce customhouse certificates. The language of the act is ambiguous, and might be so construed as to require the certificate from those who left the country between the adoption of the treaty and the passage of the restriction act, but, as no provisions existed during that period for the issue of such certificates, this construction would be clearly repugnant to the treaty. In re Tung Yeong (D. C. 1884) 19 Fed. 184.

Chinese laborers who were in the United States at the date of the treaty with China (1880), and who departed before the act of 1882 took effect, are entitled to land without producing custom house certificates. Id.

Rights of returning Chinese.—See note under § 4290, ante.

Cited without definite application, Ex parte Lau Ow Bew (1891) 12 Sup. Ct. 43, 45, 141 U. S. 583, 35 L. Ed. 868; Kum Sue v. U. S. (1910) 179 Fed. 370, 102 C. C. A. 648; Gee Cue Beng v. U. S. (1911) 184 Fed. 386, 106 C. C. A. 493; U. S. v. Wong Chung (D. C. 1899) 92 Fed. 141, 145.

§ 4293. (Act May 6, 1882, c. 126, § 6, as amended, Act July 5, 1884, c. 220.) Chinese other than laborers; certificates of identity.

In order to the faithful execution of the provisions of this act, every Chinese person, other than a laborer, who may be entitled by said treaty or this act to come within the United States, and who shall be about to come to the United States, shall obtain the permission of and be identified as so entitled by the Chinese Government, or of such other foreign Government of which at the time such Chinese person shall be a subject, in each case to be evidenced by a certificate issued by such Government, which certificate shall be in the English language, and shall show such permission, with the name of the permitted person in his or her proper signature, and which certificate shall state the individual, family, and tribal name in full, title or official rank, if any, the age, height, and all physical peculiarities, former and present occupation or profession, when and where and how long pursued, and place of residence of the person to whom the certificate is issued, and that such person is entitled by this act to come within the United States. If the person so applying for a certificate shall be a merchant, said certificate shall, in addition to above requirements, state the nature, character, and estimated value of the business carried on by him prior to and at the time of his application as aforesaid: Provided, That nothing in this act nor in said treaty shall be construed as embracing within the meaning of the word "merchant," hucksters, peddlers, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation. If the certificate be sought for the purpose of travel for curiosity, it shall also state whether the applicant intends to pass through or travel within the United States, together with his financial standing in the country from which such

certificate is desired. The certificate provided for in this act, and the identity of the person named therein shall, before such person goes on board any vessel to proceed to the United States, be vised by the indorsement of the diplomatic representatives of the United States in the foreign country from which said certificate issues, or of the consular representative of the United States at the port or place from which the person named in the certificate is about to depart; and such diplomatic representative or consular representative whose indorsement is so required is hereby empowered, and it shall be his duty, before indorsing such certificate as aforesaid, to examine into the truth of the statements set forth in said certificate, and if he shall find upon examination that said or any of the statements therein contained are untrue it shall be his duty to refuse to indorse the same. Such certificate vised as aforesaid shall be prima facie evidence of the facts set forth therein, and shall be produced to the collector of customs of the port in the district in the United States at which the person named therein shall arrive, and afterward produced to the proper authorities of the United States whenever lawfully demanded, and shall be the sole evidence permissible on the part of the person so producing the same to establish a right of entry into the United States; but said certificate may be controverted and the facts therein stated disproved by the United States authorities. (22 Stat. 60. 23 Stat. 116.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by numerous changes in the language and extensive additions thereto, making it read as set forth here, by Act July 5, 1884, c. 220, cited above.

The word "merchant," as used in acts relating to this subject, was defined by Act Nov. 3, 1893, c. 14, § 2, post, § 4324.

Notes of Decisions

1. Persons "other than laborers."
2. Persons "about to come to the United States."
3. —— Persons entitled to admission as merchants.
4. Wife and children of Chinese merchant.
5. Certificate in general—By whom issued.
6. —— Requisites and sufficiency.
7. —— Revocation by congress.
8. Certificate of merchant.
9. —— Statement as to business.
10. Certificate of Chinese re-entering the United States.
11. Viséed certificate—By whom viséed.
12. —— Necessity—"Sole evidence."
13. —— Effect as evidence.
14. —— Evidence to controvert certificate.
15. Waiver of right to enter.
16. Deportation of Chinese.
17. —— Where merchant becomes a laborer.
18. —— Deportation under Immigration Act.

1. Persons "other than laborers."—A seaman is not a laborer, and is not absolutely excluded. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639. See, also, note under § 4290, ante.

A Chinaman shipped as a seaman at Calcutta on an American vessel, and arrived in New York, when the crew were discharged; the master intending to ship the Chinaman on board some other vessel on a return voyage without landing. The Chinaman was arrested by the United States marshal, under the restriction act of July 5, 1884, and was lodged in jail. On habeas corpus, held, that seamen landing temporarily only, for the purpose of procuring a chance to ship on a return voyage in the ordinary pursuit of their vocation on the high seas, are not within the act, and are not required to procure the certificate described in this section. In re Ah Kee (D. C. 1884) 22 Fed. 519.

Chinese body servants or nurses are not persons "other than laborers" when they come to this country to ply their vocations. (1887) 18 Op. Atty. Gen. 542. Where, however, such servants or nurses accompany visitors entitled to enter the United States, and only remain here temporarily during the stay of such visitors, they do not fall within the scope of the legislation referred to. Id.

Chinese persons known as "traders" are not entitled to admission to the United States for the first time, though presenting a certificate. (1898) 22 Op. Atty. Gen. 130.

2. Persons "about to come to the United States."—This section does not include a seaman landing at a port in the United States for temporary purposes while his vessel was in port. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, writ of error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639.

3. —— Persons entitled to admission as merchants.—A person described in

his certificate as a "salesman" is not a merchant, who is entitled to remain in the United States. U. S. v. Gin Hing (1904) 76 Pac. 639, 8 Ariz. 416.

A "trader" is not expressly known to the law as among the exempt classes, nor is such a person fairly included in them unless as a merchant, and the statutory language cannot be so construed. (1898) 22 Op. Atty. Gen. 130.

4. Wife and children of Chinese merchant.—The wife and minor child of a Chinese merchant, who is domiciled in this country, may, under this act, construed in connection with the treaties of 1880 and 1894, enter the country, by reason of the right of the husband and father, without the certificate mentioned in the act. U. S. v. Gue Lim (1900) 20 Sup. Ct. 415, 416, 176 U. S. 459, 44 L. Ed. 544.

Where a minor son of a Chinese merchant doing business in the United States journeyed to China for a temporary purpose and with the intention of returning, he could on his return bring in his wife and minor children without the production of the certificate required by this section. U. S. v. Yee Quong Yuen (1911) 191 Fed. 28, 111 C. C. A. 500.

By the treaty with China of Nov. 17, 1880 (22 Stat. 13, art. 2), it is provided that "Chinese subjects, whether proceeding to the United States as teachers, students, merchants, or from curiosity, together with their body and household servants, shall be allowed to go and come of their own free will and accord, and shall be accorded all the rights, privileges, immunities, and exemptions which are accorded to the citizens and subjects of the most favored nation." Held, that the wife and children of a Chinese merchant, who is entitled to come into the country under this treaty, are entitled to come with him, without the certificate required of every Chinese person other than a laborer. In re Chung Toy Ho (C. C. 1890) 42 Fed. 398, 9 L. R. A. 204.

An infant child of a Chinese merchant lawfully residing in the United States is not entitled to enter the country without the production of the certificate, which is the sole evidence of the right of a Chinese alien to enter. In re Li Foon (C. C. 1897) 80 Fed. 881, appeal dismissed Li Foon v. McCarthy (1897) 96 Fed. 1005, 37 C. C. A. 664.

The wife of a Chinese merchant residing in this country, not belonging to the laboring class, is not a person excluded by the laws, and upon arrival here is entitled to enter and take up her residence with her husband, without producing the certificate prescribed by this section. U. S. v. Gue Lim (D. C. 1897) 83 Fed. 136, judgment affirmed (1900) 20 Sup. Ct. 415, 176 U. S. 459, 44 L. Ed. 544, disapproving In re Li Foon (C. C. 1897) 80 Fed. 881.

The fact that a Chinese person, who as shown by the uncontradicted evidence entered the United States in 1898, when a minor 14 or 15 years old, his father being at the time a merchant engaged in business in San Francisco, did not have a certificate, does not raise any presumption that his entry was unlawful, no such certificates being then required under the decisions of the Supreme Court to entitle the wives and children of Chinese merchants residing in this country to entry. U. S. v. Chin Sing (D. C. 1907) 153 Fed. 590.

Where petitioner, when he left China for the United States, was entitled to enter as the son of a regularly domiciled Chinese merchant, but his father died eight days before petitioner's arrival, he was not entitled to enter without the certificate provided for by this section. Ex parte Chan Fooi (D. C. 1914) 217 Fed. 308.

The wife of a Chinese merchant residing in the United States must produce the certificate before being allowed to enter this country for the purpose of joining her husband. (1898) 22 Op. Atty. Gen. 260.

The status of such wife does not extend so far as to confer upon her an immunity from the certificate requirement to which the husband is entitled because of his acquired domicile here. Id.

5. Certificate in general—By whom issued.—A certificate of identification given by a Chinese consul in Japan, and viséed by the vice consul general of the United States at Yokohama, is not sufficient under this section, in the absence of evidence, other than the certificate itself, that the consul issuing it has authority from the Chinese government to do so. U. S. v. Mock Chew (1893) 54 Fed. 490, 4 C. C. A. 482.

Consular officers of China stationed in foreign countries, being duly empowered by the Chinese government, may properly issue the certificates of identification, and such certificates, duly issued and accurately conforming to the requirements of this section, are the certificates contemplated by the law. (1894) 20 Op. Atty. Gen. 693.

The treaty of 1894 with China so modifies the requirements of this section that Chinese subjects resident at the British colony of Hongkong, and belonging to one of the privileged classes, may now be admitted to the United States upon a certificate signed by the proper representative of the colonial government. (1896) 21 Op. Atty. Gen. 347.

Certificates of identification presented by Chinese persons as evidence of their right to enter this country for the first time, signed by a Chinese consul general within the United States, are not entitled to be treated as made by the Chinese government within the mean-

ing of the said act, notwithstanding the fact that the Chinese minister had by letter communicated to the Secretary of State the information that his government had "authorized the consuls of China in foreign countries to issue" such certificates. (1897) 21 Op. Atty. Gen. 481.

The original entry certificates of Chinese merchants and others exempted must be issued by their government or the government where they last reside. (1898) 22 Op. Atty. Gen. 72.

Chinese subjects of the permitted classes coming to the United States from China must produce the certificate of the government of China, and coming from other foreign countries in which they are residents must now produce, under the treaty of 1894, the certificate of the government of such countries, and not, as under the act of 1884 (23 Stat. 116), the certificate of consular or other proper officials of China. (1898) 22 Op. Atty. Gen. 201. Consular officers of China in foreign countries have not, therefore, since the treaty of 1894, the right to issue the certificates prescribed by section 6 of the above-named act. Id.

6. —— **Requisites and sufficiency.**—The Chinese exclusion act must be strictly complied with, in order that the certificate may be of value to the person holding the same in establishing his right to enter or remain within the United States. U. S. v. Yong Yew (D. C. 1897) 83 Fed. 832; (1894) 21 Op. Atty. Gen. 6; (1898) 22 Op. Atty. Gen. 130; (1899) 22 Op. Atty. Gen. 608; U. S. v. Gin Hing (1904) 76 Pac. 639, 8 Ariz. 416.

A certificate of a consul of the United States in China, not indorsed on one from the Chinese government, is not evidence tending to establish the right of a Chinese person to entry into the United States. U. S. v. Chu Chee (1899) 93 Fed. 797, 35 C. C. A. 613.

It is not sufficient that the information required to be in the certificate for admission should be supplied by the consular visé alone. The statute requires the guaranty of the certificate as well as the visé upon each point. (1894) 21 Op. Atty. Gen. 6.

The Secretary of the Treasury has power to require the production of a certificate for admission in such form as he may prescribe, as evidence of the right of certain Chinese subjects to enter the United States. (1894) 21 Op. Atty. Gen. 68.

A certificate of naturalization issued to a Chinese person by the circuit court of the district of Montreal, Canada, and a passport issued by the governor general of Canada, upon which the right is claimed as a merchant to enter into and travel through the United States, cannot be accepted as a substitute for the certificate of identification prescribed. (1895) 21 Op. Atty. Gen. 123.

The omission of any of the statutory requirements from a certificate for admission under the Chinese exclusion laws is fatal. (1898) 22 Op. Atty. Gen. 130, 131.

Certain Chinese subjects presenting certificates in the Chinese language issued by the authorized representative of the Chinese government, plainly stating the character and nature of their business, but not stating it in the English translation of the certificates accompanying the same, are not entitled to land in this country. (1899) 22 Op. Atty. Gen. 608.

7. —— **Revocation by congress.**—The certificates of identity issued to Chinese laborers were mere licenses, revocable at the pleasure of congress. Chae Chan Ping v. U. S. (1889) 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068, affirming order In re Chae Chan Ping (C. C. 1888) 36 Fed. 431.

8. **Certificate of merchant.**—A Chinese person, duly certified as a merchant and entering the United States from Mexico under proper certificate, held not subject to deportation as a laborer. U. S. v. Chin Chong Pong (D. C. 1911) 192 Fed. 722.

9. —— **Statement as to business.**—A merchant's certificate which does not conform to the requirement of this section by stating the estimated value of his business carried on in China, nor fully establish his status as a merchant, does not entitle him to enter the United States, nor to remain after his entry has been permitted. Cheung Pang v. U. S. (1904) 133 Fed. 392, 66 C. C. A. 454.

It is necessary for the certificate of a merchant to state the specified facts, or it will be ineffectual to entitle him to enter or remain within the United States. U. S. v. Gin Hing (1904) 76 P. 639, 8 Ariz. 416.

10. **Certificate of Chinese re-entering the United States.**—A Chinaman having obtained a certificate on his departure, and having had it stolen from him during his absence, is entitled to land on his return to the port whence he sailed (no one in the meantime having presented the certificate), on proving these facts and identifying himself as the person to whom the certificate was issued. Harlan, Field, and Lamar, JJ., dissenting. U. S. v. Jung Ah Lung (1888) 8 Sup. Ct. 663, 666, 124 U. S. 621, 31 L. Ed. 591, affirming judgment In re Jung Ah Lung (D. C. 1885) 25 Fed. 141.

Since the passage of Act Oct. 1, 1888, no Chinese person, formerly resident in the United States but temporarily absent therefrom, is entitled to return without the prescribed certificate. Wan Shing v. U. S. (1891) 11 Sup. Ct. 729, 140 U. S. 424, 35 L. Ed. 503.

The supreme court has jurisdiction to review by certiorari a judgment of the

circuit court of appeals, denying to a Chinese merchant long domiciled in this country the right to land, after a temporary visit to China, without presenting the viséed certificate required by this section. Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 520, 144 U. S. 47, 36 L. Ed. 340.

The evidential requirements of this section do not apply to a Chinese merchant domiciled in the United States, who, having left the country temporarily only, seeks to re-enter it on his return to his business and home. Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 522, 144 U. S. 47, 36 L. Ed. 340, reversing judgment In re Lau Ow Bew (C. C. 1891) 47 Fed. 578; U. S. v. Gee Lee, 50 Fed. 271, 1 C. C. A. 516.

A certificate not issued to the holder by the Chinese government when he was about to return from China to the United States, but which was procured from the Chinese consul at New York before he left the United States, was not such a certificate as is provided for by this section as amended. Li Sing v. U. S. (1901) 21 Sup. Ct. 449, 451, 180 U. S. 486, 45 L. Ed. 634.

With reference to Chinese laborers re-entering the United States after having once left, congress did not intend, in the amendatory act of July 5, 1884, making the certificate of the collector of the port the only evidence as to those to whom it is applicable, that the certificate of the collector of the port, required by section 4 of the original statute, should be produced by such Chinamen as had departed from the United States before it would have been possible to obtain the certificate from the collector. The presentation of such a certificate gives the Chinese a prima facie privilege to return, but the privilege may rest upon evidence other than the certificate, bearing upon the facts it would have proved of a right to re-enter the United States. In re Ah Quan (C. C. 1884) 21 Fed. 182.

The fact that a Chinaman had a "tag" entitling him to such a certificate, but that the collector took up such "tag," and failed to give him a certificate therefor, will not entitle him to re-enter. Case of the Limited Tag (C. C. 1884) 21 Fed. 789.

This section is not applicable to Chinese subjects, residents of the United States, who left the United States for foreign countries for temporary purposes, intending to return before the passage of the amendatory act of 1884, having a right to return at the time of their departure, and who did not return till after the passage of the act; nor to Chinese subjects, residents of the United States, departing for temporary purposes of business or pleasure since the passage of the act. In re Ah Ping (C. C. 1885) 23 Fed., 329.

This section is not applicable to a Chinese merchant, one of a firm residing and doing their principal business in the United States, who temporarily departed therefrom before the passage of said act to attend to a branch of the said firm's business in British Columbia, and who returned to the United States after the passage of said act; and he may re-enter the United States without producing the certificate required thereby. Id.

The requirement of this section that the viséed certificate of identity therein provided for shall be the sole evidence permissible to establish a right to enter the United States, does not apply to a merchant, long domiciled in this country, who is returning from a temporary visit to China, and he may establish his right by the documentary evidence of identity furnished to him by the customs officers on his departure from the United States. In re Lau Ow Bew (C. C. 1891) 47 Fed. 578, distinguishing Wan Shing v. U. S. (1891) 11 Sup. Ct. 729, 140 U. S. 424, 35 L. Ed. 503, and judgment affirmed (1891) 47 Fed. 641, 1 C. C. A. 1; reversed Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 144 U. S. 47, 36 L. Ed. 340.

In the case of Chinese laborers who left the United States after the law of 1882 went into effect, and before the passage of the law of July 5, 1884, evidence tending to excuse their failure to obtain custom house certificates cannot be received. The terms of the act of 1884 expressly forbid the reception of any evidence of the right to re-enter other than the certificates required by the law. In re Shong Toon (D. C. 1884) 21 Fed. 386.

A Chinaman may be entitled to land without a certificate, if it appears that he resided in the United States at the date of the treaty and departed therefrom before the Restriction Act went into operation, and before it was possible for him to obtain a return certificate from the custom house. In re Jung Ah Lung (D. C. 1885) 25 Fed. 141, 143.

The return entry of Chinese is allowed only upon strict compliance with the terms of the treaty and the regulations formed thereunder. (1898) 22 Op. Atty. Gen. 72.

The Treasury Department has no authority to issue a return certificate nunc pro tunc, although such person may have believed that he had done all that was incumbent upon him, and may have been misled by the action of the government officer in affixing to such application his certificate of departure. (1902) 23 Op. Atty. Gen. 619.

On the trial of a Chinaman charged with being unlawfully in the United States, it was proper to allow in evidence a certificate granted him on his return from China, where he had been temporarily, which stated that it was issued under this section, though it does not state that he is entitled by the above act to come into the United States; he being a former resident

merchant therein. U. S. v. Quong Chee (Ariz. 1907) 89 P. 525.

A Chinaman who was a resident merchant in the United States prior to the congressional legislation relative to the exclusion of Chinese laborers, and who is in possession of a merchant's certificate providing for his re-entering after a temporary absence, cannot be held to be unlawfully in the United States because he has become a restaurant keeper and has no laborer's certificate. Id.

11. Viséed certificate—By whom viséed.—Chinese certificates viséed by the British consul at Havana during the absence of the United States consular officers may be accepted by the authorities of the United States, provided this duty is performed in accordance with the requirements of the laws of the United States and the regulations thereunder. (1898) 22 Op. Atty. Gen. 72.

Certificates issued to Chinese persons of the exempted class by the Chinese consul at Havana, in the absence of certification by a consular officer of the United States, should not be accepted by the customs officials of the United States. Id.

12. —— Necessity—"Sole evidence."—Act July 5, 1884, c. 120, prescribing the certificate which shall be produced by a Chinese laborer as the "only evidence permissible to establish his right of re-entry" into the United States, is not retrospective, and does not apply to Chinese laborers who, residing in this country at the date of the treaty of November 17, 1880, which gave to such Chinese laborers the right to come and go at will, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884. Chew Heong v. U. S. (1884) 5 Sup. Ct. 255, 112 U. S. 536, 28 L. Ed. 770, reversing judgment In re Cheen Heong (C. C. 1884) 21 Fed. 791.

A Chinaman, having obtained a certificate of identification from the collector of customs and having had the same stolen from him during his absence, is entitled to land on his return to the port whence he sailed, no one in the meantime having presented the certificate, on proving the facts and identifying himself as the person to whom the certificate was issued. U. S. v. Jung Ah Lung (1888) 8 Sup. Ct. 663, 124 U. S. 621, 31 L. Ed. 591.

A Chinaman who left this country after the passage of 22 Stat. 58, but before the amendment thereof by 23 Stat. 115, and who returned after the passage of the amendment, is entitled to land on complying with the requirements of the original act; the amendment relating to evidence of identity not being retroactive. Id.

The wife and minor children of a Chinese merchant who is domiciled in this country may, under the act of congress of 1884, construed in connection with the treaty of 1880, enter the country by reason of the right of the husband and father, without a certificate. U. S. v. Gue Lim (1900) 20 Sup. Ct. 415, 176 U. S. 459, 44 L. Ed. 544, affirming judgment (D. C. 1897) 83 Fed. 136.

No abrogation of the provisions of this act and the act amendatory thereof, relative to the evidence which a member of the exempted class of Chinese must produce to secure admission into the United States, was affected by the treaty with China of December 8, 1894. Lee Lung v. Patterson (1902) 22 Sup. Ct. 795, 798, 186 U. S. 168, 46 L. Ed. 1108.

In a proceeding for the deportation of a Chinese person charged with having unlawfully entered the United States, it is error to admit any evidence of the right of the defendant to enter, except the certificate issued by his government, which is made by statute the sole evidence of such right. U. S. v. Pin Kwan (1900) 100 Fed. 609, 40 C. C. A. 618, reversing decree (D. C. 1899) 94 Fed. 824.

Chinese merchants who resided, on the passage of Act May 6, 1882, in other countries than China, on arriving on a vessel in a port of the United States are not required by said act to produce certificates of the Chinese government establishing their character as merchants, as a condition of their being allowed to land. Their character as such merchants can be established by parol evidence. Case of the Chinese Merchant (C. C. 1882) 13 Fed. 605.

Chinese, other than Chinese laborers, entitled under the treaty with China, and not prohibited from entering the United States by the restriction acts, who left China or other foreign country before July 5, 1884, on their way to enter the United States, are now entitled to enter, upon such satisfactory evidence as was recognized as competent and sufficient before the amendatory act of July 5, 1884, providing that every Chinese person on coming to this country shall produce to the collector of the port the certificate prescribed therein. In re Ah Quan (C. C. 1884) 21 Fed. 182.

A Chinese laborer, in September, 1883, went back to China, after obtaining from the custom house officer a "tag" entitling him to the certificate required by the act of 1882, but without procuring the certificate itself, and in August, 1884, returned to the United States, and sought to land by virtue of his "tag." Held, that the act of 1884, which declares that the certificate issued to the laborer should be the only evidence permissible to establish his right to re-enter the United States, was as applicable to the certificate issued under the act of 1882, as to a certificate issued under the act of 1884, and

that he was not entitled to re-enter. Case of the Unused Tag (C. C. 1884) 21 Fed. 701.

The wife of a Chinese laborer is not entitled to enter the United States on her husband's certificate since the passage of the act of 1884, but must furnish the certificate required by this section. Case of the Chinese Wife (C. C. 1884) 21 Fed. 785.

Under this section the Chinese person, not a laborer, was also excluded who did not obtain a certificate from the Chinese government. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639.

The certificate of identification, in order to establish a right to land in the United States, cannot be dispensed with. It is the sole evidence admissible to establish such right. In re Tong Ah Chee (D. C. 1883) 23 Fed. 441; (1890) 19 Op. Atty. Gen. 510.

A Chinese person who fails to produce a certificate cannot establish a right to enter by any other evidence. In re Wo Tai Li (D. C. 1888) 48 Fed. 668.

The presence of a Chinese merchant, otherwise entitled to be in the United States, is not rendered unlawful by the fact that upon his return from a visit to Canada the collector permitted him to land, upon the certificates of private persons and his own personal knowledge, without the viséed certificate required by this section, since Act Sept. 13, 1888, § 12, provided that "the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the secretary of the treasury, and not otherwise." U. S. v. Lee Hoy (D. C. 1891) 48 Fed. 825, order affirmed U. S. v. Gee Lee (1892) 50 Fed. 271, 1 C. C. A. 516.

While, in all cases of entering the United Staes, and in the case of laborers within the country when the act requiring registration was passed, the official certificate is indispensable, and the sole evidence of the right to enter or remain, in all other cases the status of the person at the time the inquiry is made may be shown by any affirmative proof satisfactory to the judge, justice, or commissioner before whom he is taken. U. S. v. Chu Chee (D. C. 1898) 87 Fed. 312.

Under this section a Chinese person erroneously permitted to enter without certificate is unlawfully within the United States, and may be arrested and deported, without regard to his occupation since his entry; and in such case the action of the customs official in permitting his entry is not even prima facie evidence of his right to remain. Mar Bing Guey v. U. S. (D. C. 1899) 97 Fed. 576.

Chinese Exclusion Act, held not to limit the provision making the certificate the sole evidence of a person's right to enter the United States only with reference to persons producing the same, but to provide that no persons within this section may enter without producing such certificate. Ex parte Chan Fooi (D. C. 1914) 217 Fed. 308.

A Chinese person, whose certificate states his occupation as "salesman," cannot prove by evidence aliunde that he is in fact a merchant, and hence a member of a privileged class. U. S. v. Gin Hing (1904) 76 P. 639, 8 Ariz. 416.

The fact that a Chinese person has been permitted to enter the United States does not alter this rule of evidence, as he can only enter by means of a proper certificate, and the statute expressly provides for its production after entry, whenever lawfully demanded, and that any person unlawfully within the United States shall be removed therefrom. Id.

Where the right of a Chinese person to remain in the country is challenged after he had been landed as a merchant by the customs officers on his return from a visit to China, and he produces a certificate, which states that it was issued under this section before amendment, which certificate was not controverted by the government, such certificate is not by law the only evidence admissible, and he may show by two white witnesses that he had been a merchant in the United States. U. S. v. Quong Chee (Ariz. 1907) 89 P. 525.

13. —— **Effect as evidence.**—A collector of customs, by disregarding the certificates which by this section are made evidence to establish a right of entry into the United States on the part of the persons presenting them, does not lose his jurisdiction finally to determine the right of such persons to enter the United States. Lee Lung v. Patterson (1902) 22 Sup. Ct. 795, 186 U. S. 168, 46 L. Ed. 1108, affirming judgment In re Lee Lung (D. C. 1900) 102 Fed. 132.

Where immigration authorities, in determining the right of a Chinese person to enter, considered all the evidence, the fact that they did not give proper effect to his certificate did not entitle him to his release on habeas corpus. U. S. v. Li Chiong (1914) 217 Fed. 45, 133 C. C. A. 31.

The certificate is not the only competent evidence that a Chinese person is not a laborer, and therefore entitled to come to and reside within the United States, but the fact may be shown by any other pertinent and convincing testimony. In re Ho King (D. C. 1883) 14 Fed. 724.

Under the Chinese exclusion act the certificate from the Chinese government is prima facie evidence of the holder's mercantile character, so as to entitle

him to land. In re Tung Yeong (D. C. 1884) 19 Fed. 184.

A certificate of the governor and commander in chief of the colony of Hong Kong and its dependencies and vice admiral of the same, to the effect that he believes a Chinese person to be a British subject, is not competent evidence to prove such citizenship. (1892) 20 Op. Atty. Gen. 424.

The certificate of a United States commissioner states that a Chinaman charged with unlawfully coming within the United States, after a full hearing, was adjudged to have the lawful right to remain in the United States, and was accordingly discharged, it appearing that he is a citizen of the United States. Held, that certificates of this character should not be accepted as sufficient evidence of the right of the holders to enter this country. (1897) 21 Op. Atty. Gen. 581.

14. —— Evidence to controvert certificate.—If declarations of a Chinese immigrant on his examination at the port of entry are to be used to overcome the prima facie case made by his certificate and papers, they must be taken under oath, and reduced to writing in the usual way. In re Chinese Relators (C. C. 1893) 58 Fed. 554.

Where the passport certificate and papers of a Chinese immigrant are regular, and such as the statutes declare to be prima facie evidence of the facts therein stated, their effect is not to be overcome by the sworn statement of a special inspector that he was told by an interpreter that the immigrant had made statements inconsistent with the papers. Id.

Where a Chinaman is admitted into this country upon presentation of a certificate identifying him as a merchant, proof that, ever since he was permitted to land, he has continuously engaged in manual labor, will overcome the effect of such certificate as prima facie evidence, of his right to remain in the United States. U. S. v. Ng Park Tan (D. C. 1898) 86 Fed. 605.

Though a Chinese merchant certificate may be collaterally attacked, proof that the Chinaman was qualified as a merchant when he arrived, and that he had worked as a laundryman for 16 years in the United States, showed that he was properly admitted. U. S. v. Fong Sen (D. C. 1913) 205 Fed. 398.

15. Waiver of right to enter.—Where a Chinese person was entitled to reenter the country by virtue of his being a merchant at L., the fact that, on his attempting to enter a second time after being deported, he put forward the unfounded claim that he was entitled to enter as a merchant at B., did not constitute a waiver of his rights based on the facts that he had been a merchant at L. Ex parte Ow Guen (D. C. 1906) 148 Fed. 926.

16. Deportation of Chinese.—See note under § 4313, post.

A Chinese person procuring a certificate of admission by means of which he enters the United States by false and fraudulent representations, is unlawfully within the United States, in violation of Chinese Exclusion Act, and may be deported. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

Under a warrant charging that Chinese persons were in and had entered the United States in violation of this and the following section, Chinese laborers may be deported under section 4270, ante. Ex parte Lee Ying (D. C. 1915) 225 Fed. 335.

17. —— Where merchant becomes a laborer.—A Chinese person, who entered the United States upon a certificate granted by the Chinese authorities in accordance with the provisions of this section, showing him to belong to one of the classes entitled to enter under said act is subject to deportation under the subsequent exclusion acts, where it is shown that from the time of his entry, several years before his arrest, he has been a manual laborer. Chain Chio Fong v. U. S. (1904) 133 Fed. 154, 66 C. C. A. 220.

A Chinese person, entering the United States on a merchant's certificate obtained in accordance with this section, is subject to deportation, as being unlawfully in this country, where it is shown that, after being in business as a merchant for 15 months after his arrival, he became a laborer, and has remained such ever since—a space of several years. Cheung Him Nin v. U. S. (1904) 133 Fed. 391, 66 C. C. A. 453.

The adopted son of a Chinese merchant, long in business in the United States, who was brought into this country while a minor by his father on returning from a temporary visit to China, and afterward himself engaged in business as a merchant, was lawfully in the United States, and did not lose such status, and become subject to deportation, because he afterward temporarily became a laborer. U. S. v. Yee Quong Yuen (1911) 191 Fed. 28, 111 C. C. A. 500.

That minor son of Chinese merchant worked in a laundry held not to defeat his right to remain in the United States. Lew Ling Chong v. U. S. (1915) 222 Fed. 195, 137 C. C. A. 635.

Where a Chinese person was, in 1901, 1902, and 1903, and before that, a merchant in the United States, the fact that he subsequently became a laborer was no ground for his deportation. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

A minor son of a Chinese person who is a member of one of the exempt classes, admitted as such into the United States, does not forfeit his right to

remain by subsequently working as a laborer. Ex parte Wong Yee Toon (D. C. 1915) 227 Fed. 247.

18. —— Deportation under immigration act.—See note under § 4269, ante.

Cited without definite application, Lem Moon Sing v. U. S. (1895) 15 Sup. Ct. 967, 969, 158 U. S. 538, 39 L. Ed. 1082; U. S. v. Yeung Chu Keng (D. C. 1905) 140 Fed. 748; In re Lee Sher Wing (D. C. 1908) 164 Fed. 506.

§ 4294. (Act May 6, 1882, c. 126, § 7.) Altering name in or forging certificate, or false personation of person named therein, punishable.

Any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge any such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, shall be deemed guilty of a misdemeanor; and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years. (22 Stat. 60.)

See notes to section 1 of this act, ante, § 4290.

Similar provisions relating to certificates of identity were made by Act Sept. 13, 1888, c. 1015, § 11, post, § 4312, re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337, and relating to certificates of residence, by Act May 5, 1892, c. 60, § 8, post, § 4322.

Notes of Decisions

Deportation—Warrant.—Under a warrant charging that Chinese persons were in and had entered the United States in violation of this and the preceding section, Chinese laborers may be deported under Immigration Act, § 21 (section 4270, ante). Ex parte Lee Ying (D. C. 1915) 225 Fed. 335.

§ 4295. (Act May 6, 1882, c. 126, § 8, as amended, Act July 5, 1884, c. 220.) Lists of Chinese passengers to be delivered by masters of vessels arriving from foreign ports; contents; penalty for failure.

The master of any vessel arriving in the United States from any foreign port or place shall, at the same time he delivers a manifest of the cargo, and if there be no cargo, then at the time of making a report of the entry of the vessel pursuant to law, in addition to the other matter required to be reported, and before landing, or permitting to land, any Chinese passengers, deliver and report to the collector of customs of the district in which such vessels shall have arrived a separate list of all Chinese passengers taken on board his vessel at any foreign port or place, and all such passengers on board the vessel at that time, such list shall show the names of such passengers (and if accredited officers of the Chinese or of any other foreign Government, traveling on the business of that Government, or their servants, with a note of such facts), and the names and other particulars as shown by their respective certificates; and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo. Any refusal or wilful neglect of any such master to comply with the provisions of this section shall incur the same penalties and forfeiture as are provided for a refusal or neglect to report and deliver a manifest of the cargo. (22 Stat. 60. 23 Stat. 117.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by inserting in the parenthesis, after the words "and if accredited officers of the Chinese," the words "or of any other foreign," and by changing the words at the beginning of the last sentence from "Any wilful refusal or neglect" to "Any refusal or wilful neglect," making the section read as set forth here, by Act July 5, 1884, c. 220, cited above.

§ 4296. (Act May 6, 1882, c. 126, § 9.) Comparison of lists with certificates.

Before any Chinese passengers are landed from any such vessel, the collector, or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the pas-

sengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law. (22 Stat. 60.)

See notes to section 1 of this act, ante, § 4290.

In so far as this section relates to the right of Chinese laborers to re-enter the United States after having once departed therefrom, it must be regarded as superseded by Act Oct. 1, 1888, c. 1064, post, §§ 4303–4305.

A subsequent provision that in every case where an alien was excluded from admission into the United States under any law or treaty then existing or thereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, should be final, unless reversed on appeal to the Secretary of Commerce, was made by the Immigration Act of Feb. 20, 1907, c. 1134, § 25, ante, § 4274.

Notes of Decisions

Refusal to permit landing—Review.—The refusal to allow a Chinese passenger to land is a restraint of liberty, reviewable on habeas corpus. In re Jung Ah Lung (D. C. 1885) 25 Fed. 141; In re Jew Wong Loy (D. C. 1898) 91 Fed. 240.

§ 4297. (Act May 6, 1882, c. 126, § 10, as amended, Act July 5, 1884, c. 220.) Forfeitures of vessels for violations of act.

Every vessel whose master shall knowingly violate any of the provisions of this act shall be deemed forfeited to the United States, and shall be liable to seizure and condemnation in any district of the United States into which such vessel may enter or in which she may be found. (22 Stat. 61. 23 Stat. 115.)

See notes to section 1 of this act, ante, § 4290.

The application of the provisions of this section was extended by Act Oct. 1, 1888, c. 1064, § 3, post, § 4305.

Notes of Decisions

"Vessel."—The word "vessel" is broad enough to include the vessel's tackle, apparel, furniture, and appurtenances. The Frolic (D. C. 1906) 148 Fed. 918.

A chronometer supplied on account of the owners of a schooner as a necessary part of her equipment for a special service, although not in general a necessary part of her equipment, is to be regarded as appurtenant to the ship, and as included in the term "ship" or "vessel." The Frolic (D. C. 1906) 148 Fed. 921.

Stolen vessel.—A vessel stolen and used without the owner's knowledge or consent to bring in Chinese laborers was not subject to seizure, and sale. U. S. v. The Geo. E. Wilton (D. C. 1890) 43 Fed. 606.

Condemnation and sale.—An agreement by the owner to sell a schooner, to be paid for in installments, under which he put the purchaser in possession and appointed him master, with the right to use the vessel and receive her earnings, although retaining title until full payment of the purchase price, was sufficient to authorize the purchaser to appoint another master and to render her subject to condemnation and sale, for the knowing and willful violation of the provisions of such act by the new master so appointed. The Frolic (D. C. 1906) 148 Fed. 918.

Exemption of property.—A chronometer, which is one of the appurtenances of a vessel seized under this section for a willful violation of such act by the master, is not exempt from forfeiture because of the fact that it is not the property of the owners of the vessel, but was leased to them by the owner to be used as a necessary part of the vessel's equipment. The Frolic (D. C. 1906) 148 Fed. 918.

Right of Chinese to recover passage money from proceeds of forfeited vessel.—Chinese passengers who paid six times the regular fare of the passage held not entitled to recover such payments, it being presumed that they knew the excessive fare was paid to secure their illegal landing. U. S. v. The Haytian Republic (D. C. 1894) 65 Fed. 120.

Judgment of forfeiture.—See note under § 4298, post.

Cited without definite application, Ex parte Lau Ow Bew (1891) 12 Sup. Ct. 43, 45, 141 U. S. 583, 35 L. Ed. 868; Case of Unused Tag (C. C. 1884) 21 Fed. 701; U. S. v. Wong Chung (D. C. 1899) 92 Fed. 141, 145.

§ 4298. (Act May 6, 1882, c. 126, § 11, as amended, Act July 5, 1884, c. 220.) Bringing or landing Chinese laborers not entitled to enter, punishable.

Any person who shall knowingly bring into or cause to be brought into the United States by land, or who shall aid or abet the same,

or aid or abet the landing in the United States from any vessel, of any Chinese person not lawfully entitled to enter the United States, shall be deemed guilty of a misdemeanor, and shall on conviction thereof, be fined in a sum not exceeding one thousand Dollars, and imprisoned for a term not exceeding one year. (22 Stat. 61. 23 Stat. 117.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by changing the words "or who shall knowingly aid or abet the same," contained in the section as originally enacted, to "or who shall aid or abet the same," as set forth here, by Act July 5, 1884, c. 220, cited above.

The application of the provisions of this section was extended by Act Oct. 1, 1888, c. 1064, § 3, post, § 4305.

Notes of Decisions

Indictment.—Where, in a prosecution for aiding and abetting the illegal landing of Chinese laborers, the indictment alleged that the landing was effected from a foreign steamship lying in the port of T., and that such laborers had been brought into the United States at such port on such steamship from the empire of China, it was not objectionable in that it showed that the Chinese alleged to have been landed had already entered the United States. Sims v. U. S. (1903) 121 Fed. 515, 58 C. C. A. 92.

An indictment charging defendants with "aiding and abetting," and immediately thereafter charging them with "landing" Chinese, was not objectionable for repugnancy, since, as defendants were liable as principals for aiding and abetting the commission of the offense, the further charge of "landing the Chinese" was surplusage, and not repugnant to the other charge. Id.

In a prosecution for aiding and abetting the landing of certain Chinese, an indictment charging that defendants did unlawfully and knowingly land, and aid and abet in landing, in the United States, from a certain foreign steamship specified, then lying at the port of T., three certain male Chinese laborers, named, each of whom was not lawfully entitled to enter the United States, who had previously been brought on such steamship from the empire of China, was not demurrable for failure to set out the facts constituting the alleged unlawful landing. Id.

An indictment declaring that all laws now in force prohibiting and regulating the coming of Chinese persons be, and the same are, re-enacted, extended, and continued, so far as the same are not inconsistent with treaty obligations, was not objectionable for failure to charge that the Chinese alleged to have been landed in violation of the act were not entitled to land by virtue of treaty obligations. Id.

Where an offense against the exclusion act was alleged to have been committed on February 15, 1902, an indictment therefor not brought until after the expiration of the time limited was not demurrable, since the exclusion act was continued in force as to such offense. Id.

Where an indicment alleged that defendants feloniously conspired with divers other persons, whose names were to the grand jurors unknown, to willfully, etc., aid and abet the landing of unknown Chinese persons in the United States from certain vessels, the names of which were to the grand jurors unknown, from ports or places in the empire of China to the grand jurors unknown, etc., and that, to effect the object of such conspiracy, defendant W. D., whose true name was to the grand jurors unknown, did bribe one B., deputy sheriff, in charge of certain Chinese persons whose names were unknown, who had been sentenced to deportation, to cause certain other Chinese persons, whose names were to the grand jurors unknown, to be substituted therefor, etc., was not defective for failure to allege the detailed facts stated to be unknown. Wong Din v. U. S. (1905) 135 Fed. 702, 68 C. C. A. 340.

In an indictment under R. S. § 5440, post, § 10201, for conspiracy to commit an offense against the United States by bringing Chinamen into the country from Mexico in violation of the statute by means of a certain vessel, the provisioning of such vessel for the outward voyage and the sailing of such vessel from an American port to Mexico for the purpose of accomplishing the purpose of the conspiracy may be averred as overt acts. Daly v. U. S. (1909) 170 Fed. 321, 95 C. C. A. 107.

An indictment under this section must state facts sufficient to show that the Chinese person was one prohibited from landing, and that he was brought on the same vessel from which he landed on a voyage which terminated at the time of the landing. It is demurrable if it merely shows that he was a Chinese laborer, and alleges that he was not lawfully entitled to enter the United States, and that he landed from a certain vessel. U. S. v. Trumbull (D. C. 1891) 46 Fed. 755.

An indictment charging a conspiracy to commit the offense of aiding and abetting the landing of Chinese laborers not entitled to enter the United States, by furnishing them with false and fraudulent evidence of identification,

is sufficient under Rev. St. § 5440; and it is immaterial whether any Chinese laborers were in fact landed as a result of the alleged conspiracy, if the criminal agreement was entered into, and any of the overt acts alleged were committed. U. S. v. Wilson (D. C. 1894) 60 Fed. 890.

A deportation decree rendered by the United States commissioner in proceedings instituted before him to determine the status of a Chinese person alleged to have been illegally brought into the United States is relevant and competent evidence of the status of such person, and was sufficient to justify a grand jury in finding an indictment against defendant for willfully bringing such person into the United States, in violation of Chinese exclusion act. U. S. v. Hills (D. C. 1903) 124 Fed. 831.

Indictment charging conspiracy under Pen. Code, § 37, to violate this section as amended, alleging the conspiracy to violate the act and charging overt acts, held sufficient. U. S. v. Dahl (D. C. 1915) 225 Fed. 909. Such indictment need not set forth the names of the persons brought in, nor charge that persons excluded by the act were parties to the conspiracy. U. S. v. Dahl (D. C. 1915) 225 Fed. 909.

Evidence.—In a prosecution for attempting to land certain Chinese laborers not entitled to enter the United States, evidence held to show a landing, an attempt to land, or the permitting of the landing of the Chinese by the defendant, and to sustain a conviction. Gerald v. U. S. (1908) 159 Fed. 421, 86 C. C. A. 401.

On trial of an indictment charging a conspiracy to land Chinese laborers unlawfully, the manifests of the vessels named, describing the passengers landed as merchants, are not evidence of that fact, as such statements were necessarily derived from information furnished by the passengers themselves. U. S. v. Wilson (D. C. 1894) 60 Fed. 890.

Defenses—Judgment of forfeiture.—A judgment of forfeiture entered against a vessel under section 4297, ante, for an act of the master in bringing Chinese laborers from a foreign port and landing them in the United States, in violation of section 4291, ante, cannot be pleaded by the owner of the vessel in bar to an indictment for aiding and abetting the act of the master, as forbidden in this section. U. S. v. Olsen (D. C. 1893) 57 Fed. 579, distinguishing U. S. v. McKee (1877) Fed. Cas. No. 15,688, Coffey v. U. S. (1886) 6 Sup. Ct. 437, 116 U. S. 436, 29 L. Ed. 684, and U. S. v. One Distillery (D. C. 1890) 43 Fed. 846.

Aiding or abetting unlawful landing.—Refusal of master to receive a Chinaman remanded constitutes an aiding or abetting or permitting an unlawful landing. Case of Unused Tag (C. C. 1884) 21 Fed. 701.

§ 4299. (Act May 6, 1882, c. 126, § 12, as amended, Act July 5, 1884, c. 220.) Chinese not to enter United States by land without certificate; deportation of Chinese unlawfully within United States; expenses.

No Chinese person shall be permitted to enter the United States by land without producing to the proper officer of customs the certificate in this act required of Chinese persons seeking to land from a vessel. And any Chinese person found unlawfully within the United States shall be caused to be removed therefrom to the country from whence he came, and at the cost of the United States, after being brought before some justice, judge, or commissioner of a court of the United States and found to be one not lawfully entitled to be or to remain in the United States; and in all such cases the person who brought or aided in bringing such person to the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority as a marshal or United States marshal in reference to carrying out the provisions of this act or the act of which this is amendatory, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation to be audited and paid by the same officers. And the United States shall pay all costs and charges for the maintenance and return of any Chinese person having the certificate prescribed by law as entitling such Chinese person to come into the United States who may not have been permitted to land from any vessel by reason of any of the provisions of this act. (22 Stat. 61. 23 Stat. 117.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by striking out, after the words "to the country from whence he came," the words "by direction of the President of the United

States," contained in the section as originally enacted, and by adding the provisions beginning with the words "and in all such cases," etc., to the end of the section as set forth here by Act July 5, 1884, c. 220, cited above.

The application of the provisions of this section was extended by Act Oct. 1, 1888, c. 1064, § 3, post, § 4305.

Notes of Decisions

Construction and operation in general.—No abrogation of the judicial procedure for deportation of Chinese laborers provided by this section continued in force by section 4315, post, for 10 years from and after the passage of this act, was affected by the treaty with China of December 8, 1894, because of its failure to prescribe any such procedure or to continue in force any prior statute thereon, as such provision might be enforced without affecting any treaty right. U. S. v. Lee Yen Tai (1902) 22 Sup. Ct. 629, 631, 185 U. S. 213, 46 L. Ed. 878.

This section held not to limit the provision making the certificate provided by section 4293, ante, the sole evidence of a person's right to enter the United States only with reference to persons producing the same, but to provide that no persons within section 4293 ante, may enter without producing such certificate. Ex parte Chan Fooi (D. C. 1914) 217 Fed. 308.

Deportation of Chinese.—See, also, note under § 4313, post.

See Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121; Chin Ying v. Same (1902) 22 Sup. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126; note under § 4320, post.

—— **Arrest.**—This section does not impose on inspectors of customs the duty of arresting Chinese persons who have been landed or unlawfully brought in by land, but an inspector may as a citizen lawfully arrest Chinese laborers in the act of coming into the United States unlawfully. U. S. v. Baird (D. C. 1891) 48 Fed. 554, 555.

—— **Detention pending deportation.**—This section confers, by implication, on the "justice, judge, or commissioner" who shall find that a person is not lawfully entitled to be in the United States, the right to hold that person for a reasonable time to await the discretion of the President as to his removal. In re Chow Goo Pooi (C. C. 1884) 25 Fed. 77, 80.

Where the "justice, judge, or commissioner" finds that the petitioner is a Chinese laborer, prohibited by law from landing or from being or remaining in the United States, and, if the ship were in port, and about to return to China, would remand him to the ship to be carried to the country from whence he came, such a finding amounts to a finding in effect that he is unlawfully in the United States, and the court should order him to be remanded by the marshal to the custody from which he was taken; and, when the marshal returns that the ship has sailed, a supplemental order may be passed committing him to the custody of the marshal to be held for a reasonable time to await the direction of the president. Id.

Detention by an officer is in effect an arrest and a person under detention or arrest must be furnished subsistence at the expense of the government making the arrest. (1898) 22 Op. Atty. Gen. 51.

The board bills of Chinese boys remaining at Richford, Vt. after they are by the authority of the Treasury Department denied the privilege of coming within the United States should not be paid by the United States pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion acts as they are neither under detention nor arrest. Id.

—— **Order of deportation.**—The order of the president in regard to removal of Chinamen may be retrospective and prospective and inasmuch as the law imposes on him the duty of causing the person to be removed to the country whence he came after he shall have been found to be unlawfully here by a "justice, judge or commissioner" but gives him no power to revise that judgment and apparently confers on him no discretion in the matter he may direct that all persons who shall thus have been found to be unlawfully here shall be removed, and he may instruct the officer to procure them tickets and effectuate their removal; and, if there be any difficulty from the want of appropriation or means at his command in fulfilling that duty, it is for congress to remove it. In re Chow Goo Pooi (C. C. 1884) 25 Fed. 77.

Where a Chinese person has, on proceeding by habeas corpus, or by a justice, judge or commissioner, been found to be unlawfully within the United States, and the vessel from which he was taken has sailed, the court may direct the marshal, to whose custody such person has been remanded, to cause him to be removed to the country whence he came. In re Chin Ah Sooey (D. C. 1884) 21 Fed. 393.

A commissioner has jurisdiction to order the deportation of Chinese persons who are adjudged under this section to have unlawfully entered the United States. In re Tsu Tse Mee (D. C. 1897) 81 Fed. 562, following In re Wong Fock (D. C. 1897) 81 Fed. 558.

—— **Expenses of deportation.**—The acts of congress, both original and amendatory, contemplate that parties unlawfully bringing here Chinese labor-

ers prohibited from landing shall take them back to the country from which they are brought, or at least, beyond the jurisdiction of the United States; and a steamship company cannot escape from this duty by the departure of the vessel on which they are brought, or any change in its officers or management pending proceedings to determine the right of a Chinaman to re-enter the United States. Case of the Unused Tag (C. C. 1884) 21 Fed. 701.

Where a sheriff in Washington territory apprehended certain Chinamen and brought them before a United States commissioner, who, having found them to be in the country unlawfully, remanded them to the custody of the sheriff, to be sent out of the country, held, that the expenses incurred by the sheriff in the performance of such service are payable from the appropriation made by the act of July 7, 1884 (23 Stat. 206), to meet expenses incurred in executing the act relating to the Chinese, approved May 6, 1882. (1884) 18 Op. Atty. Gen. 90.

Review on habeas corpus.—See note under § 4319, post.

Compensation of commissioners.—This act imposes duties upon commissioners, but provides no compensation; they are nevertheless entitled by law to docket fees. Cass v. U. S. (1889) 24 Ct. Cl. 118.

Deportation under immigration act.—A Chinese person, who entered in violation of the Chinese exclusion acts, may be deported on an order of the acting secretary of labor in accordance with Immigration Act, § 21 (section 4270, ante); section 43 (section 4289, ante) showing that the immigration act was applicable to Chinese persons. Ex parte Woo Shing (D. C. 1915) 226 Fed. 141.

Cited without definite application, Toy Tong v. Same (1906) 146 Fed. 343, 345, 76 C. C. A. 621; Case of the Chinese Wife (C. C. 1884) 21 Fed. 808 (writ of error dismissed Cheong Ah Moy v. U. S. [1885] 5 Sup. Ct. 431, 113 U. S. 216, 28 L. Ed. 983); In re Sing Tuck (C. C. 1903) 126 Fed. 386, 396 (reversed [1904] 128 Fed. 592, 63 C. C. A. 199); Ex parte Chow Chok (C. C. 1908) 161 Fed. 627; U. S. v. Lim Yuen (D. C. 1914) 211 Fed. 1001, 1005.

§ 4300. (Act May 6, 1882, c. 126, § 13, as amended, Act July 5, 1884, c. 220.) Diplomatic and other officers, their servants, etc., exempted from application of act.

This act shall not apply to diplomatic and other officers of the Chinese or other Governments traveling upon the business of that Government, whose credentials shall be taken as equivalent to the certificate in this act mentioned, and shall exempt them and their body and household servants from the provisions of this act as to other Chinese persons. (22 Stat. 61. 23 Stat. 118.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by changing the words "Chinese Government," contained in the section as originally enacted, to "Chinese or other Governments," as set forth here, by Act July 5, 1884, c. 220, cited above.

Cited without definite application,
Toy Tong v. U. S. (1906) 146 Fed. 343,
76 C. C. A. 621.

§ 4301. (Act May 6, 1882, c. 126, § 15, as amended by Act July 5, 1884, c. 220.) Persons to whom act is applicable; "Chinese laborers" defined.

The provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power; and the words Chinese laborers, wherever used in this act shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining. (22 Stat. 61. 23 Stat. 118.)

See notes to section 1 of this act, ante, § 4290.

This section was amended by inserting, at the beginning of the section, the words "That the provisions of this act shall apply to all subjects of China and Chinese, whether subjects of China or any other foreign power," and by adding two new sections, numbered 16 and 17, respectively, post, § 4302, by Act July 5, 1884, c. 220, cited above.

The word "laborer," as used in subsequent acts was defined by Act Nov. 3, 1893, c. 14, § 2, post, § 4324.

Notes of Decisions

"Laborers."—A Chinese laundryman is a laborer, within the meaning of the exclusion acts. In re Leung (1898) 86 Fed. 303, 30 C. C. A. 69.

The term "laborer" is used in the treaty with China of November 17, 1880, and the act in aid thereof of May 6, 1882, in its popular sense, and does

not include any person but those whose occupation involves physical toil and who work for wages. In re Ho King (D. C. 1883) 14 Fed. 724.

A restaurant proprietor is a laborer, and not a merchant, within the exclusion act. In re Ah Yow (D. C. 1894) 59 Fed. 561.

The status of a Chinese "laborer" under the acts relating to deportation was not changed by his arrest upon a criminal charge, and his subsequent enforced idleness in jail. U. S. v. Chung Ki Foon (D. C. 1897) 83 Fed. 143.

The wives and minor children of Chinese merchants lawfully domiciled in the United States are not laborers, and not within the intent of the exclusion acts. In re Lee Yee Sing (D. C. 1898) 85 Fed. 635.

Subjects of Great Britain.—Natives of China who have become subjects of Great Britain are prohibited entrance to this country. (1894) 20 Op. Atty. Gen. 729.

Cited without definite application, U. S. v. Hung Chang (D. C. 1903) 126 Fed. 400, 402 (reversed [1904] 134 Fed. 19, 67 C. C. A. 93); U. S. v. Foong King (D. C. 1904) 132 Fed. 107.

§ 4302. (Act May 6, 1882, c. 126, as amended, Act July 5, 1884, c. 220.) Violations of act punishable.

Any violation of any of the provisions of this act, or of the act of which this is amendatory, the punishment of which is not otherwise herein provided for, shall be deemed a misdemeanor, and shall be punishable by a fine not exceeding one thousand dollars, or by imprisonment for not more than one year, or both such fine and imprisonment. (22 Stat. 58. 23 Stat. 118.)

See notes to section 1 of this act, ante, § 4290.

This section was added to Act May 6, 1882, c. 126, by amendment by Act July 5, 1884, c. 220, cited above.

Section 17, also added to Act May 6, 1882, c. 126, by the same amendment, provided that said amendatory act should not affect any prosecution, etc., begun under the original act. It is omitted, as temporary merely.

§ 4303. (Act Oct. 1, 1888, c. 1064, § 1.) Return to United States of Chinese laborers after departure therefrom, unlawful.

From and after the passage of this act, it shall be unlawful for any chinese laborer who shall at any time heretofore have been, or who may now or hereafter be, a resident within the United States, and who shall have departed, or shall depart, therefrom, and shall not have returned before the passage of this act, to return to, or remain in, the United States. (25 Stat. 504.)

This section and the two sections next following were part of an act entitled "An act a supplement to an act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved the sixth day of May, eighteen hundred and eighty-two."

Section 4 of this act repealed all parts inconsistent therewith of said act to which this was a supplement.

The act referred to in the title of this act, to which this act was a supplement, Act May 6, 1882, c. 126, as amended by Act July 5, 1884, c. 220, ante, §§ 4290–4302, suspended the coming of Chinese laborers to the United States, but excepted from its provisions laborers in the United States, and provided for the identification of such laborers, and for evidence of their right to go from and come to the United States. These provisions were superseded by this act.

The act so referred to in the title of this act, as well as the amendatory act mentioned above, were repealed by Act Sept. 13, 1888, c. 1015, the repeal to take effect on the ratification of a pending treaty; but, the treaty not having been ratified, the repeal did not take effect.

In so far as the provisions of this act prohibited the return of a Chinese laborer who had a wife, child, or parent in the United States, or who had property therein of the value of $1,000, or debts of like amount due him and pending settlement, they were superseded by the provisions permitting any such laborer to return upon his compliance with the requirements as to securing a certificate of right to return as the laws of the United States might then or thereafter require, not inconsistent with the treaty, contained in the Convention with China of Dec. 7, 1894, art. 2, post, § 4327, and by provisions for the return of such laborers and the issuance of certificates of right to return, contained in Act Sept. 13, 1888, c. 1015, §§ 6–8, ante, §§ 4293–4295, re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337.

The provisions of this act, like those of Act May 6, 1882, c. 126, to which it was a supplement, which were continued in force for a period of ten years by Act May 5, 1892, c. 60, § 1, post, § 4315, and which were not superseded

by the treaty and acts referred to, and all laws prohibiting and regulating the coming of Chinese into the United States and their residence therein, in force at the time, were re-enacted, extended, and continued, and were also made applicable to the island territory under the jurisdiction of the United States, by Act April 29, 1902, c. 641, § 1, post, § 4337.

Notes of Decisions

History of legislation.—The laws in force on the 5th day of May 1892, upon the subject of Chinese exclusion had their origin in the treaty between the United States and the empire of China, dated November 17, 1880. Pursuant to this treaty congress passed the act entitled "An act to execute certain treaty stipulations relating to Chinese," approved May 6, 1882. This was the first of the exclusion acts passed by congress. This act proved ineffective to prevent the coming of Chinese laborers into the United States, and thereupon the act of 1882 was amended for the purpose of prohibiting the landing of any Chinese laborers in the United States who could not produce return certificates. The amendatory act was the act of July 5, 1884. The purpose of congress in these amendments was to provide that no Chinese laborer, or Chinese person other than a laborer, should be permitted to land or come into the United States, unless he could produce the certificate as required by the act of 1882; but the amendments failed of their purpose, particularly the one relating to the certificate for returning Chinese laborers—the supreme court holding, in the case of Chew Heong v. U. S. (1884) 5 Sup. Ct. 255, 112 U. S. 536, 28 L. Ed. 770, that the fourth section of the act of 1882, as amended by the act of 1884, was not applicable to Chinese laborers who, residing in this country at the date of the treaty of 1880, departed by sea before May 6, 1882, and remained out of the United States until after July 5, 1884. This resulted in the negotiation of a new treaty by the state department, and congress immediately passed the act of September 13, 1888, to carry the treaty into effect. The treaty, however, was finally rejected by the Chinese government, and consequently that portion of the act dependent upon the ratification of the treaty failed to become a law. Thereupon congress passed an act to supplement the act of 1882. It was approved October 1, 1888. This act closed the door effectually against Chinese laborers coming into the United States upon any claim of prior residence, whether supported by return certificates or proof of residence in the United States between November 17, 1880 and August 5, 1882. U. S. v. Chu Chee (1899) 93 Fed. 797, 799, 802, 35 C. C. A. 613.

Validity of statute.—The Chinese exclusion act of October 1, 1888, is not unconstitutional, as being a law devesting rights fully vested under the several treaties between the United States and China, and the prior restriction acts of 1882 and 1884, to which it is supplemental; nor is it unconstitutional, as being an ex post facto law, since there is nothing in the nature of an offense in a Chinaman's departing from this country; nor, since certificates of identification gave no vested rights, is it unconstitutional, as interfering with vested rights. In re Chae Chan Ping (C. C. 1888) 36 Fed. 431, affirmed (1889) 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Wong Wing v. U. S. (1896) 16 Sup. Ct. 977, 978, 163 U. S. 228, 41 L. Ed. 140.

It was within the power of Congress to exclude aliens seeking to re-enter. Chinese Exclusion Case (1889) 130 U. S. 581, 9 Sup. Ct. 623, 32 L. Ed. 1068; Wan Shing v. U. S. (1891) 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503; Lem Moon Sing v. Same (1895) 158 U. S. 538, 15 Sup. Ct. 967, 39 L. Ed. 1082; U. S. v. Chu Chee (1899) 93 Fed. 797, 35 C. C. A. 613.

The fact that the Chinese exclusion act of October 1, 1888, violates existing treaties with China, is no objection to its validity. Treaties are of no higher dignity than acts of congress, and may be modified or repealed in like manner, and whether such modification or repeal is wise or just is not a judicial question. Chae Chan Ping v. U. S. (1889) 9 Sup. Ct. 623, 627, 130 U. S. 581, 32 L. Ed. 1068.

Operation in general.—The Chinese exclusion act, approved Oct. 1, 1888, took effect from its passage, and it applies to all Chinese laborers who had departed from the United States, and had not in fact returned and arrived in the United States before its passage. In re Chae Chan Ping (C. C. 1888) 36 Fed. 431, order affirmed Chae Chan Ping v. U. S. (1889) 9 Sup. Ct. 623, 130 U. S. 581, 32 L. Ed. 1068.

The right of Chinamen to temporarily depart and return was revoked by this section. U. S. v. Don On (C. C. 1891) 49 Fed. 569; Wan Shing v. U. S. (1891) 140 U. S. 424, 11 Sup. Ct. 729, 35 L. Ed. 503.

Persons affected by statute.—A daughter of a Chinese merchant, who does not work at anything but sewing, and not at that for a living, but only for her own purposes, is not a Chinese laborer. In re Yung Sing Hee (C. C. 1888) 36 Fed. 437, 439.

A Chinaman who left the United States in 1893, being at the time a laborer, cannot return. U. S. v. Wong Hong (D. C. 1895) 71 Fed. 283, judgment reversed Wong Fong v. U. S. (1896) 77 Fed. 168, 23 C. C. A. 110.

—— **Seamen.**—The treaty of 1894 with the empire of China and acts of

1888 and 1894, excluding "Chinese laborers" from coming into the United States, are not applicable to a Chinese seaman, who ships as steward aboard a vessel bound for a port in the United States, and who lands with the intention and desire to reship as soon as possible. In re Jam (D. C. 1900) 101 Fed. 989.

Loss of residence.—This act does not forfeit commercial domicile by temporary absence at the domicile of origin, nor subject resident merchants to loss of treaty rights, if they fail to produce from the domicile of origin evidence which it is impossible to obtain there. Lau Ow Bew v. U. S. (1892) 12 Sup. Ct. 517, 522, 144 U. S. 47, 36 L. Ed. 340.

A Chinese laborer, and resident of the United States, does not lose his residence by going into Mexico, and remaining there only one night. U. S. v. Lee Yung (D. C. 1894) 63 Fed. 520.

What constitutes departing.—Chinese subjects purchasing through tickets, and embarking in an American vessel, from one American port to another, who do not leave the vessel when she, having leave to do so, touches at a foreign port, have not departed from the United States within the meaning of this section. In re Tong Wah Sick (C. C. 1888) 36 Fed. 440.

A Chinese laborer, who ships on an American vessel, at an American port, for a round voyage, and who does not land at any foreign port, but remains on board until the voyage is completed, does not depart from the United States within the meaning of this section. In re Jack Sen (C. C. 1888) 36 Fed. 441.

Cited without definite application, Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1027, 149 U. S. 698, 37 L. Ed. 905; Li Sing v. Same (1901) 21 Sup. Ct. 449, 450, 180 U. S. 486, 45 L. Ed. 634; Ex parte Petterson (D. C. 1908) 166 Fed. 536.

§ 4304. (Act Oct. 1, 1888, c. 1064, § 2.) Certificates of identity not to be issued, and those issued void.

No certificates of identity provided for in the fourth and fifth sections of the act to which this is a supplement shall hereafter be issued; and every certificate heretofore issued in pursuance thereof, is hereby declared void and of no effect, and the chinese laborer claiming admission by virtue thereof shall not be permitted to enter the United States. (25 Stat. 504.)

See notes to section 1 of this act, ante, § 4290.

This section superseded the provisions of Act May 6, 1882, c. 126, §§ 4, 5, as amended by Act July 5, 1884, c. 220, until the provisions of this act were suspended by those of the Convention with China of Dec. 7, 1894, post, §§ 4326–4331.

§ 4305. (Act Oct. 1, 1888, c. 1064, § 3.) Duties, liabilities, penalties, and forfeitures under previous act extended.

All the duties prescribed, liabilities penalties and forfeitures imposed, and the powers conferred by the second, tenth, eleventh, and twelfth, sections of the act to which this is a supplement are hereby extended and made applicable to the provisions of this act. (25 Stat. 504.)

See notes to section 1 of this act, ante, § 4290.

Sections 2, 10–12, of Act May 6, 1882, c. 126, referred to in this section, are set forth ante, §§ 4291, 4297–4299. At the time of the passage of this act, the entire act of which those sections were part, and Act July 5, 1884, c. 220, amendatory thereof, had been repealed, and other provisions relating to the subject enacted, the repeal to take effect on the ratification of a treaty then pending, by Act Sept. 13, 1888, c. 1015, § 15, 25 Stat. 479, to which act no reference was made in this act. See notes to section 5 of said act, post, § 4306.

Cited without definite application, U. S. v. Hung Chang (D. C. 1903) 126 Fed. 400, 402, reversed (1904) 134 Fed. 19, 67 C. C. A. 93.

§ 4306. (Act Sept. 13, 1888, c. 1015, § 5.) Return of Chinese laborers after departure not permitted, except under conditions stated.

From and after the passage of this act, no Chinese laborer in the United States shall be permitted, after having left, to return thereto, except under the conditions stated in the following sections. (25 Stat. 477.)

Act Sept. 13, 1888, c. 1015, of which this section and the eight sections next following were part, was entitled "An act to prohibit the coming of Chinese laborers to the United States."

The act, by section 1 thereof, was to become effective from and after the date of the exchange of ratifications of a treaty between the United States and China signed March 12, 1888. That treaty was never ratified, but sections 5–11, 12, 13 of this act were expressly re-enacted by Act April 29, 1902, c. 641, § 1, post, § 4337.

The sections of the Act of Sept. 13, 1888, which were not so re-enacted, were as follows:

"Be it enacted, etc., That from and after the date of the exchange of ratifications of the pending treaty between the United States of America and His Imperial Majesty the Emperor of China, signed on the twelfth day of March, anno Domini eighteen hundred and eighty-eight, it shall be unlawful for any Chinese person, whether a subject of China or of any other power, to enter the United States, except as hereinafter provided.

"Sec. 2. That Chinese officials, teachers, students, merchants, or travelers for pleasure or curiosity, shall be permitted to enter the United States, but in order to entitle themselves to do so, they shall first obtain the permission of the Chinese Government, or other government of which they may at the time be citizens or subjects. Such permission and also their personal identity shall in such case be evidenced by a certificate to be made out by the diplomatic representative of the United States in the country, or of the consular representative of the United States at the port or place from which the person named therein comes. The certificate shall contain a full description of such person, of his age, height, and general physical features, and shall state his former and present occupation or profession and place of residence, and shall be made out in duplicate. One copy shall be delivered open to the person named and described, and the other copy shall be sealed up and delivered by the diplomatic or consular officer as aforesaid to the captain of the vessel on which the person named in the certificate sets sail for the United States, together with the sealed certificate, which shall be addressed to the collector of customs at the port where such person is to land. There shall be delivered to the aforesaid captain a letter from the consular officer addressed to the collector of customs aforesaid, and stating that said consular officer has on a certain day delivered to the said captain a certificate of the right of the person named therein to enter the United States as a Chinese official, or other exempted person, as the case may be. And any captain who lands or attempts to land a Chinese person in the United States, without having in his possession a sealed certificate, as required in this section shall be liable to the penalties prescribed in section nine of this act.

"Sec. 3. That the provisions of this act shall apply to all persons of the Chinese race, whether subjects of China or other foreign power, excepting Chinese diplomatic or consular officers and their attendants; and the words 'Chinese laborers,' whenever used in this act, shall be construed to mean both skilled and unskilled laborers and Chinese employed in mining.

"Sec. 4. That the master of any vessel arriving in the United States from any foreign port or place with any Chinese passengers on board shall, when he delivers his manifest of cargo, and if there be no cargo, when he makes legal entry of his vessel, and before landing or permitting to land any Chinese person (unless a diplomatic or consular officer, or attendant of such officer), deliver to the collector of customs of the district in which the vessel shall have arrived the sealed certificates and letters as aforesaid, and a separate list of all Chinese persons taken on board at the time of arrival as aforesaid. Such list shall show the names of such persons and other particulars as shown by their open certificates, or other evidences required by this act, and such list shall be sworn to by the master in the manner required by law in relation to the manifest of the cargo.

"The master of any vessel as aforesaid shall not permit any Chinese diplomatic or consular officer or attendant of such officer to land without having first been informed by the collector of customs of the official character of such officer or attendant. Any refusal or willful neglect of the master of any vessel to comply with the provisions of this section shall incur the same penalties and forfeitures as are provided for a refusal or neglect to report and deliver a manifest of the cargo."

"Sec. 12. That before any Chinese passengers are landed from any such vessel, the collector or his deputy, shall proceed to examine such passengers, comparing the certificates with the list and with the passengers; and no passenger shall be allowed to land in the United States from such vessel in violation of law; and the collector shall in person decide all questions in dispute with regard to the right of any Chinese passenger to enter the United States, and his decision shall be subject to review by the Secretary of the Treasury, and not otherwise."

"Sec. 15. That the act entitled 'An act to execute certain treaty stipulations relating to Chinese,' approved May sixth, eighteen hundred and eighty-two, and an act to amend said act, approved July fifth, eighteen hundred and

eighty-four, are hereby repealed to take effect upon the ratification of the pending treaty as provided in section one of this act."

Since the pending treaty referred to in this last section was not ratified, the repeal of the previous acts mentioned therein never became effective.

Notes of Decisions

Operation of act.—Deportation of Chinese, see § 4313, post.

The Chinese exclusion act of September 13, 1888, has a field of operation despite the nonratification of the proposed treaty of March 12, 1888, between the United States and China, and is now in force excepting sections 2–4 and 15. United States v. Jim (D. C. 1891) 47 Fed. 431, followed. United States v. Long Hop (D. C. 1892) 55 Fed. 58.

This section was continued in force by Act April 29, 1902, c. 641, as amended by Act April 27, 1904, c. 1630, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

The act of 1882 specifically refers to laborers only, and though the act of 1888 is broadly comprehensive of all Chinese persons, sections 1 and 15 clearly never went into effect, and it is doubtful whether sections 2–4 ever went into effect, while sections 5–14, are administrative sections, without excluding any new classes. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639.

Only such Chinese persons as are declared to be admissible may enter the United States or can safely be found therein. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

Where a Chinese laborer holding a United States labor certificate departed from the United States at a point other than the places of departure prescribed, without applying to the collector of customs for permission to leave, etc., and thereafter re-entered the United States at a nondesignated point, in the absence of evidence as to his intention in departing, he had forfeited his right to remain in the United States, and was subject to deportation. U. S. v. Tuck Lee (D. C. 1903) 120 Fed. 989.

§ 4307. (Act Sept. 13, 1888, c. 1015, § 6.) Conditions under which Chinese laborers may return.

No Chinese laborer within the purview of the preceding section shall be permitted to return to the United States unless he has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. The marriage to such wife must have taken place at least a year prior to the application of the laborer for a permit to return to the United States, and must have been followed by the continuous cohabitation of the parties as man and wife.

If the right to return be claimed on the ground of property or of debts, it must appear that the property is bona fide and not colorably acquired for the purpose of evading this act, or that the debts are unascertained and unsettled, and not promissory notes or other similar acknowledgments of ascertained liability. (25 Stat. 477.)

See note to section 5 of this act, ante, § 4306.

Notes of Decisions

Operation of statute.—This act was passed to take effect upon the ratification of a treaty then pending between the United States and the emperor of China which was never ratified, and this section is not now in effect. Li Sing v. U. S. (1901) 21 Sup. Ct. 449, 451, 180 U. S. 486, 45 L. Ed. 634.

A Chinese laborer does not lose his residence by going to the Hot Springs in Mexico, one or two miles from the boundary, for the benefit of his health and remaining there only one night. U. S. v. Lee Yung (D. C. 1894) 63 Fed. 520.

See Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902; note under § 4306, ante.

Debts "unascertained and unsettled."—An open book account of over $1,000 of a registered Chinese laborer seeking to return to this country, with a Chinese debtor, the existence of which account has been established, is one "unascertained and unsettled" within the meaning of this section. (1903) 24 Op. Atty. Gen. 637.

Cited without definite application, U. S. v. Tuck Lee (D. C. 1903) 120 Fed. 989.

§ 4308. (Act Sept. 13, 1888, c. 1015, § 7.) Identification of Chinese laborers claiming right to leave and return; certificates; limitation of time for return; ports at which Chinese may enter.

A Chinese person claiming the right to be permitted to leave the United States and return thereto on any of the grounds stated in the foregoing section, shall apply to the collector of customs of the district from which he wishes to depart at least a month prior to the time of his departure, and shall make on oath before the said collector a full statement descriptive of his family, or property, or debts, as the case may be, and shall furnish to said collector such proofs of the facts entitling him to return as shall be required by the rules and regulations prescribed from time to time by the Secretary of the Treasury, and for any false swearing in relation thereto he shall incur the penalties of perjury. He shall also permit the collector to take a full description of his person, which description the collector shall retain and mark with a number. And if the collector, after hearing the proofs and investigating all the circumstances of the case, shall decide to issue a certificate of return, he shall at such time, and place as he may designate, sign and give to the person applying a certificate containing the number of the description last aforesaid, which shall be the sole evidence given to such person of his right to return. If this last named certificate be transferred, it shall become void, and the person to whom it was given shall forfeit his right to return to the United States. The right to return under the said certificate shall be limited to one year; but it may be extended for an additional period, not to exceed a year, in cases where, by reason of sickness or other cause of disability beyond his control, the holder thereof shall be rendered unable sooner to return, which facts shall be fully reported to and investigated by the consular representative of the United States at the port or place from which such laborer departs for the United States, and certified by such representative of the United States to the satisfaction of the collector of customs at the port where such Chinese person shall seek to land in the United States, such certificate to be delivered by said representative to the master of the vessel on which he departs for the United States. And no Chinese laborer shall be permitted to reenter the United States without producing to the proper officer of the customs at the port of such entry the return certificate herein required. A Chinese laborer possessing a certificate under this section shall be admitted to the United States only at the port from which he departed therefrom, and no Chinese person, except Chinese diplomatic or consular officers, and their attendants, shall be permitted to enter the United States except at the ports of San Francisco, Portland, Oregon, Boston, New York, New Orleans, Port Townsend, or such other ports as may be designated by the Secretary of the Treasury. (25 Stat. 477.)

See note to section 5 of this act, ante, § 4306.

Notes of Decisions

Operation of statute.—This section was continued in force by Act April 29, 1902, c. 641, as amended by Act April 27, 1904, c. 1630, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

Return certificate.—Since the passage of this act no Chinese person, formerly resident of the United States, but temporarily absent therefrom, is entitled to return without the prescribed certificate. Wan Shing v. U. S. (1891) 11 Sup. Ct. 729, 140 U. S. 424, 35 L. Ed. 503.

The issuance of a return certificate to a Chinese laborer leaving the United States is not conclusive of his right to re-enter the United States upon his return. Hom Yuen v. U. S. (1914) 214 Fed. 57, 130 C. C. A. 497.

The certificate required of Chinese

returning to this country cannot entitle the wife or children of the holder to enter with him. There must be either an independent certificate for each, or else the certificate issued to the husband or father must contain also a certificate of the facts required, both as to the wife and each minor child sought to be introduced. In re Ah Quan (C. C. 1884) 21 Fed. 182.

The only evidence of the right of a Chinese laborer who left the United States after the passage of the act of 1882 to re-enter this country is the certificate provided in the act. Case of the Limited Tag (C. C. 1884) 21 Fed. 789.

A Chinese laborer resided in the United States from November 17, 1880, until June, 1881, when he departed for Honolulu, in the Hawaiian kingdom, where he remained until September, 1884, when he sought to re-enter the United States. Held, that the acts of 1882 and 1884 did not except him from the necessity of presenting the certificate required by those acts, and that without it he could not be allowed to re-enter. Case of Former Residence by a Chinese Laborer (C. C. 1884) 21 Fed. 791, judgment reversed Chew Heong v. U. S. (1884) 5 Sup. Ct. 255, 112 U. S. 536, 28 L. Ed. 770.

The petitioner, having full knowledge of the law requiring the production of the certificate provided for under the third section of the act of May 6, 1881, by Chinese laborers, having left this country and desiring to return after the passage of said act, failed to apply for such certificate upon leaving this country, for the reason that he had no expectation of returning to the United States. Held, that he had, by his own omission, renounced the right secured to him by the treaty, by neglecting to procure the evidence of that right, which the law requires and which it was entirely within his power to obtain. In re Chin A On (D. C. 1883) 18 Fed. 506; In re Tong Ah Chee (D. C. 1883) 23 Fed. 441; In re Pong Ah Chee (D. C. 1883) 18 Fed. 527.

A Chinese laborer, who proposes to leave the United States and return, complies with the conditions necessary to demand a certificate if he file the required papers "with the collector of customs of the district from which he departs." Any rule directing him to file such papers with the collector of any other district imposes a condition not warranted by the treaty. (1896) 21 Op. Atty. Gen. 424.

A Chinese laborer holding a certificate of residence, who, prior to his leaving this country, has made application under oath for a return certificate, but who has not filed such application with the collector of customs nor received a return certificate, is not entitled to reentry, although such application bears upon its face the stamp and signature of the Chinese inspector showing the departure of such laborer on a certain date. (1902) 23 Op. Atty. Gen. 619.

The facts which entitle a Chinese laborer to return to this country must exist not only at the time of his departure but also at the time of his return, and this notwithstanding the fact that he has obtained a return certificate. (1902) 24 Op. Atty. Gen. 91.

Certificate of disability.—Article II of the convention with China of December 8, 1894 (section 4327, ante), abrogates that portion of section 7 of the act of Sept. 13, 1888 (25 Stat. 476), which requires a returning Chinese laborer after an absence from the United States of more than one year and less than two, to present with his return certificate a certificate of the consular representative of the United States at the port of departure for this country, showing that the holder has been unable to return sooner by reason of sickness, etc., and provides that this certificate of disability shall be issued by the Chinese consul at the port of departure from this country. (1896) 21 Op. Atty. Gen. 357; (1901) 23 Op. Atty. Gen. 545; (1901) 24 Op. Atty. Gen. 544.

Proof of identity of returning Chinese person.—A person of Chinese parentage testified, on a hearing in habeas corpus proceedings to determine his right to come into the United States, that he was born in San Francisco in 1877, that he was taken to China by his parents when under three years of age, and remained there continuously until October, 1890. On the question of his birth he was corroborated only by the hearsay testimony of other Chinese persons, who had seen him but a few times. Held, that a finding against him should not be disturbed on appeal. Gee Fook Sing v. U. S. (1892) 49 Fed. 146, 1 C. C. A. 211; Lem Hing Dun v. Same (1892) 49 Fed. 148, 1 C. C. A. 210.

The uncorroborated testimony of Chinese witnesses will not be accepted as sufficient to identify a Chinese person claiming the right to enter the United States on the ground that he was born in this country, where it is admitted that he left it when 3 years old, and has remained away for 16 years. In re Louie You (D. C. 1899) 97 Fed. 580.

Decision of immigration officer.—The decision of the immigration officer at the port from which a Chinese person departed from the United States against such person's right to re-enter could not be collaterally attacked in deportation proceedings after he had surreptitiously entered the United States. Hom Yuen v. U. S. (1914) 214 Fed. 57, 130 C. C. A. 497.

Determination that a Chinese person was entitled to enter or remain in the United States because he had been

therein prior to November 19, 1880, held not conclusive of his right thereafter to re-enter after having made a subsequent visit to China. U. S. v. Lim Jew (D. C. 1910) 192 Fed. 644, judgment affirmed Lim Jew v. U. S. (1912) 196 Fed. 736, 116 C. C. A. 364.

Cited without definite application, U. S. v. Tuck Lee (D. C. 1903) 120 Fed. 989.

§ 4309. (Act Sept. 13, 1888, c. 1015, § 8.) Regulations, etc., to be prescribed by Secretary of Treasury.

The Secretary of the Treasury shall be, and he hereby is, authorized and empowered to make and prescribe, and from time to time to change and amend such rules and regulations, not in conflict with this act, as he may deem necessary and proper to conveniently secure to such Chinese persons as are provided for in articles second and third of the said treaty between the United States and the Empire of China, the rights therein mentioned, and such as shall also protect the United States against the coming and transit of persons not entitled to the benefit of the provisions of said articles. And he is hereby further authorized and empowered to prescribe the form and substance of certificates to be issued to Chinese laborers under and in pursuance of the provisions of said articles, and prescribe the form of the record of such certificate and of the proceedings for issuing the same, and he may require the deposit, as a part of such record, of the photograph of the party to whom any such certificate shall be issued. (25 Stat. 478.)

See note to section 5 of this act, ante, § 4306, as to effect of failure of ratification of the treaty referred to in this section.

Notes of Decisions

Operation of statute and when effective.—This section was continued in force by Act April 29, 1902, c. 641, as amended by Act April 27, 1904, c. 1630, without modification, limitation, or condition, after the expiration of the then existing treaty with China, on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

This section was independent legislation, not dependent on the ratification of the treaty then pending to become a law, and it became effective on its passage. In re Lee Gon Yung (C. C. 1901) 111 Fed. 998, order affirmed Lee Gon Yung v. U. S. (1902) 22 Sup. Ct. 690, 185 U. S. 306, 46 L. Ed. 921.

Regulations of secretary.—Practice of forwarding to the bureau of immigration, in accordance with a rule in deportation proceedings, the full record, does not infringe any constitutional right of an alien sought to be deported. Choy Gum v. Backus (1915) 223 Fed. 487, 139 C. C. A. 35.

A rule governing proceedings to deport an alien held not so arbitrary as to be beyond the power of the executive department, empowered to enforce the law to enact. Id.

Under the regulations of the department authorizing Chinese seamen to enter the United States on shore leave, on giving bond to depart within 30 days, a Chinese seaman belongs to the excluded class, and may not enter the United States, except by giving the required bond. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

Neither the Chinese treaty of 1880, nor subsequent legislation relating to Chinese exclusion, has any relation to Chinese persons, not of the laboring class, who were at the time of the adoption of that treaty domiciled in the United States, and who have since continued to reside therein; and such a person who temporarily leaves the country, with the intention of returning, cannot be excluded on his return because he is not included in one of the classes expressly excepted from the operation of the exclusion acts, and who alone are permitted to enter the United States by rules 1 and 2 of the regulations adopted by the Department of Commerce and Labor; such rules being applicable only to persons seeking to enter for the first time. Ex parte Ng Quong Ming (D. C. 1905) 135 Fed. 378.

Under Chinese Regulations, rule 3, where a Chinese person in preinvestigation proceedings complied with all the requirements to establish his status as a Chinese person entitled to depart from and return to the United States under the Chinese exclusion laws, and he was not examined as to his right to enter as an ordinary alien, an examination as to his right to re-enter should be limited to the Chinese exclusion laws and regulations. Ex parte Wong Tuey Hing (D. C. 1914) 213 Fed. 112.

The question of the validity of a proposed regulation of the Treasury De-

partment providing that in case a Chinese laborer who has left the United States upon a valid return certificate is delayed beyond one year from the date of his departure by reason of sickness or other disability beyond his control, the consular representative of the United States shall certify to such facts before the Chinaman shall be admitted into this country, not being a question actually or presently arising in the administration of the Treasury Department, the Attorney General declines to express his opinion thereon. (1901) 23 Op. Atty. Gen. 582.

—— **Student becoming laborer.**—Chinese student, entering United States under treaty with China, may not be deported on his becoming a laborer, notwithstanding rules of Secretary of Labor, under this section. In re Tam Chung (D. C. 1915) 223 Fed. 801.

§ 4310. (Act Sept. 13, 1888, c. 1015, § 9.) Masters of vessels landing Chinese in contravention of act, punishable.

The master of any vessel who shall knowingly bring within the United States on such vessel, and land, or attempt to land, or permit to be landed any Chinese laborer or other Chinese person, in contravention of the provisions of this act, shall be deemed guilty of a misdemeanor and, on conviction thereof, shall be punished with a fine of not less than five hundred dollars nor more than one thousand dollars, in the discretion of the court, for every Chinese laborer or other Chinese person so brought, and may also be imprisoned for a term of not less than one year, nor more than five years, in the discretion of the court. (25 Stat. 478.)

See note to section 5 of this act, ante, § 4306.

Provisions somewhat similar to those of this section were made by Act May 6, 1882, c. 126, § 2, as amended by Act July 5, 1884, c. 220, ante, § 4291.

Notes of Decisions

Operation of statute.—This section was continued in force by Act April 29, 1902, c. 641, as amended by Act April 27, 1904, c. 1630, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

—— **Statutes repealed.**—Sections 4291, 4292, ante, were impliedly repealed by this section, which covers substantially the same offense, but prescribes a different punishment. U. S. v. Wood (D. C. 1909) 168 Fed. 438; Same v. Durie (D. C. 1909) 170 Fed. 624.

As to landing of Chinese in violation of Act May 6, 1882, c. 126, § 2, as amended, see ante, §§ 4291, 4292, and notes thereunder.

—— **Chinese sailors and right to shore leave.**—A Chinese seaman, a member of the crew of a vessel calling temporarily at the port of New York, was not a "laborer" or a "Chinese person" within this section. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, writ of error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639.

The rights of sailors under treaty provisions to shore leave, and to remain within the country after discharge before the consuls of the various nations and the signing of new articles, only applies so long as the sailors are intending to continue their vocation and to leave the United States on the continuation of the voyage, or on taking passage on another vessel, and immediately terminates on their attempt to enter the United States as an immigrant. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

This section does not prevent the bringing of Chinese into the United States as a vessel's crew nor the granting of shore leave to them, subject to immigration regulations. U. S. v. Innes (D. C. 1914) 218 Fed. 705.

Offense.—Master of a ship having a Chinese crew held not guilty of violating this section by reason of the escape of a Chinese member of the crew without the master's knowledge, notwithstanding reasonable precautions taken to prevent the crew from going ashore. U. S. v. Innes (D. C. 1914) 218 Fed. 705.

—— **Indictment.** — An indictment charging the master of a vessel with a violation of this section must aver that defendant "knowingly" permitted such Chinese person to be landed. U. S. v. Walker (C. C. 1907) 156 Fed. 987; Same v. Rout (D. C. 1909) 170 Fed. 201.

An indictment charging the master of a vessel with having permitted a Chinese laborer to land in the United States from his vessel held to sufficiently negative the exceptions contained in section 4311, where it averred that the said Chinese person was not landed by reason of "any necessity." U. S. v. Graham (C. C. 1908) 164 Fed. 654.

The words "bringing into the United States" mean "bringing with the intention to leave"; and hence an indictment charging the master of a vessel

with bringing a Chinese laborer into the United States, failing to allege that his act was with the specific intent to leave such person in the United States contrary to law, was insufficient. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, writ of error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639.

An indictment under this section must negative the exceptions stated in section 4311. U. S. v. Wood (D. C. 1909) 168 Fed. 438.

—— **Evidence.**—In a prosecution for conspiring to unlawfully bring into the United States Chinese persons not entitled to enter, accused on cross-examination was asked whether, when arrested, he did not state that, unless he was furnished bond, he would implicate a prominent man in a certain city, and he denied having made the admission. Held, that proof of the admission was proper in rebuttal as such admission reflected directly on the guilt of accused. U. S. v. Adamson (N. M. 1910) 106 P. 653.

Cited without definite application, The Frolic (D. C. 1906) 148 Fed. 921.

§ 4311. (Act Sept. 13, 1888, c. 1015, § 10.) Masters of vessels in distress excepted from foregoing section.

The foregoing section shall not apply to the case of any master whose vessel shall come within the jurisdiction of the United States in distress or under stress of weather, or touching at any port of the United States on its voyage to any foreign port or place. But Chinese laborers or persons on such vessels shall not be permitted to land, except in case of necessity, and must depart with the vessel on leaving port. (25 Stat. 478.)

See note to section 5 of this act, ante, § 4306.

A similar exception was contained in Act May 6, 1882, c. 126, § 3, as amended by Act July 5, 1884, c. 220, ante, § 4292.

Notes of Decisions

Operation of statute.—This section was continued in force by section 4337, post, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

Exceptions to be negatived.—An indictment under section 4310, ante, must negative the exceptions stated in this section. U. S. v. Wood (D. C. 1909) 168 Fed. 438.

§ 4312. (Act Sept. 13, 1888, c. 1015, § 11.) Altering name in or forging certificate, or false personation of person named therein, punishable.

Any person who shall knowingly and falsely alter or substitute any name for the name written in any certificate herein required, or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in any such certificate, and any person other than the one to whom a certificate was issued who shall falsely present any such certificate, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars, and imprisoned in a penitentiary for a term of not more than five years. (25 Stat. 478.)

See note to section 5 of this act, ante, § 4306.

Provisions similar to a great extent to those of this section were made by Act May 6, 1882, c. 126, § 7, ante, § 4294. And similar provisions relating to certificates of residence were made by Act May 5, 1892, c. 60, § 8, post, § 4322.

Notes of Decisions

Evidence of intent.—On the trial of a defendant for the forgery of Chinese duplicate certificates of residence, other forged and fraudulent certificates not mentioned in the indictment, but shown to be in the handwriting of defendant, were admissible on the question of intent. Dillard v. U. S. (1905) 141 Fed. 303, 72 C. C. A. 451.

§ 4313. (Act Sept. 13, 1888, c. 1015, § 13.) Arrest and removal of Chinese unlawfully in United States.

Any Chinese person, or person of Chinese descent, found unlawfully in the United States, or its Territories, may be arrested

upon a warrant issued upon a complaint, under oath, filed by any party on behalf of the United States, by any justice, judge, or commissioner of any United States court, returnable before any justice, judge, or commissioner of a United States court, or before any United States court, and when convicted, upon a hearing, and found and adjudged to be one not lawfully entitled to be or remain in the United States, such person shall be removed from the United States to the country whence he came. But any such Chinese person convicted before a commissioner of a United States court may, within ten days from such conviction, appeal to the judge of the district court for the district. A certified copy of the judgment shall be the process upon which said removal shall be made, and it may be executed by the marshal of the district, or any officer having authority of a marshal under the provisions of this section. And in all such cases the person who brought or aided in bringing such person into the United States shall be liable to the Government of the United States for all necessary expenses incurred in such investigation and removal; and all peace officers of the several States and Territories of the United States are hereby invested with the same authority in reference to carrying out the provisions of this act, as a marshal or deputy marshal of the United States, and shall be entitled to like compensation, to be audited and paid by the same officers. (25 Stat. 479.)

See note to section 5 of this act, ante, § 4290.

Subsequent provisions relating to the removal of Chinese not lawfully in the United States, and specifying the place or places to which they shall be removed, are contained in Act May 5, 1892, c. 60, § 2, post, § 4316.

Chinese ordered deported by judicial writ are to be delivered into the custody of an officer designated for that purpose, by a provision of Act June 23, 1913, c. 3, § 1, post, § 4341.

Notes of Decisions

I. Operation and validity

1. Operation in general.
2. Validity.

II. Deportation of Chinese

3. Chinese subject to removal and grounds for removal.
4. —— Chinese "found unlawfully in the United States."
5. —— Change in occupation.
6. Place to which removed.
7. Domicile of Chinese person.
8. Bail.
9. Expenses.
10. Deportation proceedings—Nature.
11. —— Jurisdiction.
12. —— Complaint.
13. —— Warrant and process.
14. —— Arrest.
15. —— Hearing.
16. —— Evidence.
17. —— Defenses.
18. —— Judgment and conclusiveness thereof.
19. —— New trial.
20. —— Order of deportation.
21. Deportation under immigration act.
22. Appeal in deportation proceedings.
23. —— Right of appeal.
24. —— Effect of appeal.
25. —— Notice.
26. —— Jurisdiction.
27. —— "District judge of the district."
28. —— Presentation on appeal.
29. —— Trial de novo.
30. —— Review of findings and decision.
31. —— Harmless error.
32. Review on habeas corpus.

I. OPERATION AND VALIDITY

1. Operation in general.—The extension of the Chinese exclusion and immigration laws to the Philippine Islands does not deprive the government of the islands of the power to authorize summary executive deportation of aliens. Chuoco Tiaco v. Forbes (1913) 33 Sup. Ct. 585, 228 U. S. 549, 57 L. Ed. 960.

Act Sept. 13, 1888, entitled "An act to prohibit the coming of Chinese laborers to the United States," having been passed subject to the ratification of a treaty then pending between the United States and the emperor of China, which was never ratified, is not in force, except this section. U. S. v. Gee Lee (1892) 50 Fed. 271, 1 C. C. A. 516, affirming order Same v. Lee Hoy (D. C. 1891) 48 Fed. 825.

This section was continued in force by section 4337, post, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

This section did not depend upon the ratification of the treaty, but became effective from the date of the approval of the act. In re Mah Wong Gee (D. C. 1891) 47 Fed. 433; U. S. v. Jim (D. C. 1891) 47 Fed. 431.

2. Validity.—The constitutional and statutory provisions prohibiting the deprivation of life, limb, or property without due process of law have no application to Chinese exclusion pro-

ceedings. In re Chin Wah (D. C. 1910) 182 Fed. 256, order affirmed Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422. Nor have the provisions guaranteeing trial by jury application to such proceedings. Id.

This section is constitutional. U. S. v. Foong King (D. C. 1904) 132 Fed. 107. But see U. S. v. Coe (D. C. 1904) 128 Fed. 199, order reversed Same v. Jock Coe (1905) 25 Sup. Ct. 794, 196 U. S. 635, 49 L. Ed. 629.

II. DEPORTATION OF CHINESE

3. Chinese subject to removal and grounds for removal.—Under the fourteenth amendment to the constitution, the laws excluding immigrants who are Chinese laborers are inapplicable to a person born in the United States, and subject to its jurisdiction, even though his parents were not citizens, and, being Chinese, were not entitled to become citizens under the naturalization laws. Gee Fook Sing v. U. S. (1892) 49 Fed. 146, 1 C. C. A. 211; Lem Hing Dun v. Same (1892) 49 Fed. 148, 1 C. C. A. 210.

A resident of the United States claiming to be a native born citizen, although of the Chinese race, may not be deported or banished until the right of the government to deport or banish has been judicially determined in accordance with the usual and ordinary rules of evidence. Moy Suey v. U. S. (1906) 147 Fed. 697. 78 C. C. A. 85.

A Chinese alien, who enters the United States unlawfully, may be summarily deported by order of the Secretary of Commerce and Labor at any time within three years. Prentis v. Seu Leung (1913) 203 Fed. 25, 121 C. C. A. 389.

The adopted son of a Chinese merchant, brought to this country when 5 years old, had the status of the person who adopted him, and was not subject to be deported. U. S. v. Lee Chee (1915) 224 Fed. 447, 140 C. C. A. 649.

A Chinese person, who is shown by uncontradicted evidence to be entitled to remain in the United States, cannot be deported because of his refusal to be sworn to testify at the request of the prosecution. Ex parte Sing (C. C. 1897) 82 Fed. 22.

A Chinese person, not a laborer, who has come here with a certificate properly signed and visèed, and, after examination, has been permitted to enter the United States, and has engaged in business here as a merchant for 17 months, cannot, in the absence of fraud, be deported, on the ground that the certificate is incomplete and defective in matters of nomenclature and description. U. S. v. Pin Kwan (D. C. 1899) 94 Fed. 824, decision reversed in (1900) 100 Fed. 609, 40 C. C. A. 618.

Where a Chinese person is shown to have been a member of a firm of merchants in this country for seven years, with $1,000 invested as his share of the capital, the fact that he has lately visited China, and returned from there, nothing being shown as to his manner of reentry, does not warrant his arrest and deportation. U. S. v. Wong Lung (D. C. 1900) 103 Fed. 794.

Where a Chinese laborer holding a United States labor certificate departed from the United States at a point other than the places of departure prescribed, without applying to the collector of customs for permission to leave, etc., and thereafter re-entered the United States at a nondesignated point, in the absence of evidence as to his intention in departing, he had forfeited his right to remain in the United States, and was subject to deportation. U. S. v. Tuck Lee (D. C. 1903) 120 Fed. 989.

The fact that a Chinese person emigrates to the United States from Hongkong, or even that he is a native of that colony, does not prevent his being subject to the provisions of this section. U. S. v. Foong King (D. C. 1904) 132 Fed. 107.

A Chinese seaman, having been landed and sent to a hospital for medical treatment, held subject to deportation on failing to depart within 30 days after his discharge from the hospital. U. S. v. Wong Kee (D. C. 1911) 192 Fed. 583.

A Chinese alien and subject of the Chinese Empire not of the exempt classes, who knowingly crosses the Canadian border into the United States, but not at or near any established port of entry, with the purpose of entering and remaining in the United States, who is apprehended after he has crossed the boundary and taken before a Commissioner of Immigration at the nearest port of entry and given a hearing as an applicant for entry, and after such hearing is refused admission and ordered returned to Canada, but who cannot be returned because of the demand of the Canadian authorities for a head tax which he refuses to pay, is found, and is unlawfully, in the United States, and subject to arrest and deportation under the Chinese exclusion laws. U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260, order affirmed Yuen Pak Sune v. U. S. (1911) 191 Fed. 825, 112 C. C. A. 339.

A Chinese born in the United States is, by virtue of the fourteenth amendment, a citizen of the United States, and he is lawfully within the United States and cannot be arrested without a warrant or on a warrant unless based on a complaint showing a statement of fact by some responsible person from which the charge of unlawful presence in the country may be deduced. U. S. v. Hom Lim (D. C. 1914) 214 Fed. 456.

Where, in proceedings to deport a Chinese person, the arrest was made before the issuance of a warrant and on no facts indicating unlawful presence in the United States, and the hearing before the commissioner developed

the fact that the Chinese person was apparently a citizen, he should be discharged. Id.

4. —— Chinese "found unlawfully in the United States."—Chinese persons were not "found unlawfully in the United States," so as to entitle them to a hearing as to their right to remain, where when they crossed the border into the United States at a point remote from the designated port of entry, they were within sight of inspectors, who, intending to prevent their unlawful entry, followed them closely until they had proceeded about one-fourth of a mile across the border, and until it was apparent that they intended to enter unlawfully, and, taking them into custody, conducted them immediately to the nearest port of entry for investigation of their right to enter; the term, "found unlawfully in the United States" referring to those Chinese persons who have entered, gone at large, and mixed with and become a part of the population. Hence such persons having been given opportunity to show their right to enter, and having remained mute, the inspector in charge had jurisdiction to exclude them. Ex parte Chow Chok (C. C. 1908) 161 Fed. 627, order affirmed Chow Chok v. U. S. (1908) 163 Fed. 1021, 90 C. C. A. 230.

An "entry" or "entrance" of a Chinese person into the United States within the Chinese exclusion acts, and the term "found unlawfully in the United States," mean more than the mere act of crossing the border, and consists in his going at large or becoming domiciled in the country. Ex parte Chow Chok (C. C. 1908) 161 Fed. 627, order affirmed Chow Chok v. U. S. (1908) 163 Fed. 1021, 90 C. C. A. 230.

A Chinese person procuring a certificate of admission by means of which he enters the United States by false and fraudulent representations, is unlawfully within the United States, in violation of Chinese exclusion act, and may be deported. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

5. —— Change in occupation.—That student, who was actually such when sought to be deported, had worked temporarily to support himself, held not to make him subject to the exclusion act. U. S. v. Lau Chu (1915) 224 Fed. 446, 140 C. C. A. 648.

Defendant held to have been adopted by Chinese merchant, who took him when he was 5 years old and thereafter supported him, and, though defendant subsequently became a laborer, he could not be deported. U. S. v. Lee Chee (1915) 224 Fed. 447, 140 C. C. A. 649.

A Chinese person who before, during, and for a long time after the time when Chinese laborers were required by the exclusion acts to register was lawfully domiciled in the United States as a merchant is not subject to deportation thereunder on subsequently becoming a laborer. U. S. v. Seid Bow (D. C. 1905) 139 Fed. 56.

Where a Chinese person, born in China, came to the United States when five or six years old with a merchant, and was too young, when the registration act was passed, to have any knowledge of the requirement with respect thereto, and he apparently at that time was a merchant, in so far as his status was that of the person with whom he lived and with whom he came to this country, and he later engaged in the laundry business, he could not be deported merely because he was a laborer at the time of arrest. U. S. v. Hom Lim (D. C. 1914) 214 Fed. 456.

Where a Chinese person entered the United States in the exempt class because entering with his father engaging in the mercantile business in the United States, and also engaged by himself in the mercantile trade, he could not be deported merely because he became a laborer and was a laborer at the time of his arrest. Id.

A Chinese person admitted into the United States as a student may remain after ceasing to be a student, and he may earn his living in any lawful manner without subjecting himself to deportation. Id.

Where a Chinese alien has been admitted into the United States as the minor son of a resident Chinese merchant, he may not be lawfully deported for the sole reason that after attaining his majority he has worked as a laborer. Ex parte Lew Lin Shew (D. C. 1914) 217 Fed. 317.

6. Place to which removed.—Under commerce and labor rule 9, providing that every Chinese person refused admission to the United States, being actually or constructively on the conveyance by which he was brought to a port of entry, must be returned to the country whence he came, at the expense of the transportation agency owning such conveyance, where the petitioning Chinese persons were apprehended in an attempt to unlawfully enter from Canada, and were ordered to be dealt with according to law, an inspector had no right to take them to Hoboken, to deport them direct to China, but should have returned them to Canada. Lui Lum v. U. S. (1909) 166 Fed. 106, 92 C. C. A. 90.

Chinese person, who came to Canada and was then smuggled into the United States, held properly ordered deported to China instead of Canada. Lee Sim v. U. S. (1914) 218 Fed. 432, 134 C. C. A. 232.

Person of Chinese descent held properly ordered deported to China, though not shown to have come from China. Ng You Nuey v. U. S. (1915) 224 Fed. 340, 140 C. C. A. 26.

A Chinese laborer was arrested for being in the United States in violation of the exclusion acts, as amended. The evidence showed that he had been in

this country continuously for 22 years prior to April 1, 1891, but that he was at Kingston, Canada, in the last week of that month. He denied having been there, and there was nothing to show his purpose in going, or his intention as to returning. Held, that he was unlawfully in the United States, and should be returned to Canada, as the country "whence he came." U. S. v. Don On (C. C. 1891) 49 Fed. 569, applying Wan Shing v. U. S. (1891) 11 Sup. Ct. 729, 140 U. S. 424, 35 L. Ed. 503, and distinguishing In re Ah Tie (C. C. 1882) 13 Fed. 291.

The words, "country from whence he came," as used in Act Oct. 1, 1888, providing for deportation "to the country from whence he came" of a Chinaman not entitled to remain in the United States, and other acts on the subject, do not refer exclusively to the empire of China. In re Leo Hem Bow (D. C. 1891) 47 Fed. 302.

Where a Chinese person has been convicted of being unlawfully in the United States, and the evidence shows that he entered the United States from Canada, after having been in that country for a time, he must be returned to Canada, under the act which provides that such person shall be removed to "the country whence he came." In re Mah Wong Gee (D. C. 1891) 47 Fed. 433.

A convicted Chinaman need not be returned to the country of which he is a "subject"; and one who acquired a domicile in Canada before coming into the United States must be returned to that country, and not to China. U. S. v. Chong Sam (D. C. 1891) 47 Fed. 878.

Where alien Chinese are foiled in an effort to enter the United States illegally over the Canadian boundary, they are not subject to deportation to China, but only to be turned back to Canada. Ex parte Wong You (D. C. 1910) 176 Fed. 933, order reversed Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

Where proceedings are instituted for the deportation of certain Chinese persons under the immigration law, they can be deported only to the country from whence they came, and cannot be returned to China. U. S. v. Redfern (D. C. 1914) 210 Fed. 548.

Where the commissioner found that the defendants illegally entered the United States at a point unknown from Canada, a warrant directing their return to China was improper. Id.

Evidence held to justify finding that Chinese person, entering the United States from Canada, came originally from China. U. S. v. Sisson (D. C. 1914) 220 Fed. 538.

Chinese persons, ordered deported to China, must show from what country, other than China, they came to the United States, if they wish to be deported to some other country. Id. 541.

The port to which a Chinese person should be deported is to be determined by the immigration authorities, and, if ordered deported to the wrong port, such Chinese person must show the proper port. Id. 541.

Under the facts and evidence, held, that a Chinese person should be deported to China, and not to Canada, through which he entered. U. S. ex rel. Haum Pon v. Sisson (D. C. 1915) 222 Fed. 693.

The burden of proof is upon a Chinaman claiming to be entitled to be returned to a foreign country other than China to establish the conclusion that he is a subject of such foreign country. (1891) 20 Op. Atty. Gen. 171.

Chinese persons found to be unlawfully in this country may be removed directly to China unless they show conclusively by competent evidence that they are not subjects of China and are the subjects of some other foreign country. Id.

A collector of customs has the right to enforce his exclusion of certain Chinese persons of alleged American birth who entered the United States, were deported to Canada, but subsequently returned to the United States, by again returning them to Canada. (1897) 21 Op. Atty. Gen. 614.

Certain Chinese persons of alleged American birth who entered the United States were deported to Canada, but subsequently returned to the United States. Held, the collector of customs has the right to enforce his exclusion by again returning them to Canada. Id.

See, also, note under § 4316, post.

7. Domicile of Chinese person.—That a Chinese person who has acquired a domicile in Canada, and who is convicted of having recently entered the United States contrary to law, possesses a certificate of leave to return to Canada, is sufficient evidence of intention to return there to show prima facie that he has not lost his domicile. U. S. v. Chong Sam (D. C. 1891) 47 Fed. 878.

That a Chinaman carried on a laundry at a town in Canada for four months, that he had been in the same province for a considerable period before that, and that he possessed a return certificate, issued by the Canadian officials at Vancouver, is sufficient to show that he acquired a domicile in Canada, when there is nothing to show that he left China with the ulterior purpose of coming to the United States, except the fact that he had recently made attempts to enter. Id.

The residence and domicile of a Chinaman remain in China until he acquires a new one with intent to re-

main in it. (1891) 20 Op. Atty. Gen. 171.

8. **Bail.**—A Chinese seaman being authorized to land in the United States on giving bond to depart within 30 days, as required by commerce and labor rule 32, a bail bond given by such seaman, on being arrested in the United States for violating the customs revenue law, was valid. U. S. v. Ah Fook (1910) 183 Fed. 33, 105 C. C. A. 325.

A Chinese person arrested in this country for deportation under the exclusion acts may be admitted to bail by a district court or judge pending his hearing before the commissioner. In re Lum Poy (C. C. 1904) 128 Fed. 974.

After a final order of deportation has been entered by a district court or judge against a Chinese person, he is not entitled to be admitted to bail pending an appeal as a matter of right, but admission to bail rests in the discretion of the court, which should be carefully exercised with regard to the special circumstances of the case. Where it does not appear that defendant had any justification for entering the country, but that he entered and remained in plain violation and defiance of the law, bail will not be allowed. U. S. v. Fah Chung (D. C. 1904) 132 Fed. 109.

The constitutional and statutory provisions regulating the admission to bail in criminal cases have no application to Chinese exclusion proceedings. In re Chin Wah (D. C. 1910) 182 Fed. 256, order affirmed Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422.

Exclusion proceedings under the Chinese Exclusion Acts are not criminal in their nature, so that a defendant therein cannot demand bail as one accused of crime; its allowance being at most discretionary. U. S. v. Wong Lee Foo (Ariz. 1910) 108 P. 488.

9. **Expenses.**—For transporting to the frontier or seaboard Chinese persons unlawfully within the United States, marshals are not entitled to fees, under section 1386, ante, at the rate of either 10 cents or 6 cents per mile; the service is a special one, and, under the acts making appropriations for Chinese exclusion, only actual expenses are allowed. Jacobus v. U. S. (C. C. 1898) 87 Fed. 99, motion to dismiss writ of error denied (1899) 96 Fed. 260, 37 C. C. A. 466.

A warrant for the arrest of a Chinese person under Act Sept. 13, 1888, will not be refused by a district judge, who has no judicial knowledge that the executive department is without the funds necessary to deport such person under Geary Act May 5, 1892. In re Lintner (D. C. 1893) 57 Fed. 587.

The board bills of Chinese boys remaining at Richford, Vt., after they are denied the privilege of coming into the United States, should not be paid by the United States pending their subsequent arrest by the United States marshal and a hearing thereafter under the Chinese exclusion act, as they are neither under detention nor arrest. (1898) 22 Op. Atty. Gen. 51.

10. **Deportation proceedings—Nature.**—A proceeding to expel or exclude aliens under the federal law is civil, and not criminal in its nature. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1029, 149 U. S. 698, 37 L. Ed. 905; Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422 (affirming order In re Chin Wah [D. C. 1910] 182 Fed. 256); U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442; Same v. Moy You (D. C. 1903) 126 Fed. 226. And hence the constitutional provisions which safeguard the rights of persons accused of crime do not apply therein. U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93, reversing judgment (D. C. 1903) 126 Fed. 400. And the strictness and formality required of criminal pleading are not essential. Ex parte Jim Hong (1914) 211 Fed. 73, 127 C. C. A. 569.

Proceedings for the deportation of Chinese persons are not "causes," within section 1583, ante, declaring that the trial of issues of fact in the United States district courts in all causes except cases in equity and cases of admiralty and maritime jurisdiction, etc., shall be by jury. Toy Tong v. U. S. (1906) 146 Fed. 343, 76 C. C. A. 621.

A proceeding for the deportation of a Chinese person as being unlawfully within the United States is civil and not criminal in its nature, and the defendant may be sworn and examined as a witness for the government. Law Chin Woon v. U. S. (1906) 147 Fed. 227, 77 C. C. A. 369.

A deportation proceeding is civil in its nature, and to be decided by the preponderance of the evidence. Woo Jew Dip v. U. S. (1911) 192 Fed. 471, 112 C. C. A. 609.

A proceeding for the exclusion of an alleged Chinese person, in so far as the trial of the issue as to whether or not accused is a Chinese person is concerned, is to be regarded as criminal in its nature. U. S. v. Hung Chang (D. C. 1903) 126 Fed. 400, writ of error dismissed (1904) 130 Fed. 439, 64 C. C. A. 641, judgment reversed (1904) 134 Fed. 19, 67 C. C. A. 93.

Alien Chinese persons not of the exempt classes having no right to be or to remain in the United States, a deportation proceeding is a civil proceeding, not involving punishment for a crime, the imposition of a fine, or the enforcement of a "penalty" or "forfeiture"; and hence the defendant may not refuse to become a witness against himself. U. S. v. Tom Wah (D. C. 1908) 160 Fed. 207, order affirmed

Tom Wah v. U. S. (1908) 163 Fed. 1008, 90 C. C. A. 178.

11. —— **Jurisdiction.**—Under this section and Act March 3, 1901, §§ 1, 3 (sections 4332, 4334, post), a federal court or commissioner of a district other than that in which a Chinese person was arrested had no jurisdiction of proceedings for his deportation. U. S. v. Chin Tong (1911) 192 Fed. 485, 112 C. C. A. 647.

The provision of the Chinese exclusion acts for the examination before United States commissioners of Chinese persons alleged to be unlawfully in this country clothes them with a jurisdiction independent of the district court; and that court has no power to issue a dedimus potestatem to take testimony to be used in such an investigation, since section 1477, ante, authorizing the issuance of such a commission by the federal courts "in any case where it is necessary in order to prevent a failure or delay of justice," applies only to cases of which those courts have jurisdiction. U. S. v. Hom Hing (D. C. 1892) 48 Fed. 635.

A United States commissioner, while he has authority, in a summary proceeding under the Chinese exclusion acts, to order the deportation of a Chinaman found to be unlawfully within the United States, has no jurisdiction to order him to be imprisoned at hard labor for 30 days prior to the time fixed for his deportation. In re Ah Yuk (D. C. 1893) 53 Fed. 781, applying U. S. v. Wong Sing (D. C. 1892) 51 Fed. 79.

Since Act Sept. 13, 1888, § 12, providing that the decision of the collector as to the right of any Chinese passenger to enter the United States should be subject to review only by the secretary of the treasury, was never in force, having been enacted subject to the ratification of a treaty between the United States and China, which was never ratified, the right of a Chinese person to enter the United States may be tried in proceedings of arrest, though the collector has previously decided that he was entitled to enter. U. S. v. Loo Way (D. C. 1895) 68 Fed. 475, judgment affirmed Loo Way v. U. S. (1896) 72 Fed. 688, 18 C. C. A. 681.

12. —— **Complaint.**—Since no formal complaint or pleadings are required in Chinese deportation proceedings, where certain Chinese persons proceeded against were before the commissioner and before the district court on appeal objections to the validity of the process of arrest were not available to oust the court of jurisdiction. Toy Tong v. U. S. (1906) 146 Fed. 343, 76 C. C. A. 621.

Where a Chinese alien had a certificate of residence entitling him to remain in the United States, it was not essential, to confer jurisdiction on the United States commissioner in proceedings to deport such alien, that the complaint aver facts invalidating the certificate, since the existence thereof was a matter of evidence and its effect a matter of law, neither of which were required to be pleaded. Ex parte Jim Hong (1914) 211 Fed. 73, 127 C. C. A. 569.

Where a United States commissioner has jurisdiction of the subject-matter in Chinese deportation proceedings, he may require amendment of the complaint in order to cure a defect therein. Id.

In Chinese deportation proceedings, a mere omnibus charge that the alien is within the country in violation of law is too indefinite. Ex parte Lew Lin Shew (D. C. 1914) 217 Fed. 317.

13. —— **Warrant and process.**—Warrant for arrest of alien for deportation, stating that he was unlawfully within the United States, in that he entered without inspection, held not void. Lee Sim v. U. S. (1914) 218 Fed. 432, 134 C. C. A. 232.

An alien in deportation proceedings is not legally entitled to cross-examine witnesses giving testimony preliminary to issuance of warrant of arrest. Choy Gum v. Backus (1915) 223 Fed. 487, 139 C. C. A. 35.

Proceedings for deportation of a Chinese person held not invalidated by the fact that the warrant on which he was arrested was in cipher. Jung Bow v. U. S. (1915) 228 Fed. 868, 143 C. C. A. 266.

In general, process is not returnable to a district other than that of its issuance, but the Chinese exclusion act of 1888 alters this rule so far as relates to inquiry into the right of a Chinese person to be in the United States. U. S. v. Long Hop (D. C. 1892) 55 Fed. 58.

Judgment and order of deportation held enforceable upon recapture of escaped prisoner, notwithstanding state law under which an execution in a civil case would have expired before the recapture. Ex parte Wong Wing (D. C. 1914) 220 Fed. 352.

Under the Chinese exclusion acts, warrant for deportation of a Chinese person held properly issued. U. S. ex rel. Haum Pon v. Sisson (D. C. 1915) 222 Fed. 693.

A Chinaman could not be lawfully imprisoned in a county jail in the northern district of the state by a deputy marshal of the southern district on a finding of a United States court commissioner of the latter district, which, after reciting certain facts, declared that "now, therefore, from the foregoing facts, I find that the said" Chinaman "was found unlawfully within the United States, and that he is not lawfully entitled to be in or remain" therein. People v. Ah Teung (1891) 92 Cal. 421, 28 Pac. 577, 15 L. R. A. 190.

14. —— **Arrest.**—This section does not impose on inspectors of customs

the duty of arresting Chinese persons who have been landed or unlawfully brought in by land, but an inspector may as a citizen lawfully arrest Chinese laborers in the act of coming into the United States unlawfully. U. S. v. Baird (D. C. 1891) 48 Fed. 554, 555.

Where a Chinese person is unlawfully within the United States and subject to arrest, any citizen, including a Chinese inspector, may secure the evidence necessary to cause an arrest or may at his own risk prevent him from escaping by restraining him, but such restraint is not the arrest which will throw on him the burden of showing his right to remain, until some facts appear, and a warrant is issued, or until evidence is disclosed on a hearing indicating that his presence is unlawful. U. S. v. Hom Lim (D. C. 1914) 214 Fed. 456.

15. —— **Hearing.**—Where a Chinese person in deportation proceedings claims to be a native-born citizen, he is entitled to a judicial determination of such question. Fong Gum Tong v. U. S. (1911) 192 Fed. 320, 112 C. C. A. 572.

Evidence held not to sustain claim of Chinese person that he was not given fair hearing in deportation proceedings. In re Ng Wah Chung (C. C. A. 1915) 220 Fed. 639.

A Chinese cannot be deported as a laborer without being first given a hearing on the charge. McDonald v. Siu Tak Sam (C. C. A. 1915) 225 Fed. 710.

Refusal to permit defendant in proceeding for deportation of a Chinese person to have assistance of counsel, if shown, might be evidence that he was denied a fair hearing. Jeung Bow v. U. S. (C. C. A. 1915) 228 Fed. 868.

Where the official interpreter, acting under his oath of office, interprets the testimony in a Chinese exclusion proceeding, there is no necessity of his being specially sworn. Id.

Congress not having authorized trial by jury in proceedings for the deportation of a Chinese person, provided for by this act, the right to a jury trial does not exist. U. S. v. Ngum Lun May (D. C. 1907) 153 Fed. 209.

Where, in proceedings against certain Chinese aliens under the immigration laws, it appeared that they were illegally ordered deported to China when they had entered from Canada, it was the duty of the court to determine the merits. U. S. v. Redfern (D. C. 1914) 210 Fed. 548.

Chinese person, in possession of certificate of admission when sought to be deported, though not entitled to the constitutional guaranties accorded to citizens, held entitled to a fair hearing as near as may be in accordance with the elementary rules of procedure obtaining in all nations. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

The fact alone that a Chinese alien before, at, or after his arrest was interrogated without counsel being present does not show that his hearing was not fair, although it is a circumstance which may be considered. Ex parte Wong Yee Toon (D. C. 1915) 227 Fed. 247.

In the hearing of cases arising under the Chinese exclusion laws the duties of a United States commissioner are judicial rather than ministerial. Consequently the Treasury Department has no authority to issue instructions to United States commissioners as officers charged with the enforcement of these laws. (1900) 23 Op. Atty. Gen. 40.

16. —— **Evidence.** — Evidence and burden of proof in proceedings to remove Chinese, see note under § 4317, post.

17. —— **Defenses.**—Where a Chinese slave girl was brought to the United States, and her entry secured by fraud in violation of the exclusion laws, her subsequent marriage in this country to a Chinese inhabitant registered as a Chinese laborer, and not entitled to have a wife in this country, is not a defense to proceedings for her deportation; and especially where the marriage was at her solicitation, for her protection, and was not followed by cohabitation, nor apparently regarded by the parties as more than a formality. U. S. v. Ah Sou (1905) 138 Fed. 775, 71 C. C. A. 141, appeal dismissed Ah Sou v. U. S. (1905) 26 Sup. Ct. 752, 200 U. S. 611, 50 L. Ed. 619, reversing judgment (D. C. 1904) 132 Fed. 878.

The fact that the deportation of a Chinese slave girl illegally brought into this country for purposes of prostitution by her master, from whom she subsequently escaped, would result in remanding her to slavery and degradation, affords no ground upon which the courts can refuse to enforce the statute. Id.

An alien in deportation proceedings and her counsel, permitted to inspect the warrant of arrest and preliminary testimony, held enabled to present a defense. Choy Gum v. Backus (1915) 223 Fed. 487, 139 C. C. A. 35.

Where person ordered deported escaped and was subsequently arrested under another name, but ordered discharged, held, that there was no waiver; election of remedies or estoppel preventing the United States from deporting him under the prior judgment. Ex parte Wong Wing (D. C. 1914) 220 Fed. 352.

18. —— **Judgment and conclusiveness thereof.**—A commissioner rendered a judgment reciting that on a full hearing it is ordered that defendant, a Chinese, be "discharged" on consent of the assistant United States attorney appearing in its behalf. The return of the writ showed that defendant was born in the United States. Held, that the

judgment was on the merits, and constituted a conclusive adjudication of defendant's right to remain in the United States. Leung Jun v. U. S. (1909) 171 Fed. 413, 96 C. C. A. 369, reversing order Ex parte Loung June, alias Leong Jun (D. C. 1908) 160 Fed. 251.

A finding in proceedings to determine the right of a Chinese person to reenter the United States, that he had been a resident of the United States prior to November 18, 1880, but without determining the place of his nativity, did not estop the United States to thereafter deny in a subsequent deportation proceeding that he was not a natural-born citizen. Lim Jew v. U. S. (1912) 196 Fed. 736, 116 C. C. A. 364, affirming judgment U. S. v. Lim Jew (D. C. 1910) 192 Fed. 644.

A commissioner's finding, affirmed by the district court, that a Chinese person is unlawfully within the United States, is conclusive unless the commissioner and the court arbitrarily ignored the evidence and entered judgment in defiance thereof. Moy Guey Lum v. U. S. (1914) 211 Fed. 91, 127 C. C. A. 515.

A judgment of conviction and deportation by a United States commissioner, who has jurisdiction, is conclusive as to such person's right to remain in the United States, subject to appeal to the district judge, as provided by this section. In re Tsu Tse Mee (D. C. 1897) 81 Fed. 702.

A proceeding to deport a Chinese person will be dismissed where he appears to have been already ordered deported by the commissioner of another district, the latter having acquired an exclusive jurisdiction of the case. U. S. v. Luey Guey Auck (D. C. 1902) 115 Fed. 252.

A United States commissioner exercises special authority in Chinese cases, and where a Chinese person charged with being unlawfully in the United States has had a hearing regular in form before a commissioner, who has adjudged that such person is entitled to be and remain within the United States and has ordered his discharge, the decision is determinative of the issue, and such person cannot be again apprehended and proceeded against upon a complaint filed in the District Court of the same district upon substantially the same facts. U. S. v. Yeung Chu Keng (D. C. 1905) 140 Fed. 748.

A judgment to be res adjudicata, must be on the merits. Ex parte Loung June (D. C. 1908) 160 Fed. 251, order reversed Leung Jun v. U. S. (1909) 171 Fed. 413, 96 C. C. A. 369.

A decision of a United States Commissioner confirming a Chinese person's asserted right to live in the United States and enjoy the privileges of a native-born citizen is not a final adjudication by a court of competent jurisdiction, free from collateral attack in a subsequent proceeding; such commissioners not being courts of the United States, ordained and established by Congress, in which the judicial power of the government can be vested. Ex parte Lung Wing Wun (D. C. 1908) 161 Fed. 211.

Proceedings by the United States for the deportation of Chinese persons are civil, and not criminal, and an unexecuted order of deportation does not prevent a subsequent order of deportation based on full knowledge of the facts, on the theory that the two orders provided for double punishment for the same acts. U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260, affirmed (1911) 191 Fed. 825, 112 C. C. A. 339.

Where a Chinese alien knowingly crossed the Canadian border into the United States but not at or near any established port of entry, with the purpose of entering and remaining in the United States and is apprehended after he has crossed the boundary and taken before a commissioner of immigration and given a hearing as an applicant for entry and after such hearing is refused admission and ordered returned to Canada but could not be returned because of the demand of the Canadian authorities for a head tax which he refused to pay, the treating of such alien in the first instance as an applicant for entry and the order directing his return to Canada was not an election of remedies by the United States which precludes his subsequent deportation to China, since prior to his hearing his status could not be known nor was it known that he could not be returned to Canada in obedience to the order, but the ascertaining of such facts determines that he was unlawfully in the United States. U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260, order affirmed Yuen Pak Sune v. U. S. (1911) 191 Fed. 825, 112 C. C. A. 339.

A determination in a prior deportation proceeding that a Chinese person had been a resident of the United States prior to November 18, 1880, and was therefore entitled to remain under Act July 5, 1884, held not conclusive of an issue of citizenship in the determination of his subsequent right to enter the United States. U. S. v. Lim Jew (D. C. 1910) 192 Fed. 644, judgment affirmed Lim Jew v. U. S. (1912) 196 Fed. 736, 116 C. C. A. 364.

A judgment of acquittal in a criminal prosecution of a Chinese person for having in his possession with intent to defraud the United States a false record of habeas corpus proceedings, which purported to show that he was therein adjudged to be a native of the United States, held a bar to proceedings for his deportation. Chin Kee v. U. S. (D. C. 1912) 196 Fed. 74.

The decisions of United States commissioners in proceedings to deport aliens are "judgments." Ex parte

Wong Wing (D. C. 1914) 220 Fed. 352.

An adjudication by a United States commissioner, in proceedings to deport a Chinese, that the Chinese was born in the United States, is conclusive on his right to remain in the United States. U. S. v. Lew Ah Jung (D. C. 1915) 224 Fed. 649.

19. —— New trial.—Where a Chinese alien was ordered deported after trial, at which he produced a witness who testified that defendant was born in the United States, and at the time of the trial he knew of another witness, who would have testified to the same fact, defendant was not entitled to a new trial in order to produce such witness. U. S. v. Ng Young (D. C. 1903) 126 Fed. 425.

Where a Chinese person alleged to be unlawfully within the United States was apprehended on September 9, 1903, and his trial was postponed until October 3d succeeding, and though a witness did not reach the place of trial until after the same had ended, no effort was made to open the case and introduce the witness' testimony until after the decision of the commissioner was filed on November 26, 1903, and the delay was not excused, defendant was guilty of such negligence as to preclude the granting of a new trial in order to introduce the witness' testimony. Id.

In proceedings for the exclusion of an alleged Chinese alien, an application for a new trial after judgment of deportation had been entered on trial before a United States commissioner should be addressed to the commissioner. Id.

20. —— Order of deportation.—A Chinese laborer having left the United States for a visit to China, and being by Act Oct. 1, 1888, prohibited from returning, did return unlawfully via British Columbia, having spent one year as a sojourner in that country. On his arrival in the United States he was arrested, and by a United States commissioner sentenced to be deported to British Columbia; but he was without means to pay the $50 head tax exacted by the laws of Canada of persons of his class on entering that country, and for that reason debarred from returning to British Columbia. Held, that the court, on application of the United States attorney, may vacate said sentence, and issue a new writ of deportation to China, for the reasons that the commissioner's order is impossible of execution, and effective only to detain and imprison the defendant in this country unlawfully, and that China is the country from whence he came, within the meaning of the act of congress providing for the deportation of Chinese persons found to be not lawfully entitled to remain in the United States. U. S. v. Ah Toy (D. C. 1891) 47 Fed. 305.

A commissioner having made an order of deportation, his further order that the person to be deported "be forthwith taken before the nearest United States judge, that a review of these proceedings may be had and proper order of deportation made," being unnecessary, may be treated as surplusage. In re Wong Fock (D. C. 1897) 81 Fed. 558.

It is enough if the order of deportation shows that the person to be deported has been adjudged to be unlawfully within the United States, without a finding stating where he came from, as the specification of the country to which he is to be deported concludes any inquiry on that point. In re Tsu Tse Mee (D. C. 1897) 81 Fed. 562.

The order of deportation need not explicitly refer to the specific act of congress under which the person to be deported is adjudged to be unlawfully in the United States. Id.

21. Deportation under immigration act.—Where a Chinese person had established his right to depart from and return to the United States on a preinvestigation, under the exclusion laws, he could not thereafter be lawfully deported on returning to the United States, for alleged violation of the immigration act, without a hearing before a justice, judge, or commissioner. Ex parte Wong Tuey Hing (D. C. 1914) 213 Fed. 112.

See, also, §§ 4270, 4274, 4293, ante.

22. Appeal in deportation proceedings.—The proceeding for the deportation of a Chinese person being anomalous and of a summary character, in the absence of any provision fixing a time within which an appeal from the decision of a commissioner shall be heard by the district judge it is within his discretion to determine when the delay in bringing the matter before him for hearing is such as to amount to an abandonment of the appeal. Chow Loy v. U. S. (1901) 112 Fed. 354, 50 C. C. A. 279.

An appeal from an order for the deportation of defendant as a Chinese person unlawfully in the United States held frivolous on the record, and the order affirmed. Yuen Pak Sune v. U. S. (1911) 191 Fed. 825, 112 C. C. A. 339, affirming order U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260.

Proceeding on appeal from order of deportation held properly taken to Circuit Court of Appeals by appeal. Lew Ling Chong v. U. S. (1915) 222 Fed. 195, 137 C. C. A. 635.

Mere appearance of an attorney and giving notice of an appeal does not constitute an appeal under this section. In re Chow Loy (C. C. 1901) 110 Fed. 952.

A Chinese person, ordered deported by a commissioner, may appeal to the district judge as a matter of right under the statute, and, in the absence of a rule of court requiring it, an order of the judge allowing the appeal is un-

necessary; the service of notice of appeal on the commissioner and the district attorney, and the filing of such notice with the clerk, being sufficient. An order of the judge, however, is necessary to stay the execution of the commissioner's order pending the appeal. U. S. v. Loy Too (D. C. 1906) 147 Fed. 750, order affirmed Toy Gaup v. U. S. (1907) 152 Fed. 1022, 81 C. C. A. 682.

Under this section, unless an appeal is taken within the time limited, the court acquires no jurisdiction to hear and determine the cause. U. S. v. Yuen Yee Sum (D. C. 1907) 153 Fed. 494.

The constitution does not require that an alien ordered deported shall be granted the right to appear by counsel on an appeal to the commissioner of labor. Ex parte Chin Quock Wah (D. C. 1915) 224 Fed. 138.

Technical objections to the form of the warrants in Chinese deportation cases are not sustainable, when it appears that the alien had notice of the actual charge against him in time to meet it and had a fair hearing thereon. Ex parte Wong Yee Toon (D. C. 1915) 227 Fed. 247.

23. —— **Right of appeal.**—An appeal is the proper proceeding for the review by the Circuit Court of Appeals of a judgment of a District Court rendered on appeal from an order of a commissioner for the deportation of a Chinese person arrested under this section. U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93.

A judgment of the District Court on an appeal from an order of commissioners directing the deportation of a Chinese is not subject to review on a writ of error, but only on appeal. Leo Lung On v. U. S. (1908) 159 Fed. 125, 86 C. C. A. 513.

A defendant, charged with being a Chinese person unlawfully within the United States, who made no denial of his nationality, and no claim that he was within the exempted classes or that he was born in this country, who stated that he had no counsel and did not want one then, and who, on all other questions, refused to answer, but stood mute, has no ground of appeal from an order of deportation. Chin Ken v. U. S. (1911) 191 Fed. 817, 112 C. C. A. 331, affirming order U. S. v. Chin Ken (D. C. 1910) 183 Fed. 332.

While the restrictions of sections 1, 2 and 4 of Act Sept. 13, 1888, were postponed until the treaty should be ratified, the other provisions went into effect immediately, and hence the right of appeal now exists, although ratifications have not been exchanged. U. S. v. Chong Sam (D. C. 1891) 47 Fed. 878.

An appeal by the United States does not lie from an order of a commissioner discharging a Chinese person arrested for being unlawfully in this country. This section which expressly gives the right of appeal to the defendant in case of conviction, by implication limits such right to him. U. S. v. Mar Ying Yuen (D. C. 1903) 123 Fed. 159.

Where a motion for a new trial in Chinese deportation proceedings is denied by the commissioner before whom the proceedings were had, an appeal may be taken to the United States District Court from the order denying the motion. U. S. v. Ng Young (D. C. 1903) 126 Fed. 425.

Under this section, authorizing commissioners of United States courts to exclude Chinese not of the privileged class, and giving the defendant a right of appeal, within 10 days, from a conviction by a commissioner of a United States court, to the United States district court; and under Act May 28, 1896, abolishing the commissioners of the United States circuit courts, and authorizing the appointment of commissioners by the United States district courts, and defining their powers, —the United States has no right of appeal from the order of a commissioner of a United States district court discharging a Chinaman as a member of the privileged class, since the statute provides an appeal only for the defendant from a conviction. U. S. v. Lee Ching Goon (1900) 60 P. 692, 7 Ariz. 2.

24. —— **Effect of appeal.**—An appeal from an order of deportation suspends execution until after determination of the appeal. U. S. v. Louie Lee (D. C. 1911) 184 Fed. 651.

An appeal by a Chinese person, taken under this section to a judge of a district court from the judgment of the commissioner, does not vacate, but merely suspends, the judgment of the commissioner and proceedings thereunder until the appeal is dismissed. (1899) 22 Op. Atty. Gen. 340.

25. —— **Notice.**—Appeal may be taken by a notice given to the commissioner orally within the 10 days and entered of record. When notice is so given, it is not necessary that the matter should be presented to the judge within the 10 days to preserve the appellant's right to a hearing on review. Chow Loy v. U. S. (1901) 112 Fed. 354, 50 C. C. A. 279.

A notice of appeal served 13 days after a judgment of conviction is without force, and gives the appellate court no jurisdiction of the case. U. S. v. See Ho How (D. C. 1900) 100 Fed. 730.

Where a notice of appeal in Chinese deportation proceedings, though entitled in the District Court, was left with the commissioner and transmitted with the papers in the case, the fact that it was entitled in the District Court, and not before the commissioner, was not a jurisdictional defect. U. S. v. Wong Ock Hong (D. C. 1910) 179 Fed. 1004.

26. —— **Jurisdiction.**—Where a Chinese person, arrested under this sec-

tion, was ordered deported by a commissioner, and appealed to the district court, where the case was tried de novo, and he was discharged, the government cannot for the first time on a writ of error in the circuit court of appeals raise the objection that the record filed on appeal was insufficient to give the district court jurisdiction. U. S. v. Lee Seick (1900) 100 Fed. 398, 40 C. C. A. 448.

Under section 6 of Act March 3, 1891, creating the Circuit Courts of Appeals (26 Stat. 828, c. 517), which gives such courts the power to review by appeal or writ of error final decisions in the District Court, an appeal lies to such court from a judgment of a District Court rendered on an appeal from an order of a commissioner for the deportation of a Chinese person arrested under this section. Tsoi Yii v. U. S. (1904) 129 Fed. 585, 64 C. C. A. 153, judgment affirmed (1904) 133 Fed. 1022, 66 C. C. A. 681.

Failure of the commissioner in Chinese deportation proceedings to certify the judgment to the district court on appeal is not a jurisdictional defect. U. S. v. Wong Ock Hong (D. C. 1910) 179 Fed. 1004.

Appeal will lie to Circuit Court of Appeals from judgment of District Court affirming order of deportation. Woo Jew Dip v. U. S. (1911) 192 Fed. 471, 112 C. C. A. 609.

The right of appeal to a district court is not taken away by section 4317. U. S. v. Wong Dep Ken (D. C. 1893) 57 Fed. 203.

27. —— **"District judge of the district."**—The appeal to "the judge of the district court of the district" is, in effect, an appeal to the district court, and not to the district judge as an individual; and the commissioner's transcript and other papers pertaining to the cause may therefore be filed in that court, and the final order of the judge be entered as the final order of the court. In re U. S. (1904) 24 Sup. Ct. 629, 630, 194 U. S. 194, 48 L. Ed. 931.

The re-enactment by this section indicated an intention by congress to accept the construction placed upon the former section that the appeal should be taken to the district court, and not to the judge personally. In re U. S. (1904) 24 Sup. Ct. 629, 630, 194 U. S. 194, 48 L. Ed. 931.

The phrase "judge of the district court for the district" is equivalent to the "district court of the district," and a writ of error will lie from the circuit court of appeals to the judgment thereof. U. S. v. Gee Lee (1892) 50 Fed. 271, 1 C. C. A. 516, affirming order Same v. Lee Hoy (D. C. 1891) 48 Fed. 825.

The right of appeal is to the judge, as a special tribunal, and not to the district court. Chow Loy v. U. S. (1901) 112 Fed. 354, 50 C. C. A. 279.

28. —— **Presentation on appeal.**—Appeal from order of deportation will not be dismissed, though there was no bill of exceptions or certificate of evidence, and the only ground of reversal urged was that the district judge erred in affirming the order of deportation. Wong Keow v. U. S. (C. C. A. 1914) 215 Fed. 95.

Motion for leave to bring up duly authenticated certificate of evidence after end of the term will be denied, where the commissioner's certificate indicated that the order of deportation was proper, and there was no showing that a certificate of evidence would afford any stronger basis for attacking the order. Id.

On an appeal in a proceeding to deport a Chinese person, the evidence should be brought up by a certificate of evidence under equity rule 75 (198 Fed. xl, 115 C. C. A. xl) rather than by a common-law bill of exceptions. Id.

Where a physical comparison was made by the acting commissioner between a minor Chinese applicant for admission and his alleged father, a resident and native of the United States, such comparison constitutes competent and material evidence, and he is entitled to have findings thereon embodied in the record on an appeal. Ex parte Chooey Dee Ying (D. C. 1911) 214 Fed. 873.

Under the regulations for the admission of Chinese the commissioner, in deciding on the right to admission of an applicant, does not act as an appellate but as a trial tribunal, and all evidence submitted to him constitutes properly a part of the record. Id.

In proceeding to deport Chinese person, held, that it was improper for the immigration inspector, without becoming a witness, to insert in the examination his statement that such person was found engaged in laundry work. Ex parte Lam Fuk Tak (D. C. 1914) 217 Fed. 468.

In proceeding to deport Chinese person taken directly before commissioner upon his arrest, examination at such time held not inadmissible because of the absence of counsel. U. S. v. Lem You (D. C. 1915) 224 Fed. 519.

That Chinese person, sought to be deported, was first examined in the absence of counsel, or whether this preliminary inquisition was before an inspector or a commissioner, held immaterial. U. S. v. Moy Toom (D. C. 1915) 224 Fed. 520.

29. —— **Trial de novo.**—A hearing de novo before the district judge is contemplated by this section. Liu Hop Fong v. U. S. (1908) 28 Sup. Ct. 576, 209 U. S. 453, 52 L. Ed. 888.

On an appeal from an order of a United States commissioner excluding a Chinese alien to the United States district court, the hearing is de novo,

and not on the testimony taken before the commissioner. U. S. v. Hung Chang (D. C. 1903) 126 Fed. 400, writ of error dismissed (1904) 130 Fed. 439, 64 C. C. A. 641, judgment reversed (1904) 134 Fed. 19, 67 C. C. A. 93.

A Chinaman's appeal from a commissioner's order of deportation is triable de novo before the district judge. U. S. v. Wong Ock Hong (D. C. 1910) 179 Fed. 1004.

On appeal from a United States commissioner's deportation order in exclusion proceedings, the case is to be heard de novo. U. S. v. Louie Lee (D. C. 1911) 184 Fed. 651.

The court, on appeal from an order of a United States commissioner directing the deportation of a Chinese person, must consider and decide the case de novo. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

30. —— **Review of findings and decision.**—The deportation of a Chinaman lawfully admitted to the United States upon a student's certificate, complying with the treaty with China of December 8, 1894, cannot be ordered by a federal district court upon the transcript of the proceedings before the commissioner, which presents merely such student's certificate and a statement that witnesses were examined, without any findings, or the giving of any testimony, although additional separate findings of the commissioner were afterwards filed, where this was done without the order of the court, and there was no consent to a hearing upon such additional findings. Liu Hop Fong v. U. S. (1908) 28 Sup. Ct. 576, 209 U. S. 453, 52 L. Ed. 888.

Where, in proceedings for the deportation of a Chinese woman, she testified and offered other evidence to prove that she was born in the United States, which evidence was practically without contradiction, but there were inconsistencies in the evidence which might well cause its truth to be doubted, and circumstances which tended to impeach her evidence, the finding of the commissioner against such evidence should not be set aside. Lee Ah Yin v. U. S. (1902) 116 Fed. 614, 54 C. C. A. 70.

Where a commissioner's determination rejecting the evidence of citizenship in a proceeding for the deportation of a Chinese alien on the ground that he did not believe the testimony that the defendant was only 29 years of age was affirmed by the district judge, and there is nothing in the record to show that the commissioner's conclusion as to defendant's age was incorrect, the ruling will be affirmed. Ark Foo v. U. S. (1904) 128 Fed. 697, 63 C. C. A. 249.

The judgment of a district court ordering deportation of a Chinese person will be affirmed on appeal, unless the case clearly shows that an incorrect conclusion has been reached. Mar Sing v. U. S. (1905) 137 Fed. 875, 70 C. C. A. 213.

It is the settled general rule that the finding of a commissioner, who sees and hears Chinese witnesses sworn in behalf of Chinese persons of the prohibited class seeking entry to the United States, and who reaches the deliberate conclusion that they are not entitled to credit, will not be reversed by an appellate court. Hong Yon v. U. S. (1908) 164 Fed. 330, 90 C. C. A. 542.

A commissioner's finding, after seeing and hearing witnesses, that they were not entitled to credit, and that an alien was not entitled to remain, should not be reversed. Wong Chun v. U. S. (1909) 170 Fed. 182, 95 C. C. A. 198.

Where the right of persons of the Chinese race, who entered the United States surreptitiously, to remain, depended entirely on the question of fact whether they were natives of this country, the decision of the district court, which heard the witnesses testify, will not be reversed on appeal. Yee Yet v. U. S. (1910) 175 Fed. 565, 99 C. C. A. 187.

Where, in proceedings for the deportation of a Chinese person, his own evidence as to whether he was born in China or in the United States is conflicting, the finding of the commissioner, affirmed by the district court, that he was not born in the United States, will not be reviewed by an appellate court. Chu King Foon v. U. S. (1911) 191 Fed. 822, 112 C. C. A. 336, affirming judgment U. S. v. Chu King Foon (D. C. 1910) 179 Fed. 995.

As a general rule, findings of fact made by a commissioner in a proceeding against a Chinese person for being unlawfully in the United States, concurred in by the district court, will not be re-examined by the appellate court. Gong Nom Wood v. U. S. (1911) 191 Fed. 830, 112 C. C. A. 344.

The concurring judgments of a commissioner and a district court, in the proceedings for the deportation of a Chinese person on a question of fact, dependent on the credibility of defendant as a witness, will not be reviewed, where there is nothing unusual or extraordinary to call for a re-examination. You Fook Hing v. U. S. (1914) 214 Fed. 77, 130 C. C. A. 517.

Judgment on appeal in deportation proceeding, affirming commissioner's order of deportation, held not to be disturbed on the facts, except in a perfectly clear case. Yee Et (Ep) v. U. S. (1915) 222 Fed. 66, 137 C. C. A. 537.

On appeal in deportation proceeding, review of facts held not precluded by finding of commissioner and district

court that alien was unlawfully within the United States. Lew Ling Chong v. U. S. (1915) 222 Fed. 195, 137 C. C. A. 635.

Unless there are special circumstances, a finding by a commissioner, and also by a district court on a hearing de novo, that a Chinese person was not born in the United States, will not be reversed on appeal. Fong Ping Ngar v. U. S. (1915) 223 Fed. 523, 139 C. C. A. 71.

Findings of United States commissioner and district judge, adverse to Chinese laborer with regard to his claim that he had a statutory certificate, but lost it, held not to be disturbed. Lau Lau v. U. S. (1915) 223 Fed. 768, 139 C. C. A. 298.

A finding of the trial judge hearing the witnesses in proceedings to deport a Chinese person will not be disturbed on appeal. Lum Kim v. U. S. (1915) 225 Fed. 31, 140 C. C. A. 357.

An order of a United States commissioner that a Chinaman be deported to China, based on a finding that that is the country from whence he came, will not be reviewed by the district court, on a proceeding by a writ of habeas corpus, where the petitioner alleges no illegality in the decision of the commissioner other than error in said finding. In re Leo Hem Bow (D. C. 1891) 47 Fed. 302.

The finding of a commissioner that a Chinaman is not lawfully in the United States will not be disturbed on appeal, unless clearly against the weight of evidence. U. S. v. Chung Fung Sun (D. C. 1894) 63 Fed. 261.

While a court, in its discretion, on appeal, may permit a Chinese laborer arrested on the Texas side of the Rio Grande and ordered deported by a commissioner, to return to Mexico, where he formerly resided, when satisfied of the truth of his claim that he entered the United States unintentionally, it will not interfere with the order of deportation, where it appears more probable from the evidence that his entry was intentional. Yee Yee Chung v. U. S. (D. C. 1899) 95 Fed. 432.

The father of a deported Chinaman testified that he had been in the United States 30 years; was married in San Francisco and had one child, the one in question; that at the age of 12 the boy's mother returned to China, the boy remaining and accompanying his father to New York, where he lived with his father three years, and then obtained employment with a third party, working for him five years; that shortly thereafter the boy returned to China to visit his mother, staying three years. He testified that he had received letters from the son while in China, but could not produce any of them. The son testified that he was born in San Francisco; that he visited his mother in China in 1898, remaining until 1901, when he returned, landing in Vancouver, and paying the head tax, and coming into the United States from Canada. No other testimony was offered in his behalf. Held, that the commissioner's order deporting the son would not be disturbed, not being clearly against the weight of evidence. U. S. v. Leung Sam (D. C. 1902) 114 Fed. 702.

On appeal from a commissioner's decision in Chinese deportation proceedings, the commissioner's finding that one or more witnesses were not entitled to belief would not be disturbed, unless it is manifest that he acted arbitrarily. U. S. v. Lee Chung (D. C. 1913) 206 Fed. 367.

31. —— Harmless error.—Error in sustaining an objection to a question asked a witness held harmless, where his examination showed that his knowledge was hearsay. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

Errors in sustaining objections to questions put to witnesses are not ground for reversal, where the answers, if favorable to defendant, could not have changed the result. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

32. Review on habeas corpus.—A judgment of deportation of a Chinese person by a court having jurisdiction of the controversy and the parties cannot be impeached on habeas corpus by proof of a different state of facts from that on which the judgment was based; and where the court found that the Chinese person unlawfully remained in the United States without procuring the certificate of residence required by the acts of May 5, 1892, and Nov. 3, 1893, such a certificate cannot be received in evidence in the habeas corpus proceeding. In re Gut Lun (D. C. 1897) 83 Fed. 141.

Where an alien was legally in custody in deportation proceedings, and was not entitled to remain in the United States, he was not entitled to discharge on habeas corpus, because the warrant under which he was detained indicated an intention on the part of the Secretary of Commerce and Labor to deport him to the wrong country, since habeas corpus will only lie to release an alien after he has been adjudged entitled to remain in the country. U. S. ex rel. Ueberall v. Williams (D. C. 1911) 187 Fed. 470.

Where an alien is given a fair hearing, and there has been no manifest abuse of discretion in concluding that he should be deported, the court cannot on habeas corpus set aside the order of deportation. Ex parte Bun Chew (D. C. 1915) 220 Fed. 387.

Under this section, since a Chinese person ordered deported has right of appeal, the question whether there is any evidence upon which commissioner

could act is not reviewable on habeas corpus. U. S. v. McCarthy (D. C. 1916) 228 Fed. 398.

See In re Chow Loy (C. C. 1901) 110 Fed. 952, and notes under section 1279 et seq., ante.

CITED WITHOUT DEFINITE APPLICATION

Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121; U. S. v. Lim Yuen (D. C. 1914) 211 Fed. 1001, 1005.

§ 4314. (Act Sept. 13, 1888, c. 1015, § 14.) Chinese diplomatic and consular officers excepted from preceding sections.

The preceding sections shall not apply to Chinese diplomatic or consular officers or their attendants, who shall be admitted to the United States under special instructions of the Treasury Department, without production of other evidence than that of personal identity. (25 Stat. 479.)

See note to section 5 of this act, ante, § 4290.

An exception somewhat similar was contained in Act May 6, 1882, c. 126, § 13, as amended by Act July 5, 1884, c. 220, ante, § 4300, and also in Act May 5, 1892, c. 60, § 2, post, § 4316.

Notes of Decisions

Operation of statute.—This section was continued in force by section 4337, post, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

§ 4315. (Act May 5, 1892, c. 60, § 1.) Laws prohibiting coming of Chinese continued.

All laws now in force prohibiting and regulating the coming into this country of Chinese persons and persons of Chinese descent are hereby continued in force for a period of ten years from the passage of this act. (27 Stat. 25.)

This section and the eight sections next following were an act entitled "An act to prohibit the coming of Chinese persons into the United States."

The laws referred to and continued in force by this section were Act May 6, 1882, c. 126, as amended by Act July 5, 1884, c. 220, ante, §§ 4290–4302, which suspended for ten years the coming of Chinese laborers into the United States; such provisions of Act Sept. 13, 1888, c. 1015, as became operative notwithstanding the failure of ratification of the treaty referred to therein, ante, §§ 4306–4314; and Act Oct. 1, 1888, c. 1064, ante, §§ 4303–4305, a supplement to Act May 6, 1882, c. 126.

Other provisions prohibiting the transportation or importation of subjects of China, etc., as coolies, or without their consent, were contained in Rev. St. §§ 2158–2163, post, §§ 4342–4347.

The immigration of Chinese laborers, except under conditions specified, was further prohibited by the convention of December 7, 1894, between the United States and China, post, §§ 4326–4331.

The provisions of this act, and all laws prohibiting and regulating the coming of Chinese into the United States and their residence therein, in force at the time, were re-enacted, extended, and continued, and were also made applicable to the island territory under the jurisdiction of the United States, by Act April 29, 1902, c. 641, § 1, post, § 4337.

On the establishment of the Department of Commerce and Labor and the transfer thereto from the Treasury Department of the Immigration Service, by Act Feb. 14, 1903, c. 552, ante, under Title XII A, "The Department of Commerce," the authority, power, and jurisdiction possessed and exercised by the Secretary of the Treasury by any law in relation to the exclusion from and the residence within the United States, its territories, and the District of Columbia, of Chinese and persons of Chinese descent were transferred to and conferred upon the Secretary of Commerce and Labor, and the authority, power, and jurisdiction in relation thereto vested by law or treaty in the collectors of customs and the collectors of internal revenue were conferred upon and vested in such officers under the control of the Commissioner-General of Immigration, as the Secretary of Commerce and Labor might designate therefor, by provisions of section 7 of that act, ante, § 858.

On the creation of the Department of Labor, the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration

and Naturalization and the Immigration Service at large, were transferred to that Department, and the duties and powers of the Secretary of Commerce and Labor with reference thereto were transferred to the Secretary of Labor, by Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

Notes of Decisions

Operation of statute.—No abrogation of the judicial procedure for deportation of Chinese laborers provided for by section 4299, ante, continued in force by this section for 10 years from and after the passage of this act was affected by the treaty with China of December 8, 1894, because of its failure to prescribe any such procedure or to continue in force any prior statute thereon, as such provision might be enforced without affecting any treaty right. U. S. v. Lee Yen Tai (1902) 22 Sup. Ct. 629, 631, 185 U. S. 213, 46 L. Ed. 878.

This act did not create a new law nor repeal any of the laws then in existence, but continued in force, without interruption, the Chinese exclusion act of May 6, 1882 (22 Stat. 58, c. 126), as amended by Act July 5, 1884 (23 Stat. 115, c. 220) and extended for 10 years by Act May 5, 1892 (27 Stat. 25, c. 60). Sims v. U. S. (1903) 121 Fed. 515, 58 C. C. A. 92.

Where an offense against the exclusion act was alleged to have been committed on February 15, 1902, an indictment therefor, not brought until after the expiration of the time limited, was not demurrable, since the exclusion act was continued in force as to such offense. Id.

The Chinese exclusion acts do not apply to a person born in this country of Chinese parents who have a permanent domicile and residence and are carrying on business in this country. Ng You Nuey v. U. S. (1915) 224 Fed. 340, 140 C. C. A. 26.

Only such Chinese persons as are declared to be admissible may enter the United States or can safely be found therein. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

The laws continued in force include provisions for summary hearings and judgments by judges and United States commissioners. U. S. v. Wong Sing (D. C. 1892) 51 Fed. 79, 80.

Object of statute.—The manifest objects of this and the following six sections are to provide a system of registration and identification of Chinese laborers, to require time to obtain certificates of residence, and, if they do not do so within a year, to have them deported from the United States. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1027, 149 U. S. 698, 37 L. Ed. 905.

Validity of statute.—This act is valid. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1026, 149 U. S. 698, 37 L. Ed. 905; U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260, affirmed (1911) 191 Fed. 825, 112 C. C. A. 339.

This act expressly provides that all prior acts regulating Chinese immigration are continued in force. Held, that the validity of such prior acts is not affected by the constitutionality or unconstitutionality of other provisions of the Geary act. In re Ng Loy Hoe (C. C. 1892) 53 Fed. 914.

The Chinese exclusion act of May 5, 1892, is not repugnant to the fourteenth amendment to the federal constitution, as denying the Chinese the equal protection of the laws; for that amendment is restrictive of the action of the several states, and has no reference to legislation by congress. In re Sing Lee (D. C. 1893) 54 Fed. 334.

Cited without definite application, Interstate Commerce Commission v. Brimson (1894) 14 Sup. Ct. 1125, 1137, 154 U. S. 447, 38 L. Ed. 1047; Lem Moon Sing v. U. S. (1895) 15 Sup. Ct. 967, 969, 158 U. S. 538, 39 L. Ed. 1082; Chin Bak Kan v. Same (1902) 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121; Fong Mey Yuk v. Same (1902) 113 Fed. 898, 51 C. C. A. 528; Lui Lum v. Same (1909) 166 Fed. 106, 92 C. C. A. 90; U. S. v. Foo Duck (1909) 172 Fed. 856, 97 C. C. A. 204; In re Lum Poy (C. C. 1904) 128 Fed. 974; U. S. v. Jamieson (C. C. 1911) 185 Fed. 165 (error dismissed [1912] 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639); The Frolic (D. C. 1906) 148 Fed. 918.

§ 4316. (Act May 5, 1892, c. 60, § 2.) Removal of Chinese not entitled to be or remain in United States.

Any Chinese person or person of Chinese descent, when convicted and adjudged under any of said laws to be not lawfully entitled to be or remain in the United States, shall be removed from the United States to China, unless he or they shall make it appear to the justice, judge, or commissioner before whom he or they are tried that he or they are subjects or citizens of some other country, in which case he or they shall be removed from the United States to such country: Provided, That in any case where such other country of which such Chinese person shall claim to be a citizen or subject shall demand any tax as a condition of the

removal of such person to that country, he or she shall be removed to China. (27 Stat. 25.)

See notes to section 1 of this act, ante, § 4315.

Provisions somewhat similar to those of this section were contained in Act Sept. 13, 1888, c. 1015, § 13, ante, § 4313, and were superseded by this section.

The designation of a commissioner, before whom a Chinese person arrested for being unlawfully within or for having unlawfully entered the United States should be taken for hearing, the fee of the commissioner for hearing and deciding such case, and the issuance of warrants of arrest for violations of the Chinese exclusion laws, were provided for by Act March 3, 1901, c. 845, post, §§ 4332–4334.

Notes of Decisions

Deportation in general, see note under § 4313, ante.

Evidence and burden of proof in proceedings to remove Chinese, see note under § 4317, post.

Appeal and review on habeas corpus in deportation proceedings, see note under § 4313, ante.

Place to which deported.—Chinamen arrested just after crossing into the United States from British Columbia should be deported to China, there being no evidence that they were citizens of or subjects of British Columbia, but merely that they had lived there between 1½ and 3 years, and had property there, and no trick being played on them in the matter of their arrest, further than that the person who drove them to the boundary line disclosed to the officers the nature of the work he was engaged in. U. S. v. Lee Kee (1902) 116 Fed. 612, 54 C. C. A. 68. See, also, note under § 4313, ante.

"Justice, judge, or commissioner."—The provision in section 4320, post, that Chinese laborers without certificates may be "taken before a United States judge," is satisfied by a proceeding before a "justice, judge, or commissioner," which are the words used in this section, while section 4332, post, expressly authorizes the district attorney to designate the commissioner before whom a Chinese person may be brought. Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121; Chin Ying v. Same (1902) 22 Sup. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126.

The power is impliedly conferred on the "justice, judge, or commissioner" to cause the person whose right to enter is in question to be brought before him, that that fact may be determined. In re Chow Goo Pooi (C. C. 1884) 25 Fed. 77, 79.

The words "justice, judge, or commissioner" are so used in this section as to indicate clearly that in the enactment of this law congress intended that it should be enforced by summary proceedings. U. S. v. Wong Sing (D. C. 1892) 51 Fed. 79, 80.

Habeas corpus.—See In re Tsu Tse Mee (D. C. 1897) 81 Fed. 562, and notes under section 1479 et seq., ante.

Cited without definite application, Fong Mey Yuk v. U. S. (1902) 113 Fed. 898, 51 C. C. A. 528; Ex parte Li Dick (D. C. 1909) 174 Fed. 674.

§ 4317. (Act May 5, 1892, c. 60, § 3.) Chinese person arrested must prove right to remain.

Any Chinese person or person of Chinese descent arrested under the provisions of this act or the acts hereby extended shall be adjudged to be unlawfully within the United States unless such person shall establish, by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States. (27 Stat. 25.)

See notes to section 1 of this act, ante, § 4315.

Notes of Decisions

I. Validity, construction, operation, and repeal of statute

1. Validity.
2. Operation in general.
3. —— "Judge."
4. Repeal.

II. Evidence in proceedings for removal of Chinese

5. In general.
6. Admissibility.
7. Degree of proof.
8. Sufficiency.
9. Probative effect.
10. Burden of proof.

I. VALIDITY, CONSTRUCTION, OPERATION, AND REPEAL OF STATUTE

1. Validity.—This section is constitutional. In re Li Sing (1898) 86 Fed. 896, 30 C. C. A. 451; Bak Kun v. U. S. (1912) 195 Fed. 53, 115 C. C. A. 55; U. S. v. Wong Dep Ken (D. C. 1893) 57 Fed. 206, approving In re Sing Lee (D. C. 1893) 54 Fed. 334.

This section is valid, and unless the right to remain in the United States affirmatively appears from the evidence, it is the duty of the court to order the

defendant deported. U. S. v. Chun Hoy (1901) 111 Fed. 899, 50 C. C. A. 57.

This section is inconsistent with the fundamental principles of American jurisprudence, if every Chinese person arrested must be tried as a criminal for the purpose of punishing him. U. S. v. Wong Sing (D. C. 1892) 51 Fed. 79, 80.

2. **Operation in general.**—The right of appeal to a district court is not taken away by this section. U. S. v. Wong Dep Ken (D. C. 1893) 57 Fed. 203.

3. —— **"Judge."**—A United States commissioner is a United States "judge," within the meaning of this section. In re Wong Fock (D. C. 1897) 81 Fed. 558.

4. **Repeal.**—No repeal of this section was effected by section 4337, post, on the theory that the former section was inconsistent with treaty with China Dec. 8, 1894, art. 4 (section 4329, post), giving the Chinese the rights of citizens of the most favored nation, in view of article 5 (section 4330, post). Ah How v. U. S. (1904) 24 Sup. Ct. 357, 358, 193 U. S. 65, 48 L. Ed. 619.

This act in so far as it places the burden of proof of the right of a Chinese person without a certificate to remain in the United States on him, is valid. Low Foon Yin v. United States Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355.

II. EVIDENCE IN PROCEEDINGS FOR REMOVAL OF CHINESE

5. **In general.**—Where a witness to the citizenship of an alleged Chinese alien was not impeached or discredited, but was clear and straightforward, and no criticism was made with regard to the same by the commissioner, and the alleged alien was not requested to be sworn in his own behalf, his failure to offer himself as a witness was not a sufficient reason for ordering him deported. Ark Foo v. U. S. (1904) 128 Fed. 697, 63 C. C. A. 249.

Where the evidence in Chinese deportation proceedings left the question as to defendant's alleged citizenship in doubt, it was not error for the judge to cause defendant, accompanied by his counsel, to be brought before him, and to further examine defendant concerning the evidence. Lee Yuen Sue v. U. S. (1906) 146 Fed. 670, 77 C. C. A. 96.

On appeal from order of deportation, statements in the commissioner's memorandum opinion held not evidence against the person sought to be deported. Lew Ling Chong v. U. S. (1915) 222 Fed. 195, 137 C. C. A. 635.

If the defendants fail to give testimony in their own behalf to explain doubtful matters peculiarly within their own knowledge or to contradict testimony given against them, such fact may be considered, where the testimony is contradictory. U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442.

Where, in deportation proceedings under the Chinese exclusion act, a commissioner found that defendants had produced a witness who testified that defendants were born in the state of California, and that such witness was not contradicted, impeached, or discredited in any manner whatsoever, it was error for the court to order their deportation solely on the ground that their right to remain in the United States was discredited by their refusal to take the stand and testify on the demand of the United States attorney. U. S. v. Leung Shue (D. C. 1903) 126 Fed. 423.

Where a Chinese person, in applying to an inspector for admission to the United States, relied on a commissioner's judgment discharging him on a former charge of having been unlawfully in the United States as conclusively showing his right to be therein, if evidence of annotations on the evidence taken by the commissioner tending to show that such person was discharged because of sickness was competent at all, it should have been given in his presence and that of his counsel before the inspector, since he had the right to controvert it. Ex parte Loung June (D. C. 1908) 160 Fed. 251, order reversed Leung Jun v. U. S. (1909) 171 Fed. 413, 96 C. C. A. 369.

Immigration officers in deportation proceedings are not bound by the rules of criminal procedure or by the rules of evidence applied in court, nor is it enough for review of their decision on habeas corpus, that there was no sworn testimony taken or no record of the testimony or of the decision; no formal complaint or pleadings being required. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

An affidavit made by a United States Chinese inspector charging defendant with being a Chinese laborer unlawfully within the United States without a certificate of registration, on which a warrant was issued for defendant's arrest, was not evidence at the hearing to prove that defendant was a Chinese person. U. S. v. Louie Lee (D. C. 1911) 184 Fed. 651.

A Chinese person may, in proceedings to deport him, establish his right to remain by testimony of Chinese alone; but the court, in weighing the testimony may consider sections 4320 and 4324, post, relating to credibility of Chinese witnesses on other questions. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

Where, on the trial of a Chinese person charged with being unlawfully in the United States, defendant introduced in evidence a certificate granted him on his return from a visit to China,

which stated that he was a Chinese person other than a laborer, his testimony that since his return he had engaged in merchandising and in the restaurant business does not contradict the statements of the certificate. U. S. v. Quong Chee (Ariz. 1907) 89 P. 525.

6. **Admissibility.**—Where a witness to the citizenship of a Chinese alien testified that defendant was born in the United States, but was unable to state any facts concerning the village where it was alleged defendant was born, and where the witness testified he lived for 18 years—the only event which he recalled with certainty being defendant's birth—and, in answer to a question as to his business, stated that he did "odd jobs and loaf," a finding of the commissioner, rejecting his testimony, affirmed by the district judge, will be affirmed on appeal. Ark Foo v. U. S. (1904) 128 Fed. 697, 63 C. C. A. 249.

Admissions or statements of a defendant, voluntarily made to the officers by whom he is arrested in answer to questions put by them either before or after his arrest, are admissible in evidence against him, and the government has the right to call and examine him as a witness. U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93, reversing judgment (D. C. 1903) 126 Fed. 400.

In Chinese deportation proceedings, a written statement of defendant's examination by an inspector through an interpreter held admissible, though the inspector failed to state that he could not testify to the statement without reference to the writing. Guan Lee v. U. S. (1912) 198 Fed. 596, 117 C. C. A. 304.

In Chinese deportation proceedings, written answers to questions asked defendant through an interpreter held admissible on proof by the interpreter that he interpreted correctly. Toy Dip v. U. S. (1912) 198 Fed. 603, 117 C. C. A. 311.

The certificate of a United States commissioner that a Chinese person had a full hearing before him and was adjudged to be lawfully in the United States by reason of being a citizen thereof is not competent evidence of either of such facts in a subsequent proceeding for his deportation. You Fook Hing v. U. S. (1914) 214 Fed. 77, 130 C. C. A. 517.

Testimony of alleged Chinese person, in deportation proceeding, that he was born in New York City, held not competent evidence of citizenship. Lee Sim v. U. S. (C. C. A. 1914) 218 Fed. 432.

In proceedings to deport an alien, affidavits taken by the government held admissible, though taken without giving the alien the privilege of cross-examination or notifying her of the intent to take them. Choy Gum v. Backus (1915) 223 Fed. 487, 139 C. C. A. 35.

On a proceeding against a Chinaman for being unlawfully in this country, it was error to admit parol evidence of the contents of a ship's list of Chinese passengers, since a certified copy should have been produced. U. S. v. Long Hop (D. C. 1892) 55 Fed. 58.

In a proceeding for the deportation of a Chinese person, a certificate, signed by a United States commissioner, that complaint was presented before him charging that the defendant was unlawfully within the United States, and that the defendant was brought before him, and that upon full hearing it was adjudged by him that the defendant had a lawful right to be and remain in the United States, and he was accordingly discharged is inadmissible in proof of a prior adjudication of defendant's right to remain in this country; it not being a certified copy of such adjudication, but a mere recital that such judgment had been rendered. U. S. v. Lew Poy Dew (D. C. 1903) 119 Fed. 786.

A certificate, made by a United States commissioner, that a certain Chinese person was tried before him for being unlawfully in the United States and discharged, is not a "judgment," nor copy of a judgment, and is not admissible in evidence to prove the fact so recited. Ex parte Lung Foot (D. C. 1909) 174 Fed. 70.

In deportation proceedings, the immigration authorities properly considered a record of similar proceedings previously conducted purporting to show that the immigrant had then attempted to enter the country and was excluded after a hearing and the exclusion affirmed on appeal. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

Where the government rested in Chinese deportation proceedings without introducing any evidence that defendant was a Chinese person, whereupon defendant moved to dismiss the proceedings and for his discharge, he was entitled to have the motion determined on the record as it stood when the motion was made, and hence the government's application for permission then to introduce evidence to prove the fact was denied. U. S. v. Louie Lee (D. C. 1911) 184 Fed. 651.

In proceedings to deport a Chinese person in the United States, a certificate of a United States commissioner certifying that such person is entitled to remain in the United States by reason of being born in the United States is inadmissible in evidence. Lum Bing Wey v. U. S. (D. C. 1912) 201 Fed. 379.

The proof furnished by a Chinese person on being questioned before his arrest, or before he has been subjected to duress by a Chinese inspector or any other person as to his status, may be

used against him in deportation proceedings in requiring from him affirmative proof of his right to remain in the United States, to prevent his deportation. U. S. v. Hom Lom (D. C. 1914) 214 Fed. 456.

Testimony of Chinese person, sought to be deported, that his father told him he was born in San Francisco, held competent, though hearsay. U. S. v. Lem You (D. C. 1915) 224 Fed. 519.

An affidavit of accused that he was a merchant, signed and verified by him before a United States commissioner, and similar affidavits of citizens, held inadmissible. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

Testimony by a Chinese person that he was born in the United States is incompetent to prove his citizenship. Ex parte Chin Him (D. C. 1915) 227 Fed. 131.

A certificate of a commissioner, showing that a Chinaman had, under a certain name, been adjudged to be lawfully in the United States, held admissible, in a subsequent proceeding, to corroborate testimony that the defendant was the person tried in that proceeding. Chin Wah v. U. S. (D. C. 1915) 43 App. D. C. 38.

A report to the Department of Justice of an investigator of charges against a commissioner, reciting that the latter had tried a Chinaman upon the charge of being unlawfully in this country, held inadmissible in a subsequent proceeding, in which the defendant claims to have been the person tried and discharged by the commissioner. Id.

Even though the evidence undeniably established and the government conceded that defendant had been for more than 20 years a Chinese merchant domiciled in the United States, in a proceeding against him on the charge of being a Chinese laborer, and with being unlawfully in the United States because he was without the certificate of residence required, where the issue was his right to remain, the obligation to establish such right "by affirmative evidence to the satisfaction of the court," would entitle him to the introduction of any affirmative evidence necessary thereto. U. S. v. Quong Chee (Ariz. 1907) 89 P. 525.

The fact that defendant had not produced certain evidence before the collectors of customs upon his admission to the United States held not to bar its introduction, as, at the time of his admission, the proof was not required by law. Id.

7. Degree of proof.—In Chinese deportation proceedings there is a natural presumption that a person of Mongolian race coming to the United States from China is an alien, to overcome which, and secure recognition of rights, privileges, and immunities pertaining to United States citizenship, convincing evidence is essential. Ex parte Lung Wing Wun (D. C. 1908) 161 Fed. 211.

In a proceeding for the deportation of a person, two questions are put in issue by defendant's plea of not guilty: First, whether or not he is a Chinese person or person of Chinese descent; and, second, if so, whether he is entitled to be and remain in the United States—the burden of proof on the latter issue being on the defendant. Upon either issue proof to the satisfaction of the commissioner or the court is all that is required, and upon the issue as to race the appearance of defendant, his color, manner of wearing his hair, his dress, and language may properly be taken into consideration by the commissioner or court; and inspectors and interpreters employed by the government in the enforcement of the exclusion laws, who state their ability from practical experience to identify persons of the Chinese race from such characteristics, are competent to testify upon such issue, although they may have no theoretical knowledge of the science of ethnology. U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93.

When it is sought to deport a Chinese person admitted to the United States upon a certificate of admission duly viséed, it must be shown by evidence, and not merely by suspicious circumstances or conjecture, that he obtained such certificate by means of fraudulent representations. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

This statute does not invest the judge or commissioner with arbitrary power, but only requires proof which ordinarily satisfies an unprejudiced mind beyond a reasonable doubt; this constituting "satisfactory evidence." Moy Guey Lum v. U. S. (1914) 211 Fed. 91, 127 C. C. A. 515.

This section requires the Chinese person or person of Chinese descent to produce credible evidence sufficient to satisfy the judgment of a reasonable man, considering the same fairly and impartially. A commissioner may not, arbitrarily, capriciously, or against reasonable, unimpeached, and credible evidence, which is uncontradicted in its material points, and susceptible of but one fair construction, refuse to be satisfied; but, on the other hand, he is not bound to be satisfied by the testimony of a single witness as to facts which, if the testimony is true, must necessarily be known to other obtainable witnesses who are not produced. U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442.

The mere assertion of citizenship cannot deprive a United States commissioner of his statutory jurisdiction to adjudge a Chinese person to be unlawfully within the United States, unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States. Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891,

894, 186 U. S. 193, 46 L. Ed. 1121; Chin Ying v. Same (1902) 22 Sup. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126.

8. Sufficiency. — Unimpeached testimony of birth in this country and consequent citizenship is sufficient to establish a lawful right to remain here. Chin Wah v. U. S. (1915) 43 App. D. C. 38.

Unimpeached and uncontradicted testimony that a person of the Chinese race, seeking to enter the United States from China, was born in this country, when direct, positive, and circumstantial, cannot be disregarded, and must be held to overcome the presumption of his Chinese nativity. U. S. v. Jue Wy (D. C. 1900) 103 Fed. 795.

In Chinese deportation proceedings, evidence held to require finding that alleged alien is a native-born citizen of United States. Pang Sho Yin v. U. S. (1907) 154 Fed. 660, 83 C. C. A. 484; Gee Cue Beng v. Same (1911) 184 Fed. 383, 106 C. C. A. 493; Woo Jew Dip v. Same (1911) 192 Fed. 471, 112 C. C. A. 609; U. S. v. Chu Hung (D. C. 1910) 179 Fed. 564; Mar Poy v. U. S. (D. C. 1911) 189 Fed. 288: Lim Sam v. Same (D. C. 1911) 189 Fed. 534; U. S. v. Leu Jin (D. C. 1911) 192 Fed. 580; Same v. Lee Chung (D. C. 1913) 206 Fed. 367; Same v. Lem You (D. C. 1915) 224 Fed. 519; Same v. Chin Hing (D. C. 1915) 225 Fed. 794; Same v. Chin Mun (D. C. 1915) 225 Fed. 799.

Evidence held insufficient to establish that a Chinese person was a citizen of the United States. Chew Hing v. U. S. (1904) 133 Fed. 227, 66 C. C. A. 281; Lee Yuen Sue v. Same (1906) 146 Fed. 670, 77 C. C. A. 96; Eng Choy v. Same (1910) 175 Fed. 566, 99 C. C. A. 188; Bak Kun v. Same (1912) 195 Fed. 53, 115 C. C. A. 55; Ngon Kay v. Same (1912) 198 Fed. 85, 117 C. C. A. 291; Moy Guey Lum v. Same (1914) 211 Fed. 91, 127 C. C. A. 515; Hoey Ay Sing v. Same (C. C. A. 1915) 227 Fed. 209; U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442; Same v. Sing Lee (D. C. 1903) 125 Fed. 627; Same v. Moy You (D. C. 1903) 126 Fed. 226; Same v. Wong Du Bow (D. C. 1904) 133 Fed. 326; Same v. Loy Too (D. C. 1906) 147 Fed. 750 (order affirmed Toy Gaup v. U. S. [1907] 152 Fed. 1022, 81 C. C. A. 682); U. S. v. Lam Jung Sing (D. C. 1907) 151 Fed. 715; Ho Ngen Jung v. U. S. (D. C. 1907) 153 Fed. 232; Ex parte Lung Wing Wun (D. C. 1908) 161 Fed. 211; U. S. v. Chu King Foon (D. C. 1910) 179 Fed. 995 (judgment affirmed Chu King Foon v. U. S. [1911] 191 Fed. 822, 112 C. C. A. 336); Same v. Too Toy (D. C. 1911) 185 Fed. 838; Same v. Hom Young (D. C. 1912) 198 Fed. 577; Same v. Moy You (D. C. 1915) 223 Fed. 809.

Right of a Chinese person sought to be deported to remain must be shown by clear testimony, and evidence that he is a merchant, without stating the facts, is a mere conclusion. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

Evidence held to show that father of Chinese person, admitted as minor son of a merchant, was a merchant. Lew Ling Chong v. U. S. (1915) 222 Fed. 195, 137 C. C. A. 635.

Evidence held insufficient to warrant the deportation of a Chinese person as a laborer without a certificate, where it fairly appeared that he had in fact been a merchant in this country and held a merchant's certificate, which was lost in the San Francisco fire. U. S. v. Lee You Wing (D. C. 1913) 208 Fed. 166.

Defendant was a Chinese person of reputable character, who had resided in this country for 19 years, and was the proprietor of two laundries, which he conducted. If he labored himself, it was only incidentally. He testified that he entered the country on proper papers, which he had lost, and that he applied to a lawyer to obtain a duplicate certificate, and did obtain a paper which he supposed to be one, and which he produced, but it was in fact worthless. Held, that the evidence was not sufficient to show that he was a laborer, and that his evident good faith, and the fact that he had remained in the country so long without being molested, raised a presumption that he was entitled to remain. U. S. v. Kol Lee (D. C. 1904) 132 Fed. 136.

See U. S. v. Ngum Lun May (D. C. 1907) 153 Fed. 209; U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

Evidence held to show that a Chinese had no right to remain in the United States. Lee Yue v. U. S. (1904) 133 Fed. 45, 66 C. C. A. 178; Tsoi Yii v. Same (1904) 133 Fed. 1022, 66 C. C. A. 681; U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93; Lee Joe Yen v. U. S. (1906) 148 Fed. 682, 78 C. C. A. 427 (affirming judgment U. S. v. Lee Wing [D. C. 1905] 136 Fed. 701); Guan Lee v. Same (1912) 198 Fed. 596, 117 C. C. A. 304; Ng Jin v. Same (1915) 223 Fed. 426, 138 C. C. A. 577; U. S. v. Quan Wah (1915) 224 Fed. 420, 140 C. C. A. 114; U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442; Ex parte Bun Chew (D. C. 1915) 220 Fed. 387.

In proceedings for the deportation of a Chinaman, the fact that he was permitted to live in the United States for 19 years without molestation was insufficient to raise a presumption that his arrival antedated the date on which the exclusion act went into effect, he never having registered as a laborer or merchant as required by law. U. S. v. Ah Chung (1904) 130 Fed. 885, 65 C. C. A. 562.

In proceedings for the deportation of an alleged Chinese person, the fact that he was a native of China, coupled with his personal appearance, indicating by his dress, physiognomy and queue that

he was a Chinaman, was sufficient to justify a finding to that effect in the absence of evidence to the contrary. Low Foon Yin v. United States Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355.

Evidence considered, and held to sustain a finding that the marriage of a Chinese woman, after a judgment of deportation against her, and while at large on bail pending an appeal, to a native-born citizen of the United States, was not in good faith, but a mere sham, pretense, and form, for the purpose of evading the judgment of deportation. Wong Heung v. Elliott (1910) 179 Fed. 110, 102 C. C. A. 408.

Evidence considered, and held insufficient to support an order for the deportation of a Chinese person as having unlawfully entered the United States. N. Jim Quan v. U. S. (C. C. A. 1914) 210 Fed. 617.

Where a Chinaman arrested for being in the United States unlawfully is identified as a man who has been in the United States for several years, and defendant testifies that he came to the United States long prior to the passage of the exclusion act, and his testimony shows a knowledge of places in the United States, and events which have occurred during the past 10 years, it is sufficient to overcome presumptions arising from the fact that he was found near the border line, and was a stranger to the officers who made the arrest. U. S. v. Jim (D. C. 1891) 47 Fed. 431.

In proceedings under the Chinese exclusion act, the testimony of Chinese witnesses, unknown and coming from a distance—especially that of foreigners—may be regarded as more or less weak; and, when contradicted or really discredited in any of the modes recognized by our law, the commissioner is justified in regarding it as insufficient, standing alone, to convince the judicial mind, where he acts from a fair conviction that the case is not made out; and in such case the appellate court is not warranted in reversing his finding. U. S. v. Lee Huen (D. C. 1902) 118 Fed. 442.

Chinese testimony to the effect that defendants, arrested for deportation, were born in the United States or that they are merchants, is sufficiently corroborated by the testimony of credible white witnesses, in the one case, that they have seen and known defendants since they were young as the children of Chinamen resident in this country, or, in the second case, that defendants were for years employed in stores as merchants, and reputed to be partners therein. U. S. v. Lee Wing (D. C. 1905) 136 Fed. 701, judgments affirmed Lee Wong Jeong v. U. S. (1906) 145 Fed. 512, 76 C. C. A. 190, and Lee Joe Yen v. Same (1906) 148 Fed. 682, 78 C. C. A. 427.

The determination of a commissioner, affirmed after retrial on additional testimony by the Department of Commerce and Labor, that accused had not established that he was the person named in the former proceeding, held neither arbitrary, nor an abuse of discretion, but justified by the facts. Ex parte Long Lock (D. C. 1909) 173 Fed. 208.

A person of Chinese descent, claiming to have been born in the United States and to have never been out of this country, where he and other unimpeached witnesses testify to such fact without contradiction, and his good character and truthfulness are testified to by white persons of standing who have known him for years, cannot be ordered deported solely on testimony tending to show that he made false statements to an inspector, which is denied. U. S. v. Jhu Why (D. C. 1910) 175 Fed. 630.

Evidence held to establish defendant's right to remain in the country. U. S. v. Wong Ock Hong (D. C. 1910) 179 Fed. 1004.

Where a person named Louie Lee was arrested on complaint of a United States Chinese inspector in deportation proceedings, and on appearing in court was attired in the ordinary street apparel of an American gentleman, with his hair worn as an American and with nothing to indicate that he was a Chinese except his color and features, which were more or less common to all Mongolians, his name not being distinctively Chinese, his appearance was insufficient to establish that he was a Chinese person within the exclusion acts. U. S. v. Louie Lee (D. C. 1911) 184 Fed. 651.

Evidence held insufficient to identify appellant against whom a deportation order had been rendered as the same person who had been granted a certificate to enter the United States by the Superintendent of Imperial Chinese Customs at Canton, viséed by the American Consul General, as a fruit merchant. Chan Tse Cheung v. U. S. (D. C. 1911) 189 Fed. 412.

Where a Chinese person claimed that he had been born in the United States and had been readmitted to the United States four years before his arrest in deportation proceedings, he could not be deported, in the absence of anything in the papers readmitting him to the United States, contradicting his claim, and the mere fact that he could not explain the absence of the readmission papers, which might have been destroyed by fire, did not justify a finding against him. U. S. v. Hom Lim (D. C. 1914) 214 Fed. 456.

In a proceeding to deport a Chinese person who entered the United States upon a certificate of admission issued to him as a student, on the ground that he was a laborer and obtained such certificate by false representations, evidence held insufficient to sustain the

charge. Ex parte Lam Pui (D. C. 1914) 217 Fed. 456.

In a proceeding to deport a Chinese person, who entered the United States upon a certificate of admission issued to him as a merchant, on the ground that the certificate was obtained by false representations, evidence held insufficient to sustain this charge. Ex parte Lam Fuk Tak (D. C. 1914) 217 Fed. 468.

9. Probative effect.—Certificates of the clerk of the District Court of prior deportation proceedings resulting in a discharge, if admissible, are without effect, without evidence identifying the person in the two proceedings. Lum Bing Wey v. U. S. (D. C. 1912) 201 Fed. 379.

In proceeding to deport Chinese person, his testimony that he was born in New York City, if competent, held discredited by his ignorance of that city. Lee Sim v. U. S. (1914) 218 Fed. 432, 134 C. C. A. 232.

Testimony under commission in deportation proceeding of witnesses who identified the accused persons by photograph, though they could have testified in open court, held entitled to little if any weight. Yee Et. (Ep.) v. U. S. (1915) 222 Fed. 66, 137 C. C. A. 537.

On an issue as to the citizenship of a person of the Chinese race arrested as a Chinese laborer unlawfully within the United States, the testimony of the defendant that he was born in this country is entitled to be considered and weighed by the same rules applicable to all other testimony, although, if untrue, it would be impossible to contradict it. U. S. v. Yee Mun Sang (D. C. 1899) 93 Fed. 365.

The commissioner need not believe a Chinese witness when he sees him. U. S. v. Chu King Foon (D. C. 1910) 179 Fed. 995, judgment affirmed Chu King Foon v. U. S. (1911) 191 Fed. 822, 112 C. C. A. 336.

Notwithstanding repeated illegal acts on the part of Chinamen to enter the country, the court should give a fair hearing to each case that is presented, and the testimony should be carefully weighed and considered, and there should be no radical departure from the rules of evidence in determining the proper weight to be given to the testimony. Lim Sam v. U. S. (D. C. 1911) 189 Fed. 534.

Certificate of United States commissioner held not conclusive that holder was native-born citizen in proceeding involving right of his alleged minor son to enter the United States. Ex parte Chin Quock Wah (D. C. 1915) 224 Fed. 138.

The certificate of a United States commissioner stating that a Chinaman charged with unlawfully coming within the United States, after a full hearing, was adjudged to have the lawful right to remain in the United States, and was accordingly discharged, it appearing that he is a citizen of the United States, should not be accepted as sufficient evidence of the right of the holders to enter this country. (1897) 21 Op. Atty. Gen. 581.

10. Burden of proof.—A Chinese person has the burden of showing his right to remain in the United States in proceedings to deport him. Toy Tong v. U. S. (1906) 146 Fed. 343, 76 C. C. A. 621; U. S. v. Quan Wah (1915) 224 Fed. 420, 140 C. C. A. 114; Lum Kim v. U. S. (1915) 225 Fed. 31, 140 C. C. A. 357; U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260 (affirmed [1911] 191 Fed. 825, 112 C. C. A. 339); Same v. Chin Ken (D. C. 1910) 183 Fed. 332 (affirmed [1911] 191 Fed. 817, 112 C. C. A. 331); Lum Bing Wey v. U. S. (D. C. 1912) 201 Fed. 379; U. S. v. Hom Lim (D. C. 1914) 214 Fed. 456. Whether he claims such right as a merchant. U. S. v. Yee Gee You, alias Yee Jim (1907) 152 Fed. 157, 81 C. C. A. 409; Same v. Lee You Wing (1914) 211 Fed. 939, 128 C. C. A. 437; Same v. Lung Hong (D. C. 1900) 105 Fed. 188; Same v. Fong Sen (D. C. 1913) 205 Fed. 398; Same v. Chin Sing Quong (D. C. 1915) 224 Fed. 752. Or as a citizen. Lee Yuen Sue v. U. S. (1906) 146 Fed. 670, 77 C. C. A. 96; Yee King v. Same (1910) 179 Fed. 368, 102 C. C. A. 646; Kum Sue v. Same (1910) 179 Fed. 370, 102 C. C. A. 648; U. S. v. Chin Tong (1911) 192 Fed. 485, 112 C. C. A. 647; Same v. Hom Lim (1915) 223 Fed. 520, 139 C. C. A. 68 (reversing order [D. C. 1914] 214 Fed. 456); Fong Ping Ngar v. U. S. (1915) 223 Fed. 523, 139 C. C. A. 71; Ng You Nuey v. Same (1915) 224 Fed. 340, 140 C. C. A. 26; In re Jew Wong Loy (D. C. 1898) 91 Fed. 240; U. S. v. Sing Lee (D. C. 1903) 125 Fed. 627; Same v. Hoy Way (D. C. 1907) 156 Fed. 247; Ex parte Loung June (D. C. 1908) 160 Fed. 251 (order reversed Leung Jun v. U. S. [1909] 171 Fed. 413, 96 C. C. A. 369); Ex parte Long Lock (D. C. 1909) 173 Fed. 208; U. S. v. Too Toy (D. C. 1911) 185 Fed. 838; Yee Ging v. U. S. (D. C. 1911) 190 Fed. 270; U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752; Ex parte Lee Ying (D. C. 1915) 225 Fed. 335.

On the question of citizenship, some courts take a contrary view, and it has been held that where, in Chinese deportation proceedings, defendant claims to be a natural-born citizen, never to have left the United States, he was entitled to rely on his constitutional right to remain, and the burden was on the government to prove noncitizenship. Moy Suey v. U. S. (1906) 147 Fed. 697, 78 C. C. A. 85; Gee Cue Beng v. Same (1911) 184 Fed. 383, 106 C. C. A. 493; U. S. v. Louie Lee (D. C. 1911) 184 Fed. 651. See U. S. v. Hung Chang (D. C. 1903) 126 Fed. 400 (writ of error dismissed [1904] 130 Fed. 439,

64 C. C. A. 641, judgment reversed [1904] 134 Fed. 19, 67 C. C. A. 93), holding that the burden of proving that a person arrested as a Chinese alien is not entitled to enter as a Chinese person or a person of Chinese descent is on the United States.

It would seem that the burden of overthrowing defendant's prima facie case of birth in this country and consequent citizenship rests upon the government, where a Chinaman has lived here for a long time, and when arrested for remaining here claims, by reason of birth here, to be a citizen. Chin Wah v. U. S. (1915) 43 App. D. C. 38.

Under this section it has been held that it is not only a very reasonable presumption that a female of Chinese descent, coming to this country from China, is a person born in China, but it is the duty of the court to presume that she was born in China, and to require testimony that is entirely satisfactory to show that she is a native of this country. The court need not be satisfied beyond a reasonable doubt, but must be satisfied that it is not being made an instrument for the evasion of the exclusion laws. Woey Ho v. U. S. (1901) 109 Fed. 888, 889, 48 C. C. A. 705, appeal dismissed (1903) 24 Sup. Ct. 844, 191 U. S. 558, 48 L. Ed. 301.

A Mongolian held presumed an alien, requiring clear and convincing evidence to citizenship. Lee Sim v. U. S. (1914) 218 Fed. 432, 134 C. C. A. 232.

Chinese laborer, sought to be deported, held to have burden of proving his claim that he had the certificate required by the Chinese Exclusion Act, but subsequently lost it. Lau Lau v. U. S. (1915) 223 Fed. 768, 139 C. C. A. 298.

Where a Chinese person is found in the United States and is arrested, but not on view of his entry into this country, he cannot be removed, unless it is shown that he is unlawfully in this country. In re Mah Wong Gee (D. C. 1891) 47 Fed. 433.

Under the Chinese exclusion acts, due process of law requires that the United States, when prosecuting, should show that defendant is unlawfully in this country, and not that defendant should show a right to be here. U. S. v. Long Hop (D. C. 1892) 55 Fed. 58.

Where a Chinese person entered the United States in the exempt class, he could not be deported merely because a doubt was cast on his real status when entering, for the decision of his right to enter was presumptively correct, and the United States must, to obtain his deportation, show persuasively the contrary, unless his entry was fraudulently obtained. U. S. v. Hom Lim (D. C. 1914) 214 Fed. 456.

A Chinese person, when his arrest in deportation proceedings is not based on any facts making his arrest presumptively lawful, cannot be forced into the position of proving his right to remain in the United States, but the entire case must fall for want of right to deport. Id.

There is a presumption that a person of Mongolian race is an alien, which can be overthrown only by clear and convincing testimony as to his birthplace. Ex parte Chin Him (D. C. 1915) 227 Fed. 131.

The fact that a Chinese alien was allowed to land is not the equivalent of a certificate of status or residence, and does not shift the burden of proof from him in subsequent proceedings for his deportation. Ex parte Wong Yee Toon (D. C. 1915) 227 Fed. 247.

CITED WITHOUT DEFINITE APPLICATION

Liu Hop Fong v. U. S. (1908) 28 Sup. Ct. 576, 209 U. S. 453, 52 L. Ed. 888; Fong Mey Yuk v. U. S. (1902) 113 Fed. 898, 51 C. C. A. 528; U. S. v. Fah Chung (D. C. 1904) 132 Fed. 109.

§ 4318. (Act May 5, 1892, c. 60, § 4.) Chinese unlawfully in United States punishable.

Any such Chinese person or person of Chinese descent convicted and adjudged to be not lawfully entitled to be or remain in the United States shall be imprisoned at hard labor for a period of not exceeding one year and thereafter removed from the United States, as hereinbefore provided. (27 Stat. 25.)

See notes to section 1 of this act, ante, § 4315.

The provision of this section for imprisonment at hard labor before deportation was held unconstitutional in Wong Wing v. U. S., 163 U. S. 228, 16 Sup. Ct. 977, 41 L. Ed. 140.

Notes of Decisions

Validity of statute.—"It is not consistent with the theories of our government that the legislature should, after having defined an offense as an infamous crime, find the fact of guilt, and adjudge the punishment by one of its own agents." Wong Wing v. U. S. (1896) 16 Sup. Ct. 977, 163 U. S. 228, 41 L. Ed. 140.

This section in effect provides for such imprisonment upon the adjudication of a justice, judge, or commissioner upon a summary hearing, and conflicts with Const. Amends. 5, 6. Id.

So much of this section as provides for the imprisonment at hard labor of all Chinese persons adjudged by a commissioner to be unlawfully in the United States, is void, under Const. art. 3, § 2, par. 3, and amendments 5 and 6,

securing the right of trial by jury and other rights to persons criminally prosecuted by the United States. U. S. v. Wong Dep Ken (D. C. 1893) 57 Fed. 206.

"Adjudged."—The word "adjudged" in Act May 5, 1892, providing that any Chinese person convicted and adjudged to be not lawfully entitled to remain in the United States shall be imprisoned, etc., means "found," or "decided" by a United States commissioner, representing, not the criminal law, but the political department of the government. U. S. v. Hing Quong Chow (C. C. 1892) 53 Fed. 233.

Indictment.—This section cannot be made the basis of an indictment, as the statute is political, and not criminal, in its nature,—the proceeding is summary in character, and the imprisonment is not for the purpose of punishment but for detention until the removal is effected as provided by the act. U. S. v. Hing Quong Chow (C. C. 1892) 53 Fed. 233.

Under this act the government may, at its election, merely deport any Chinese person adjudged to be unlawfully in the United States, or imprison such person and deport him; and where the government elects to deport only, the offense is not an infamous crime requiring procedure by indictment or presentment of a grand jury. In re Ng Loy Hoe (C. C. 1892) 53 Fed. 914, approving U. S. v. Wong Sing (D. C. 1892) 51 Fed. 79.

This section does not, because of this "infamous punishment," render it necessary, under the constitution, to proceed by indictment against all Chinese persons arrested under the act; for it is the evident intent of congress that Chinese shall be removed by summary proceedings as heretofore, and, to give effect to all the provisions of the act, it should be construed as requiring criminal prosecutions only in cases in which the government is able to procure evidence to justify the same. U. S. v. Wong Sing (D. C. 1892) 51 Fed. 79.

Punishment.—A United States commissioner cannot order a Chinaman imprisoned for 30 days prior to the time fixed for his deportation. In re Ah Yuk (D. C. 1893) 53 Fed. 781.

The imprisonment provided for in this section prior to deportation is not a "punishment," in the sense of the criminal law, but is merely a means of detention. In re Sing Lee (D. C. 1893) 54 Fed. 334.

The constitutional and statutory provisions prohibiting cruel and inhuman punishment have no application to Chinese exclusion proceedings. In re Chin Wah (D. C. 1910) 182 Fed. 256, order affirmed (1911) Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422.

Cited without definite application, Ex parte Chow Chock (C. C. 1908) 161 Fed. 627; In re Tsu Tse Mee (D. C. 1897) 81 Fed. 562, 565.

§ 4319. (Act May 5, 1892, c. 60, § 5.) Habeas corpus proceedings by Chinese denied landing; bail not allowed.

After the passage of this act on an application to any judge or court of the United States in the first instance for a writ of habeas corpus, by a Chinese person seeking to land in the United States, to whom that privilege has been denied, no bail shall be allowed, and such application shall be heard and determined promptly without unnecessary delay. (27 Stat. 25.)

See notes to section 1 of this act, ante, § 4315.

A provision that in every case where an alien was excluded from admission into the United States under any law or treaty then existing or thereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, should be final, unless reversed on appeal to the Secretary of Commerce and Labor (now the Secretary of Labor), was made by the Immigration Act of Feb. 20, 1907, c. 1134, § 25, ante, § 4274.

Notes of Decisions

Habeas corpus.—See § 1279 et seq., ante, and notes thereunder.

—— **Jurisdiction.**—Denial of a fair hearing before immigration authorities prior to the rendition of a deportation warrant is the only foundation for jurisdiction of a federal court to review the proceedings on habeas corpus. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

—— **Petition.**—A petition by a Chinese person ordered deported for a writ of habeas corpus, alleging merely that petitioner was not given a fair hearing, held insufficient to sustain jurisdiction to issue the writ. Lee Leong v. U. S. (1914) 217 Fed. 48, 133 C. C. A. 34.

—— **Evidence.**—In habeas corpus proceedings by a Chinese against an immigrant inspector to secure release from custody under a deportation warrant, evidence held to show that such Chinese had maintained the status of merchant and had not become a laborer. McDonald v. Siu Tak Sam (1915) 225 Fed. 710, 140 C. C. A. 584.

Testimony that inspectors, on ap-

prehending Chinese persons who attempted to enter the United States unlawfully, "took charge of them," was objectionable as the statement of a conclusion. Chow Chok v. U. S. (1908) 163 Fed. 1021, 90 C. C. A. 230, affirming order Ex parte Chow Chok (C. C. 1908) 161 Fed. 627.

Evidence in habeas corpus proceedings held to show that Chinese person held under judgment for deportation of person who subsequently escaped was the same person named in the judgment. Ex parte Wong Wing (D. C. 1914) 220 Fed. 352.

—— **Scope of inquiry.**—Section 4325, post, is not inconsistent with this section, but on the return to the writ the court can only inquire whether relator is an alien, and the appropriate officer has made a decision. In re Chin Yuen Sing (C. C. 1894) 65 Fed. 572.

—— **Right to discharge.**—Where immigration authorities, in determining the right of a Chinese person to enter, considered all the evidence, the fact that they did not give proper effect to his certificate did not entitle him to his release on habeas corpus. U. S. v. Li Chiong (1914) 217 Fed. 45, 133 C. C. A. 31.

Where the Secretary of Labor heard an appeal from an order deporting a Chinese, pending habeas corpus proceedings for his release because his appeal was not heard by an authorized officer, the writ will be discharged. Ex parte Ching Hing (D. C. 1915) 224 Fed. 261.

Admission to bail pending habeas corpus proceedings.—This section did not give an absolute right to bail to a Chinese person domiciled and residing in the United States at the time of his arrest for deportation, pending an appeal from a commissioner's order to the District Court, but authorized the granting or withholding of bail under such circumstances in the exercise of discretion. Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422, affirming order In re Chin Wah (D. C. 1910) 182 Fed. 256.

See Case of Unused Tag (C. C. 1884) 21 Fed. 701, holding prior to this statute, that when, on proceedings by habeas corpus to test the right of a Chinese laborer to re-enter the United States, his body is produced in court, the court may order that he continue in the custody of the party detaining him, or commit him to the custody of the marshal, or release him on bail to await a decision of the question; and, when he has been released on bail, he is still deemed in the custody of the law, and as never having been landed.

The court will not admit to bail, pending appeal from the denial of a writ of habeas corpus, a Chinese immigrant, seeking discharge from detention by the collector. In re Chin Yuen Sing (C. C. 1894) 65 Fed. 788.

The words "in the first instance" did not render the prohibition against bail any less applicable after the court had made its decision than before, and hence, where a Chinese person had been ordered deported and writ of habeas corpus dismissed, the alien was not entitled to bail pending appeal. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

Cited without definite application, U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 194 U. S. 161, 48 L. Ed. 917.

§ 4320. (Act May 5, 1892, c. 60, § 6, as amended, Act Nov. 3, 1893, c. 14, § 1.) Certificates of residence; arrest and deportation of Chinese laborers not having certificate.

It shall be the duty of all Chinese laborers within the limits of the United States who were entitled to remain in the United States before the passage of the act to which this is an amendment to apply to the collector of internal revenue of their respective districts within six months after the passage of this act for a certificate of residence; and any Chinese laborer within the limits of the United States who shall neglect, fail, or refuse to comply with the provisions of this act and the act to which this is an amendment, or who, after the expiration of said six months, shall be found within the jurisdiction of the United States without such certificate of residence, shall be deemed and adjudged to be unlawfully within the United States, and may be arrested by any United States customs official, collector of internal revenue or his deputies, United States marshal or his deputies, and taken before a United States judge, whose duty it shall be to order that he be deported from the United States, as provided in this act and in the act to which this is an amendment; unless he shall establish clearly to the satisfaction of said judge that by reason of accident, sickness, or other unavoidable cause he has been unable to procure his certificate, and to the satisfaction of said United States judge, and by at least one credible witness other than

Chinese, that he was a resident of the United States on the fifth of May, eighteen hundred and ninety-two; and if, upon the hearing, it shall appear that he is so entitled to a certificate, it shall be granted upon his paying the cost. Should it appear that said Chinaman had procured a certificate which has been lost or destroyed, he shall be detained and judgment suspended a reasonable time to enable him to procure a duplicate from the officer granting it, and in such cases the cost of said arrest and trial shall be in the discretion of the court; and any Chinese person, other than a Chinese laborer, having a right to be and remain in the United States, desiring such certificate as evidence of such right, may apply for and receive the same without charge; and that no proceedings for a violation of the provisions of said section six of said act of May fifth, eighteen hundred and ninety-two, as originally enacted, shall hereafter be instituted, and that all proceedings for said violation now pending are hereby discontinued: Provided, That no Chinese person heretofore convicted in any court of the States or Territories or of the United States of a felony shall be permitted to register under the provisions of this act; but all such persons who are now subject to deportation for failure or refusal to comply with the act to which this is an amendment shall be deported from the United States as in said act and in this act provided, upon any appropriate proceedings now pending or which may be hereafter instituted. (27 Stat. 25. 28 Stat. 7.)

See notes to section 1 of this act, ante, § 4315.

This section was amended by Act Nov. 3, 1893, c. 14, § 1, cited above, by numerous changes in the language, the principal effect of which was to extend the time for application for the certificate required, which, by the section as originally enacted, was one year after the passage of the act, to six months after the passage of the amendatory act, and by adding the provisions relating to proceedings under the original act, beginning with the words "and that no proceedings for a violation of the provisions of said section six," etc., to the end of the section as set forth here.

The proviso, beginning "Provided, That no Chinese person heretofore convicted," etc., was not included within the quotation marks indicating the extent of the amendment of this section as printed in the volume of the Statutes at Large containing the amendatory act (28 Stat. 8). It is however, so nearly related to the subject-matter of this section as amended that it is retained here.

The word "laborer," as used in this act, was defined, and further provisions relating to the execution of orders of deportation, and the requisites of certificates of residence, were made, by Act Nov. 3, 1893, c. 14, § 2, post, § 4324.

See, as to transfer of authority, powers, etc., in relation to Chinese exclusion, etc., of collectors of customs and collectors of internal revenue, to other officers, notes under section 1 of this act, ante, § 4315.

Provisions for the issuance of certificates of residence to Chinese in Hawaii were made by Act April 30, 1900, c. 339, § 101, post, § 4336, and to those in the other insular possessions, by Act April 29, 1902, c. 641, § 4, post, § 4339.

Notes of Decisions

I. Validity, construction, and operation in general
1. Validity.
2. Construction and operation.
3. —— "Chinese laborers."
4. —— Wife of citizen.
5. —— Readmission of Chinaman.

II. Registration and certificate
6. Registration.
7. —— Collateral attack.
8. Certificate—Necessity.
9. —— Issuance and right thereto.
10. —— Evidentiary effect and rights conferred.
11. —— Cancellation.

III. Deportation proceedings
12. Nature.
13. —— Jury trial.
14, 15. Jurisdiction.
16. Grounds—Failure to register and procure certificate.
17. —— Change of occupation.
18. Pleadings.
19. Evidence.
20. Defenses.
21. —— Excuses for failure to procure certificate.
22. Bail.
23. Findings and judgment.
24. Review.
25. Costs and expenses.

I. VALIDITY, CONSTRUCTION, AND OPERATION IN GENERAL

1. Validity.—That portion of the Geary act requiring Chinese laborers to procure certificates is valid. U. S.

v. Chum Shang Yuen (D. C. 1893) 57 Fed. 588, 590.

2. **Construction and operation.**—Section 4319, ante, was not repealed by section 4325, post, and governs where a Chinese person refused admission by the immigration officers and the secretary applies to a federal court for a writ of habeas corpus. In re Ong Lung (C. C. 1903) 125 Fed. 813.

A judgment in habeas corpus proceedings, remanding a Chinese person to the custody of the master of a vessel in which he immigrated, for deportation, was vacated by the subsequent passage of this act. In re Tom Hon (D. C. 1906) 149 Fed. 842.

3. —— **"Chinese laborers."**—See note under § 4324, post.

4. —— **Wife of citizen.**—This section cannot be construed to authorize the deportation of a Chinese woman who lawfully entered the country before the enactment of any exclusion laws, and remained, but who failed to obtain the required certificate, where she was thereafter, and prior to her arrest, lawfully married to a citizen of the United States. Assuming that she was subject to deportation previous to her marriage, she then, having lawfully entered the country, took the status of her husband as to the right of domicile in the United States, and, if deported under a strict construction of the act, would have the right to immediately return and remain as the lawful wife of an American citizen. Tsoi Sim v. U. S. (1902) 116 Fed. 920, 54 C. C. A. 154.

5. —— **Readmission of Chinaman.**—Act Nov. 3, 1893, applies to Chinese persons who left the country before its passage, and afterwards seek to return. Lew Jim v. U. S. (1895) 66 Fed. 953, 14 C. C. A. 281; Lai Moy v. Same (1895) 66 Fed. 955, 14 C. C. A. 283.

A Chinese laborer's certificate of residence was abrogated by leaving the United States, and did not entitle him to return. Hom Yuen v. U. S. (1914) 214 Fed. 57, 130 C. C. A. 497.

Readmission of Chinese merchant, see note under § 4324, post.

II. REGISTRATION AND CERTIFICATE

6. **Registration.**—The fact that a Chinese laborer was a minor 19 or 20 years old at the time of the passage of the registration acts did not exempt him from the duty of registering thereunder. U. S. v. Joe Dick (D. C. 1905) 134 Fed. 988.

7. —— **Collateral attack.**—Where a Chinese person was duly registered as a native-born citizen, such registration was not subject to collateral attack in a proceeding to enforce a judgment of deportation rendered against him before the registration law took effect. In re Tom Hon (D. C. 1906) 149 Fed. 842.

8. **Certificate—Necessity.**—A Chinese laborer having a certificate of residence under the act of 1892 is entitled to remain in the country, though he has no certificate under this act. U. S. v. Jung Jow Tow (D. C. 1901) 110 Fed. 154.

The provisions relating to Chinese laborer's certificate of residence do not apply to one entering the country long subsequent to the passage of the act. In re Tam Chung (D. C. 1915) 223 Fed. 801.

9. —— **Issuance and right thereto.**—The Treasury Department has no authority to issue a return certificate nunc pro tunc to a Chinese laborer, holding a certificate of residence who, prior to his leaving this country, has made application under oath for a return certificate, but who has not filed such application with the collector of customs nor received a return certificate as required by this treaty and Act Sept. 13, 1888, although such person may have believed that he had done all that was incumbent upon him, and may have been misled by the action of the government officer in affixing to such application his certificate of departure. (1902) 23 Op. Atty. Gen. 619.

A Chinese person possessing a "certificate of residence" as a person other than a laborer, issued to him under the provisions of the act of May 5, 1892, is not entitled thereby to the "return certificate" provided for in article 2 of the treaty with China of December 8, 1894 (28 Stat. 1210), as that article applies only to registered Chinese laborers. (1902) 24 Op. Atty. Gen. 132.

10. —— **Evidentiary effect and rights conferred.**—A certificate of residence is prima facie evidence of the right of the holder to remain in the country, of which right he can only be deprived by the courts upon clear proof that he has committed some act which would work its forfeiture. Jew Sing v. U. S. (D. C. 1899) 97 Fed. 582.

Each collector of internal revenue is charged with the duty of ascertaining and determining whether the Chinese person applying to him for a certificate of residence is entitled thereto, and in any collateral inquiry as to the right of the holder of the certificate to remain in the United States, the certificate is conclusive evidence of the facts recited therein. In re See Ho How (D. C. 1900) 101 Fed. 115, 116.

There is nothing in the resolution of annexation of the Hawaiian Islands (30 Stat. 750), nor in the organic act which provides a government for that territory, nor in any law of congress, which would prevent the entrance into those islands of Chinese, now legally resident in the United States and hold-

ing certificates of registration. (1901) 23 Op. Atty. Gen. 487.

A Chinese laborer, holding a certificate of residence under Act May 5, 1892, who prior to his leaving this country has made application under oath for a return certificate, but who has not filed such application with the collector of customs nor received a return certificate, as required by this treaty and Act Sept. 13, 1888, is not entitled to re-entry, although such application bears upon its face the stamp and signature of the Chinese inspector showing the departure of such laborer on a certain date. (1902) 23 Op. Atty. Gen. 619.

11. —— Cancellation.—In a proceeding for the deportation of a Chinese person arrested as being unlawfully in the United States, the commissioner has no jurisdiction to cancel a certificate of residence issued to the defendant and regular on its face, on the ground that it was procured by fraud; and, having found that defendant is possessed of such certificate, an order by the commissioner for his deportation is void, unless it is further found that defendant has, since the issuance of such certificate, forfeited his right to remain in the United States by departing therefrom without procuring from the collector a certificate entitling him to re-entry. In re See Ho How (D. C. 1900) 101 Fed. 115.

III. DEPORTATION PROCEEDINGS

12. Nature.—The proceeding provided for in this section is in no proper sense a trial and sentence for crime, nor is the order of deportation a banishment in the technical sense, but the whole proceeding is merely a method of enforcing the return to his own country of an alien who fails to comply with the conditions prescribed for his continued residence here; and the provisions of the constitution requiring due process of law and trial by jury, and prohibiting unreasonable searches and seizures and cruel and unusual punishments, have no application. Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer dissenting. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1027, 149 U. S. 698, 37 L. Ed. 905.

13. —— Jury trial.—The deportation of a Chinese person adjudged by a commissioner to be unlawfully in the United States is not a punishment for crime, within the meaning of the provisions of the federal constitution, securing to persons accused of crime certain rights, including trial by jury. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 149 U. S. 698, 37 L. Ed. 905, followed. U. S. v. Wong Dep Ken (D. C. 1893) 57 Fed. 206.

The provision for summary proceedings before a commissioner for the deportation of unauthorized persons is not, by reason of its failure to allow a jury trial, open to the objection that it operates a denial of due process of law. In re Sing Lee (D. C. 1893) 54 Fed. 334.

14, 15. Jurisdiction.—The designation in this section of the judge in general terms as "a United States judge" is a sufficient description of a judge of the United States and is equivalent to or synonymous with the designation in sections 1280, 1674, ante, authorizing the issuance of habeas corpus or warrants to arrest persons accused of crime. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1028, 149 U. S. 698, 37 L. Ed. 905.

The reasonable inference is that Chinese laborers taken into custody must be taken before a judge within the judicial district in which the arrest was made. Id.

The provision in this section that Chinese laborers without certificates may be "taken before a United States judge" is satisfied by a proceeding before a "justice, judge, or commissioner," which are the words used in sections 4299, 4313, 4317, ante, while section 4332, post, expressly authorizes the district attorney to designate the commissioner before whom a Chinese person may be brought. Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121; Chin Ying v. Same (1902) 22 Sup. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126.

A lack in the complaint of positive averments of the facts and as to the official character of the person making it does not deprive a United States commissioner of his jurisdiction to determine the right of a Chinese laborer to remain in the United States. Id.

The mere assertion of citizenship cannot deprive a United States commissioner of his statutory jurisdiction to adjudge a Chinese person to be unlawfully within the United States unless he "shall establish by affirmative proof, to the satisfaction of such justice, judge, or commissioner, his lawful right to remain in the United States." Id.

Act May 5, 1892, gives a commissioner jurisdiction to hear the charge against a Chinaman of being in the country without a certificate of residence. Fong Mey Yuk v. U. S. (1902) 113 Fed. 898, 51 C. C. A. 528.

A United States commissioner has jurisdiction to hear and determine a charge against a Chinese person of being unlawfully within the country without a certificate of residence. Low Foon Yin v. United States Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355.

A commissioner has jurisdiction to make an order of deportation under this section and also to order the deportation of Chinese persons who are adjudged, under section 4299, ante, to have unlawfully entered the United

States. In re Tsu Tse Mee (D. C. 1897) 81 Fed. 562, following In re Wong Fock (D. C. 1897) 81 Fed. 558.

A United States commissioner is "a United States judge," within the meaning of this section. In re Wong Fock (D. C. 1897) 81 Fed. 558.

It is considerable stretching of language to hold that a United States commissioner is a United States judge within this section, especially as the two are differentiated in other parts of the act. In re Chin Ark Wing (D. C. 1902) 115 Fed. 412.

A laborer was first taken before a commissioner, where the testimony was taken without objection. From his decision such laborer appealed to the judge, making no objections to the findings of facts. Held, that he thereby impliedly assented to a hearing before the judge on an agreed statement of facts, and the court had jurisdiction, whether it be considered an original proceeding, or as an appeal from the commissioner. Id.

In deportation proceedings in which defendant was arrested and brought before a United States district judge, the case could not be referred to a United States commissioner, and judgment of deportation rendered upon the evidence in his report; defendant being entitled to a judgment upon a hearing of the witnesses before the district judge personally. Jung Goon Jow v. U. S. (Ariz. 1910) 108 P. 490.

16. Grounds—Failure to register and procure certificate.—Where a Chinese person arrested as unlawfully within the United States at the time of his arrest was working as a servant in a boarding house, and since coming to the United States had worked as a cook and deliveryman in a store in which he had no interest, he was not a "merchant," and, not having procured a certificate of residence, a deportation order issued against him was not error. Mar Sing v. U. S. (1905) 137 Fed. 875, 70 C. C. A. 213.

Defendant was born in China in 1870, and came to San Francisco in 1890 with $800 in American money. He joined two others in operating a drug business, which they continued until 1906, when it was destroyed by earthquake. He then went to Oakland, where he remained for a short time, then, went to New York City, having $1,500 in United States currency, finally establishing himself in New Jersey as partner in a grocery business, in which he invested about $1,000. This was unsuccessful, and after losing some $200 he sold his interest and purchased a laundry, and while engaged in the laundry he was arrested as a Chinese laborer unlawfully within the country. In 1910, contemplating a visit to China, he applied for a certificate that he was a merchant to enable him to return, but, though this was denied, no steps were taken to deport him until October 22, 1912. Held, that defendant was a merchant during the period of registration prescribed, and, not being required to register under that act, was not subject to deportation. U. S. v. Lee You Wing (1914) 211 Fed. 939, 128 C. C. A. 437.

Act Nov. 3, 1893, extending the time for registration of Chinese laborers is not ex post facto because it excepts from its provisions those who had been theretofore convicted of felony, as the deportation was only the consequence of a failure to register under the original act (May 5, 1892), and had no relation to the felony. U. S. v. Chew Cheong (D. C. 1894) 61 Fed. 200.

A Chinese laborer, convicted of felony, is not entitled to register under Act Nov. 3, 1893, extending the time for registration, and such person may be deported on the expiration of the time fixed by the original act (May 5, 1892) for failure to register. Id.

17. —— Change of occupation.—Defendant, in 1890, became a member of two Chinese mercantile firms in California; his name appearing on the partnership books as a partner and so continued up to the time of the commencement of deportation proceedings. From 1890 to 1900 he engaged in no manual labor, but devoted his entire time to his mercantile interests, until he purchased an interest in a shrimp company in March, 1900, after which from March till August he devoted a portion of his time to keeping books for the concern, but did manual labor, such as picking shrimps and delivering them to customers. The shrimp business was absorbed by another company in which he was interested until May, 1902, when he sold the interest in the purchasing company and returned to China, he having devoted his entire time after the sale and before his return to the mercantile business of the firms of which he was a member. Held, that by engaging in manual labor while in the shrimp business he did not lose his right to remain in the United States. Ow Yang Dean v. U. S. (1906) 145 Fed. 801, 76 C. C. A. 365.

The minor son of a Chinese merchant lawfully domiciled in the United States, who immigrated and entered the United States while a minor without trick, deception, or fraud, under a certificate issued by the Registrar General at Hongkong and viséed by the acting United States Consul General at the same time, and who during the remainder of his minority labored and studied in the United States, is entitled to remain after attaining his majority, though he has since worked as a laborer. U. S. v. Foo Duck (1909) 172 Fed. 856, 97 C. C. A. 204, affirming judgment (D. C. 1908) 163 Fed. 440.

Prior to October 1, 1894, and at the date of the passage of the Geary act

of May 5, 1892, S. was a Chinese merchant residing in San Francisco. He obtained a lease, running from October 1, 1894, to September 30, 1897, of certain fruit land in California, on which he employed laborers; and he performed certain manual labor himself—the extent of which did not appear—in assisting such laborers to care for and gather the fruit. S. failed to register as a laborer under the Geary act, and proceedings for his deportation were commenced. Held, that S., having been a merchant at the time of the passage of the act, and during the time for registration, was not made liable to deportation by subsequently becoming a laborer. U. S. v. Sing Lee (D. C. 1896) 71 Fed. 680.

Even if the certificate of identity of a "merchant" of China is in due form, he may enter this country only for the purpose of prosecuting his business as a merchant here; and if, upon his arrival, he immediately proceeds to and continues in employment as a laborer, such fact has a strong retroactive bearing as evidence of the intent with which he came here. U. S. v. Yong Yew (D. C. 1897) 83 Fed. 832.

Where a Chinese merchant, lawfully in the United States from 1892 to 1894, afterwards became a laborer, he could not thereafter be deported, since he was not able to procure a certificate within the time stated in such act; not being at the time a laborer, and entitled to a laborer's certificate. In re Chin Ark Wing (D. C. 1902) 115 Fed. 412.

A Chinaman, who has lawfully entered the United States as a merchant, and has lawfully practiced his calling here for some time thereafter, but who is not a merchant at the time of his arrest, is not subject to deportation under existing statutes. In re Yew Bing Hi (D. C. 1904) 128 Fed. 319.

Where at the time of the passage of Act Cong. May 5, 1892, a Chinese person thereafter charged to be unlawfully in the United States was in the United States and engaged in business as a merchant, and was therefore not entitled to registration as a laborer under such act, he was not subject to deportation, though he subsequently became a laborer. U. S. v. Louie Juen (D. C. 1904) 128 Fed. 522.

This section does not apply to Chinese merchants, or authorize the deportation of a Chinese person who was then lawfully in this country in business as a merchant, and who continued in such business until after the time for registration had expired, because he subsequently became a laborer on his failure in business, and is not provided with a certificate of registration under said acts. U. S. v. Leo Won Tong (D. C. 1904) 132 Fed. 190.

This section did not prohibit an unregistered laborer from remaining in the United States until proceeded against, and hence, prior to the taking of such proceedings, he was entitled to become a merchant and to the immunities accorded to them. Ex parte Ow Guen (D. C. 1906) 148 Fed. 926.

Where certain Chinese persons while minors were admitted into the United States, without fraud, as the sons of a Chinese merchant and a Chinese teacher, residents of the United States, they were not subject to deportation because, after arriving at age, they were found working as laborers in a laundry. U S. v. Lim Yuen (D. C. 1914) 211 Fed. 1001.

18. Pleadings.—No formal complaint or pleadings are required in the proceedings under this act. Ah How v. U. S. (1904) 24 Sup. Ct. 357, 359, 193 U. S. 65, 48 L. Ed. 619.

19. Evidence.—Congress may properly require a Chinaman to assume the burden of proving his right to remain in the United States, and may prescribe what evidence shall be received and what effect it shall have. Li Sing v. U. S. (1901) 21 Sup. Ct. 449, 452, 180 U. S. 486, 45 L. Ed. 634, affirming judgment In re Li Sing (1898) 86 Fed. 896, 30 C. C. A. 451, 58 U. S. App. 1.

In proceedings to deport a Chinese person, it was admitted that on August 1, 1893, he was a "merchant," as defined by the statute. On that day the store he and his partner occupied was burned, and in November he left for China, returning in May, 1895. Before leaving, the firm had rebuilt and restocked the store, and, on returning, he resumed his connection with the business, which, the partner testified, had always been retained. Held sufficient to show that he had not lost the character of merchant, though there was no direct testimony that his name appeared in partnership articles or partnership accounts; nor was his status affected by the fact that he also conducted a gardening enterprise with Chinese labor, his own work being supervisory only. Wong Fong v. U. S. (1896) 77 Fed. 168, 23 C. C. A. 110, reversing U. S. v. Wong Hong (D. C. 1895) 71 Fed. 283.

A Chinese person, who obtains entry into the United States without the certificate from the Chinese government showing him to be a member of the class privileged to enter, which is required by the acts of congress, cannot establish his right to remain, when arrested as a Chinese laborer within the United States without the certificate of residence required by law, by proof that since his entry he has not been a laborer, but has followed the occupation of a member of the privileged class. U. S. v. Chu Chee (1899) 93 Fed. 797, 35 C. C. A. 613.

A judgment of deportation will not be disturbed, notwithstanding uncontradicted evidence as to the alien's right to remain, where such testimony is not conclusive and satisfactory. Quong Sue

v. U. S. (1902) 116 Fed. 316, 54 C. C. A. 652.

A judgment of deportation of a Chinese laborer cannot be disturbed, she, according to the testimony of an inspector, having at the time of her arrest and a few days thereafter told him that she came from China four or four years before, and that she had her registration certificate, but the certificate not being produced, and she and several Chinese witnesses testified that she was born in the United States. Yee N'Goy v. U. S. (1902) 116 Fed. 333, 54 C. C. A. 205.

A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence is not a criminal proceeding, and hence it is competent for the government to swear such Chinese person as a witness against himself. Low Foon Yin v. U. S. Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355.

Where, in proceedings for the deportation of a Chinaman, he claimed to be a native-born citizen of the United States, the burden of proof of such fact was on him. Lee Yuen Sue v. U. S. (1906) 146 Fed. 670, 77 C. C. A. 96.

In proceedings for the deportation of a Chinese person charged with being unlawfully in this country, which were resisted on the ground that defendant was a native born citizen of the United States where his testimony was consistent and explicit, giving his place of birth, residence at different times, place of attending school, and the occupation and places of business of his father and uncle, and was corroborated by the testimony of his uncle and cousin, and wholly uncontradicted, his deportation was not warranted by a finding that he had not established his right to remain in the United States "by affirmative proof to the satisfaction of the commissioner." Moy Suey v. U. S. (1906) 147 Fed. 697, 78 C. C. A. 85.

In deportation cases the only permissible evidence of a Chinese laborer's right to be in the United States is the certificate of residence mentioned in such legislation, or, in lieu thereof, testimony showing that by reason of accident, sickness, or other unavoidable cause he was unable to procure such certificate, and the testimony of at least one white witness that he was a resident of the United States prior to the registration period. U. S. v. Yee Gee You, alias Yee Jim (1907) 152 Fed. 157, 81 C. C. A. 409.

The provision that any Chinese laborer found within the United States without the certificate of residence required by that act shall be ordered deported unless he shall establish "by at least one credible witness, other than Chinese," that he was a resident on May 5, 1892, leaves no room for construction, and gives the judge before whom such person is brought no discretion to accept any other testimony than that prescribed. U. S. v. Williams (D. C. 1897) 83 Fed. 997.

Where a complaint is filed for the deportation of a Chinese laborer on the ground that he is without the certificate of residence, an allegation therein that such laborer was a resident of the United States on May 5, 1892, is surplusage, and cannot take the place of the evidence of such fact required to be furnished by the defendant. Id.

The action of the collector of a port in permitting a Chinese laborer to land, upon representations that he was born here, is not in any sense judicial, and, in a proceeding for the laborer's deportation, does not constitute even prima facie evidence of his right to remain in the United States. U. S. v. Lau Sun Ho (D. C. 1898) 85 Fed. 422.

In a proceeding before a commissioner for the deportation of a Chinese person, the action of a deputy collector, some months previously, in refusing the defendant entry into the United States, is not an adjudication which constitutes a bar to the consideration of defendant's rights by the commissioner on the merits, where the deputy entered no decision, made no findings, and heard no evidence to rebut the prima facie showing made by defendant of his right of entry, but acted solely on statements made to him by a third person in a conversation in another city regarding a statement the latter had heard, and which was irrelevant, if true. U. S. v. Wong Chung (D. C. 1899) 92 Fed. 141.

In proceedings for the deportation of Chinese persons whose right to remain in this country rests solely on a claim that they were born in the United States, the testimony of their alleged father, shown by other Chinese witnesses to be inconsistent with previous statements made by him, which statements he denies having made, is not alone sufficient to establish such claim to citizenship. U. S. v. Lee Pon (D. C. 1899) 94 Fed. 827.

In Chinese deportation proceedings, the fact that accused was in the United States and engaged in business as a merchant at the time of the passage of Act May 5, 1892, may be established by Chinese witnesses. U. S. v. Louie Juen (D. C. 1904) 128 Fed. 522.

Evidence in Chinese deportation proceedings held to establish that defendant was a resident of the state of Montana, and engaged in business there as a merchant, prior to the passage of Act May 5, 1892, and was therefore not subject to deportation. Id.

Where, on the return of a Chinese person to the United States, his claim that he was a merchant at L. was not investigated by the immigration officers, but he was deported, because of his former status as an unregistered laborer, such decision was not conclusive against his right to again enter the United States by virtue of his being

a merchant in L., established by two credible witnesses other than Chinese. Ex parte Ow Guen (D. C. 1906) 148 Fed. 926.

Congress may determine the quantity, character, and quality of evidence that shall be required to admit an alien into the United States, or grant him a certificate of return after absence, or to establish his right to remain, when found here, but, where it does not do so, the court must receive the testimony of all qualified witnesses and give it the weight to which it is entitled. U. S. v. Ching Sing Quong (D. C. 1915) 224 Fed. 752.

A Chinese person may, in proceedings to deport him, establish his right to remain by testimony of Chinese alone; but the court, in weighing the testimony, may consider the provisions of this section and section 4324, post, relating to credibility of Chinese witnesses on other questions. Id.

20. Defenses.—Where, in proceedings for the deportation of certain Chinese persons, none of them were alleged to have ever had any certificate entitling them to remain in the United States, or that any such certificates had been taken from them, pursuant to Chinese Regulation Rule 23, the invalidity of such rule was immaterial. Toy Tong v. U. S. (1906) 146 Fed. 343, 76 C. C. A. 621.

Where, in deportation proceedings against an alleged immoral alien Chinese woman, she was described in the complaint and warrant as "Sally Doe," and it appeared from her own testimony that she was a Chinese person without a certificate of residence required by law and was not entitled to be or remain in the United States, she was thereby specifically identified by her status, by the place where she was found, and by her own testimony, and hence it was not material that she was not identified as the person named in the complaint and warrant. Wong Chun v. U. S. (1909) 170 Fed. 182, 95 C. C. A. 198.

Where the complaint in deportation proceedings against a Chinese person duly alleged that he was a Chinese manual laborer within the United States without a certificate of residence, it was not material to the right of the government to deport him that he came into the United States at a time when it was impossible to obtain a certificate of residence. Lew Quen Wo v. U. S. (1911) 184 Fed. 685, 106 C. C. A. 639.

21. —— Excuses for failure to procure certificate.—A United States commissioner is not, as a matter of law, bound to be satisfied by the testimony of a Chinese laborer that he was disabled by sickness from obtaining the certificate of residence required by this section. Ah How v. U. S. (1904) 24 Sup. Ct. 357, 359, 193 U. S. 65, 48 L. Ed. 619.

Evidence considered, and held insufficient to establish clearly that a Chinese laborer who testified that he was a resident of the United States on May 5, 1892, and who failed to procure a certificate of residence, was unable to do so "by reason of accident, sickness or other unavoidable cause," and a judgment ordering his deportation affirmed. Yee Yuen v. U. S. (1904) 133 Fed. 222, 66 C. C. A. 276.

A Chinaman who failed to show one of the prescribed excuses for not having procured a certificate is liable to deportation, although he does show the required residence. In re Ny Look (C. C. 1893) 56 Fed. 81.

Imprisonment pursuant to sentence for crime is not a valid excuse for failure to register in time. U. S. v. Ah Poing (D. C. 1895) 69 Fed. 972.

22. Bail.—See note under § 4324, post.

23. Findings and judgment.—The written statement by a United States commissioner that a Chinaman was brought before him charged with being unlawfully within the United States, and was adjudged to have the right to remain in the United States by reason of being a citizen thereof, is not evidence of such adjudication. Ah How v. U. S. (1904) 24 Sup. Ct. 357, 359, 193 U. S. 65, 48 L. Ed. 619.

Where a judgment for the deportation of a Chinese person recited that it appeared to the court that accused was a Chinese laborer and a subject of the Emperor of China, that he was not registered, and that he did not belong to one of the classes of Chinese excepted by said acts from such registration, and was unlawfully within the United States, it was not objectionable for failure to state sufficient facts to sustain it. Lee Won Jeong v. U. S. (1906) 145 Fed. 512, 76 C. C. A. 190, affirming judgment U. S. v. Lee Wing (D. C. 1905) 136 Fed. 701, which is affirmed Lee Joe Yen v. U. S. (1906) 148 Fed. 682, 78 C. C. A. 427.

As the Geary Act neither makes provision for actual deportation, nor requires the Chinaman to be imprisoned an indefinite time while awaiting it, the court will, in a proper case, order that he be deported whenever provision is made therefor by the proper authority, and that in the meantime he be discharged from custody. In re Ny Look (C. C. 1893) 56 Fed. 81.

A complaint for the deportation of a Chinese laborer alleged merely that she had been and remained in the United States without procuring the certificate of residence required by the acts of May 5, 1892, and November 3, 1893. On the trial the court found that defendant was unlawfully within the jurisdiction of the United States, and, further, that she had entered the United States in violation of law, and gave judgment of deportation. Held, that the general finding that defendant was unlawfully in the United States was sufficient to sup-

port the judgment, though the further finding of an unlawful entry was not within the issues made by the pleading. In re Gut Lun (D. C. 1897) 83 Fed. 141.

A judgment of deportation of a Chinese person by a court having jurisdiction of the controversy and the parties cannot be impeached on habeas corpus by proof of a different state of facts from that on which the judgment was based; and where the court found that the Chinese person unlawfully remained in the United States without procuring the certificate of residence, such a certificate cannot be received in evidence in the habeas corpus proceeding. Id.

24. Review.—Orders for the deportation of Chinese laborers, made on the sole ground that they had failed to show that they were bona fide merchants at the time registration was required, will be reversed by the federal Supreme Court, where that court is satisfied, from an examination of the record, that the testimony did establish that fact. Tom Hong v. U. S. (1904) 24 Sup. Ct. 517, 520, 193 U. S. 517, 48 L. Ed. 772.

The decision of the United States supreme court in Wan Shing v. U. S. (1891) 140 U. S. 424, 11 Sup. Ct. 729, that no Chinese merchant formerly residing in the United States, but temporarily absent therefrom, is entitled to return without presenting the certificate prescribed by this section, is conclusive upon the circuit court of appeals, and that court will not certify a like case to the supreme court for instructions. Lau Ow Bew v. U. S. (1891) 47 Fed. 641, 1 C. C. A. 1, petition for writ of certiorari granted (1891) 12 Sup. Ct. 43, 141 U. S. 583, 35 L. Ed. 868, judgment reversed (1892) 12 Sup. Ct. 517, 144 U. S. 47, 36 L. Ed. 340.

25. Costs and expenses.—Congress having appropriated funds for the enforcement of the Geary act, a district judge should take judicial cognizance that there are funds for the enforcement of any or all of the sections of such act, and should order the deportation of a Chinaman who has not procured certificates of residence, although the attorney general has informed such judge "that there are no funds to execute the Geary law, so far as the same provides for the deportation of Chinamen who have not obtained certificates of residence." U. S. v. Chum Shang Yuen (D. C. 1893) 57 Fed. 588.

The act does not refer to the costs of the laborer's arrest and trial. U. S. v. Tye (D. C. 1895) 70 Fed. 318.

CITED WITHOUT DEFINITE APPLICATION

Wong Wing v. U. S. (1896) 16 Sup. Ct. 977, 978, 163 U. S. 228, 41 L. Ed. 140; Chain Chio Fong v. Same (1904) 133 Fed. 154, 66 C. C. A. 220; Cheung Him Nin v. Same (1904) 133 Fed. 391, 66 C. C. A. 453; Cheung Pang v. Same (1904) 133 Fed. 392, 66 C. C. A. 454; U. S. v. Hung Chang (1904) 134 Fed. 19, 67 C. C. A. 93; Chin Ken v. Same (1911) 191 Fed. 817, 112 C. C. A. 331; U. S. v. Jamieson (C. C. 1911) 185 Fed. 165 (error dismissed [1912] 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639); Ex parte Li Dick (D. C. 1909) 174 Fed. 674; U. S. v. Weis (D. C. 1910) 181 Fed. 860.

§ 4321. (Act May 5, 1892, c. 60, § 7.) Regulations, etc., to be prescribed for execution of act.

Immediately after the passage of this act, the Secretary of the Treasury shall make such rules and regulations as may be necessary for the efficient execution of this act, and shall prescribe the necessary forms and furnish the necessary blanks to enable collectors of internal revenue to issue the certificates required hereby, and make such provisions that certificates may be procured in localities convenient to the applicants, such certificates shall be issued without charge to the applicant, and shall contain the name, age, local residence and occupation of the applicant, and such other description of the applicant as shall be prescribed by the Secretary of the Treasury, and a duplicate thereof shall be filed in the office of the collector of internal revenue for the district within which such Chinaman makes application. (27 Stat. 26.)

See notes to section 1 of this act, ante, § 4315.

See, also, as to transfer of duties and powers, in relation to Chinese exclusion, etc., of the Secretary of the Treasury to the Secretary of Labor, and of the authority, etc., in relation thereto, of collectors of internal revenue, to other officers, notes under section 1 of this act, ante, § 4315.

Further requirements as to certificates of residence, and as to the photograph of the applicant to be contained therein, were made by Act Nov. 3, 1893, c. 14, § 2, post, § 4324.

Notes of Decisions

Regulations of secretary.—The Secretary of the Treasury may authorize the landing at a port in this country of Chinese sentenced to deportation and their detention at said port until the vessel returns and is ready to proceed on her return voyage. (1894) 21 Op. Atty. Gen. 18.

§ 4322. (Act May 5, 1892, c. 60, § 8.) Altering name in or forging certificate, or false personation of person named therein, punishable.

Any person who shall knowingly and falsely alter or substitute any name for the name written in such certificate or forge such certificate, or knowingly utter any forged or fraudulent certificate, or falsely personate any person named in such certificate, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined in a sum not exceeding one thousand dollars or imprisoned in the penitentiary for a term of not more than five years. (27 Stat. 26.)

See note to section 1 of this act, ante, § 4315.

Similar provisions relating to certificates of identification were made by Act May 6, 1882, c. 126, § 7, ante, § 4294, and by Act Sept. 13, 1888, c. 1015, § 11, ante, § 4312.

Notes of Decisions

"Certificate."—The making or having in possession of a blank form of a certificate of residence such as, when filled and issued by the United States to Chinese persons, entitled them to remain in the country, is not such a document as is described in this section. U. S. v. Ah Won (C. C. 1899) 97 Fed. 494.

Indictment.—An indictment for forging and uttering Chinese duplicate certificates of residence, such as a collector is authorized to issue on proof of loss of the originals, need not aver that originals were issued or lost, nor to whom the duplicates were issued, where the certificates are described and the names of the Chinese persons to whom they purport to have been issued are given, and it is alleged that the persons to whom they were uttered were to the jurors unknown. Dillard v. U. S. (1905) 141 Fed. 303, 72 C. C. A. 451.

Evidence.—Evidence admitted on the trial of a defendant for the forgery of Chinese duplicate certificates of residence held competent and material as tending to connect defendant with the offense charged. Dillard v. U. S. (1905) 141 Fed. 303, 72 C. C. A. 451.

§ 4323. (Act May 5, 1892, c. 60, § 9.) Compensation to officers for services under act.

The Secretary of the Treasury may authorize the payment of such compensation in the nature of fees to the collectors of internal revenue, for services performed under the provisions of this act in addition to salaries now allowed by law, as he shall deem necessary, not exceeding the sum of one dollar for each certificate issued. (27 Stat. 26.)

See notes to section 1 of this act, ante, § 4315.

The provisions of this section, so far as they authorized payment of compensation to collectors of internal revenue, and subsequent provisions relating thereto of Res. Dec. 7, 1893, No. 1, 28 Stat. 575, and Res. April 4, 1894, No. 19, 28 Stat. 581, were superseded by the transfer of the duties and powers, in relation to Chinese exclusion, of the Secretary of the Treasury to the Secretary of Labor, and of the authority, etc., in relation thereto, of collectors of internal revenue, to other officers, as stated in notes to section 1 of this act, ante, § 4315.

Certificates were to be issued without charge to the applicant by a provision of section 7 of this act, ante, § 4321.

§ 4324. (Act Nov. 3, 1893, c. 14, § 2.) "Laborer" and "merchant" defined; proof required for entrance of merchant; deportation; certificate of residence to contain photograph.

The words "laborer" or "laborers," wherever used in this act, or in the act to which this is an amendment, shall be construed to mean both skilled and unskilled manual laborers, including Chinese employed in mining, fishing, huckstering, peddling, laundrymen, or those engaged in taking, drying, or otherwise preserving shell or other fish for home consumption or exportation.

The term "merchant," as employed herein and in the acts of which this is amendatory, shall have the following meaning and none other: A merchant is a person engaged in buying and selling merchandise, at a fixed place of business, which business is conducted in his name, and who during the time he claims to be engaged as a merchant,

does not engage in the performance of any manual labor, except such as is necessary in the conduct of his business as such merchant.

Where an application is made by a Chinaman for entrance into the United States on the ground that he was formerly engaged in this country as a merchant, he shall establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business as hereinbefore defined for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant, and in default of such proof shall be refused landing.

Such order of deportation shall be executed by the United States Marshal of the district within which such order is made, and he shall execute the same with all convenient dispatch; and pending the execution of such order such Chinese person shall remain in the custody of the United States Marshal, and shall not be admitted to bail.

The certificate herein provided for shall contain the photograph of the applicant, together with his name local residence and occupation, and a copy of such certificate, with a duplicate of such photograph attached, shall be filed in the office of the United States Collector of Internal Revenue of the district in which such Chinaman makes application.

Such photographs in duplicate shall be furnished by each applicant in such form as may be prescribed by the Secretary of the Treasury. (28 Stat. 8.)

This section was part of an act entitled "An act to amend an act entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May fifth, Eighteen hundred and Ninety-two."

Section 1 of this act amended section 6 of the act referred to in said title, to read as set forth ante, § 4320.

Previous provisions relating to the construction of the word "laborer" were contained in Act May 6, 1882, c. 126, § 15, as amended by Act July 5, 1884, c. 220, ante, § 4320, and in Act Sept. 13, 1888, c. 1015, § 3, quoted in note to section 5 of said act, ante, § 4306.

Previous provisions relating to the construction of the word "merchant" were contained in Act May 6, 1882, c. 126, § 6, as amended by Act July 5, 1882, c. 220, ante, § 4293.

The order of deportation referred to in this section was provided for by Act May 5, 1892, c. 60, § 6, as amended by section 1 of this act, ante, § 4320.

Certificates of residence referred to in this section were provided for by Act May 5, 1892, c. 60, §§ 6, 7, ante, §§ 4320, 4321.

The provisions of this Act, like those of Act May 5, 1892, c. 60, which it amended and all laws prohibiting and regulating the coming of Chinese into the United States and their residence therein, in force at the time, were reenacted, extended, and continued, and were also made applicable to the island territory under the jurisdiction of the United States, by Act April 29, 1902, c. 641, § 1, post, § 4337.

See, as to transfer of duties and powers, in relation to Chinese exclusion, etc., of the Secretary of the Treasury to the Secretary of Labor, notes to Act May 5, c. 60, § 1, ante, § 4315.

Notes of Decisions

Construction and operation in general.—Only such Chinese persons as are declared to be admissible may enter the United States or can safely be found therein. U. S. v. Crouch (C. C. 1911) 185 Fed. 907.

This section applies to those Chinese who departed from the United States prior to the passage of the act as well as to those who departed after that date. In re Yee Lung (D. C. 1894) 61 Fed. 641, 643; In re Loo Yue Soon (D. C. 1894) 61 Fed. 643, 644.

A judgment in habeas corpus proceedings, remanding a Chinese person to the custody of the master of a vessel in which he immigrated, for deportation, was vacated by the subsequent passage of this act. In re Tom Hon (D. C. 1906) 149 Fed. 842.

The true theory is, not that all Chinese persons may enter this country who are not forbidden, but that only those are entitled to enter who are expressly allowed to do so. (1901) 23 Op. Atty. Gen. 485.

"Laborer."—The term "Chinese laborers" includes a Chinese person who, during half his time, is engaged in cutting and sewing garments for sale by a firm of which he is a member. Lai Moy v. U. S. (1895) 66 Fed. 955, 14

C. C. A. 283. A Chinese prostitute. Lee Ah Yin v. U. S. (1902) 116 Fed. 614, 54 C. C. A. 70. A Chinese person owning a $500 interest in a general merchandise store, but operating a fruit farm as a tenant and selling the fruit grown thereof by his own labor. Lew Quen Wo v. U. S. (1911) 184 Fed. 685, 106 C. C. A. 639. Or a member of a firm of Chinese merchants who is sent to take charge of an establishment in which the firm owns an interest. In re Chu Poy (D. C. 1897) 81 Fed. 826. An unpaid Chinese Sunday school teacher, whose chief occupation was that of a laundryman. In re Leung (1898) 86 Fed. 303, 30 C. C. A. 69. But this term does not include seamen. U. S. v. Jamieson (C. C. 1911) 185 Fed. 165, error dismissed (1912) 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639. A Chinese actor. In re Ho King (D. C. 1883) 14 Fed. 724. And a Chinaman engaged in the business of keeping a restaurant and lodging house, and all Chinese persons dependent upon their labor for self-support, whether actually employed as laborers or not. In re Ah Yow (D. C. 1894) 59 Fed. 561; U. S. v. Chung Ki Foon (D. C. 1897) 83 Fed. 143. A Chinaman serving a term of imprisonment at hard labor. U. S. v. Wong Ah Hung (D. C. 1894) 62 Fed. 1005. A Chinaman who was a peddler at the time of the passage of the act of May 5, 1892, but who ceased peddling and became a member of a trading firm prior to the passage of this act of Nov. 3, 1893. U. S. v. Mark Ying (D. C. 1896) 76 Fed. 450. A Chinese physician. U. S. v. Chin Fee (D. C. 1899) 94 Fed. 828. A Chinese man, who owns an interest in a mercantile firm, but is not actively engaged in the conduct of its business, and who works as head cook in a restaurant, of which he is a part proprietor. Mar Bing Guey v. U. S. (D. C. 1899) 97 Fed. 576. But see (1893) 20 Op. Atty. Gen. 602, holding that the owner of a restaurant is not necessarily a laborer.

A Chinese person who, during his residence in the United States, was engaged in business as a member of a firm, but occasionally, during a year previous to his departure for a temporary visit, worked for short periods as a house servant, to accommodate an old employer when he was without a servant, was engaged in manual labor. Lew Jim v. U. S. (1895) 66 Fed. 953, 14 C. C. A. 281.

The act of Congress of November 3, 1893, did not limit the meaning of the words "laborer" and "laborers," so as to exclude any persons who were laborers within the meaning of such words as used in the treaty of 1880 (22 Stat. 826). Lee Ah Yin v. U. S. (1902) 116 Fed. 614, 54 C. C. A. 70.

Where a Chinese merchant for a year prior to his return to China did no manual labor except that for a short time he assisted in picking shrimps and going in wagons to deliver them to customers in connection with the business of a shrimp company, in which he was a partner, such work did not amount to the doing of manual labor not necessary in the conduct of his business. Ow Yang Dean v. U. S. (1906) 145 Fed. 801, 76 C. C. A. 365.

This act does not restrict the meaning of the word "laborers" as used in the prior acts, so as to enlarge the privileged classes. U. S. v. Yee Gee You, alias Yee Jim (1907) 152 Fed. 157, 81 C. C. A. 409.

Since there is no statutory provision that a decision of the appropriate immigration or customs officer favorable to the admission of a Chinese alien is conclusive on the United States, the admission of a Chinese alien as a merchant is not conclusive against the United States on the application of the alleged merchant's son to enter, and did not prevent the son's exclusion on the ground that the father, while having a financial interest in a mercantile establishment, was in fact a laborer engaged in fruit culture as a tenant. Lew Quen Wo v. U. S. (1911) 184 Fed. 685, 106 C. C. A. 639.

The words "Chinese laborers," have the same meaning as in the treaty with China of 1880 (22 Stat. 826), in which they are broad enough in their true meaning and intent to include Chinese gamblers and highbinders, since section 2 of the treaty by exclusion provides that no Chinese should be entitled to the benefit of the general provisions of the Burlingame treaty (16 Stat. 739), but those who come to the United States for purposes of teaching, study, mercantile transactions, travel, or curiosity. U. S. v. Ah Fawn (D. C. 1893) 57 Fed. 591.

The fact that a Chinese member of a trading firm lives at the store with several other members of the firm, and does the housework for them, does not constitute him a laborer. U. S. v. Sun (D. C. 1896) 76 Fed. 450.

"Merchant."—A Chinese merchant, within the exception of the Geary exclusion act, need not have his name appear in the firm designation, if his real interest appears in his own name in the firm accounts and articles of copartnership. Lee Kan v. U. S. (1894) 62 Fed. 914, 10 C. C. A. 669.

Where a Chinese person arrested as unlawfully within the United States at the time of his arrest was working as a servant in a boarding house, and since coming to the United States had worked as a cook and deliveryman in a store in which he had no interest, he was not a "merchant." Mar Sing v. U. S. (1905) 137 Fed. 875, 70 C. C. A. 213.

A Chinaman, who is a member of a firm of Chinese merchants engaged in buying and selling merchandise at a fixed place of business, and who is sent out by such firm, as an employé, to

take charge of another mercantile establishment in which said firm owns a one-half interest, is a merchant, and not a laborer, and is not liable to deportation while thus employed. In re Chu Poy (D. C. 1897) 81 Fed. 826.

A member of a Chinese copartnership within the United States, whose name is not a part of the firm name, is not a "merchant" within the meaning of this section, and therefore is not entitled to leave the United States and return thereto as a merchant. (1894) 21 Op. Atty. Gen. 5.

Chinese "traders" could not be admitted as merchants. (1898) 22 Op. Atty. Gen. 130.

A Chinese person, resident in the United States and member of a firm engaged in the manufacture of cigars within the United States and of selling the cigars so manufactured, who, having temporarily left the United States, desires readmission, is a "returning merchant" in the sense in which that term is used in the treaty and the laws relating to the exclusion of Chinese and as such is entitled to readmission into this country. (1901) 23 Op. Atty. Gen. 485.

The fact that a bona fide Chinese merchant is also a manufacturer makes him none the less a merchant. Id.

A person described in his certificate as a "salesman" is not a merchant, who is entitled to remain in the United States. U. S. v. Gin Hing (1904) 76 P. 639, 8 Ariz. 416.

—— **"Business conducted in his name."**—The names of any of the partners need not appear in the company name under which a Chinese grocery is actually conducted at a fixed place of business in order to constitute them "merchants" within the meaning of this section. Tom Hong v. U. S. (1904) 24 Sup. Ct. 517, 519, 193 U. S. 517, 48 L. Ed. 772.

Evidence that a Chinese person since he came to the United States has been assisting in the business of a mercantile company, keeping the books and selling goods, and that he has an interest in the stock of goods of such company, is insufficient to establish his status as a merchant within the statute; it not being shown that his name appears in the partnership articles, or that he is in fact a partner. U. S. v. Pin Kwan (1900) 100 Fed. 609, 40 C. C. A. 618, reversing decree (D. C. 1899) 94 Fed. 824.

In order that a Chinese person may be exempt from deportation as a merchant, he must have had a substantial and real interest in a merchantable business, though his own name need not necessarily appear in the firm style, when the business is carried on under a company name which does not include the names of the individuals interested therein. U. S. v. Lee You Wing (1914) 211 Fed. 939, 128 C. C. A. 437.

A Chinaman seeking entrance into the United States on the ground that he was formerly engaged as a merchant therein must be excluded, where it appears that the business was conducted under a firm name of which his own name was no part, though there is evidence that he was a partner, and that Chinese merchants do not, in general, conduct business in individual or partnership names. In re Quan Gin (D. C. 1894) 61 Fed. 395.

A mercantile business conducted in the name of a partnership is conducted in the name of a partner in the firm, within the meaning of this section, although his name does not appear in the firm name. U. S. v. Wong Ah Gah (D. C. 1899) 94 Fed. 831.

A Chinese person is not a "merchant" unless he conducts his business either in his own name or in a firm name of which his own is a part. (1894) 21 Op. Atty. Gen. 5.

Deportation proceedings.—See note under § 4320, ante.

A Chinese person may, in proceedings to deport him, establish his right to remain by testimony of Chinese alone; but the court, in weighing the testimony, may consider the provisions of section 4320, ante, and this section, relating to credibility of Chinese witnesses on other questions. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

—— **Bail.**—This section did not give an absolute right to bail to a Chinese person domiciled and residing in the United States at the time of his arrest for deportation, pending an appeal from a commissioner's order to the district court, but authorized the granting or withholding of bail under such circumstances in the exercise of discretion. Chin Wah v. Colwell (1911) 187 Fed. 592, 109 C. C. A. 422, affirming order In re Chin Wah (D. C. 1910) 182 Fed. 256.

This section applies, and denies bail only when a final order of deportation has been made, and has no application to the question whether bail may be allowed pending an appeal from the decision of the commissioner. Id.

This section applies only where the order of deportation is final, and does not prevent the admission of a Chinese alien, ordered to be deported, to bail pending an appeal from such order. In re Ah Tai (D. C. 1903) 125 Fed. 795.

A proceeding under the exclusion acts for the deportation of a Chinese alien, though civil in its nature, is sui generis, and the District Judge to whom an appeal is taken from a commissioner's order directing deportation has inherent power to admit the alien to bail pending the appeal. Id.

A proceeding for the deportation of a Chinese alien under the exclusion acts is not criminal in its nature, so as to entitle such alien to bail, as a

person accused of crime, pending appeal from a commissioner's order of deportation. Id.

The words "in the first instance" in section 4319, ante, did not render the prohibition against bail any less applicable after the court had made its decision than before, and hence where a Chinese person had been ordered deported and writ of habeas corpus dismissed, the alien was not entitled to bail pending appeal. In re Jem Yuen (D. C. 1910) 188 Fed. 350.

One ordered deported may be admitted to bail pending an appeal. U. S. v. Yee Yet (D. C. 1911) 192 Fed. 577.

The requirement for execution of an order of deportation held to relate to a final order as affecting right to bail. Id.

A bail bond given in a deportation proceeding held enforceable as a voluntary obligation, not illegal or against public policy. Id.

The right to bail of a Chinese person arrested for deportation is determinable, not by the rule applicable to ordinary cases under the writ of habeas corpus, but by this section. Chan Gun v. U. S. (1896) 9 App. D. C. 290.

This section does not prevent the District Judge from granting bail in his discretion, pending appeal to him from an order of deportation of a commissioner; the commissioner's order not being necessarily final, though such discretion should be sparingly exercised, in view of the object of the Chinese exclusion law, which was to prevent competition of Chinese labor with American labor. U. S. v. Wong Lee Foo (1910) 13 Ariz. 252, 108 Pac. 488, 31 L. R. A. (N. S.) 1088.

A Chinese person is not entitled to bail pending appeal from an order of deportation of a district judge to the territorial Supreme Court; the case not being tried de novo on such appeal, so that the order is merely suspended pending appeal, leaving the statutory provision operative. Jung Goon Jow v. U. S. (1910) 13 Ariz. 252, 108 Pac. 490, 31 L. R. A. (N. S.) 1088.

Readmission of Chinese merchant.—The right of a Chinaman to readmission to the United States on the ground that he was already engaged as a merchant therein is governed by Act Nov. 3, 1893, though he departed from the country before that act was passed. In re Yee Lung (D. C. 1894) 61 Fed. 641; In re Loo Yue Soon (D. C. 1894) Id. 643; U. S. v. Loo Way (D. C. 1895) 68 Fed. 475, judgment affirmed Loo Way v. U. S. (1896) 72 Fed. 688, 18 C. C. A. 681.

Merchants already in the United States when this section took effect, the third paragraph of which requires proof of an applicant for readmission that he actually conducted a business here as merchant, may leave and return as if that act had not been passed. (1894) 21 Op. Atty. Gen. 21, 99.

Act Nov. 3, 1893, applies to Chinese persons who left the country before its passage and afterwards seek to return. Lew Jim v. U. S. (1895) 66 Fed. 953, 14 C. C. A. 281; Lai Moy v. Same (1895) 66 Fed. 955, 14 C. C. A. 283.

The fact that during the six months immediately following the passage of this act appellants were merchants, and therefore not required to apply to the collector of internal revenue for a certificate of residence, would not be conclusive of their present right to remain in the United States, where they afterwards left the country, disposing of whatever business they had during the six-months period, and without any proven intention of returning, and then returned and engaged in business as laborers. U. S. v. Moy Yim (D. C. 1902) 115 Fed. 652.

Merchants already here when the statute took effect may leave the country and return as if the act of November 3, 1893, had not been passed. (1894) 21 Op. Atty. Gen. 21.

Evidence.—A Chinaman seeking to enter the United States on a certificate showing that he was formerly engaged in this country as a merchant is required by this section to establish by the testimony of two credible witnesses other than Chinese the fact that he conducted such business for at least one year before his departure from the United States, and that during such year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as such merchant. Li Sing v. U. S. (1901) 21 Sup. Ct. 449, 452, 180 U. S. 486, 45 L. Ed. 634 (affirming judgment In re Li Sing [1898] 86 Fed. 896, 30 C. C. A. 451, 58 U. S. App. 1); In re Loo Yue Soon (D. C. 1894) 61 Fed. 643.

The exclusion of Chinese as witnesses to prove the fact that a Chinaman claiming the right as a merchant to reenter the United States had been engaged as such for a year before his departure is not violative of constitutional guaranties. Id.

The requirement that the mercantile character of a Chinese person prior to his departure for China must be established by two witnesses on his application for re-entry is special, and does not apply to other issues, such as the American nativity of the Chinaman, which are to be determined by the ordinary rules of evidence. U. S. v. Lee Seick (1900) 100 Fed. 398, 40 C. C. A. 448.

A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence is not a criminal proceeding, and hence it is competent for the government to swear such Chinese person as a witness against himself. Low Foon Yin v. U. S. Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355.

In deportation cases the only permis-

sible evidence of a Chinese laborer's right to be in the United States is the certificate of residence mentioned in such legislation, or, in lieu thereof, testimony showing that by reason of accident, sickness, or other unavoidable cause he was unable to procure such certificate, and the testimony of at least one white witness that he was a resident of the United States prior to the registration period. U. S. v. Yee Gee You, alias Yee Jim (1907) 152 Fed. 157, 81 C. C. A. 409.

A Chinaman claiming to be a merchant and making application for entrance into the United States on the ground that he was formerly engaged in this country as a merchant must, by this act, establish by the testimony of two credible witnesses other than Chinese the facts that he was engaged in this country in buying and selling merchandise at a fixed place of business, conducted in his own name, for at least one year before his departure from the United States, and that during the year he was not engaged in the performance of any manual labor, except such as was necessary in the conduct of his business as merchant. In re Quan Gin (D. C. 1894) 61 Fed. 395.

A Chinese person may, in proceedings to deport him, establish his right to remain by testimony of Chinese alone; but the court, in weighing the testimony, may consider the provisions of this section. U. S. v. Chin Sing Quong (D. C. 1915) 224 Fed. 752.

The provisions of the third paragraph of this section, requiring proof of an applicant for readmission that he actually conducted a business as merchant, are to be regarded as merely prospective in their operation and as applying exclusively to Chinese merchants who both come into the United States for the first time since November 3, 1893, and, having carried on business here, afterwards leave the country and seek to return. (1894) 21 Op. Atty. Gen. 21.

Cited without definite application, U. S. v. Fah Chung (D. C. 1904) 132 Fed. 109.

§ 4325. (Act Aug. 18, 1894, c. 301, § 1.) Decisions of immigration officers excluding from admission final unless reversed on appeal.

In every case where an alien is excluded from admission into the United States under any law or treaty now existing or hereafter made, the decision of the appropriate immigration or customs officers, if adverse to the admission of such alien, shall be final, unless reversed on appeal to the Secretary of the Treasury. (28 Stat. 390.)

This was a provision of the sundry civil appropriation act for the fiscal year 1895, cited above.

The provision applied in terms to decisions excluding any alien, but it was superseded, as to cases of immigrants generally, by provisions for their examination by immigrant inspectors and boards of special inquiry, also making the decisions of the appropriate immigration officers, if adverse to admission, final, unless reversed on appeal to the Secretary of Commerce and Labor, made by Act March 3, 1903, c. 1012, §§ 24, 25, 32 Stat. 1219, 1220, and Act Feb. 20, 1907, c. 1134, §§ 24, 25, ante, §§ 4274, 4275. But this provision may be regarded as remaining in force as applicable to decisions excluding Chinese persons.

Notes of Decisions

Operation of statutes in general.—Section 12 of the act of Sept. 13, 1888, making the decisions of collectors of customs as to the right of Chinese persons to enter the United States final, in all cases, unless reversed on appeal to the secretary of the treasury, even if it ever went into effect, is no longer so since this act. In re Li Sing (1898) 86 Fed. 896, 30 C. C. A. 451.

Section 4319, ante, was not repealed by this section, and governs where a Chinese person refused admission by the immigration officers, and the secretary applies to a federal court for a writ of habeas corpus. In re Ong Lung (C. C. 1903) 125 Fed. 813.

This section is not inconsistent with section 4319, ante, but on the return to the writ the court can only inquire whether relator is an alien and the appropriate officer has made a decision. In re Chin Yuen Sing (C. C. 1894) 65 Fed. 572.

When decision conclusive.—The decision of the appropriate immigration or customs officers denying an alien admission into the country is final unless reversed on appeal to the secretary of the treasury. Lim Jew v. U. S. (1912) 196 Fed. 736, 116 C. C. A. 364 (affirming judgment U. S. v. Lim Jew [D. C. 1910] 192 Fed. 644); U. S. v. Chung Shee (D. C. 1895) 71 Fed. 277 (judgment affirmed [1896] 76 Fed. 951, 22 C. C. A. 639); Same v. Lue Yee (D. C. 1903) 124 Fed. 303; Ex parte Lung Foot (D. C. 1909) 174 Fed. 70. And cannot be reviewed by the courts. Lem Moon Sing v. U. S. (1895) 15 Sup. Ct. 967, 158 U. S. 538, 39 L. Ed. 1082; Toy Tong v. Same (1906) 146 Fed. 343, 76 C. C. A. 621; In re Moses (C. C. 1897) 83 Fed. 995; Ex parte Lee Kow (C. C. 1908) 161 Fed. 592; In re Lee Gon Yung (C. C. 1911) 111 Fed. 998 (order affirmed [1902] 22 Sup. Ct. 690, 185 U. S. 306, 46 L. Ed.

921); Ex parte Long Lock (D. C. 1909) 173 Fed. 208. On habeas corpus. U. S. v. Gin Fung (1900) 100 Fed. 389, 40 C. C. A. 439 (reversing judgment In re Gin Fung [C. C. 1898] 89 Fed. 153); Same v. Wong Chow (1901) 108 Fed. 376, 47 C. C. A. 406; Wong Sang v. U. S. (1906) 144 Fed. 968, 75 C. C. A. 383 (affirming judgment Ex parte Wong Sang [D. C. 1905] 143 Fed. 147); In re Sing Tuck (C. C. 1903) 126 Fed. 386 (order reversed Sing Tuck v. U. S. [1904] 128 Fed. 592, 63 C. C. A. 199, judgment reversed U. S. v. Sing Tuck [1904] 24 Sup. Ct. 621, 194 U. S. 161, 48 L. Ed. 917); In re Lee Yee Sing (D. C. 1898) 85 Fed. 635; In re Lee Lung (D. C. 1900) 102 Fed. 132 (judgment affirmed Lee Lung v. Patterson [1902] 22 Sup. Ct. 795, 186 U. S. 168, 46 L. Ed. 1108). Where no abuse of discretion is shown. Tang Tun v. Edsell (1912) 32 Sup. Ct. 359, 361, 223 U. S. 673, 56 L. Ed. 606 (affirming judgment In re Tang Tun [1909] 168 Fed. 488, 93 C. C. A. 644); Ex parte Jong Jim Hong (C. C. 1907) 157 Fed. 447; Ex parte Wong Sang (D. C. 1905) 143 Fed. 147 (judgment affirmed Wong Sang v. U. S. [1906] 144 Fed. 968, 75 C. C. A. 383); In re Jem Yuen (D. C. 1910) 188 Fed. 350. But see contrary holding in U. S. v. Chin Fee (D. C. 1899) 94 Fed. 828. Nor can such decision be reviewed in deportation proceedings. U. S. v. Wong Soo Bow (D. C. 1901) 112 Fed. 416. And it is sustained by any fair evidence. Ex parte Wong Yee Toon (D. C. 1915) 227 Fed. 247. Nor can the decision of the secretary of the treasury affirming the action of immigration officers in refusing an alien admission to the United States under a law of congress be reviewed, though clearly erroneous. In re Giovanna (D. C. 1899) 93 Fed. 659; In re Ota (D. C. 1899) 96 Fed. 487.

The only questions into which a court can inquire on habeas corpus seeking the discharge of one from restraint by the collector of customs are whether relator is an alien, and the collector has made a decision. In re Chin Yuen Sing (C. C. 1894) 65 Fed. 571. However, the decision of the appropriate immigration or customs officers in favor of the right of a Chinese alien to enter the country is not final, but the question of his right to enter is subject to re-examination by the courts. Li Sing v. U. S. (1901) 21 Sup. Ct. 449, 451, 180 U. S. 486, 45 L. Ed. 634; In re Li Sing (1898) 86 Fed. 896, 30 C. C. A. 451; Lim Jew v. U. S. (1912) 196 Fed. 736, 116 C. C. A. 364 (affirming judgment U. S. v. Lim Jew [D. C. 1910] 192 Fed. 644); In re Li Foon (C. C. 1897) 80 Fed. 881, appeal dismissed Li Foon v. McCarthy (1897) 96 Fed. 1005, 37 C. C. A. 664.

The decision of commissioners of emigration as to indigent immigrants cannot be reversed by the collector. In re Palagano (C. C. 1889) 38 Fed. 580.

This section does not exclude the jurisdiction of the courts in habeas corpus when, although an appeal to the secretary has been taken, through some rule of procedure in the office the papers will not be sent to him. In re Monaco (C. C. 1898) 86 Fed. 117.

This article has reference to the condition of the laborer at the time of his return, and it is competent for the appropriate department of the government to adopt a regulation requiring an inquiry into the matter by the immigration officers on the laborer's return, notwithstanding his possession of a collector's certificate, obtained when he left the country, as provided for by the treaty; and the adverse decision of such officers is within the terms of Act Aug. 18, 1894, c. 301, 28 Stat. 390, and conclusive, unless reversed on appeal to the secretary. In re Ong Lung (C. C. 1903) 125 Fed. 814.

The court, in investigating the legality of the detention of a Chinese passenger on board a vessel, is not bound or controlled by the decision of the collector of the port, or his deputy, as to the right of such passenger to land. In re Jung Ah Lung (D. C. 1885) 25 Fed. 141, judgment affirmed U. S. v. Jung Ah Lung (1887) 8 Sup. Ct. 663, 124 U. S. 621, 31 L. Ed. 591.

The decision of a customs officer that a Chinese person is not entitled to enter the United States, made after such person has already entered, and without any application for entry, is not such an adjudication as is made conclusive by the statute. U. S. v. Chin Fee (D. C. 1899) 94 Fed. 828.

The fact that the collector disregards the plain provisions of the statute, and refuses the right to land to one having a certificate of his student character, conforming to the requirements of the law, and which is not controverted by the United States, does not give a court jurisdiction to review his decision. In re Lee Ping (D. C. 1900) 104 Fed. 678.

The decision of the inspection officers, excluding one who had been domiciled in this country for a great many years and had resided here before any Chinese exclusion laws were adopted, is not final, but may be tested upon habeas corpus. Ex parte Ng Quong Ming (D. C. 1905) 135 Fed. 378.

A Chinese person, denied admission to the United States after a full and fair hearing, who accepts such decision and deportation without appealing, is concluded thereby, and cannot, by applying for entry at a different port, have a rehearing on the same questions. Ex parte Lung Foot (D. C. 1909) 174 Fed. 70.

Immigration authorities held not to have abused their discretion on the hearing of a Chinese applicant for en-

try. Ex parte Mac Fock (D. C. 1913) 207 Fed. 696.

Review of particular questions.—Where an alien has been denied admission to the United States under the Chinese exclusion act, upon grounds therein prescribed, and has exercised his right of appeal to the secretary of the treasury, by whom the decision of the collector has been affirmed, a court is without power on habeas corpus to review such decision on the ground of irregularity in the taking of the testimony by the collector, or his refusal to receive cumulative evidence offered by the petitioner. The manner of conducting the hearing is not prescribed by the statute, and the discretion of the collector in that regard is not subject to control by the courts. In re Leong Youk Tong (C. C. 1898) 90 Fed. 648.

The right to enforce a penalty against a foreign ship for an alleged violation of the immigration laws is essentially a judicial right, and when it is attempted by an executive officer to constrain the shipmaster to pay a penalty, or when clearance is refused his ship for failure to pay such penalty, the courts are not excluded from consideration of the question by this section. U. S. v. Burke (C. C. 1899) 99 Fed. 895.

—— **Citizenship of Chinese person.**—While this act does not purport to apply to one who is a citizen in fact, it does apply to a decision on the question of citizenship where issues of fact are involved. U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 622, 194 U. S. 161, 48 L. Ed. 917.

The constitutional guaranty of due process of law is not infringed by the provision of this section making the decision of the appropriate department on the right of a person of Chinese descent to enter the United States conclusive on the federal courts in habeas corpus proceedings, in the absence of any abuse of authority, even where citizenship is the ground on which the right of entry is claimed. U. S. v. Ju Toy (1905) 25 Sup. Ct. 644, 646, 198 U. S. 253, 49 L. Ed. 1040.

Where a Chinese person, defendant in a deportation proceeding, alleges citizenship, a determination of such question by the secretary is conclusive, subject only to the jurisdiction of the federal courts to review on habeas corpus whether the person had been accorded a proper hearing. Haw Moy v. North (1910) 183 Fed. 89, 105 C. C. A. 381, writ of certiorari denied (1911) 32 Sup. Ct. 522, 223 U. S. 717, 56 L. Ed. 628; Hoo Choy v. Same (1910) 183 Fed. 92, 105 C. C. A. 384, writ of certiorari denied (1911) 32 Sup. Ct. 522, 223 U. S. 718, 56 L. Ed. 628. It was held in earlier cases that this section does not give final jurisdiction to determine whether a person of Chinese descent is a citizen of the United States, but such question may be determined by the courts on habeas corpus. U. S. v. Burke (C. C. 1899) 99 Fed. 895; In re Tom Yum (D. C. 1894) 64 Fed. 485; U. S. v. Yee Mun Sang (D. C. 1899) 93 Fed. 365; Ex parte Lung Wing Wun (D. C. 1908) 161 Fed. 211. See, also, Sing Tuck v. U. S. (1904) 128 Fed. 592, 63 C. C. A. 199, reversing order In re Sing Tuck (C. C. 1903) 126 Fed. 386, and judgment reversed U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 194 U. S. 161, 48 L. Ed. 917.

Where the question of citizenship was not passed upon by the commissioner of immigration, nor certified to the secretary nor passed upon by him, no question of finality arises. U. S. v. Rodgers (D. C. 1906) 144 Fed. 711.

Fairness of hearing and review thereof.—Rights of applicant of Chinese descent for admission into the United States held not violated by act of inspector in examining the records of the custom house and requiring explanation of apparent rejection. Tang Tun v. Edsell (1912) 32 Sup. Ct. 359, 361, 223 U. S. 673, 56 L. Ed. 606, affirming judgment In re Tang Tun (1909) 168 Fed. 488, 93 C. C. A. 644.

Decision of appeal from rejection of application of a person of Chinese descent for admission into the United States held that of the Secretary of Commerce and Labor, though communicated by a telegram from the assistant secretary. Id.

Finality of decision by Secretary of Commerce and Labor of appeal from decision of inspector rejecting application of person of Chinese descent for admission held not affected by the fact that the department held the case under consideration for less than two days. Id.

Entire case may be taken to the Circuit Court of Appeals for review, where the District Court took jurisdiction of habeas corpus by a person of Chinese descent who had been refused admission into the United States. Id.

Refusal to admit person of Chinese descent into the United States on the ground that he was not born in the United States held not to show a denial of a fair hearing. Id.

Inspector, who has rejected the application of a person of Chinese descent for admission into the United States, held on habeas corpus by such applicant not guilty of unfair or improper conduct. Id.

Inspector, who had rejected application of person of Chinese descent for admission into the United States, held not guilty of improper conduct in forwarding to Secretary of Commerce and Labor papers found by examination of the records of other Chinese persons who arrived with the applicant, which records show his rejection. Id.

An applicant for entry into the United States of Chinese descent, but claiming to be a citizen thereof, is not deprived of his liberty without due process of law by his detention, if he is given a hearing in good faith as to his rights by the appropriate officers of the department, though the officers do not permit him to be present in person or by counsel or to be informed of the nature of the testimony. In re Can Pon (1909) 168 Fed. 479, 93 C. C. A. 635, affirming judgment In re Tang Tun (D. C. 1908) 161 Fed. 618.

Relator, a person of the Chinese race, after entering the United States, was arrested and taken before a commissioner, who, after a hearing, found him to be a native-born citizen, entitled to remain in this country, and entered judgment accordingly. More than seven years afterward, relator left for China on a visit, presenting a certified copy of the judgment to the inspector at the port of departure, who made an indorsement thereon. On his return to the same port, he was denied admission. There was no tangible evidence that he was not the same person who departed, or to whom the commissioner's judgment related, nor to impeach such judgment, which, on the contrary, was proved genuine. Held, that under such facts the inspector was not justified in arbitrarily disregarding it, and that his failure to give it proper credit and weight was a denial to relator of a fair hearing. U. S. v. Chin Len (1911) 187 Fed. 544, 109 C. C. A. 310.

A hearing by an immigration inspector of the case of a person of Chinese descent claiming to be a native-born citizen of, and seeking to enter, the United States, upon testimony and unsworn statements taken ex parte, without giving the applicant or his counsel the opportunity to be present, is not a judicial inquiry nor due process of law. In re Tang Tun (D. C. 1908) 161 Fed. 618, judgment affirmed In re Can Pon (1909) 168 Fed. 479, 93 C. C. A. 635, and judgment reversed In re Tang Tun (1909) 168 Fed. 488, 93 C. C. A. 644, which is affirmed Tang Tun v. Edsell (1912) 32 Sup. Ct. 359, 223 U. S. 673, 56 L. Ed. 606.

Due process.—The Supreme Court of the United States has decided what facts must exist to constitute a Chinese person born within the United States a citizen thereof, and as the Department of Commerce and Labor is charged by the Constitution with the regulation of interstate and foreign commerce, including the coming of persons into the United States, Congress may devolve on the officers of that department the power to determine the existence or nonexistence of the fact on which the right to enter the United States depends. As such persons have a tribunal in which to be heard, a hearing on notice, with opportunity to present evidence, a judgment, and the right of appeal, all according to the law of the land, they are not denied due process of law. In re Sing Tuck (C. C. 1903) 126 Fed. 386, order reversed Sing Tuck v. U. S. (1904) 128 Fed. 592, 63 C. C. A. 199, which judgment was reversed in U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 194 U. S. 161, 48 L. Ed. 917.

Evidence of judgment.—A certificate by a United States commissioner that a Chinese person of a certain name was tried before him and adjudged to have the right to remain in the United States is not competent evidence of a judgment which can be used in bar of a subsequent proceeding. Ex parte Mac Fock (D. C. 1913) 207 Fed. 696.

Authority of secretary.—The Secretary of the Treasury has power to require the production of a certificate, in such form as he may prescribe, evidencing the right of certain subjects of China to enter the United States, and has authority to require that Chinese laborers leaving the United States temporarily shall return to this country only at the ports from which they depart. (1894) 21 Op. Atty. Gen. 68.

The authority vested in the Secretary of the Treasury to determine finally and conclusively whether or not a Chinese person shall be admitted to this country may be exercised in such manner as will keep faith and do no injustice to a Chinese who seeks to return. (1899) 22 Op. Atty. Gen. 324.

The Secretary of the Treasury has authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under regulations of the existing government allowing them to return, as they are not excluded by the extension to the islands of the law and regulations now operative within the United States. (1899) 22 Op. Atty. Gen. 353.

The Secretary of the Treasury has no authority to limit the number of Chinese to be admitted to the United States as participants in the Tennessee Exposition. (1897) 21 Op. Atty. Gen. 518.

Cited without definite application, Kaoru Yamataya v. Fisher (1903) 23 Sup. Ct. 611, 613, 189 U. S. 86, 47 L. Ed. 721; U. S. v. Wong Chung (D. C. 1899) 92 Fed. 141, 145.

§ 4326. (Convention with China, Dec. 8, 1894, Art. I.) Coming of Chinese laborers to United States to be prohibited.

The High Contracting Parties agree that for a period of ten years, beginning with the date of the exchange of the ratifications of this Convention, the coming, except under the conditions herein-

after specified, of Chinese laborers to the United States shall be absolutely prohibited. (28 Stat. 1210.)

A preamble to this convention was as follows:

"Whereas, on the 17th day of November A. D. 1880, and of Kwanghsü, the sixth year, tenth moon, fifteenth day, a Treaty was concluded between the United States and China for the purpose of regulating, limiting, or suspending the coming of Chinese laborers to, and their residence in, the United States;

"And whereas the Government of China, in view of the antagonism and much deprecated and serious disorders to which the presence of Chinese laborers has given rise in certain parts of the United States, desires to prohibit the emigration of such laborers from China to the United States;

"And whereas the two Governments desire to cooperate in prohibiting such emigration, and to strengthen in other ways the bonds of friendship between the two countries;

"And whereas the two Governments are desirous of adopting reciprocal measures for the better protection of the citizens or subjects of each within the jurisdiction of the other:

"Now, therefore, the President of the United States has appointed Walter Q. Gresham, Secretary of State of the United States, as his Plenipotentiary, and His Imperial Majesty, the Emperor of China has appointed Yang Yu, officer of the second rank, Sub-Director of the Court of Sacrificial Worship, and Envoy Extraordinary and Minister Plenipotentiary to the United States of America, as his Plenipotentiary; and the said Plenipotentiaries having exhibited their respective Full Powers found to be in due and good form, have agreed upon the following articles:"

The convention was signed at Washington March 17, 1894; ratification advised by the Senate August 13, 1894; ratified by the President August 22, 1894; ratifications exchanged at Washington December 7, 1894; and ratification proclaimed December 8, 1894.

The Secretary of the Treasury was authorized to make rules and regulations to execute the provisions of this treaty, by Act April 29, 1902, c. 641, § 2, post, § 4338. But the authority possessed and exercised by the Secretary of the Treasury by virtue of any law in relation to the exclusion from and residence within the United States, its territories, and the District of Columbia, of Chinese and persons of Chinese descent, was transferred to and conferred upon the Secretary of Commerce and Labor, by a provision of the act establishing the Department of Commerce and Labor, Act Feb. 14, 1903, c. 552, § 7, ante, § 858.

On the establishment of the Department of Labor the powers and duties of the Secretary of Commerce and Labor, with reference to the laws relating to the exclusion from and residence within the United States, its territories, and the District of Columbia, were transferred to and conferred upon the Secretary of Labor, by Act March 4, 1913, § 8, ante, § 940.

The coming of Chinese laborers to the United States was suspended for a period of ten years by Act May 6, 1882, c. 126, § 1, as amended by Act July 5, 1884, c. 220, ante, § 4290; and the laws in force on the subject were continued for a period of ten years by Act May 5, 1892, c. 60, § 1, ante, § 4318, and were again re-enacted, extended, and continued without limitation and were made applicable to the island territory under the jurisdiction of the United States by Act April 29, 1902, c. 641, § 1, post, § 4337.

Notes of Decisions

Operation of treaty in general.—No abrogation of the judicial procedure for deportation of Chinese laborers provided by section 4299, ante, continued in force by section 4315, ante, for 10 years, was effected by the treaty with China of December 8, 1894, because of its failure to prescribe any such procedure or to continue in force any prior statute thereon, as such provision might be enforced without affecting any treaty right. U. S. v. Lee Yen Tai (1902) 22 Sup. Ct. 629, 631, 185 U. S. 213, 46 L. Ed. 878.

No abrogation of the provisions of section 4293, ante, relative to the evidence which a member of the exempted class of Chinese must produce to secure admission into the United States, was effected by this treaty. Lee Lung v. Patterson (1902) 22 Sup. Ct. 795, 798, 186 U. S. 168, 46 L. Ed. 1108.

No repeal of section 4317, ante, was effected by section 4337, post, on the theory that the former section was inconsistent with this article of the treaty with China of December 8, 1894, in view of article 5 (section 4330, post). Ah How v. U. S. (1904) 24 Sup. Ct. 357, 358, 193 U. S. 65, 48 L. Ed. 619.

A treaty, so far as its provisions are self-executing, repeals a prior statute with which it is in conflict. (1896) 21 Op. Atty. Gen. 347.

The convention of 1894 between the United States and China is a treaty. Id.

—— **Repeal of statutes.**—This convention did not repeal any prior legislation, except the act approved Octo-

ber 1, 1888 (25 Stat. 504). (1894) 21 Op. Atty. Gen. 68.

Chinese persons excluded.—The restriction on immigration of Chinamen, both by the treaty and the act of congress, is confined to Chinese laborers, and persons other than Chinese laborers are not prohibited from landing. In re Jung Ah Lung (D. C. 1885) 25 Fed. 141, 143.

Where children of a Chinese laborer are lawfully permitted to enter this country as students, and thereafter remain continually in the public and private English schools of the country, they thereby acquire the status of students, and the occupation of the father is not imputable to them. U. S. v. Chu Chee (D. C. 1898) 87 Fed. 312.

This treaty is not applicable to a Chinese seaman, who ships as steward aboard a vessel bound for a port in the United States, and who lands with the intention and desire to reship as soon as possible. In re Jam (D. C. 1900) 101 Fed. 989.

Cited without definite application, Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 893, 186 U. S. 193, 46 L. Ed 1121.

§ 4327. (Convention with China, Dec. 8, 1894, Art. II.) Preceding article not to apply to return to United States of certain laborers; certificates of right to return; limitation of time for return.

The preceding Article shall not apply to the return to the United States of any registered Chinese laborer who has a lawful wife, child, or parent in the United States, or property therein of the value of one thousand dollars, or debts of like amount due him and pending settlement. Nevertheless every such Chinese laborer shall, before leaving the United States, deposit, as a condition of his return, with the collector of customs of the district from which he departs, a full description in writing of his family, or property, or debts, as aforesaid, and shall be furnished by said collector with such certificate of his right to return under this Treaty as the laws of the United States may now or hereafter prescribe and not inconsistent with the provisions of this Treaty; and should the written description aforesaid be proved to be false, the right of return thereunder, or of continued residence after return, shall in each case be forfeited. And such right of return to the United States shall be exercised within one year from the date of leaving the United States; but such right of return to the United States may be extended for an additional period, not to exceed one year, in cases where by reason of sickness or other cause of disability beyond his control, such Chinese laborer shall be rendered unable sooner to return—which facts shall be fully reported to the Chinese consul at the port of departure, and by him certified, to the satisfaction of the collector of the port at which such Chinese subject shall land in the United States. And no such Chinese laborer shall be permitted to enter the United States by land or sea without producing to the proper officer of the customs the return certificate herein required. (28 Stat. 1210.)

See note to Art. I of this treaty, ante, § 4326.

Provisions for return of Chinese laborers under conditions similar to those prescribed by this article, and relating to certificates, time for return, etc., were contained in Act Sept. 13, 1888, c. 1015, §§ 6, 7, ante, §§ 4307, 4308.

This article superseded the provisions forbidding the return of Chinese laborers of Act Oct. 1, 1888, c. 1064, § 1, ante, § 4303, in so far as those provisions referred to laborers of the classes described in this article.

Notes of Decisions

1. Return of registered Chinese—Conditions precedent in general.
2. Filing of papers.
3. Return certificate.
4. —— Necessity.
5. —— Accompanying certificate.
6. —— Certificate of disability.
7. Period for return.
8. —— Extension of time.
9. —— "Chinese consul at port of departure."
10. Debt "pending settlement."
11. "Land" and "port."
12. Regulations.

1. Return of registered Chinese—Conditions precedent in general.—Circular No. 52, Bureau of Immigration, Treasury Department, issued May 10, 1902, providing that duly registered Chinese laborers seeking admission to the United States after temporary absence, under this article, must prove

that some one of the conditions mentioned exists at the time of application for readmission, is warranted both by the treaty with China and by the existing laws of the United States. (1902) 24 Op. Atty. Gen. 91.

The facts which entitle a Chinese laborer to return to this country must exist, not only at the time of his departure, but also at the time of his return, and this notwithstanding the fact that he has obtained a return certificate. Id.

2. **Filing of papers.**—A Chinese laborer, who proposes to leave the United States and return, complies with the conditions necessary to demand a certificate if he file the required papers "with the collector of customs of the district from which he departs." Any rule directing him to file such papers with the collector of any other district imposes a condition not warranted by the treaty. (1896) 21 Op. Atty. Gen. 424.

3. **Return certificate.**—The deportation of a Chinaman lawfully admitted to the United States upon a student's certificate, complying with this treaty, cannot be ordered by a federal District Court upon the transcript of the proceedings before the commissioner, which presents merely such student's certificate and a statement that witnesses were examined, without any findings, or the giving of any testimony, although additional separate findings of the commissioner were afterwards filed, where this was done without the order of the court, and there was no consent to a hearing upon such additional findings. Liu Hop Fong v. U. S. (1908) 28 Sup. Ct. 576, 209 U. S. 453, 52 L. Ed. 888.

Chinese subjects resident at the British colony of Hongkong, desiring admittance to the United States under the provisions of this treaty, may now be admitted to the United States upon a certificate signed by the proper representative of the colonial government. (1896) 21 Op. Atty. Gen. 347.

The Treasury Department has no authority to issue a return certificate nunc pro tunc to a Chinese laborer, holding a certificate of residence, who, prior to his leaving this country, has made application under oath for a return certificate, but who has not filed such application with the collector of customs nor received a return certificate, as required by this treaty and the act of September 13, 1888, although such person may have believed that he had done all that was incumbent upon him, and may have been misled by the action of the government officer in affixing to such application his certificate of departure. (1902) 23 Op. Atty. Gen. 619.

A Chinese person possessing a "certificate of residence" as a person other than a laborer, issued to him under the provisions of the act of May 5, 1892, is not entitled thereby to the "return certificate" provided for in this article, which applies only to registered Chinese laborers. (1902) 24 Op. Atty. Gen. 182.

4. —— **Necessity.**—The Treasury Department has no authority to direct the admission of Chinese laborers who fail to obtain before departure from this country the certificate required by this article, although they have complied with all the requirements affecting Chinese who leave the United States, except the procuring of this certificate. (1896) 21 Op. Atty. Gen. 424.

The intent of this article was that each Chinaman should, before leaving the United States, receive from the collector a certificate of his right to return, in order to entitle him to do so. (1896) 21 Op. Atty. Gen. 425.

A Chinese laborer holding a certificate of residence, who, prior to his leaving this country has made application under oath for a return certificate, but who has not filed such application with the collector of customs nor received a return certificate, is not entitled to re-entry, although such application bears upon its face the stamp and signature of the Chinese inspector showing the departure of such laborer on a certain date. (1902) 23 Op. Atty. Gen. 619.

5. —— **Accompanying certificate.**—The return certificate of Chinese persons entitled to return to the United States under the contingency contemplated by this article must be accompanied by a certificate as to the facts, made by the Chinese consul at the port of departure for return to the United States. (1898) 22 Op. Atty. Gen. 72.

6. —— **Certificate of disability.**—As heretofore held by this department ([1896] 21 Op. Atty. Gen. 357; [1901] 23 Op. Atty. Gen. 545), this article displaced the provisions of section 7 of the act of 1888, with regard to the certificate of disability which must be presented by a registered Chinese laborer returning to the United States after an absence of more than one year. (1902) 24 Op. Atty. Gen. 544.

7. **Period for return.**—The "additional period" of one year beyond the period in which a registered Chinese laborer is required to return to this country is only for such time as the disability therein mentioned continues, the extreme limit of such extension under any circumstances being one year. (1903) 25 Op. Atty. Gen. 48.

8. —— **Extension of time.**—The Secretary of the Treasury has no authority to permit the return to the United States of Chinese laborers who left for China after having received the necessary certificates entitling them to return, and availed themselves of the

extension of one year, and who, although they left China in sufficient time to reach the United States within the extended year, were delayed in quarantine by the Canadian authorities, so that in fact they did not reach this country until three days late. (1897) 21 Op. Atty. Gen. 575.

In the extension of one year the treaty has made the sole provision for delay, and in any event the laborer must return to the United States within the additional year. Id.

Neither the Secretary of the Treasury nor the collector has discretion to inquire into causes of further delay or grant an additional extension. Id.

9. —— "Chinese consul at port of departure."—The phrase "Chinese consul at the port of departure" means the consul who represents the Chinese government at the place where the laborer leaves the United States. (1896) 21 Op. Atty. Gen. 357.

10. Debt "pending settlement."—An open book account of over $1,000 of a registered Chinese laborer seeking to return to this country with a Chinese debtor, the existence of which account has been established, is one "pending settlement" under this article. (1903) 24 Op. Atty. Gen. 637.

11. "Land" and "port."—It is necessary for Chinese laborers to leave this country at a place which is a port and is within the jurisdiction of a Chinese consul, and that they should return to it at a port of entry where there is a collector, but as they have the right to go and return by land, these places need not be seaports. (1896) 21 Op. Atty. Gen. 357.

The words "land" and "port" do not limit the right to return to such Chinese as travel by sea. Id.

12. Regulations.—This article has reference to the condition of the laborer at the time of his return, and it is competent for the appropriate department of the government to adopt a regulation requiring an inquiry into the matter by the immigration officers on the laborer's return, notwithstanding his possession of a collector's certificate, obtained when he left the country, as provided for by the treaty, and the adverse decision of such officers is conclusive, unless reversed on appeal to the secretary. In re Ong Lung (C. C. 1903) 125 Fed. 814.

The Secretary of the Treasury has authority to issue regulations requiring Chinese laborers residing in the United States, and who may depart therefrom for temporary sojourn abroad, to return to this country only at the ports from which they depart. (1894) 21 Op. Atty. Gen. 68.

§ 4328. (Convention with China, Dec. 8, 1894, Art. III.) Classes of Chinese permitted to enter; privilege of transit of laborers.

The provisions of this Convention shall not affect the right at present enjoyed of Chinese subjects, being officials, teachers, students, merchants or travelers for curiosity or pleasure, but not laborers, of coming to the United States and residing therein. To entitle such Chinese subjects as are above described to admission into the United States, they may produce a certificate from their Government or the Government where they last resided vised by the diplomatic or consular representative of the United States in the country or port whence they depart.

It is also agreed that Chinese laborers shall continue to enjoy the privilege of transit across the territory of the United States in the course of their journey to or from other countries, subject to such regulations by the Government of the United States as may be necessary to prevent said privilege of transit from being abused. (28 Stat. 1211.)

See note to Art. I of this treaty, ante, § 4326.

Provisions for the coming to the United States of Chinese other than laborers, and for certificates of identity of such persons, were made by Act May 6, 1882, c. 126, § 6, as amended by Act July 5, 1884, c. 220, ante, § 4293, and Act Sept. 13, 1888, c. 1015, § 2, quoted in note to Act Sept. 13, 1888, c. 1015, § 5, ante, § 4312.

The words "laborer" and "merchant" as used in those acts, were defined in Act Nov. 3, 1893, c. 14, § 2, ante, § 4324.

Notes of Decisions

Privileged classes — Merchant. — An adult merchant in China may apply for papers in China which may insure his entry into the United States; but his father, a merchant in the United States, may not procure a paper for him. U. S. v. Quan Wah (1915) 224 Fed. 420, 140 C. C. A. 114.

A Chinese proprietor of a restaurant was duly classified as a merchant and obtained the necessary certificate entitling him to re-enter the United States. At the time of his return to this country such persons were deemed laborers and he was refused admission. Held that as he had been regularly classified

as a merchant the department should not, in fairness, refuse to recognize him as such and he should be admitted. (1899) 22 Op. Atty. Gen. 324.

—— **Certificate.**—A Chinese physician, not a laborer, who resided in this country for several years, registered as permitted by the statute, and afterwards went to China temporarily, intending to return, is entitled to remain in the United States after his entry. U. S. v. Chin Fee (D. C. 1899) 94 Fed. 828.

The treaty of 1894 with China so modifies the requirements of section 4326, ante, that Chinese subjects resident at the British colony of Hongkong, and belonging to one of the privileged classes, may now be admitted to the United States upon a certificate signed by the proper representative of the colonial government. (1896) 21 Op. Atty. Gen. 347.

A person described in his certificate as a "salesman" is not a merchant, who is entitled to remain in the United States. U. S. v. Gin Hing (1904) 76 Pac. 639, 8 Ariz. 416.

Chinese laborers—Right of transit—Regulations.—The regulations of the treasury department of December 8, 1900, governing the privilege of transit by Chinese laborers across the territory of the United States, which require that evidence be produced which shall satisfy the collector of customs "that a bona fide transit only was intended," were authorized by this treaty. Fok Young Yo v. U. S. (1902) 22 Sup. Ct. 686, 185 U. S. 296, 46 L. Ed. 917; Lee Gon Yung v. Same (1902) 22 Sup. Ct. 690, 185 U. S. 306, 46 L. Ed. 921, affirming order In re Lee Gon Yung (C. C. 1901) 111 Fed. 998.

The effect of the second paragraph of this section was to recognize the regulations then in force, and to agree to their continuance, and to such modifications as might be found necessary to prevent the privilege granted from being abused. In re Lee Gon Yung (C. C. 1901) 111 Fed. 998, order affirmed Lee Gon Yung v. U. S. (1902) 22 Sup. Ct. 690, 185 U. S. 306, 46 L. Ed. 921.

Cited without definite application, U. S. v. Foo Duck (1909) 172 Fed. 856, 97 C. A. 204.

§ 4329. (Convention with China, Dec. 8, 1894, Art. IV.) Protection of Chinese in United States.

In pursuance of Article III of the Immigration Treaty between the United States and China, signed at Peking on the 17th day of November, 1880, (the 15th day of the tenth month of Kwanghsü, sixth year) it is hereby understood and agreed that Chinese laborers or Chinese of any other class, either permanently or temporarily residing in the United States, shall have for the protection of their persons and property all rights that are given by the laws of the United States to citizens of the most favored nation, excepting the right to become naturalized citizens. And the Government of the United States reaffirms its obligation, as stated in said Article III, to exert all its power to secure protection to the persons and property of all Chinese subjects in the United States. (28 Stat. 1211.)

See note to Art. I of this treaty, ante, § 4326.

Article III of the treaty of November 17, 1880, 22 Stat. 820, referred to in this article, was as follows: "If Chinese laborers, or Chinese of any other class, now either permanently or temporarily residing in the territory of the United States, meet with ill-treatment at the hands of any other persons, the Government of the United States will exert all its power to devise measures for their protection and to secure to them the same rights, privileges, immunities, and exemptions as may be enjoyed by the citizens or subjects of the most favored nation, and to which they are entitled by treaty."

Notes of Decisions

Protection of Chinese.—Chinese laborers residing in the United States are entitled, like all other aliens, so long as they are permitted by the government to remain in the country, to all the safeguards of the constitution, and to the protection of the laws in regard to their rights of person and of property, and to their civil and criminal responsibility; but, as they have taken no steps to become citizens, and are incapable of becoming such under the naturalization laws, they remain subject to the power of congress to order their expulsion or deportation whenever, in its judgment, such a measure is necessary or expedient for the public interest. Mr. Chief Justice Fuller, Mr. Justice Field, and Mr. Justice Brewer dissenting. Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 149 U. S. 698, 37 L. Ed. 905.

The treaty with China of 1868, which gives to Chinese subjects visiting or residing in the United States the same privileges, immunities, and exemptions

in respect to travel or residence as may there be enjoyed by the citizens and subjects of the most favored nations, is still in full force, except in so far as it has been modified by subsequent treaties or acts of Congress. Ex parte Ng Quong Ming (D. C. 1905) 135 Fed. 378.

Cited without definite application, U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 628, 194 U. S. 161, 48 L. Ed. 917.

§ 4330. (Convention with China, Dec. 8, 1894, Art. V.) Registration of Chinese laborers in United States, and of citizens of United States in China.

The Government of the United States, having by an Act of the Congress, approved May 5, 1892, as amended by an Act approved November 3, 1893, required all Chinese laborers lawfully within the limits of the United States before the passage of the first named Act to be registered as in said Acts provided, with a view of affording them better protection, the Chinese Government will not object to the enforcement of such acts, and reciprocally the Government of the United States recognizes the right of the Government of China to enact and enforce similar laws or regulations for the registration, free of charge, of all laborers, skilled or unskilled, (not merchants as defined by said Acts of Congress), citizens of the United States in China, whether residing within or without the treaty ports.

And the Government of the United States agree that within twelve months from the date of the exchange of the ratifications of this Convention, and annually, thereafter, it will furnish to the Government of China registers or reports showing the full name, age, occupation and number or place of residence of all other citizens of the United States, including missionaries, residing both within and without the treaty ports of China, not including, however, diplomatic and other officers of the United States residing or travelling in China upon official business, together with their body and household servants. (28 Stat. 1211.)

See note to Art. I of this treaty, ante, § 4326.

Act May 5, 1892, c. 60, § 6, as amended by Act Nov. 3, 1893, c. 14, is set forth ante, § 4293.

Notes of Decisions

Repeal of statute.—See Ah How v. U. S. (1904) 24 Sup. Ct. 357, 358, 193 U. S. 65, 48 L. Ed. 619; note under § 4326, ante.

§ 4331. (Convention with China, Dec. 8, 1894, Art. VI.) Time convention to remain in force; notice of termination.

This Convention shall remain in force for a period of ten years beginning with the date of the exchange of ratifications, and, if six months before the expiration of the said period of ten years, neither Government shall have formally given notice of its final termination to the other, it shall remain in full force for another like period of ten years. (28 Stat. 1212.)

See note to Art. I of this treaty, ante, § 4326.

Notes of Decisions

Expiration of treaty.—The treaty with China of 1868, as amended by the treaty of 1880, was in part suspended by the terms of this treaty for a period of 10 years, at the end of which time (China having given notice of its final termination) the treaty obligations between the United States and that empire will be the same as they were immediately before the taking effect of that treaty. (1904) 25 Op. Atty. Gen. 137.

The expiration of the treaty of December 8, 1894, with China will in no way affect the validity of the laws now in force relating to Chinese immigration. Id.

§ 4332. (Act March 3, 1901, c. 845, § 1.) Commissioner for hearing on arrest of Chinese person unlawfully in United States.

It shall be lawful for the district attorney of the district in which any Chinese person may be arrested for being found unlawfully within the United States, or having unlawfully entered the United

States, to designate the United States commissioner within such district before whom such Chinese person shall be taken for hearing. (31 Stat. 1093.)

This section and the two sections next following were part of an act entitled "An act supplementary to an act entitled 'An act to prohibit the coming of Chinese persons into the United States,' approved May 5, Eighteen hundred and ninety-two, and fixing the compensation of commissioners in such cases."

The removal of Chinese persons unlawfully within the United States was provided for, and proceedings thereon were regulated, by Act Sept. 13, 1888, c. 1015, § 13, and Act May 5, 1892, c. 60, §§ 2, 3, ante, §§ 4313, 4316, 4317.

The provisions of this act, like those of Act May 5, 1892, c. 60, to which it was supplementary, and all laws prohibiting and regulating the coming of Chinese into the United States and their residence therein, in force at the time, were re-enacted, extended, and continued, and were also made applicable to the island territory under the jurisdiction of the United States, by Act April 29, 1902, c. 641, § 1, post, § 4337.

Notes of Decisions

Jurisdiction in cases under exclusion laws.—A federal court or commissioner of a district other than that in which a Chinese person was arrested had no jurisdiction of proceedings for his deportation. U. S. v. Chin Tong (1911) 192 Fed. 485, 112 C. C. A. 647.

The provisions of the Chinese exclusion acts, authorizing Chinese persons thought to be unlawfully within the United States to be arrested and taken before a commissioner, confer jurisdiction upon such commissioner to determine the cases, and no order of a district judge referring such cases to the commissioner for hearing is either required or authorized; but a commissioner cannot be required to entertain such cases in the face of an authoritative declination by the officers of the treasury department to pay his lawful fees and disbursements therein. U. S. v. Lee Lip (D. C. 1900) 100 Fed. 842.

Power to enforce their processes not being specially conferred on United States commissioners, there is no authority vested in such commissioners sitting in a Chinese deportation case to compel a witness duly subpœnaed to be sworn and give evidence, but, if the witness refuses, his refusal should be reported to the United States District Court, which has authority to compel the witness to testify by means of contempt proceedings. U. S. v. Tom Wah (D. C. 1908) 160 Fed. 207, order affirmed Tom Wah v. U. S. (1908) 163 Fed. 1008, 90 C. C. A. 178.

The powers and functions of United States commissioners in Chinese deportation proceedings are confined to the issuance of warrants for the apprehension of Chinese persons accused of being unlawfully within the United States, to the decision of questions whether such persons are unlawfully in the United States, to making orders directing those not privileged to remain to be deported, and discharging from arrest those who prove a present right to remain in the United States; such decisions being subject to review on appeal to the District Court of the proper district. Ex parte Lung Wing Wun (D. C. 1908) 161 Fed. 211.

In the hearing of cases arising under the Chinese exclusion laws, the duties of a United States commissioner are judicial rather than ministerial. Consequently the Treasury Department has no authority to issue instructions to United States commissioners as officers charged with the enforcement of these laws. (1900) 23 Op. Atty. Gen. 40.

Designation of commissioner.—This section expressly authorizes the district attorney to designate the commissioner before whom a Chinese person may be brought. Chin Bak Kan v. U. S. (1902) 22 Sup. Ct. 891, 894, 186 U. S. 193, 46 L. Ed. 1121; Chin Ying v. Same (1902) 22 Sup. Ct. 895, 186 U. S. 202, 46 L. Ed. 1126.

Under Act May 28, 1896, c. 252, §§ 7, 9, 29 Stat. 180, 181, the territory of Arizona, though divided for the administration of law and for the holding of district courts with powers of the district and circuit courts of the United States into five judicial districts, with boundaries as established by the justices, is one "district," within this section, and the district attorney of the territory may designate a commissioner within the first judicial district of the territory as the commissioner before whom a Chinese person arrested in the second judicial district shall be taken for hearing. Lee Kim Fong v. U. S. (Ariz. 1910) 108 P. 237.

Cited without definite application, Fong Mey Yuk v. U. S. (1902) 113 Fed. 898, 51 C. C. A. 528.

§ 4333. (Act March 3, 1901, c. 845, § 2.) Fees of commissioners in cases under Chinese exclusion laws.

A United States commissioner shall be entitled to receive a fee

of five dollars for hearing and deciding a case arising under the Chinese-exclusion laws. (31 Stat. 1093.)

See note to section 1 of this act, ante, § 4332.

§ 4334. (Act March 3, 1901, c. 845, § 3.) Warrants of arrest for violations of Chinese exclusion laws.

No warrant of arrest for violations of the Chinese-exclusion laws shall be issued by United States commissioners excepting upon the sworn complaint of a United States district attorney, assistant United States district attorney, collector, deputy collector, or inspector of customs, immigration inspector, United States marshal, or deputy United States marshal, or Chinese inspector, unless the issuing of such warrant of arrest shall first be approved or requested in writing by the United States district attorney of the district in which issued. (31 Stat. 1093.)

See note to section 1 of this act, ante, § 4332.

See, as to transfer of authority, etc., in relation to Chinese exclusion, etc., of collectors of customs and collectors of internal revenue, to other officers, note to Act May 5, 1892, c. 60, § 1, ante, § 4315.

Notes of Decisions

Complaint.—The official titles used in describing the persons entitled to make the complaint were mere descriptio personæ, and hence, where a complaint was made by a Chinese inspector, it was immaterial that it was filed with a United States commissioner outside the inspector's official district. Toy Tong v. U. S. (1906) 146 Fed. 343, 76 C. C. A. 621.

Jurisdiction.—An immigration inspector has jurisdiction to exclude Chinese aliens found and arrested in the act of entering the United States, whether they formally applied for admission or not. Ex parte Wong You (D. C. 1910) 176 Fed. 933, order reversed Wong You v. U. S. (1910) 181 Fed. 313, 104 C. C. A. 535, which is reversed U. S. v. Wong You (1912) 32 Sup. Ct. 195, 223 U. S. 67, 56 L. Ed. 354.

Under this section a federal court or commissioner of a district other than that in which a Chinese person was arrested had no jurisdiction of proceedings for his deportation. U. S. v. Chin Tong (1911) 192 Fed. 485, 112 C. C. A. 647.

Examination by inspector.—A Chinese inspector held authorized to examine a Chinese person as to his right to be in the United States, which examination is admissible, in the absence of an objection and proof of duress or improper influence. Guan Lee v. U. S. (1912) 198 Fed. 596, 117 C. C. A. 304.

Cited without definite application, Ex parte Jim Hong (1914) 211 Fed. 73, 77, 127 C. C. A. 569.

§ 4335. (Res. July 7, 1898, No. 55, § 1.) Exclusion of Chinese from Hawaii; entry into United States from Hawaii prohibited.

There shall be no further immigration of Chinese into the Hawaiian Islands, except upon such conditions as are now or may hereafter be allowed by the laws of the United States; no Chinese, by reason of anything herein contained, shall be allowed to enter the United States from the Hawaiian Islands. (30 Stat. 751.)

This was a provision of the joint resolution for the annexation of Hawaii, cited above.

Provisions for the issuance of certificates of residence to Chinese in Hawaii were made by Act April 30, 1900, c. 339, § 101, post, § 4336.

Notes of Decisions

Entry of Chinese into Hawaii.—The restrictions placed upon the admission to the United States of Chinese persons of the exempt class, and the regulations affecting the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there who may wish to depart with the intention of returning. (1898) 22 Op. Atty. Gen. 249.

—— **Returning Chinese.**—The Secretary of the Treasury has authority to admit to the Hawaiian Islands such Chinese persons as departed therefrom under regulations of the existing government, allowing them to return, as they are not excluded by the extension to the islands of the law and regulations now operative within the United States. (1899) 22 Op. Atty. Gen. 353.

—— **Entry from the United States.**—There is nothing in the resolution of an-

nexation of the Hawaiian Islands, nor in the Organic Act which provides a government for that territory, nor in any law of Congress, which would prevent the entrance into those islands of Chinese, now legally resident in the United States and holding certificates of registration. (1901) 23 Op. Atty. Gen. 487.

Entry of Chinese from Hawaii into the United States.—The restrictions placed upon the admission to the United States of Chinese persons of the exempt class, and the regulations affecting the departure and return to this country of registered Chinese laborers, are to be held applicable to Chinese persons applying for admission to the Hawaiian Islands or to such persons residing there who may wish to depart with the intention of returning. (1898) 22 Op. Atty. Gen. 249.

The question of the right of such Chinese persons to return to the United States from the Hawaiian Islands not decided. (1901) 23 Op. Atty. Gen. 487.

The "further immigration of Chinese" forbidden by the resolution of annexation is immigration from other countries than the United States. Id.

Chinese citizens of United States.—A Chinese person born or naturalized in the Hawaiian Islands prior to the annexation of that territory, and who has not since lost his citizenship, is a citizen of the United States. (1901) 23 Op. Atty. Gen. 345.

Any Chinese person who was a citizen of the republic of Hawaii on August 12, 1898, and who has not since abandoned or been legally deprived of his citizenship, is a citizen of the United States. (1901) 23 Op. Atty. Gen. 352.

All Chinese persons who on August 12, 1898, were citizens of the republic of Hawaii, became citizens of the United States. (1901) 23 Op. Atty. Gen. 509.

—— **Wife and children.**—A Chinese child born in Hawaii in 1885 and taken to China by his mother is entitled to re-enter that territory where his father still resides. (1901) 23 Op. Atty. Gen. 345.

The wife and children of naturalized Chinaman are entitled to enter the territory "by virtue of the citizenship" of the husband and father. Id.

§ 4336. (Act April 30, 1900, c. 339, § 101.) Certificates of residence for Chinese in Hawaii at time of annexation; such Chinese not entitled to enter other parts of United States.

Chinese in the Hawaiian Islands when this Act takes effect may within one year thereafter obtain certificates of residence as required by "An Act to prohibit the coming of Chinese persons into the United States," approved May fifth, eighteen hundred and ninety-two, as amended by an Act approved November third, eighteen hundred and ninety-three, entitled "An Act to amend an Act entitled 'An Act to prohibit the coming of Chinese persons into the United States,' approved May fifth, eighteen hundred and ninety-two," and until the expiration of said year shall not be deemed to be unlawfully in the United States if found therein without such certificates: Provided, however, That no Chinese laborer, whether he shall hold such certificate or not, shall be allowed to enter any State, Territory, or District of the United States from the Hawaiian Islands. (31 Stat. 161.)

This section was part of the act organizing the Territory of Hawaii, cited above. Other sections of the act are set forth or referred to, ante, §§ 3644–3735.

The further immigration of Chinese into Hawaii, except as allowed by the laws of the United States, and the coming of Chinese from Hawaii to the United States, were prohibited by the joint resolution annexing Hawaii, Res. July 7, 1898, No. 55, § 1, ante, § 4335.

Notes of Decisions

Proof of nativity.—Evidence held insufficient to sustain the claim of a person of the Chinese race, arrested for being unlawfully within the territory of Hawaii, that he was a native of such islands. U. S. v. Chun Hoy (1901) 111 Fed. 899, 50 C. C. A. 57.

§ 4337. (Act April 29, 1902, c. 641, § 1, as amended, Act April 27, 1904, c. 1630, § 5.) Laws prohibiting and regulating coming and residence of Chinese re-enacted, extended, and continued, and made applicable to island territory.

All laws in force on the twenty-ninth day of April, nineteen hundred and two, regulating, suspending, or prohibiting the coming of Chinese persons or persons of Chinese descent into the United States,

and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the Act entitled "An Act to prohibit the coming of Chinese laborers into the United States," approved September thirteenth, eighteen hundred and eighty-eight, be, and the same are hereby, re-enacted, extended, and continued, without modification, limitation, or condition; and said laws shall also apply to the island territory under the jurisdiction of the United States, and prohibit the immigration of Chinese laborers, not citizens of the United States, from such island territory to the mainland territory of the United States, whether in such island territory at the time of cession or not, and from one portion of the island territory of the United States to another portion of said island territory: Provided, however, That said laws shall not apply to the transit of Chinese laborers from one island to another island of the same group; and any islands within the jurisdiction of any State or the District of Alaska shall be considered a part of the mainland under this section. (32 Stat. 176. 33 Stat. 428.)

This section and the two sections next following were part of an act entitled "An act to prohibit the coming into and to regulate the residence within the United States, its territories, and all territory under its jurisdiction, and the District of Columbia, of Chinese and persons of Chinese descent."

This section as originally enacted in Act April 29, 1902, c. 641, § 1, cited above, was as follows:

"Be it enacted, &c., That all laws now in force prohibiting and regulating the coming of Chinese persons, and persons of Chinese descent, into the United States, and the residence of such persons therein, including sections five, six, seven, eight, nine, ten, eleven, thirteen, and fourteen of the Act entitled 'An Act to prohibit the coming of Chinese laborers into the United States' approved September thirteenth, eighteen hundred and eighty-eight, be, and the same are hereby, re-enacted, extended, and continued so far as the same are not inconsistent with treaty obligations, until otherwise provided by law, and said laws shall also apply to the island territory under the jurisdiction of the United States, and prohibit the immigration of Chinese laborers, not citizens of the United States, from such island territory to the mainland territory of the United States, whether in such island territory at the time of cession or not, and from one portion of the island territory of the United States to another portion of said island territory: Provided, however, That said laws shall not apply to the transit of Chinese laborers from one island to another island of the same group; and any islands within the jurisdiction of any State or the District of Alaska shall be considered a part of the mainland under this section."

It was amended by Act April 27, 1904, c. 1630, § 5, also cited above, to read as set forth here. The amendment consisted, principally, in the insertion, after the words "re-enacted, extended, and continued," instead of the words of the original section, "so far as the same are not inconsistent with treaty obligations, until otherwise provided by law," of the words, "without modification, limitation, or condition."

The laws previously in force, which were re-enacted, extended, and continued by this section, are set forth ante, §§ 4290–4336.

The treaty obligations mentioned in this section as it was originally enacted are those imposed by the provisions of the Convention of December 8, 1894, ante, §§ 4326–4331.

Further provisions for the enforcement in the insular territory of the laws made applicable thereto by this section, were made by section 4 of this act, post, § 4339, and by Act March 18, 1904, c. 716, § 1, and Act Feb. 6, 1905, c. 453, § 6, ante, § 3911.

The authority, power, and jurisdiction, possessed and exercised by the Secretary of the Treasury by virtue of any law in relation to the exclusion from and residence within the United States, its territories, and the District of Columbia, of Chinese and persons of Chinese descent, were transferred to and conferred upon the Secretary of Commerce and Labor, and the authority, power, and jurisdiction in relation thereto vested by law or treaty in the collectors of customs and the collectors of internal revenue were conferred upon and vested in such officers under the control of the Commissioner-General of Immigration as the Secretary of Commerce and Labor might designate therefor, by provisions of the act establishing the Department of Commerce and Labor, and transferring the immigration service to that department from the Treasury Department, Act Feb. 14, 1903, c. 552, § 7, ante, § 858.

On the creation of the Department of Labor, the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization and the Immigration Service at large were transferred to

that department from the Department of Commerce and Labor, and the duties and powers of the Secretary of Commerce and Labor with reference thereto were transferred to the Secretary of Labor, by Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

No Mongolian laborer is to be employed in the construction of irrigation works by contract under Act June 17, 1902, c. 1093, by a proviso annexed to section 4 of that act, post, § 4703.

Section 3 of this act provided that nothing in the provisions of this act or any other act should be construed to prevent any foreign exhibitor, etc., at any fair or exposition authorized by act of Congress, from bringing into the United States, under contract, mechanics, etc., natives of their respective foreign countries, for the purpose of making preparations for installing or conducting their exhibits or any business under any concession or privilege granted by the fair or exposition. The section, not being restricted to Chinese, but being, in terms, applicable to "any foreign exhibitor, representative, or citizen of any foreign nation," for the admission of their employés, "natives of their respective foreign countries," is set forth, ante, § 4247.

Notes of Decisions

Construction and operation of statute in general.—This section continued in force the provisions of sections 4311–4314, ante, without modification, limitation, or condition, after the expiration of the then existing treaty with China on December 8, 1894. Hong Wing v. U. S. (1906) 142 Fed. 128, 129, 73 C. C. A. 346, writ of certiorari denied (1906) 26 Sup. Ct. 758, 201 U. S. 643, 50 L. Ed. 902.

The act of April 29, 1902, continued existing laws only "so far as the same are not inconsistent with treaty obligations." (1902) 24 Op. Atty. Gen. 544.

The act of April 29, 1902, must be construed with reference to treaty obligations existing between the United States and China at that time, and not with reference to treaty obligations which may exist at a future time. So construed, only such laws as were in conflict with treaty obligations at the time of its passage were not re-enacted or extended. (1904) 25 Op. Atty. Gen. 137.

Only such obligations as arose out of the treaties with China were referred to by the language used in the act of April 29, 1902. Id.

Repeal of statute.—No repeal of section 4317, ante, was affected by this section, on the theory that the former section was inconsistent with article 4 of the treaty with China of December 8, 1894 (section 4329, ante), giving the Chinese the rights of citizens of the most favored nation, in view of article 5 (section 4330, ante). Ah How v. U. S. (1904) 24 Sup. Ct. 357, 358, 193 U. S. 65, 48 L. Ed. 619.

Chinese subject to deportation.—A Chinese alien and subject of the Chinese Empire not of the exempt classes, who knowingly crosses the Canadian border into the United States, but not at or near any established port of entry, with the purpose of entering and remaining in the United States, who is apprehended after he has crossed the boundary and taken before a Commissioner of Immigration at the nearest port of entry and given a hearing as an applicant for entry, and after such hearing is refused admission and ordered returned to Canada, but who cannot be returned because of the demand of the Canadian authorities for a head tax which he refuses to pay, is found, and is unlawfully, in the United States, and subject to arrest and deportation under the Chinese exclusion laws. U. S. v. Yuen Pak Sune (D. C. 1910) 183 Fed. 260, order affirmed Yuen Pak Sune v. U. S. (1911) 191 Fed. 825, 112 C. C. A. 339.

Chinese witness against self.—A proceeding for the deportation of a Chinese laborer not having a certificate entitling him to residence is not a criminal proceeding, and hence it is competent for the government to swear such Chinese person as a witness against himself. Low Foon Yin v. U. S. Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355.

Indictment.—An indictment declaring that all laws now in force prohibiting and regulating the coming of Chinese persons be, and the same are, re-enacted, extended, and continued, so far as the same are not inconsistent with treaty obligations, was not objectionable for failure to charge that the Chinese alleged to have been landed in violation of the act were not entitled to land by virtue of treaty obligations. Sims v. U. S. (1903) 121 Fed. 515, 58 C. C. A. 92.

Cited without definite application, U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 628, 194 U. S. 161, 48 L. Ed. 917; Chain Chio Fong v. U. S. (1904) 133 Fed. 154, 66 C. C. A. 220; Yee Yuen v. Same (1904) 133 Fed. 222, 66 C. C. A. 276; Cheung Him Nin v. Same (1904) 133 Fed. 391, 66 C. C. A. 453; Cheung Pang v. Same (1904) 133 Fed. 392, 66 C. C. A. 454; Lui Lum v. Same (1909) 166 Fed. 106, 92 C. C. A. 90; U. S. v. Foo Duck (1909) 172 Fed. 856, 97 C. C. A. 204; Same v. Jamieson (C. C. 1911) 185 Fed. 165 (error dismissed [1912] 32 Sup. Ct. 532, 223 U. S. 744, 56 L. Ed. 639); Same v. Leo Won Tong (D. C. 1904) 132 Fed. 190; The Frolic (D. C. 1906) 148 Fed. 918, 921; U. S. v. Wood. (D. C. 1909) 168 Fed. 438.

§ 4338. (Act April 29, 1902, c. 641, § 2, as amended, Res. April 28, 1904, No. 34.) Regulations for execution of provisions of acts and of treaty.

The Secretary of [Commerce and] Labor is hereby authorized and empowered to make and prescribe, and from time to time to change, such rules and regulations not inconsistent with the laws of the land as he may deem necessary and proper to execute the provisions of this Act and of the Acts hereby extended and continued and of the treaty of December eighth, eighteen hundred and ninety-four, between the United States and China, and with the approval of the President to appoint such agents as he may deem necessary for the efficient execution of said treaty and said Acts. (32 Stat. 176. 33 Stat. 591.)

See notes to section 1 of this act, ante, § 4337.

This section as originally enacted was amended by Res. April 28, 1904, No. 34, cited above, by striking out the words "Secretary of the Treasury" used therein, and inserting in lieu thereof the words "Secretary of Commerce and Labor," as set forth here.

The words "Commerce and," inclosed in brackets in this section, were superseded by the creation of the Department of Labor, with a Secretary of Labor as the head thereof, and by the transfer to said department from the Department of Commerce and Labor of the Commissioner-General of Immigration, the commissioners of immigration, the Bureau of Immigration and Naturalization and the Immigration Service at large and by the vesting of all duties, powers and authority possessed by the Secretary of Commerce and Labor with reference to those officers and bureaus in the Secretary of Labor, by Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

A provision that in every case where an alien was excluded from admission into the United States under any law or treaty then existing or thereafter made, the decision of the appropriate immigration officers, if adverse to the admission of such alien, should be final, unless reversed on appeal to the Secretary of Commerce and Labor (now the Secretary of Labor), was made by the Immigration Act of Feb. 20, 1907, c. 1134, § 25, ante, § 4274.

The acts hereby extended and continued and the treaty of December 8, 1894, mentioned in this section, are set forth, ante, §§ 4290–4336.

Appropriations for the enforcement of this act were made available for the establishment and maintenance of the Bertillon system of identification at the various ports of entry, by a provision of Act April 28, 1904, c. 1762, § 1, post, § 4340.

The Philippine Commission was authorized and required to make regulations for the enforcement of section 4 of this act in the Philippine Islands by a provision of that section, post, § 4339. And the administration of the immigration laws of the United States in force in the Philippine Islands by the officers of the government thereof was authorized by provisions of Act March 18, 1904, c. 716, § 1, and Act Feb. 6, 1905, c. 453, § 6, ante, § 3911.

Notes of Decisions

Repeal of statute.—This section does not repeal by implication the provisions of the various previous acts in relation to the exclusion of Chinese, vesting in the collector of customs and his deputies the power to enforce the provisions of those laws, but is to be regarded as additional legislation on the subject and in harmony therewith. (1903) 24 Op. Atty. Gen. 561.

Regulations.—The regulations by the department of commerce and labor made under this section, which prevent communication between the parties and others, and provide for an examination in private, with only the government officers and such witnesses as are designated present, do not violate the fifth amendment to the Constitution. U. S. v. Sing Tuck (1904) 24 Sup. Ct. 621, 623, 194 U. S. 161, 48 L. Ed. 917.

Agents.—The agents to be appointed by the Secretary of the Treasury under the above-named act are not to supersede the collectors in the performance of their duties regarding the admission of Chinese, but constitute an additional force to act in co-operation with them in securing an effective enforcement of the law. (1903) 24 Op. Atty. Gen. 561.

Cited without definite application, Nishimura Ekiu v. U. S. (1892) 12 Sup. Ct. 336, 338, 142 U. S. 651, 35 L. Ed. 1146; In re Ong Lung (C. C. 1903) 125 Fed. 814.

§ 4339. (Act April 29, 1902, c. 641, § 4.) Certificates of residence in insular territory; regulations for enforcement of section in Philippine Islands.

It shall be the duty of every Chinese laborer, other than a cit-

izen, rightfully in, and entitled to remain in any of the insular territory of the United States (Hawaii excepted) at the time of the passage of this Act, to obtain within one year thereafter a certificate of residence in the insular territory wherein he resides, which certificate shall entitle him to residence therein, and upon failure to obtain such certificate as herein provided he shall be deported from such insular territory; and the Philippine Commission is authorized and required to make all regulations and provisions necessary for the enforcement of this section in the Philippine Islands, including the form and substance of the certificate of residence so that the same shall clearly and sufficiently identify the holder thereof and enable officials to prevent fraud in the transfer of the same: Provided, however, That if said Philippine Commission shall find that it is impossible to complete the registration herein provided for within one year from the passage of this Act, said Commission is hereby authorized and empowered to extend the time for such registration for a further period not exceeding one year. (32 Stat. 177.)

See notes to section 1 of this act, ante, § 4337.

The laws made applicable to the island territory by section 1 of this act, ante, § 4337, by a proviso to that section were not to apply to the transit of Chinese laborers from one island to another island of the same group.

Provisions for the administration of the immigration laws of the United States in force in the Philippine Islands by the officers of the government thereof, were made by Act March 18, 1904, c. 716, § 1, and Act Feb. 6, 1905, c. 453, § 6, ante, § 3911.

Notes of Decisions

Philippine Islands—Deportation of aliens.—The extension of the Chinese exclusion and immigration laws to the Philippine Islands does not deprive the government of the Philippines of power to authorize the summary executive deportation of an alien. Tiaco v. Forbes (1913) 33 Sup. Ct. 585, 228 U. S. 549, 57 L. Ed. 960.

Advisory authority of collector of customs over enforcement in the Philippine Islands of Chinese exclusion acts held not exceeded by giving the board of inquiry right to determine, subject to review, right to enter under Chinese exclusion acts. Chieng Ah Sui v. McCoy (1915) 36 Sup. Ct. 95.

§ 4340. (Act April 28, 1904, c. 1762, § 1.) Use of Bertillon system of identification to prevent unlawful entry of Chinese into United States.

Enforcement of the Chinese-exclusion Act: To prevent unlawful entry of Chinese into the United States, by the appointment of suitable officers to enforce the laws in relation thereto, and for expenses of returning to China all Chinese persons found to be unlawfully in the United States, including the cost of imprisonment and actual expense of conveyance of Chinese persons to the frontier or seaboard for deportation, six hundred thousand dollars, of which sum one thousand dollars per annum shall be paid to the Commissioner-General of Immigration as additional compensation: Provided, That so much of the amount hereby appropriated, or hereafter appropriated for similar purposes, as may be necessary shall be available for the establishment and maintenance of the Bertillon system of identification at the various ports of entry; but this proviso shall not apply to persons embraced in Article Three of the treaty with China of eighteen hundred and ninety-four. (33 Stat. 478.)

This was a provision of the sundry civil appropriation act for the fiscal year 1905, cited above.

Article 3 of the treaty with China of 1894, mentioned in this provision, Convention Dec. 8, 1894, art. III, is set forth ante, § 4328.

An appropriation for enforcement of the Chinese Exclusion Act, in language similar to the provision of this paragraph preceding the proviso, was made in the sundry civil appropriation act for each subsequent year, included, in recent years, in the appropriation for expenses of regulating immigration. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

§ 4341. (Act June 23, 1913, c. 3, § 1.) Officer to be designated to deport Chinese.

From and after July first, nineteen hundred and thirteen, all Chinese persons ordered deported under judicial writs shall be delivered by the marshal of the district or his deputy into the custody of any officer designated for that purpose by the Secretary of [Commerce and] Labor, for conveyance to the frontier or seaboard for deportation in the same manner as aliens deported under the immigration laws. (38 Stat. 65.)

This was a proviso accompanying an appropriation for the immigration service in the sundry civil appropriation act for the fiscal year 1914, cited above.

The words "Commerce and," inclosed in brackets in this provision, were superseded by the creation of the Department of Labor, with a Secretary of Labor as the head thereof, and by the transfer to said Department from the Department of Commerce and Labor of the Immigration Service, and the vesting of all duties, powers, and authority possessed by the Secretary of Commerce and Labor with reference thereto in the Secretary of Labor, by Act March 4, 1913, c. 141, §§ 1, 3, 8, ante, §§ 932, 934, 940.

CHAPTER C

The Cooly-Trade

This chapter includes the provisions against the cooly-trade of R. S. §§ 2158–2163, and the additional provisions relating thereto of Act March 3, 1875, c. 141, 18 Stat. 477.

Sec.
4342. Cooly-trade prohibited.
4343. Vessels employed in cooly-trade shall be forfeited.
4344. Building vessels to engage in cooly-trade, how punished.
4345. Punishment for engaging in cooly-trade.
4346. This Title not to interfere with voluntary emigration.
4347. Examination of vessels.
4348. Inquiry and certificate by consular officer.
4349. Involuntary transportation of Chinese, Japanese, etc., for purpose of holding to service, punishable; contracts void.
4350. Contracting to supply cooly labor punishable.

§ 4342. (R. S. § 2158.) Cooly-trade prohibited.

No citizen of the United States, or foreigner coming into or residing within the same, shall, for himself or for any other person, either as master, factor, owner, or otherwise, build, equip, load, or otherwise prepare, any vessel, registered, enrolled, or licensed, in the United States, for the purpose of procuring from any port or place the subjects of China, Japan, or of any other oriental country, known as "coolies," to be transported to any foreign port, or place, to be disposed of, or sold, or transferred, for any time, as servants or apprentices, or to be held to service or labor.

Act Feb. 19, 1862, c. 27, § 1, 12 Stat. 340. Act Feb. 9, 1869, c. 24, 15 Stat. 269.

Violations of this section were made punishable by R. S. § 2161, post, § 4345.

Contracting to supply labor of coolies or others brought into the United States in violation of this section, or of any other section prohibiting the cooly trade was made punishable by Act March 3, 1875, c. 141, § 4, post, § 4350.

See, also, the various acts of Congress relating to the exclusion of Chinese laborers, ante, Chapter B, "Exclusion of Chinese."

Notes of Decisions

Charter to carry Chinese coolies.—A charter to carry Chinese coolies between foreign ports is not void on the ground of immorality, when made before the law prohibited American vessels from engaging in such business. The Hound (D. C. 1864) Fed. Cas. No. 6,731.

Cited without definite application, U. S. v. Mosby (1890) 10 Sup. Ct. 327, 330, 133 U. S. 273, 33 L. Ed. 625.

§ 4343. (R. S. § 2159.) Vessels employed in cooly-trade shall be forfeited.

If any vessel, belonging in whole or in part to a citizen of the United States, and registered, enrolled, or otherwise licensed therein, be employed in the "cooly-trade," so called, contrary to the provisions of the preceding section, such vessel, her tackle, apparel, furniture, and other appurtenances, shall be forfeited to the United States, and shall be liable to be seized, prosecuted, and condemned in any of the circuit courts or district courts of the United States for the district where the vessel may be found, seized, or carried.

Act Feb. 19, 1862, c. 27, § 1, 12 Stat. 340.

§ 4344. (R. S. § 2160.) Building vessels to engage in cooly-trade, how punished.

Every person who so builds, fits out, equips, loads, or otherwise prepares, or who sends to sea, or navigates, as owner, master, factor, agent, or otherwise, any vessel, belonging in whole or in part to a citizen of the United States, or registered, enrolled, or licensed within the same, knowing or intending that such vessel is to be or may be employed in that trade, contrary to the provisions of section twenty-one hundred and fifty-eight, shall be liable to a fine not exceeding two thousand dollars, and be imprisoned not exceeding one year.

Act Feb. 19, 1862, c. 27, § 2, 12 Stat. 340.

R. S. § 2158, mentioned in this section, is set forth ante, § 4342.

§ 4345. (R. S. § 2161.) Punishment for engaging in cooly-trade.

Every citizen of the United States who, contrary to the provisions of section twenty-one hundred and fifty-eight, takes on board of any vessel, or receives or transports any such subjects as are described in that section, for the purpose of disposing of them in any way as therein prohibited, shall be liable to a fine not exceeding two thousand dollars and be imprisoned not exceeding one year.

Act Feb. 19, 1862, c. 27, § 3, 12 Stat. 340.

R. S. § 2158, mentioned in this section, is set forth ante, § 4342.

Transporting subjects of China, Japan, etc., without their consent, for the purpose of holding them to service, was made punishable by Act March 3, 1875, c. 141, § 2, post, § 4349.

Holding or returning a person to peonage, or obstructing or preventing the enforcement of the provision relating thereto, was made punishable by R. S. §§ 5526, 5527, which were substantially re-enacted in Crim. Code, §§ 268, 269, post, §§ 10441, 10442, and repealed by Crim. Code, § 341, post, § 10598.

Bringing into the United States any person inveigled or forcibly kidnapped in any other country, with intent to hold such person in confinement or to any involuntary service, or selling into involuntary servitude any person, or holding to involuntary servitude any person so sold or brought, was made punishable by Act June 23, 1874, c. 464, 18 Stat. 251, which was substantially re-enacted in Crim. Code, § 271, post, § 10444, and was repealed by Crim. Code, § 341, post, § 10515.

§ 4346. (R. S. § 2162.) This Title not to interfere with voluntary emigration.

Nothing herein contained shall be deemed to apply to any voluntary emigration of the subjects specified in section twenty-one hundred and fifty-eight, or to any vessel carrying such person as passenger on board the same, but a certificate shall be prepared and signed by the consul or consular agent of the United States residing at the port from which such vessel may take her departure, containing the name of such person, and setting forth the fact of his voluntary emigration from such port, which certificate shall be given to the master of such vessel; and the same shall not be given until such consul or consular agent is first personally satisfied by evidence of the truth of the facts therein contained.

Act Feb. 19, 1862, c. 27, § 4, 12 Stat. 341.

R. S. § 2158, referred to in this section, is ante, § 4342.

The consular certificate provided for by this section was not to be given

when the immigrant was found to have entered into a contract or agreement for a term of service within the United States for lewd and immoral purposes, by Act March 3, 1875, c. 141, § 1, post, § 4348.

Notes of Decisions

Operation of statute.—This section only applies to consuls situated in China, Japan, and other Oriental countries, in regard to certificates respecting voluntary immigration. U. S. v. Johnson (C. C. 1881) 7 Fed. 453, 454.

Fees of consul.—This section does not refer to foreign vessels. U. S. v. Mosby (1890) 10 Sup. Ct. 327, 330, 133 U. S. 273, 33 L. Ed. 625.

Fees received from foreign vessels for the examination of Chinese emigrants, not being "for official services," are the private emoluments of the consul. Mosby v. U. S. (1888) 24 Ct. Cl. 1.

§ 4347. (R. S. § 2163.) Examination of vessels.

The President is empowered, in such way and at such time as he may judge proper, to direct the vessels of the United States, and the masters and commanders thereof, to examine all vessels navigated or owned in whole or in part by citizens of the United States, and registered, enrolled, or licensed under the laws thereof, whenever in the judgment of such master or commanding officer, reasonable cause exists to believe that such vessel has on board any subjects of China, Japan, or other oriental country, known as "coolies;" and, upon sufficient proof that such vessel is employed in violation of the preceding provisions, to cause her to be carried, with her officers and crew, into any port or district within the United States, and delivered to the marshal of such district, to be held and disposed of according to law.

Act Feb. 19, 1862, c. 27, § 6, 12 Stat. 341.

Provisions for exclusion of Chinese laborers, etc., are collected in Chapter B, "Exclusion of Chinese."

Cited without definite application, Illinois Steel Co. v. Budzisz (C. C. 1897) 82 Fed. 160, 161.

§ 4348. (Act March 3, 1875, c. 141, § 1.) Inquiry and certificate by consular officer.

In determining whether the immigration of any subject of China, Japan, or any Oriental country, to the United States, is free and voluntary, as provided by section two thousand one hundred and sixty-two of the Revised Code, title "Immigration," it shall be the duty of the consul-general or consul of the United States residing at the port from which it is proposed to convey such subjects, in any vessels enrolled or licensed in the United States, or any port within the same, before delivering to the masters of any such vessels the permit or certificate provided for in such section, to ascertain whether such immigrant has entered into a contract or agreement for a term of service within the United States, for lewd and immoral purposes; and if there be such contract or agreement, the said consul-general or consul shall not deliver the required permit or certificate. (18 Stat. 477.)

This section and the two sections immediately following were part of an act entitled "An act supplementary to the acts in relation to immigration."

Sections 3 and 5 of this act prohibited the importation and immigration of convicts and of women for purposes of prostitution, and were superseded by similar provisions in Act March 3, 1903, c. 1012, §§ 2, 3, which were repealed by the Immigration Act of Feb. 20, 1907, c. 1134, § 43, ante, § 4289.

R. S. § 2162, mentioned in this section, is set forth ante, § 4346.

§ 4349. (Act March 3, 1875, c. 141, § 2.) Involuntary transportation of Chinese, Japanese, etc., for purpose of holding to service, punishable; contracts void.

If any citizen of the United States, or other person amenable to the laws of the United States, shall take, or cause to be taken or transported, to or from the United States any subject of China, Japan, or any Oriental country, without their free and voluntary

consent, for the purpose of holding them to a term of service, such citizen or other person shall be liable to be indicted therefor, and, on conviction of such offense, shall be punished by a fine not exceeding two thousand dollars and be imprisoned not exceeding one year; and all contracts and agreements for a term of service of such persons in the United States, whether made in advance or in pursuance of such illegal importation, and whether such importation shall have been in American or other vessels, are hereby declared void. (18 Stat. 477.)

See note to section 1 of this act, ante, § 4348.

§ 4350. (Act March 3, 1875, c. 141, § 4.) Contracting to supply cooly labor punishable.

If any person shall knowingly and willfully contract, or attempt to contract, in advance or in pursuance of such illegal importation, to supply to another the labor of cooly or other person brought into the United States in violation of section two thousand one hundred and fifty-eight of the Revised Statutes, or of any other section of the laws prohibiting the cooly-trade or of this act, such person shall be deemed guilty of a felony, and, upon conviction thereof, in any United States court, shall be fined in a sum not exceeding five hundred dollars and imprisoned for a term not exceeding one year. (18 Stat. 477.)

See note to section 1 of this act, ante, § 4348.

Notes of Decisions

Coolie trade.—The coolie trade is not within the acts of Congress prohibiting the slave trade. (1859) 9 Op. Atty. Gen. 282.

TITLE XXX

NATURALIZATION

Sec.

4351. Exclusive jurisdiction to naturalize aliens conferred on courts specified; jurisdiction restricted to residents within judicial district; blank forms to be furnished; numbering and printing of certificates of naturalization.

4352. Proceedings for naturalization.
- (1) Declaration of intention; requisites and contents; prior declarations.
- (2) Petition for admission to citizenship; requisites and contents; verification by witnesses; filing certificate of arrival in United States and declaration of intention.
- (3) Declaration on oath in open court to support constitution and laws of United States, and renunciation of other allegiance.
- (4) Evidence of residence, character, etc.; witnesses.
- (5) Renunciation of hereditary title, order of nobility, etc.
- (6) Naturalization of widows and minor children of aliens dying after declaration of intention before being actually naturalized.

4353. Notice of filing of petition, hearing thereon, etc.; subpœnas for witnesses.

4354. Time for filing petition and for final action thereon; change of name of alien on his naturalization.

4355. Aliens honorably discharged from military service.

4356. Aliens honorably discharged from service in Navy or Marine Corps.

4356a. Aliens honorably discharged from service in Navy or Marine Corps or in Revenue-Cutter Service.

4357. Naturalization of seamen.

4358. Aliens of African nativity and descent.

4359. Chinese not to be naturalized.

4360. Residence of five years in United States.

4361. Residence in Hawaiian Islands equivalent to residence in United States.

4362. Alien enemies not admitted.

4363. Persons disbelieving or opposed to organized government, etc., or advocating, etc., the unlawful assaulting or killing of officers of government, or polygamists, not to be naturalized.

4364. Persons who cannot speak English language not to be naturalized; physical inability; prior declarations of intention; aliens making homestead entries on public lands.

4365. Naturalization of wife making homestead entry and minor children of aliens becoming insane after declaration of intention before being actually naturalized.

4366. Naturalization of persons not citizens who owe permanent allegiance to United States.

4367. Children of persons naturalized under certain laws to be citizens.

4368. Final hearing on petition in open court; record of final order; examination of applicant and witnesses.

4369. Evidence of residence in petition and at hearing.

4370. Appearance by United States and proceedings in opposition to granting of petition.

4371. Duties of clerks of courts; duplicates, etc., of declarations, certificates, petitions, etc.; penalty for failure to comply with provisions; responsibility for blank certificates of citizenship.

4372. Fees of clerks of courts; disposition of fees collected; deposit by petitioner for expenses and fees of witnesses; compensation from fees for additional clerical force required.

4373. Binding declaration of intention and petitions for naturalization as records of court; reference in certificate of naturalization to record of petition and stub of certificate.

4374. Cancellation of certificates fraudulently or illegally procured, or of certificates of persons taking permanent residence in foreign country; proceedings, order and judgment, records, etc.; certificates issued under prior laws.

4375. Issuance of certificate of citizenship contrary to provisions of act, a felony; punishment.

4376. Neglect of clerk or other officer to account for or pay over balance of moneys received for

Sec.
naturalization proceedings, embezzlement; punishment.
4377. Demand, etc., or receipt by clerk, etc., of fees or moneys other than those specified in act, a misdemeanor; punishment.
4378. False certification by clerk, etc., of appearance, oath, acknowledgment, etc., punishable.
4379. Procuring naturalization illegally punishable, and on conviction thereof, order admitting to citizenship to be adjudged void; aiding, etc., unauthorized proceedings for naturalization, or procuring or giving false testimony, etc., therein, punishable.
Sec.
4380. Limitation of prosecutions for crimes arising under provisions of act.
4381. Repeal.
4382. Forms; declaration of intention; petition for naturalization; affidavit of witnesses; certificate of naturalization; stub of certificate.
4383. Regulations for execution of provisions of act; certified copies of papers, etc., and records required under act, as evidence.
4384. Naturalization certificates failing to show compliance with requirements of Act March 3, 1903, c. 1012, § 39, to be valid upon compliance therewith.

§ 4351. (Act June 29, 1906, c. 3592, § 3.) Exclusive jurisdiction to naturalize aliens conferred on courts specified; jurisdiction restricted to residents within judicial district; blank forms to be furnished; numbering and printing of certificates of naturalization.

Exclusive jurisdiction to naturalize aliens as citizens of the United States is hereby conferred upon the following specified courts: United States circuit and district courts now existing, or which may hereafter be established by Congress in any State, United States district courts for the Territories of Arizona, New Mexico, Oklahoma, Hawaii, and Alaska, the supreme court of the District of Columbia, and the United States courts for the Indian Territory; also all courts of record in any State or Territory now existing, or which may hereafter be created, having a seal, a clerk, and jurisdiction in actions at law or equity, or law and equity, in which the amount in controversy is unlimited.

That the naturalization jurisdiction of all courts herein specified, State, Territorial, and Federal, shall extend only to aliens resident within the respective judicial districts of such courts.

The courts herein specified shall, upon the requisition of the clerks of such courts, be furnished from time to time by the Bureau of [Immigration and] Naturalization with such blank forms as may be required in the naturalization of aliens, and all certificates of naturalization shall be consecutively numbered and printed on safety paper furnished by said Bureau. (34 Stat. 596.)

This section was part of the Naturalization Act of 1906, entitled "An act to establish a Bureau of Immigration and Naturalization, and to provide for a uniform rule for the naturalization of aliens throughout the United States."

The words "Immigration and" inclosed in brackets in this section, were superseded by the division of the Bureau of Immigration and Naturalization, theretofore in the Department of Commerce and Labor, into two bureaus to be known as the Bureau of Immigration and the Bureau of Naturalization in the Department of Labor, by the act creating the latter department, Act March 4, 1913, c. 141, § 3, ante, § 934.

Of the sections of the act preceding this section, section 1 changed the designation of the Bureau of Immigration in the Department of Commerce and Labor to Bureau of Immigration and Naturalization, gave it charge of all matters concerning naturalization of aliens, and provided for registry of alien immigrants. Section 2 provided for the furnishing of the offices and for additional assistants, clerks, and other employés for the Bureau of Immigration and Naturalization, for the discharge of the duties imposed upon it by this act. Section 1 is set forth ante, § 963. Section 2 is omitted, as temporary, merely.

Of the sections of the act following this section, sections 4–15, 18, 20–24, 26–28, 30, are set forth post under this title.

Sections 16, 17, of the act, which made punishable forging, etc., certificates of citizenship, and engraving, etc., plates for counterfeiting such certificates, and other offenses in connection therewith, were incorporated in the Criminal Code, in sections 74, 75, thereof, post, §§ 10242, 10243, and were repealed by section 341 thereof, post, § 10515.

Section 19 of the act, which made punishable the having possession of any blank certificate of citizenship with intent unlawfully to use the same, was incorporated in the Criminal Code, in section 77 thereof, post, § 10245, and was repealed by section 341 thereof, post, § 10515.

Section 25 of the act provided that the existing naturalization laws should remain in effect for the purpose of the prosecution of offenses against them committed prior to the time this act should take effect. It is omitted, as temporary merely.

Section 29 of the act made an appropriation to carry its provisions into effect. It is omitted, as temporary merely.

Section 31 of the act provided that it should take effect ninety days from the date of its passage, with a proviso that sections 1, 2, 28, and 29 should go into effect from and after the passage of the act.

Previous provisions as to the jurisdiction of courts to admit aliens to citizenship were contained in R. S. § 2165, which was expressly repealed by section 26 of this act, post, § 4381.

Provisions validating acts of certain courts with respect to naturalization proceedings are referred to in the notes to Act June 29, 1906, c. 3624, § 1, post, § 4384.

For offenses relating to naturalization, see post, §§ 10242–10249.

Naturalized citizens are entitled to protection abroad under R. S. § 2000, ante, § 3956.

Notes of Decisions

Jurisdiction.—For the purpose of the naturalization acts all courts having jurisdiction under the acts are federal courts. U. S. v. Aakervik (D. C. 1910) 180 Fed. 137; Ex parte Knowles (1855) 5 Cal. 300; In re Christern (1878) 43 N. Y. Super. Ct. (11 Jones & S.) 523; Eldredge v. Salt Lake County (Utah, 1910) 106 P. 939; State v. Superior Court of King County (1913) 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

The jurisdiction of the district court in matters of naturalization does not depend on facts stated, but is derived from the federal statutes, and whether the court will grant naturalization papers in a given case depends on the facts; but it has jurisdiction over the matter, even if the facts be insufficient for a favorable result to the application. U. S. v. Walsh (C. C. 1884) 22 Fed. 644, 649.

Courts, in exercising jurisdiction to admit aliens to citizenship, act judicially, and their proceedings must be liberally construed; every intendment being in their favor. In re Symanowski (C. C. 1909) 168 Fed. 978.

The jurisdiction of courts in naturalizing aliens is conferred by statute and must be exercised in a special and summary manner. Ex parte Lange (D. C. 1912) 197 Fed. 769.

A judgment of naturalization obtained in the circuit court of Porto Rico under R. S. § 2165, which has since been repealed by Act June 29, 1906 (34 Stat. 596), cannot properly at this time be questioned on the ground that the court did not have jurisdiction over the naturalization of aliens. (1912) 29 Op. Atty. Gen. 521.

The powers conferred on the courts to naturalize foreigners are judicial rather than ministerial, and must be exercised by the courts rather than by the clerks thereof. In re Clark (N. Y. 1854) 18 Barb. 444.

—— **Jurisdiction of state courts.**—It is not necessary that the court should have general common-law jurisdiction; but, if any part of its jurisdiction answers that designation, it is sufficient. Levin v. U. S. (1904) 128 Fed. 826, 832, 63 C. C. A. 476; In re Wolf (C. C. 1911) 188 Fed. 519, 520; Ex parte Tweedy (D. C. 1884) 22 Fed. 84, 85; U. S. v. Nechman (D. C. 1910) 183 Fed. 788; People v. McGowan (1875) 77 Ill. 644, 20 Am. Rep. 254; Morgan v. Dudley (1858) 56 Ky. (18 B. Mon.) 693, 68 Am. Dec. 735. CONTRA, Mills v. McCabe (1867) 44 Ill. 194.

The naturalization acts of the United States, from the first one in 1790, have conferred authority on state courts to admit aliens to citizenship. Holmgren v. U. S. (1909) 30 Sup. Ct. 588, 589, 217 U. S. 509, 54 L. Ed. 861, 19 Ann. Cas. 778; Crœsus M., M. & S. Co. v. Colorado Land & Mineral Co. (C. C. 1884) 19 Fed. 78; State v. Penney (1850) 10 Ark. (5 Eng.) 621; Rump v. Commonwealth (1858) 30 Pa. 475; Eldredge v. Salt Lake County (1910) 37 Utah, 188, 106 Pac. 939.

A court whose judge acts as its only clerk is not a court having a clerk. Ex parte Cregg (C. C. 1854) Fed. Cas. No. 3,380; In re Dean (1891) 83 Me. 489, 22 Atl. 385, 13 L. R. A. 229; State v. Webster (1878) 7 Neb. 469; State v. Whittemore (1870) 50 N. H. 245, 9 Am. Rep. 196; Hook v. Worcester & U. R. R. (1878) 58 N. H. 251.

A court of record having common-law jurisdiction within this section is one having a judge, clerk, and seal. Morgan v. Dudley (1857) 56 Ky. (18 B. Mon.) 693, 68 Am. Dec. 735; Ex parte Gladhill (1844) 49 Mass. (8 Metc.) 168; State v. Webber (1905) 105 N. W. 490, 96 Minn. 422, 13 Am. St. Rep. 630; State v. Webster (1878) 7 Neb. 469.

Courts of record having common-law jurisdiction are those which have the power to punish offenses, enforce rights, or redress wrongs recognized by the common law, or courts which are governed by the principles and rules of

the common law, and distinguish courts which have some common-law jurisdiction from those which have no jurisdiction save in equity, in admiralty, or in matters not involving rights under the common law. Levin v. U. S. (1904) 128 Fed. 826, 63 C. C. A. 476; In re Wolf (C. C. 1911) 188 Fed. 519; State v. Weber (1905) 105 N. W. 490, 96 Minn. 422, 113 Am. St. Rep. 630.

Courts held not to have jurisdiction: The probate court of Shelby county, Tennessee, established under Code, § 316h. Ex parte Tweedy (D. C. 1884) 22 Fed. 84. The county courts of Tennessee. In re Wolf (C. C. 1911) 188 Fed. 519. The supreme court of California, its powers being exclusively appellate. Ex parte Knowles (1855) 5 Cal. 300. The county courts of Illinois, prior to the constitution of 1870. Knox v. Davis (1872) 63 Ill. 405. The criminal district court of Louisiana. State v. Baker (1899) 26 So. 102, 51 La. Ann. 1243. The supreme court of South Carolina. Ex parte McKenzie (1897) 28 S. E. 468, 51 S. C. 244. The marine court of the city of New York. Mills v. McCabe (1867) 44 Ill. 194.

Courts held to have jurisdiction: The court of criminal correction, established by Rev. St. Mo. 1879, p. 1511. U. S. v. Lehman (D. C. 1889) 39 Fed. 49, 50. The St. Louis Court of Appeals. Levin v. U. S. (1904) 128 Fed. 826, 63 C. C. A. 476. The probate courts of Ohio. Ex parte Smith (C. C. 1859) Fed. Cas. No. 12,969. The city court of Yonkers. U. S. v. Power (C. C. 1877) Fed. Cas. No. 16,080. The district courts of California. Ex parte Knowles (1855) 5 Cal. 300. The county courts of California. In re Conner (1870) 39 Cal. 98, 2 Am. Rep. 427. The criminal court of St. Louis. People v. McGowan (1875) 77 Ill. 644, 20 Am. Rep. 254. County courts of Illinois. Dale v. Irwin (1875) 78 Ill. 170. The city court of East St. Louis. U. S. v. Hrasky (1909) 88 N. E. 1031, 240 Ill. 560, 130 Am. St. Rep. 288, 16 Ann. Cas. 279. The police court in Lowell, Mass. Ex parte Gladhill (1844) 49 Mass. (8 Metc.) 168. The New York Supreme Court. In re Guliano (D. C. 1907) 156 Fed. 420. The county courts of New York. People v. Sweetman (N. Y. 1857) 3 Parker, Cr. R. 358; Same v. Pease (N. Y. 1860) 30 Barb. 588. The surrogates' courts of New York. In re Harstrom (N. Y. 1879) 7 Abb. N. C. 391. The court of nisi prius in Philadelphia. Commonwealth v. Lee (Pa. 1869) 1 Brewst. 273; Moran v. Rennard (1870) 3 Brewst. 601. The county courts of Texas. Ex parte Burkhardt (1856) 16 Tex. 470.

The act of 1802 enacted "that every court of record in any individual state, having common-law jurisdiction and a seal, and clerk or prothonotary, shall be considered as a district court within the meaning of this act," and such courts have power to naturalize. Ex parte Knowles (1855) 5 Cal. 300.

State courts having inferior and limited powers, although made courts of record by statute, have only statute and not common-law jurisdiction, and therefore have no power to grant naturalization. Id.

Judgment of a court of common pleas of another state, having a judge, clerk, and seal, admitting an alien to citizenship, will be presumed to have been made by a court of record having common-law jurisdiction. State v. Weber (1905) 105 N. W. 490, 96 Minn. 422, 113 Am. St. Rep. 630.

Const. Wash. art. 4, § 6, expressly conferring the power of naturalization upon superior courts, is in harmony with the United States statutes, authorizing state courts to naturalize aliens, and was not intended to reserve to the state any power already in the United States. State v. Libby (Wash. 1907) 92 P. 350.

Residence of aliens.—The import of the provision that the naturalization jurisdiction of all courts shall extend only to aliens resident within the respective judicial districts of such courts is that an alien applicant shall reside in the county where the court acting on the application is held. U. S. v. Johnson (C. C. 1908) 181 Fed. 429.

Such jurisdiction extends only to aliens resident within the territorial jurisdiction of the court; and a circuit court of Michigan, which has jurisdiction only within the county in which it sits, cannot admit to citizenship an alien resident in another county, although within the same judicial circuit, throughout which the same judge presides. U. S. v. Schurr (D. C. 1908) 163 Fed. 648; Same v. Wayer, Id. 650.

A district court of the state of Kansas has jurisdiction to naturalize aliens resident in the county where it is sitting only, its territorial jurisdiction while so sitting being restricted to that county by Dassler's Gen. St. Kan. 1905, § 2010. U. S. v. Johnson (C. C. 1908) 181 Fed. 429. But where jurisdiction is not limited to the counties composing the district, and the courts of such counties are presided over by the same judge, it is not a fatal objection to the naturalization of an alien resident of such district by the court while sitting in one county that the alien was a resident of another county. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

The court has no jurisdiction to naturalize an alien not residing in the judicial district when filing his declaration of intention. In re Pearlman (D. C. 1915) 226 Fed. 60.

An alien held not a resident in the judicial district of a United States District Court, within Naturalization Act, and the court was without jurisdiction to naturalize him. Id.

Removal of petitioner's residence after filing of notice of final hearing by the clerk does not deprive the Supreme Court in the district in which he resided at the time of the filing of the petition of jurisdiction to make a final order admitting to citizenship. In re Burke (1908) 110 N. Y. S. 36, 58 Misc. Rep. 3; U. S. v. Breen (1909) 120 N. Y. Supp. 304, 135 App. Div. 824.

Cited without definite application, Spratt v. Spratt (1830) 4 Pet. 393, 407, 7 L. Ed. 897; Ex parte Clarke (1879) 100 U. S. 399, 412, 25 L. Ed. 715; Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1028, 149 U. S. 698, 37 L. Ed. 905; U. S. v. Wong Kim Ark (1898) 18 S. Ct. 456, 466, 169 U. S. 649, 42 L. Ed. 890; Johannessen v. U. S. (1912) 32 S. Ct. 613, 615, 225 U. S. 227, 56 L. Ed. 1066; Schmidt v. Same (1904) 133 Fed. 257, 66 C. C. A. 389; Moore v. Same (1906) 144 Fed. 962, 75 C. C. A. 670; Law Foon Yin v. United States Immigration Com'r (1906) 145 Fed. 791, 76 C. C. A. 355; U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389; Same v. Balsara (1910) 180 Fed. 694, 103 C. C. A. 660; Same v. Peterson (1910) 182 Fed. 289, 104 C. C. A. 571; In re Camille (C. C. 1880) 6 Fed. 256; U. S. v. Severino (C. C. 1903) 125 Fed. 949; In re Halladjian (C. C. 1909) 174 Fed. 834; U. S. v. Spohrer (C. C. 1910) 175 Fed. 440; In re Lind (C. C. 1911) 192 Fed. 209; U. S. v. Lehman (D. C. 1889) 39 Fed. 768, 770; In re Shearer (D. C. 1908) 158 Fed. 839; In re Gross (D. C. 1908) 160 Fed. 739; U. S. v. Mansour (D. C. 1908) 170 Fed. 671; Same v. Dupont (C. C. 1910) 176 Fed. 823; Same v. Plaistow (D. C. 1910) 189 Fed. 1006.

§ 4352. (Act June 29, 1906, c. 3592, § 4, as amended, Act June 25, 1910, c. 401, § 3.) Proceedings for naturalization.

An alien may be admitted to become a citizen of the United States in the following manner and not otherwise:

(1) Declaration of intention; requisites and contents; prior declarations.

First. He shall declare on oath before the clerk of any court authorized by this Act to naturalize aliens, or his authorized deputy, in the district in which such alien resides, two years at least prior to his admission, and after he has reached the age of eighteen years, that it is bona fide his intention to become a citizen of the United States, and to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly, by name, to the prince, potentate, state, or sovereignty of which the alien may be at the time a citizen or subject. And such declaration shall set forth the name, age, occupation, personal description, place of birth, last foreign residence and allegiance, the date of arrival, the name of the vessel, if any, in which he came to the United States, and the present place of residence in the United States of said alien: Provided, however, That no alien who, in conformity with the law in force at the date of his declaration, has declared his intention to become a citizen of the United States shall be required to renew such declaration.

(2) Petition for admission to citizenship; requisites and contents; verification by witnesses; filing certificate of arrival in United States and declaration of intention.

Second. Not less than two years nor more than seven years after he has made such declaration of intention he shall make and file, in duplicate, a petition in writing, signed by the applicant in his own handwriting and duly verified, in which petition such applicant shall state his full name, his place of residence (by street and number, if possible), his occupation, and, if possible, the date and place of his birth; the place from which he emigrated, and the date and place of his arrival in the United States, and, if he entered through a port, the name of the vessel on which he arrived; the time when and the place and name of the court where he declared his intention to become a citizen of the United States; if he is married he shall state the name of his wife and, if possible, the country of her nativity and her place of residence at the time of filing his petition; and if he has children, the name, date, and place of birth and place of residence of each child living at the time of the filing of his petition: Provided, That if he has filed his

declaration before the passage of this Act he shall not be required to sign the petition in his own handwriting.

Provided further, That any person belonging to the class of persons authorized and qualified under existing law to become a citizen of the United States who has resided constantly in the United States during a period of five years next preceding May first, nineteen hundred and ten, who, because of misinformation in regard to his citizenship or the requirements of the law governing the naturalization of citizens has labored and acted under the impression that he was or could become a citizen of the United States and has in good faith exercised the rights or duties of a citizen or intended citizen of the United States because of such wrongful information and belief may, upon making a showing of such facts satisfactory to a court having jurisdiction to issue papers of naturalization to an alien, and the court in its judgment believes that such person has been for a period of more than five years entitled upon proper proceedings to be naturalized as a citizen of the United States, receive from the said court a final certificate of naturalization, and said court may issue such certificate without requiring proof of former declaration by or on the part of such person of their intention to become a citizen of the United States, but such applicant for naturalization shall comply in all other respects with the law relative to the issuance of final papers of naturalization to aliens.

The petition shall set forth that he is not a disbeliever in or opposed to organized government, or a member of or affiliated with any organization or body of persons teaching disbelief in or opposed to organized government, a polygamist or believer in the practice of polygamy, and that it is his intention to become a citizen of the United States and to renounce absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he at the time of filing of his petition may be a citizen or subject, and that it is his intention to reside permanently within the United States, and whether or not he has been denied admission as a citizen of the United States, and, if denied, the ground or grounds of such denial, the court or courts in which such decision was rendered, and that the cause for such denial has since been cured or removed, and every fact material to his naturalization and required to be proved upon the final hearing of his application.

The petition shall also be verified by the affidavits of at least two credible witnesses, who are citizens of the United States, and who shall state in their affidavits that they have personally known the applicant to be a resident of the United States for a period of at least five years continuously, and of the State, Territory, or district in which the application is made for a period of at least one year immediately preceding the date of the filing of his petition, and that they each have personal knowledge that the petitioner is a person of good moral character, and that he is in every way qualified, in their opinion, to be admitted as a citizen of the United States.

At the time of filing his petition there shall be filed with the clerk of the court a certificate from the Department of Commerce and Labor, if the petitioner arrives in the United States after the passage of this Act, stating the date, place, and manner of his arrival in the United States, and the declaration of intention of such petitioner, which certificate and declaration shall be attached to and made a part of said petition.

(3) Declaration on oath in open court to support constitution and laws of United States, and renunciation of other allegiance.

Third. He shall, before he is admitted to citizenship, declare on oath in open court that he will support the Constitution of the United States,

and that he absolutely and entirely renounces and abjures all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly by name to the prince, potentate, state, or sovereignty of which he was before a citizen or subject; that he will support and defend the Constitution and laws of the United States against all enemies, foreign and domestic, and bear true faith and allegiance to the same.

(4) Evidence of residence, character, etc.; witnesses.

Fourth. It shall be made to appear to the satisfaction of the court admitting any alien to citizenship that immediately preceding the date of his application he has resided continuously within the United States five years at least, and within the State or Territory where such court is at the time held one year at least, and that during that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and well disposed to the good order and happiness of the same. In addition to the oath of the applicant, the testimony of at least two witnesses, citizens of the United States, as to the facts of residence, moral character, and attachment to the principles of the Constitution shall be required, and the name, place of residence, and occupation of each witness shall be set forth in the record.

(5) Renunciation of hereditary title, order of nobility, etc.

Fifth. In case the alien applying to be admitted to citizenship has borne any hereditary title, or has been of any of the orders of nobility in the kingdom or state from which he came, he shall, in addition to the above requisites, make an express renunciation of his title or order of nobility in the court to which his application is made, and his renunciation shall be recorded in the court.

(6) Naturalization of widows and minor children of aliens dying after declaration of intention before being actually naturalized.

Sixth. When any alien who has declared his intention to become a citizen of the United States dies before he is actually naturalized the widow and minor children of such alien may, by complying with the other provisions of this Act, be naturalized without making any declaration of intention. (34 Stat. 596. 36 Stat. 830.)

See notes to section 3 of this act, ante, § 4351.

The amendment of this section by Act June 25, 1910, c. 401, § 3, cited above, consisted in the addition to subdivision second thereof, after the proviso "That if he has filed his declaration before the passage of this act he shall not be required to sign the petition in his own handwriting," of the further proviso inserted in said subdivision second as set forth here.

Previous provisions relating to the same subject as those of this section were contained in R. S. §§ 2165, 2167, 2168, repealed by section 26 of this act, post, § 4381.

Forms of declaration of intention, of petition for naturalization, and of affidavit of witnesses, required by this section, and of the certificate of citizenship to be issued thereon and the stub of such certificate, were prescribed by section 27 of this act, post, § 4382.

The mode of proof of residence required, in the petition and at the hearing thereon, was prescribed by section 10 of this act, post, § 4369.

When an alien, after declaration of intention, becomes insane before he is actually naturalized, and his wife thereafter makes a homestead entry under the land laws, she and their minor children may be naturalized without making declaration of intention, by Act Feb. 24, 1911, c. 151, post, § 4365.

The issue of passports to persons who have made declaration of intention to become citizens, and who have resided in the United States three years, was authorized by Act March 2, 1907, c. 2534, § 1, ante, § 3958.

Provisions for the naturalization of residents of Hawaii were made by Act April 30, 1900, c. 339, § 100, as amended by Act May 27, 1910, c. 258, § 9, post, § 4361.

Notes of Decisions

1. Procedure and requirements in general.
2. Declaration of intention.
3. —— Taking declaration.
4. —— Minors.
5. —— Intent.
6. —— Renunciation of allegiance.

7. —— Amendment.
8. Petition for admission to citizenship.
9. —— Minors.
10. —— Signature.
11. —— Time for petition.
12. —— Duplicates.
13. —— Filing.
14. —— Subsequent applications.
15. —— Certificate from department of commerce and labor.
16. —— Witnesses.
17. Oaths.
18. Evidence of residence, character, etc.
19. —— Residence.
20. —— Moral character and attachment to principles of constitution.
21. Persons erroneously believing themselves citizens.
22. Naturalization of widows and minor children of aliens dying after declaration of intention.
23. Appeal.

1. Procedure and requirements in general.—The prerequisites prescribed by statute cannot be dispensed with. U. S. v. Rodgers (1911) 185 Fed. 334, 107 C. C. A. 452 (affirming judgment [D. C. 1910] 182 Fed. 274); In re Buntaro Kumagai (D. C. 1908) 163 Fed. 922; Ex parte Lange (D. C. 1912) 197 Fed. 769; In re Hollo (D. C. 1913) 206 Fed. 852; Gerrard v. U. S. (1907) 43 Ct. Cl. 67.

The procedure in state courts is controlled by Congress. In re Gee Hop (D. C. 1895) 71 Fed. 274, 275; State v. Superior Court of King County (1913) 75 Wash. 239, 134 P. 916, Ann. Cas. 1915C, 425. But a state court may prescribe such reasonable conditions as, in its discretion, best enable it to judge of the qualifications of an applicant. In re Lab's Petition (O. & T. 1893) 3 Pa. Dist. R. 728.

The registry required by Act April 14, 1802, § 2, must have been made five years before the application for naturalization. Anonymous (C. C. 1817) Fed. Cas. No. 468.

The Naturalization Act does not prevent citizenship because slight variations from the exact language of the act in naturalization proceedings. U. S. v. Viaropulos (D. C. 1915) 221 Fed. 485.

The proceedings respecting the naturalization of aliens are to be construed liberally, and every intendment is in their favor. Priest v. Cummings (N. Y. 1837) 16 Wend. 617, 625.

2. Declaration of intention. — An alien's declaration of his intention to become a citizen does not make him a citizen. Minneapolis v. Reum (1893) 56 Fed. 576, 578, 6 C. C. A. 31; Wallenburg v. Missouri Pac. Ry. Co. (C. C. 1908) 159 Fed. 217; In re Polsson, Id. 283; Dorsey v. Brigham (1898) 52 N. E. 303, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228; State v. Collister (1905) 27 Ohio Cir. Ct. R. 529.

The certificate of declaration of intention to become a citizen in section 4357, post, refers to the oath required by the first subdivision of this section, and consists of what is popularly known as first papers. Dolan v. U. S. (1904) 133 Fed. 440, 447, 448, 69 C. C. A. 274.

The declaration must be sworn to. U. S. v. Walsh (C. C. 1884) 22 Fed. 644, 646.

An immigrant does not cease to be an alien merely by declaring his intention of becoming a citizen, so as to relieve his wife and minor children from the operation of the law governing the admission of aliens. In re Moses (C. C. 1897) 83 Fed. 995.

The declaration is abandoned by the applicant's return to his native country with the intention of remaining there, and voting and otherwise participating in its local affairs. In re Cameron (D. C. 1908) 165 Fed. 112.

The declaration must be by the alien himself. In re Poirot (D. C. 1909) 168 Fed. 456.

A declaration of intention to become a citizen, filed prior to the adoption of the Naturalization Act, held available to sustain a petition for naturalization not filed until more than seven years thereafter. In re Anderson (D. C. 1914) 214 Fed. 662.

A declaration of intention, filed by an alien in a court which has not obtained the forms for naturalization proceedings required by the act, and which is not on the form therein prescribed, is a legal nullity, and cannot be made the basis of a petition for naturalization. In re Brefo (D. C. 1914) 217 Fed. 131.

A previous declaration of intention to become a citizen is an absolute prerequisite to naturalization. McCarty v. Hodges (N. Y. 1846) 2 Edm. Sel. Cas. 433; Banks v. Walker (N. Y. 1848) 3 Barb. Ch. 438.

3. —— Taking declaration.—A declaration of intention to become a citizen must be made at the regular office of the clerk or prothonotary, or in open court. In re Langtry (C. C. 1887) 31 Fed. 879 (decree affirmed Ætna Life Ins. Co. of Hartford v. Town of Middleport [1888] 8 Sup. Ct. 625, 124 U. S. 534, 31 L. Ed. 537); Santo Scola's Case (Pa. Quart. Sess. 1890) 8 Pa. Co. Ct. R. 344. CONTRA, Andres v. Judge of Circuit Court (1889) 77 Mich. 85, 43 N. W. 857.

The clerk of the court may receive the preliminary application and oath of an alien to be naturalized. Act May 26, 1824. Butterworth's Case (C. C. 1846) Fed. Cas. No. 2,251.

4. —— Minors.—Under R. S. § 2165, an alien minor over 18 years of age could make a declaration of intention, and such a declaration was sufficient basis for a final application for citizenship under this section. U. S. v. George (1908) 164 Fed. 45, 90 C. C. A. 463; In re Symanowsski (C. C. 1909) 168 Fed. 978; In re Shapiro (C. C. 1911) 186 Fed. 606; In re Gross (D. C.

1908) 160 Fed. 739; In re Kennedy (1910) 4 Alaska, 34.

R. S. § 2167, providing that an alien who had resided in the United States three years before attaining his majority, might, under specified conditions, be naturalized after reaching his majority, without previous declaration of intention, did not imply that an alien could in no instance make such declaration during minority. In re Poisson (C. C. 1908) 159 Fed. 283.

There is nothing in the nature of the declaration which on principle a minor should not be competent to make, if it appears that he is of sufficient age and understanding to appreciate the nature of the act. Id.

This section does not authorize the naturalization without previous declaration of intention of one who attained his majority on January 22, 1909, as he was not entitled to naturalization for five years prior to May 1, 1910, though there is no direct provision that a minor cannot petition for naturalization. In re Urdang (D. C. 1913) 212 Fed. 557.

Where the son took out his citizen papers after arriving at majority, the naturalization of the son did not relate back to a declaration of intention of becoming a citizen made by the father during the minority of the son, and make the latter a citizen from that time. State v. Boyd (1891) 31 Neb. 682, 48 N. W. 739.

A minor who has not declared his intention to become a citizen as required by the statute is not entitled to be admitted to citizenship. In re Merry's Petition (Pa. 1880) 14 Phila. 212, 9 Wkly. Notes Cas. 169, 12 Lanc. Bar, 72, 1 Sch. L. Rec. 308.

5. —— **Intent.**—An oath taken by an alien with a mental reservation that he did not in good faith intend to become a permanent citizen is fraudulent. U. S. v. Ellis (C. C. 1911) 185 Fed. 546.

The intention must be declared in such form as to show the time when it was actually formed. In re Randall (Pa. 1880) 14 Phila. 224, 9 Wkly. Notes Cas. 159.

6. —— **Renunciation of allegiance.**—No renunciation of allegiance was required to be made at the time of the declaration of intention to become a citizen of the United States. Maloy v. Duden (C. C. 1885) 25 Fed. 673, 674; In re Symanowsski (C. C. 1909) 168 Fed. 978.

An alien, applying for citizenship, must, irrespective of age, at least two years before admission declare his intent and renounce allegiance generally, and particularly to one of whom he may at the time of application be a subject, or a country of which he may be a citizen. In re Poirot (D. C. 1909) 168 Fed. 456.

A declaration which contains neither a renunciation, by name, of allegiance to the sovereign of whom declarant is a subject, nor a renunciation, particularly, of allegiance to the state of which he is a subject, is insufficient. Ex parte Lange (D. C. 1912) 197 Fed. 769.

A declaration, containing a general renunciation, but failing to renounce allegiance particularly, by name, to the prince, potentate, state, or sovereignty to which declarant owed allegiance, held fatally defective. In re Stack (D. C. 1912) 200 Fed. 330.

A declaration containing a general renunciation and "particularly to the queen of Great Britain and Ireland," was not objectionable because the name of the queen was not stated. Ex parte Smith (Ind. 1847) 8 Blackf. 395.

7. —— **Amendment.**—A declaration erroneously alleging that the alien was a native or subject of one country, when, in fact, he was a subject of another, could not be amended nunc pro tunc. In re Lewkowicz (D. C. 1909) 169 Fed. 927; In re Friedl (D. C. 1913) 202 Fed. 300.

A declaration failing to renounce allegiance particularly, by name, to the prince, etc., is not subject to amendment nunc pro tunc. In re Stack (D. C. 1912) 200 Fed. 330.

A court has inherent power to amend a declaration of intention filed therein by correcting the name of the sovereign, allegiance to whom was renounced. U. S. v. Viaropulos (D. C. 1915) 221 Fed. 485.

8. **Petition for admission to citizenship.**—See § 4354, post.

The petition must allege the existence of all the facts, and the fulfillment of all the conditions on which the statutes make the right to naturalization dependent. In re Bodek (C. C. 1894) 63 Fed. 813.

The requirement that an applicant for naturalization shall state in his petition the date of his arrival in the United States and the name of the vessel on which he came, must be given practical effect, and, where such statement is disproved prima facie by proof that the applicant's name does not appear among the passengers on the vessel named, the burden of proof is shifted to him to explain such fact to the satisfaction of the court, and his testimony that he came under a fictitious name which he cannot remember will not be accepted as satisfactory. In re Kestelman (C. C. 1908) 165 Fed. 265.

Residence within the state or territory for a year immediately preceding the application is a necessary allegation. U. S. v. Dupont (D. C. 1910) 176 Fed. 823. Under the act of 1802 such allegation was not necessary. In re Cummings (1860) 41 N. H. 270.

Under the provision that a naturalization petition shall contain every fact material to the petitioner's naturalization required to be proved on the final

hearing, and subdivision 4, declaring that petitioner shall prove, among other things, that he has resided immediately preceding his application continuously within the state or territory where the court is at the time held, for one year at least, petitioner's prior residence within the state or territory for a year is a necessary allegation of a petition for naturalization, and hence perjury may be assigned on a false allegation thereof. U. S. v. Dupont (D. C. 1910) 176 Fed. 823.

A petition under the act of 1824 was required to allege it to have been the bona fide intention of the applicant, for three years next preceding his application, to become a citizen of the United States. In re Cummings (1860) 41 N. H. 270.

Application for naturalization must be made in open court. People v. Sweetman (N. Y. 1857) 3 Parker, Cr. L. 358.

9. —— **Minors.**—Where an alien minor attained his majority seven months after the passage of the act of 1910, and had never filed any declaration of intention to become a citizen, he was not entitled to naturalization. In re Joseph (D. C. 1914) 214 Fed. 815.

An infant alien cannot be naturalized upon his own petition. Ex parte Forestiere (1807) 2 Mass. 419.

An infant, 18 years old, who declares his intention to become a citizen may during his minority institute a proceeding for admission to full citizenship. In re Rousos (Sup. 1909) 119 N. Y. S. 34.

Under the act of 1802, a minor, having declared his intentions after two years' residence in the United States, and having resided therein three years thereafter, could petition by guardian. In re Merry's Petition (Pa. 1880) 9 Wkly. Notes Cas. 169.

10. —— **Signature.**—An alien, who declared his intention to become a citizen September 8, 1906, was required to sign his petition in his own handwriting. In re Martinovsky (C. C. 1909) 171 Fed. 601.

11. —— **Time for petition.**—A petition by an alien who had declared his intention to become a citizen before this act went into effect, filed more than seven years after its taking effect is too late. Yunghauss v. U. S. (1914) 218 Fed. 168, 134 C. C. A. 67 (affirming judgment In re Yunghauss [D. C. 1914] 210 Fed. 545); Harmon v. U. S. (1915) 223 Fed. 425, 139 C. C. A. 19; In re Goldstein (D. C. 1914) 211 Fed. 163.

The provision requiring a petition for naturalization to be filed not less than two nor more than seven years after the declaration of intention is in the nature of a statute of limitation, and since it contains no language indicating a contrary intention must be so construed as not to cut off the privilege of aliens who had made declaration of intention prior to its enactment to become citizens, but in such cases to give them seven years thereafter within which to file their petition. In re Wehrli (D. C. 1907) 157 Fed. 938. CONTRA, Eichhorst v. Lindsey (D. C. 1913) 209 Fed. 708; U. S. v. Lengyel (D. C. 1915) 220 Fed. 720.

An alien held not barred from citizenship by delay in his application. U. S. v. Poslusny (1910) 179 Fed. 836, 103 C. C. A. 324.

This provision is mandatory, and the right of an applicant must be complete when his petition is filed. U. S. v. Van Der Molen (D. C. 1908) 163 Fed. 650.

The day of the date of the declaration should be excluded in computing the seven-year period, and hence a petition for naturalization filed on the seventh anniversary of that date was in time. In re Babjak (D. C. 1914) 211 Fed. 551.

Acceptance of petition by alien for naturalization held a waiver of the provision that a declaration of intention cannot be used after a person has had it for 7 years. In re Fleury (D. C. 1915) 223 Fed. 803.

12. —— **Duplicates.**—The provisions requiring a naturalization petition to be filed in duplicate are directory only, so that a failure to comply therewith will not render the proceedings void. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

13. —— **Filing.**—Petitions must be filed on or before their presentation. In re Bodek (C. C. 1894) 63 Fed. 813.

Clerks of the federal courts are not subject to instruction by federal district attorneys or by the United States itself as a party to a judicial proceeding, but are required to file naturalization petitions which contain all proper allegations, though in their judgment the applicant, because of his color, race, or other disqualification, may not be entitled to citizenship. In re Halladjian (C. C. 1909) 174 Fed. 834.

Absence of a filing indorsement, or a calendar entry by a clerk concerning a naturalization petition actually filed, is immaterial if the fact of filing sufficiently appears. U. S. v. Erickson (D. C. 1910) 188 Fed. 747.

14. —— **Subsequent applications.**—An alien whose petition has been denied because he had not during the preceding five years' residence "behaved as a man of good moral character," because of his having within that time pleaded guilty to a serious criminal offense, cannot be admitted until the lapse of five years after such plea. In re Guliano (D. C. 1907) 156 Fed. 420.

The fact that an alien imperfectly acquainted with the English language obtained a certificate of naturalization under the prior law on a false statement that he was less than 18 years

old when he came to this country, which certificate he afterward voluntarily surrendered, does not necessarily reflect on his moral character to such extent as to preclude him from making a new application. In re Argento (D. C. 1908) 159 Fed. 498.

Where an alien has been once naturalized, he cannot maintain a proceeding for renaturalization, in order to establish citizenship, on the destruction of the records of the court in which he was naturalized; his remedy being by proceeding to restore the record. In re Buck (D. C. 1913) 204 Fed. 701.

An alien, whose petition for naturalization has been denied after a hearing on the merits, on the ground that he has not during the preceding five years behaved as a man of good moral character, or for other reasons has not complied with the requirements of the act, cannot maintain a second petition until the lapse of five years from the date of the order denying the first. In re Centi (D. C. 1914) 217 Fed. 833.

15. —— **Certificate from department of commerce and labor.**—Where an alien arrived subsequent to the passage of this act, a petition for his naturalization, failing to include a commerce and labor certificate of the date, place, and manner of arrival, was insufficient. In re Liberman (D. C. 1912) 193 Fed. 301.

Where an alien deserted a ship at New York harbor and entered the country without inspection, certificate of arrival, not based on his registry at that time, but on information acquired at a subsequent hearing, held not a sufficient compliance with this section. In re Hollo (D. C. 1913) 206 Fed. 852.

That the certificate of entry of an alien filed with his petition was not based upon a registry of his entry is not ground for refusing him naturalization. In re Page (D. C. 1913) 206 Fed. 1004.

The certificate which an applicant for naturalization is required to file with his petition is not necessarily the same certificate which it is provided by section 963, ante, shall be issued to an immigrant on his registry by the Commissioner of Immigration. In re Schmidt (D. C. 1913) 207 Fed. 678; In re McPhee (D. C. 1913) 209 Fed. 143.

Where a certificate of an applicant for citizenship had been issued and mislaid, the applicant was entitled to substitute a copy and have the same added to the record in lieu of the original. In re Pick (D. C. 1913) 209 Fed. 999.

Where such copy was a sufficient compliance with the Naturalization Law, it was not material that it was not in the particular form required by rule 5 of the Regulations of the Department of Naturalization. Id.

See U. S. v. Breen (1909) 120 N. Y. Supp. 304, 135 App. Div. 824.

16. —— **Witnesses.**—The witnesses required in support of the petition under subdivision 4 need not be the same witnesses who verified the petition. U. S. v. Doyle (1910) 179 Fed. 687, 103 C. C. A. 233; Same v. Ojala (1910) 182 Fed. 51, 104 C. C. A. 491; In re Schatz (C. C. 1908) 161 Fed. 237; In re Neugebauer (D. C. 1909) 172 Fed. 943.

The provision requiring two witnesses to the residence and good character of an applicant does not apply to honorably discharged soldiers applying for naturalization under section 4355, post. In re Loftus (C. C. 1908) 165 Fed. 1002; In re McNabb (D. C. 1909) 175 Fed. 511.

A petition not verified as required is not merely voidable but void, and cannot be amended. U. S. v. Martorana (1909) 171 Fed. 397, 96 C. C. A. 353, reversing decree In re Martorana (D. C. 1908) 159 Fed. 1010.

The word "district" refers to the District of Columbia, and not to the judicial district in which the petition is filed. U. S. v. Kolodner (1913) 204 Fed. 240, 124 C. C. A. 1.

An applicant for naturalization should produce a voucher other than one who habitually, and for compensation, appears as such. In re Lipshitz (C. C. 1899) 97 Fed. 584.

Where one of petitioner's witnesses at the hearing admitted that he had not known petitioner for five years antedating the filing of petition, as stated in the witness' affidavit, and the other witness, who was a naturalized alien, admitted that he had surrendered his own certificate of citizenship for cancellation because procured in violation of law, the petition was not verified as required by law. In re Aprea (C. C. 1908) 158 Fed. 702.

Other witnesses than those verifying the petition may not be examined at the hearing, where their names have not been posted for 90 days prior thereto. In re O'Dea (C. C. 1908) 158 Fed. 703.

A voucher who had not known the petitioner for five years continuously immediately preceding the filing of the petition was disqualified, though he had known the petitioner for such period at the time of the hearing. In re Welsh (C. C. 1908) 159 Fed. 1014.

While the verification must show that petitioner has resided continuously in the country for at least five years, such showing need not be made by the same witnesses for the entire period, and that so long as there are at least two credible witnesses testifying as to each fraction of the period, so as to cover the whole, the statutory requirement is satisfied. In re Godlover (C. C. 1910) 181 Fed. 731.

A petition not verified by affidavits of two citizens will be dismissed, with costs, but without prejudice to the right of the petitioner to file a new ap-

plication. In re Wolf (C. C. 1911) 188 Fed. 519.

Since, under section 3960, ante, an American woman marrying an alien became an alien, though continuing to reside in the United States, she was incompetent as a witness in support of his petition for naturalization. In re Martorana (D. C. 1908) 159 Fed. 1010, decree reversed U. S. v. Martorana (1909) 171 Fed. 397, 96 C. C. A. 353.

Where one of applicant's vouchers was incompetent, applicant could not call a qualified substitute at the hearing. Id.

The sufficiency of the petition is not affected by the fact that the witnesses verified the same on different days. In re Freeze (D. C. 1911) 189 Fed. 1022.

Where a petitioner for naturalization undertakes to prove the time of his residence in the state by affidavits of witnesses, and the remainder of his residence in the United States by deposition, as permitted by section 10 of the Naturalization Act of June 29, 1906, his affidavits must cover the entire period of his residence within the state. In re Manning (D. C. 1913) 209 Fed. 499.

An honorably discharged soldier need not have been a resident of the state for one year. In re Leichtag (D. C. 1914) 211 Fed. 681.

Witnesses who had personally known the applicant for only two years were incompetent to verify a petition, though they had acquired information, through correspondence with the applicant and others, as to his residence in the United States for five years. In re Toomey (Sup. 1908) 111 N. Y. S. 600.

An alien cannot vouch for a person petitioning to be naturalized. Commonwealth v. Paper (Pa. 1868) 1 Brewst. 263.

17. Oaths.—The oath of an applicant for naturalization to support the constitution of the United States will not be accepted if, on examination, it appear that he does not understand its significance. In re Bodek (C. C. 1894) 63 Fed. 813.

An alien is not entitled to the privileges of a citizen where he has taken an oath simply that it was his bona fide intention to renounce foreign allegiance and has not declared on oath that he will support the Constitution of the United States. State v. Collister (1905) 27 Ohio Cir. Ct. R. 529.

Under the act of 1802, requiring that an alien shall, three years at least before his admission as a citizen, give notice that it is his intention to become a citizen, and that at the time of his application to be admitted must declare on oath that he will support the constitution, it will not be a compliance with the requisites of the act if the alien, at the time of giving notice, take the oaths required at the time of his admission to citizenship, unless he takes them at the time of admission also. Richards v. McDaniel (S. C. 1820) 2 Nott & McC. 351.

To become a citizen, an alien cannot be required to take an oath of allegiance to any particular state. Ex parte Granstein (S. C. 1833) 1 Hill, 141.

The only oath required to be taken by an alien, on his becoming a citizen, is that prescribed by the act of congress. Id.

18. Evidence of residence, character, etc.—The two witnesses required to be produced by an alien in support of his petition for admission need not be the same persons who verified his petition, nor need they necessarily be the persons noticed as such as required by section 4353, post. U. S. v. Doyle (1910) 179 Fed. 687, 103 C. C. A. 233; Same v. Ojala (1910) 182 Fed. 51, 104 C. C. A. 491; In re Schatz (C. C. 1908) 161 Fed. 237; In re Neugebauer (D. C. 1909) 172 Fed. 943.

This section does not prescribe the evidence which shall be satisfactory. Spratt v. Spratt (1830) 4 Pet. 393, 406, 7 L. Ed. 897.

The applicant must prove the matters required. Anonymous (C. C. 1817) Fed. Cas. No. 468.

The petition must be supported by legal proofs. In re Bodek (C. C. 1894) 63 Fed. 813, 814, 815.

Evidence of vessel on which alien arrived. In re Kestelman (C. C. 1908) 165 Fed. 265.

Naturalization Act, § 4 (2), as amended by Act June 25, 1910, § 3, by adding a proviso dispensing with proof of former declaration of intention in certain cases, construed. In re Ross (D. C. 1915) 223 Fed. 366.

A petition for naturalization may make proof in accordance with the statute in force at the time of hearing, although enacted after filing of his petition. In re Sterbuck (D. C. 1914) 224 Fed. 1013.

The court is vested with a legal, but not a personal, discretion to determine whether an alien is qualified for admission to citizenship. U. S. v. Hrasky (1909) 88 N. E. 1031, 240 Ill. 560.

The allegation that it was the bona fide intention of the applicant for three years next preceding his application to become a citizen must be proved to the satisfaction of the court. In re Cummings (1860) 41 N. H. 270.

A sufficient examination into each case is necessary to satisfy the court of the following facts: "(1) Five years' continuous residence of the applicant within the United States, and one year of like residence within the state or territory where the court to which application is made is held; (2) that the applicant, during the five years, has conducted himself as a person of good moral character; (3) that the applicant is, in principle, attached to and well disposed towards the con-

stitution of the United States. In re Clark (N. Y. 1854) 18 Barb. 444.

Final papers will be refused where it appears that petitioner could not write, and that the oath of allegiance purporting to have been signed by him bore a well-written signature. In re Conway (Super. Ct. 1894) 9 Misc. Rep. 652, 30 N. Y. Supp. 835.

See U. S. v. Breen (1909) 120 N. Y. Supp. 304, 135 App. Div. 824.

19. —— Residence.—See § 4360, post.

The five years' residence in the United States must be continuous. Ex parte Saunderson (C. C. 1804) Fed. Cas. No. 12,378; Ex parte Walton, Id. 17,127; In re Hawley (N. Y. 1866) 1 Daly, 531; Ex parte Merry (Pa. 1880) 14 Phila. 212.

Continuous residence was first required by section 12 of Act March 3, 1813, c. 42, 2 Stat. 809, prohibiting the naturalization of an alien who should not "for the continuous term of five years next preceding his admission as aforesaid have resided within the United States, without being at any time during the said five years out of the territory of the United States." By Act June 26, 1848, c. 72, 9 Stat. 240, the words "without being at any time during the said five years out of the territory of the United States" were expressly repealed. In re Deans (D. C. 1913) 208 Fed. 1018, 1020.

The word "continuously" is not used literally, as requiring the applicant to remain at all times physically within such jurisdictions, but applies to changes of domicile only. U. S. v. Cantini (1914) 212 Fed. 925, 129 C. C. A. 445 (reversing order [D. C. 1912] 199 Fed. 857); In re Schneider (C. C. 1908) 164 Fed. 335; U. S. v. Cantini (D. C. 1912) 199 Fed. 857.

Continuous residence is not broken by absence as a seaman. U. S. v. Rockteschell (1913) 208 Fed. 530, 125 C. C. A. 532; Ex parte Pasqualt (C. C. 1805) Fed. Cas. No. 10,788; In re An Alien (D. C. 1842) Fed. Cas. No. 201a; Ex parte Scott (N. Y. 1848) 1 Daly, 534; In re Bye (N. Y. 1869) 2 Daly, 525. Nor by temporary absence for two months in Scotland, and four months while employed on the Panama Canal Zone. In re Deans (D. C. 1913) 208 Fed. 1018. Nor by temporary absence from the United States on a business trip. In re Timourian (D. C. 1915) 225 Fed. 570. And the legal residence of a minor, 16 years old, living with his parents, and sent by them to Germany for a course of study, after which he returned home before coming of age, continued to be in this country during his absence. In re Rice (N. Y. 1875) 7 Daly, 22. But continuous residence is broken by physical absence for seven months, during which time an alien obtains naturalization in another allegiance. U. S. v. Simon (C. C. 1909) 170 Fed. 680. Also by returning to and remaining in his native country for more than four years, where his family always lived, resuming his regular occupation there. U. S. v. Aakervik (D. C. 1910) 180 Fed. 137.

Two witnesses are not required as to residence of an honorably discharged soldier. In re Loftus (C. C. 1908) 165 Fed. 1002; In re McNabb (D. C. 1909) 175 Fed. 511, 512.

A deposition, made in 1802, that deponents have known the applicant "since the year 1793, in New York," is not evidence that he was residing in the United States before Jan. 29, 1795. (Act April 14, 1802.) Ex parte Tucker (C. C. 1802) Fed. Cas. No. 14,214.

The applicant must prove the period of his residence. Anonymous (C. C. 1817) Fed. Cas. No. 468.

An alien in the United States before 1802 could be admitted without proof of having resided five years. O'Brien v. Woody (C. C. 1846) Fed. Cas. No. 10,-398.

A witness who had not known petitioner for five years continuously immediately preceding the filing of the petition was disqualified as a witness at the final hearing, even though the petition was supported by qualified vouchers; the date of the application being fixed by subdivision 2, par. 4, as the date of filing the same. In re Welsh (C. C. 1908) 159 Fed. 1014.

The knowledge of witnesses, who testify that an applicant for naturalization has been a resident of the United States and of the state for the length of time required by the statute, need only be such as is compatible with the applicant's employment; and, in case of a person who has been for a portion of the time in the navy, their testimony that he resided in a certain place before his enlistment, and returned there from time to time at the termination of his voyages and after his discharge, is sufficient. In re Schneider (C. C. 1908) 164 Fed. 335.

Under the act of 1802, territorial residence was essential. Continuous service on board a United States naval vessel was not sufficient. Anonymous (D. C.) Fed. Cas. No. 465.

The former law (R. S. § 2165) prohibited the taking of the oath of the applicant himself as a proof of his residence. U. S. v. Grottkau (D. C. 1887) 30 Fed. 672.

One's residence depends largely on his intention, gathered from his acts rather than from his declarations. U. S. v. Aakervik (D. C. 1910) 180 Fed. 137.

An honorably discharged soldier need not have been a resident of the state for one year. In re Leichtag (D. C. 1914) 211 Fed. 681.

The court has no jurisdiction to naturalize an alien not residing in the judicial district when filing his declaration of intention. In re Pearlman (D. C. 1915) 226 Fed. 60.

It was not necessary under the act of 1802 for the applicant to prove that he had resided within the state or ter-

ritory where the application was made during the year next preceding his application. In re Cummings (1860) 41 N. H. 270.

Residence cannot be established by affidavit. In re —— (N. Y. 1845) 7 Hill, 137. But by section 4369, post, residence in the United States other than for the year immediately preceding the filing of the petition may be established by deposition.

20. —— Moral character and attachment to principles of constitution.—A law-abiding alien of good moral character is entitled to naturalization, though ignorant of the nature of the institutions of the country. In re Rodriguez (D. C. 1897) 81 Fed. 337; Ex parte Johnson (1902) 31 South. 208, 79 Miss. 637, 89 Am. St. Rep. 665.

A certificate by a competent court that an alien has taken the oath prescribed by the naturalization act raises a presumption that the court was satisfied as to the moral character of the alien, and of his attachment to the principles of the constitution of the United States. Campbell v. Gordon (1810) 6 Cranch, 176, 182, 3 L. Ed. 190.

A person who commits perjury is not entitled to admission to citizenship, though he has received a pardon. In re Spenser (C. C. 1878) Fed. Cas. No. 13,234.

The requirements as to moral character and a disposition to good order must be shown by evidence. In re Spenser (C. C. 1878) Fed. Cas. No. 13,234; In re Bodek (C. C. 1894) 63 Fed. 813.

A finding that an applicant had behaved as a man of good character is justified by proof that prior to the five-year period he had been convicted several times for drunkenness and once thereafter, and that he had reformed and had remained sober for more than 4½ years prior to his application. U. S. v. Dwyer (C. C. 1909) 170 Fed. 686.

Where an applicant has not behaved as a man of good moral character while residing in the United States, the court, in the exercise of a sound discretion, will refuse his petition, though his behavior has been good during the five years preceding the petition; and the court must determine, taking into account the whole conduct of the petitioner, whether he possesses the necessary qualifications for citizenship. In re Ross (C. C. 1911) 188 Fed. 685.

An alien, pleading guilty to murder in the second degree, will not be admitted to citizenship, though before the offense, and for more than five years after the expiration of the term of imprisonment, his conduct reveals no cause for censure. Id.

One entertaining socialistic views held not entitled to naturalization. Ex parte Sauer (D. C. 1891) 81 Fed. 355, note.

A law-abiding industrious man of good moral character held entitled to naturalization, though he was ignorant, and unable to read and write, and could not explain the principles of the constitution. In re Rodriguez (D. C. 1897) 81 Fed. 337; but see section 4364, post.

An applicant who continued to make use of a certificate of naturalization previously issued to him, after learning that he was not entitled to the same under the law and until it was canceled, cannot be considered as having behaved as a man of good moral character during that time, and is not entitled to apply for naturalization again until the expiration of five years. In re Di Clerico (D. C. 1908) 158 Fed. 905.

The fact that an alien imperfectly acquainted with the English language obtained a certificate of naturalization under a prior law on a false statement that he was less than 18 years old when he came to this country, which certificate he voluntarily surrendered, does not necessarily reflect on his moral character. In re Argento (D. C. 1908) 159 Fed. 498.

An applicant who has no knowledge whatever of the Constitution, or even of its existence, of the organization of the government, or the manner of the enactment or enforcement of its laws, and who, instead of availing himself of time given to obtain general information on such subjects, assumes a defiant attitude toward the court and insists on his admission as a matter of right, cannot be said to be attached to the principles of the Constitution or well disposed to the good order of the country. In re Meakins (D. C. 1908) 164 Fed. 334.

"Good moral character" is such character as measures up to the standard of the average citizen of the community in which applicant resides. In re Hopp (D. C. 1910) 179 Fed. 561.

That applicant keeps his saloon open in violation of the state Sunday closing act does not show want of good moral character, where the law has never been enforced in his city on account of adverse public sentiment, and where he is willing to obey the law if insisted upon by the proper authorities. Id. CONTRA, U. S. v. Hrasky (1909) 88 N. E. 1031, 240 Ill. 560.

An applicant who gave false answers under oath to questions asked him by the chief naturalization examiner of the department of commerce and labor cannot be found to have behaved as a man of good moral character. In re Talarico (D. C. 1912) 197 Fed. 1019.

An alien, who within five years had been convicted of illegally selling liquor in Kansas on premises covered by a liquor injunction, and who had been sentenced to imprisonment and paid a fine therefor, held not a person of good moral character. In re Trum (D. C. 1912) 199 Fed. 361.

That an applicant in his petition misnamed one of his daughters and erroneously stated that all of his children resided in Providence, was not proof of lack of good moral character, in the absence of a showing that he did so to

conceal the identity of such daughter. In re Camaras (D. C. 1913) 202 Fed. 1019.

An alien who had no understanding of the manner and methods of government in America, or the responsibilities of a citizen, and could not be made to understand questions as to whether he was a polygamist or a disbeliever in organized government, and who could neither read nor write English, and spoke and understood English very imperfectly, was not entitled to naturalization. Ex parte Shahid (D. C. 1913) 205 Fed. 812.

An alien who for 12 or 15 years habitually violated the election laws by voting, with knowledge that he was not qualified, was not attached to the principles of the Constitution and well disposed to the good order and happiness of the United States. In re Centi (D. C. 1914) 211 Fed. 559.

An applicant, otherwise entitled to citizenship, should not necessarily be denied the right because the evidence shows that he has no accurate knowledge of the federal constitution and form of government. State v. District Court of Seventeenth Dist. (1909) 120 N. W. 898, 107 Minn. 444.

Affidavits are not admissible to establish the alien's good moral character, or his attachment to the principles of our government, though on these points his own oath is admissible. But it seems that the oath of the alien should be corroborated by other evidence. Anonymous (N. Y. 1845) 7 Hill. 137.

A native of the Hawaiian Islands, who has lived in the United States six years, and who knows that his native country is governed by a king, while the United States has a president, but does not know who the president is, though he knows Washington was president at one time, who can neither read nor write English, but has read the constitution in his own language, and who promises to obey the laws of the country, does not sufficiently appear to be "attached to the principles of the constitution of the United States, and well-disposed to the good order and happiness of the same," to become a citizen. In re Kanaka Nian (1889) 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726.

21. Persons erroneously believing themselves citizens.—The second paragraph of subdivision 2 of this section is designed to aid those who, on May 1, 1910, were in a position to invoke its provisions, and who for five years prior to that date were entitled to naturalization. In re Urdang (D. C. 1913) 212 Fed. 557.

The provision permitting the naturalization without a previous declaration of intention of an alien who has resided constantly in the United States during a period of 5 years next preceding May 1, 1910, when he has through misinformation in good faith exercised the duties of citizenship and has been eligible for naturalization for more than 5 years, does not apply to an alien who was not 21 years old on May 1, 1905. In re Peters (D. C. 1914) 213 Fed. 541.

Evidence held to show that applicant for naturalization, because of misinformation as to the law, had acted as a citizen under the impression that he was a citizen. In re Center (D. C. 1914) 218 Fed. 975.

A person held entitled to naturalization without previous declaration of intention, though he did not become of age and entitled to be naturalized more than five years prior to May 1, 1910. Id.

An alien who has resided in the United States over 18 years, and who has had first papers since 1897, held entitled to naturalization. In re Fleury (D. C. 1915) 223 Fed. 803.

An alien who came to the country in 1895, and filed no declaration of intention to become a citizen, is not entitled to naturalization, though he labored under a misapprehension of law. U. S. v. Nopoulos (D. C. 1915) 225 Fed. 656.

Person believing he was a citizen, but receiving no wrongful information from a source which might be considered authentic, held not entitled to naturalization without declaration of intention. In re Mondelli (D. C. 1915) 228 Fed. 920.

22. Naturalization of widows and minor children of aliens dying after declaration of intention.—A son held entitled to the benefits of his father's declaration of intention. Boyd v. Thayer (1892) 12 Sup. Ct. 375, 143 U. S. 135, 36 L. Ed. 103.

The words "any alien who has declared his intention" include persons who made their declarations under the old statute (R. S. § 2168). In re Shearer (D. C. 1908) 158 Fed. 839; In re Schmidt (D. C. 1908) 161 Fed. 231.

This does not entitle the widow of an alien, who never declared his intention, to naturalization without previously making such declaration because he was an honorably discharged soldier of the United States and as such entitled to naturalization without making any declaration, under section 4355, post. U. S. v. Meyer (D. C. 1909) 170 Fed. 983.

A stepson held entitled to naturalization on the strength of his stepfather's declaration. In re Robertson (D. C. 1910) 179 Fed. 131.

A petitioner held not barred by laches, though he delayed his application for six years and five months after he became of age, and for nine years and five months after he became eighteen, when he could have first taken the required oaths. U. S. v. Poslusny (D. C. 1910) 179 Fed. 836, 103 C. C. A. 324.

When a foreign subject declares his

intention to become a citizen, but dies before he has received his certificate of citizenship, his children, born abroad, who came here under 17 years of age with him, on attaining 21 years of age, become citizens of the United States and of the state. Schrimpf v. Settegast (1873) 38 Tex. 96.

See, also, U. S. v. Wong Kim Ark (1898) 18 Sup. Ct. 456, 477, 169 U. S. 649, 42 L. Ed. 890; Same v. Rodick (1908) 162 Fed. 469, 471, 89 C. C. A. 389; Bessho v. U. S. (1910) 178 Fed. 245, 101 C. C. A. 605; In re Halladjian (C. C. 1909) 174 Fed. 834; Pequignot v. Detroit (D. C. 1883) 16 Fed. 211, 216; U. S. v. Olsson (D. C. 1912) 196 Fed. 562.

23. Appeal.—A proceeding for naturalization under this act is not a "case" within the meaning of Act March 3, 1891, c. 517, § 6, 26 Stat. 828, ante, § 1120, which provides that Circuit Courts of Appeals "shall exercise appellate jurisdiction to review by appeal or by writ of error final decision in the District Court and the existing Circuit Courts in all cases other than those provided for in the preceding section of this act, unless otherwise provided by law," and there being no provision for direct review in the naturalization act a Circuit Court of Appeals is without jurisdiction to review the decision of a District or Circuit Court in such a proceeding. Moreover, the admission of an alien to citizenship is a political, and not a judicial, act, and, having been vested by Congress in the courts to be exercised on proof "to the satisfaction of the court," its exercise is discretionary, and not reviewable. U. S. v. Dolla (1910) 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665.

Under the federal naturalization law there is no right of appeal from the decision of the court hearing the application, and therefore the state appellate courts cannot entertain appeals from such hearings in the state courts. State v. Superior Court of King County (1913) 75 Wash. 239, 134 Pac. 916, Ann. Cas. 1915C, 425.

Cited without definite application, U. S. v. Brelin (1908) 166 Fed. 104, 92 C. C. A. 88; Same v. Bolsara (1910) 180 Fed. 694, 103 C. C. A. 660; Same v. Peterson (1910) 182 Fed. 289, 104 C. C. A. 571; In re Fronascone (C. C. 1900) 99 Fed. 48; In re Spitzer (C. C. 1908) 160 Fed. 137; In re Rustiglau (C. C. 1908) 165 Fed. 980; In re Alverto (D. C. 1912) 198 Fed. 688; City of Rockland v. Inhabitants of Hurricane (1909) 106 Me. 169, 76 Atl. 286; State v. Macdonald (1877) 24 Minn. 48; Schutz's Petition (1887) 64 N. H. 241, 8 Atl. 827; Berry v. Hull (1892) 6 N. M. 643, 30 Pac. 936.

§ 4353. (Act June 29, 1906, c. 3592, § 5.) Notice of filing of petition, hearing thereof, etc.; subpœnas for witnesses.

The clerk of the court shall, immediately after filing the petition, give notice thereof by posting in a public and conspicuous place in his office, or in the building in which his office is situated, under an appropriate heading, the name, nativity, and residence of the alien, the date and place of his arrival in the United States, and the date, as nearly as may be, for the final hearing of his petition, and the names of the witnesses whom the applicant expects to summon in his behalf; and the clerk shall, if the applicant requests it, issue a subpœna for the witnesses so named by the said applicant to appear upon the day set for the final hearing, but in case such witnesses can not be produced upon the final hearing other witnesses may be summoned. (34 Stat. 598.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

Posting notice of petition, names of witnesses, etc.—The two witnesses required in support of the petition need not be the same persons who verified the petition, nor the persons noticed under this section, but on a reasonable showing that applicant is unable to secure the attendance of such witnesses, he may produce or summon others. U. S. v. Doyle (1910) 179 Fed. 687, 103 C. C. A. 233; Same v. Ojala (1910) 182 Fed. 51, 104 C. C. A. 491; In re Schatz (C. C. 1908) 161 Fed. 237; In re Neugebauer (D. C. 1909) 172 Fed. 943; In re Coretto (D. C. 1914) 215 Fed. 177. CONTRA, In re O'Dea (C. C. 1908) 158 Fed. 703. But where one of an applicant's vouchers was incompetent, because an alien, applicant could not call a qualified substitute at the hearing. In re Martorana (D. C. 1908) 159 Fed. 1010, decree reversed U. S. v. Martorana (1909) 171 Fed. 397, 96 C. C. A. 353.

The provision of this section requiring notice of the petition to be posted for 90 days prior to hearing is applicable to proceedings under section 4356, post. U. S. v. Peterson (1910) 182 Fed. 289, 104 C. C. A. 571.

In the absence of a contrary showing, names of witnesses are presumed to have been posted for the time required. U. S. v. Erickson (D. C. 1910) 188 Fed. 747.

§ 4354. (Act June 29, 1906, c. 3592, § 6.) Time for filing petition and for final action thereon; change of name of alien on his naturalization.

Petitions for naturalization may be made and filed during term time or vacation of the court and shall be docketed the same day as filed, but final action thereon shall be had only on stated days, to be fixed by rule of the court, and in no case shall final action be had upon a petition until at least ninety days have elapsed after filing and posting the notice of such petition: Provided, That no person shall be naturalized nor shall any certificate of naturalization be issued by any court within thirty days preceding the holding of any general election within its territorial jurisdiction. It shall be lawful, at the time and as a part of the naturalization of any alien, for the court, in its discretion, upon the petition of such alien, to make a decree changing the name of said alien, and his certificate of naturalization shall be issued to him in accordance therewith. (34 Stat. 598.)

See note to section 3 of this act, ante, § 4351.

Notes of Decisions

Filing petitions.—This act is mandatory upon clerks in requiring them to receive, file, and enter applications for citizenship, whether the judge is present or not; and this entitles a clerk to the per diem compensation allowed by law for such specific service. Marvin v. U. S. (1910) 45 Ct. Cl. 528.

These cases are placed by the statute on the same footing as bankruptcy proceedings and chancery and admiralty business, so far as the receiving and entering of petitions are involved. Id.

There is no provision in the naturalization act requiring a court to be kept open for the filing and docketing of naturalization papers. Jaynes v. U. S. (1912) 47 Ct. Cl. 523.

Amendments.—Where one of applicant's witnesses is incompetent, the petition cannot be amended by allowing it to be verified by a qualified witness. U. S. v. Martorana (1909) 171 Fed. 397, 96 C. C. A. 353, reversing decree In re Martorana (D. C. 1908) 159 Fed. 1010.

Where an alien applied for naturalization in his real name, but he had filed a declaration of intention in the maiden name of his mother, he could not amend the petition, but was required to file a new declaration in his right name. In re Boorvis (D. C. 1913) 205 Fed. 401.

Time for final action on petition.—The evident purpose of Congress in requiring that final action shall be had only on stated days to be fixed by rule of the court, and that in no case shall final action be had upon a petition until at least 90 days have elapsed after filing and posting notice of such petition, was to prevent the granting of certificates of naturalization, unless due notice is given to the United States and an opportunity afforded to oppose the application. (1908) 26 Op. Atty. Gen. 611.

Where the rule day is fixed by order of the court, and the United States attorney has an opportunity to be present and be heard, the judge may, in his discretion, adjourn the hearing to such time as may suit his convenience and the convenience of the parties to the case. Id.

Elections.—The proviso does not forbid hearings on petitions for naturalization within 30 days preceding the holding of any general election, but merely forbids the issuing of naturalization certificates within that time. (1908) 26 Op. Atty. Gen. 611.

Municipal elections held through the state of Pennsylvania do not constitute a general election within the meaning of this section. (1910) 28 Op. Atty. Gen. 146.

Cited without definite application, U. S. v. Doyle (1910) 179 Fed. 687, 103 C. C. A. 233; In re Neugebauer (D. C. 1909) 172 Fed. 943; U. S. v. Bressi (D. C. 1913) 208 Fed. 369.

(R. S. § 2165. Repealed.)

This section designated the courts which had jurisdiction to admit aliens to citizenship, and prescribed the procedure for the naturalization of aliens in general and particular procedure for those who resided in the United States prior to January 29, 1795, and those who resided therein between June 18, 1798 and June 18, 1812. It was repealed by Act June 29, 1906, c. 3592, § 26, post, § 4381, and different provisions concerning the jurisdiction of courts and the procedure for naturalization of all aliens were made by §§ 3–14 of that act, ante, §§ 4351–4354, and post, §§ 4363–4373.

This section was amended by Act Feb. 1, 1876, c. 5, which provided that the declaration of intention to become a citizen might be made before the

clerk of any court named in that section, and by validating declarations theretofore made before such clerks. That act became inoperative by the repeal of R. S. § 2165, by Act June 29, 1906, c. 3592, § 26, post, § 4381.

§ 4355. (R. S. § 2166.) Aliens honorably discharged from military service.

Any alien, of the age of twenty-one years and upward, who has enlisted, or may enlist, in the armies of the United States, either the regular or the volunteer forces, and has been, or may be hereafter, honorably discharged, shall be admitted to become a citizen of the United States, upon his petition, without any previous declaration of his intention to become such; and he shall not be required to prove more than one year's residence within the United States previous to his application to become such citizen; and the court admitting such alien shall, in addition to such proof of residence and good moral character, as now provided by law, be satisfied by competent proof of such person's having been honorably discharged from the service of the United States.

Act July 17, 1862, c. 200, § 21, 12 Stat. 597.

Provisions for naturalization, without previous declaration of intention, of aliens honorably discharged from the Navy, the Marine Corps, or the Revenue Cutter Service, were made by Act July 26, 1894, c. 163, post, § 4356, and Act June 30, 1914, c. 130, post, § 4356a.

Notes of Decisions

See notes under § 4352, ante.

Repeal.—This section was not repealed by Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596. Bessho v. U. S. (1910) 178 Fed. 245, 247, 101 C. C. A. 605; U. S. v. Meyer (D. C. 1909) 170 Fed. 983, 984; In re Leichtag (D. C. 1914) 211 Fed. 681.

Naval or marine service.—The word "armies" does not include "marines." In re Bailey (D. C. 1872) Fed. Cas. No. 728. Nor persons who have served in the navy. In re Chamavas (Super. Buff. 1892) 21 N. Y. Supp. 104, following In re Bailey (D. C. 1872) Fed. Cas. No. 728, and disapproving In re Stewart (1868) 30 N. Y. Super. Ct. (7 Rob.) 635.

Race.—The right of naturalization is not extended by this section to a person of the Mongolian race, either Chinese or Japanese. In re Buntaro Kumagai (D. C. 1908) 163 Fed. 922, 924; In re Knight (D. C. 1909) 171 Fed. 299. Nor to a person one-fourth white and three-fourths brown or Malay. In re Alverto (D. C. 1912) 198 Fed. 688.

Expatriation.—Act March 2, 1907, section 3959, ante, providing that naturalization of a citizen by any foreign state or residence of a naturalized citizen in a foreign state shall constitute expatriation, held to apply only to citizens, and that an honorably discharged soldier of the United States was not barred of his right to become a citizen, as provided by this section, by returning to Switzerland and holding an elective office there while an alien. In re Wildberger (D. C. 1914) 214 Fed. 508.

Proof of residence and moral character.—The phrase "as now provided by law" was not affected by Naturalization Act June 29, 1906, requiring two witnesses to residence and good character, and proof to the satisfaction of the court is sufficient. In re Loftus (C. C. 1908) 165 Fed. 1002, 1003; In re McNabb (D. C. 1909) 175 Fed. 511.

Proof of residence may be made by depositions. In re McNabb (D. C. 1909) 175 Fed. 511.

An honorably discharged soldier need not have been a resident of the state for one year. In re Leichtag (D. C. 1914) 211 Fed. 681.

Cited without definite application. U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389; U. S. v. Peterson (1910) 182 Fed. 289, 104 C. C. A. 571; In re Halladjian (C. C. 1909) 174 Fed. 834; In re Gross (D. C. 1908) 160 Fed. 739; Berry v. Hull (1892) 6 N. M. 643, 30 Pac. 936; Strickley v. Hill (1900) 62 P. 893, 22 Utah, 257, 83 Am. St. Rep. 786.

§ 4356. (Act July 26, 1894, c. 165.) Aliens honorably discharged from service in Navy or Marine Corps.

Any alien of the age of twenty-one years and upward who has enlisted or may enlist in the United States Navy or Marine Corps, and has served or may hereafter serve five consecutive years in the United States Navy or one enlistment in the United States Marine Corps, and has been or may hereafter be honorably discharged, shall be admitted to become a citizen of the United States upon his petition, without any previous declaration of his intention to be-

come such; and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof of such person's service in and honorable discharge from the United States Navy or Marine Corps. (28 Stat. 124.)

This was a provision of the naval appropriation act for the fiscal year 1895, cited above.

At the time this provision was enacted, the term of enlistment in the Navy was fixed at 5 years by R. S. § 1418, as amended by Act May 12, 1879, c. 5. Since then the term of enlistment was reduced to 4 years by Act March 3, 1899, c. 413, § 16, ante, § 2576.

The term of enlistment in the Marine Corps was fixed at not less than 4 years by Act March 3, 1901, c. 852, ante, § 2821.

This section is probably superseded by Act June 30, 1914, c. 130, post, § 4356a, although the later act is specifically limited to aliens who may, "under existing law," become citizens, while the above section may possibly apply to all aliens who secure the specified discharge.

Notes of Decisions

See notes under § 4355, ante, and § 4357, post.

Term of service.—A marine discharged for a physical disability before the term of his enlistment had expired could not become a citizen by proving his good moral character and his honorable discharge. U. S. v. Plaistow (D. C. 1910) 189 Fed. 1006.

This section is modified by sections 2576, 2925, ante, reducing the term of service to four years. In re Brykczynski (D. C. 1913) 207 Fed. 813.

Race.—The right to naturalization is not extended by this section to a person of the Mongolian race, either Chinese or Japanese. Bessho v. U. S. (1910) 178 Fed. 245, 101 C. C. A. 605; In re Knight (D. C. 1909) 171 Fed. 299.

Posting notice.—The provisions of section 4353, ante, requiring notice to be posted, are applicable to proceedings under this section. U. S. v. Peterson (1910) 182 Fed. 289, 104 C. C. A. 571.

§ 4356a. (Act June 30, 1914, c. 130.) Aliens honorably discharged from service in Navy or Marine Corps or in Revenue-Cutter Service.

Any alien of the age of twenty-one years and upward who may, under existing law, become a citizen of the United States, who has served or may hereafter serve for one enlistment of not less than four years in the United States Navy or Marine Corps, and who has received therefrom an honorable discharge or an ordinary discharge, with recommendation for reenlistment, or who has completed four years in the Revenue-Cutter Service and received therefrom an honorable discharge or an ordinary discharge with recommendation for reenlistment, or who has completed four years of honorable service in the naval auxiliary service, shall be admitted to become a citizen of the United States upon his petition without any previous declaration of his intention to become such, and without proof of residence on shore, and the court admitting such alien shall, in addition to proof of good moral character, be satisfied by competent proof from naval or revenue-cutter sources of such service: Provided, That an honorable discharge from the Navy, Marine Corps, Revenue-Cutter Service, or the naval auxiliary service, or an ordinary discharge with recommendation for reenlistment, shall be accepted as proof of good moral character: Provided further, That any court which now has or may hereafter be given jurisdiction to naturalize aliens as citizens of the United States may immediately naturalize any alien applying under and furnishing the proof prescribed by the foregoing provisions. (38 Stat. 392.)

This was a provision of the naval appropriation act for the fiscal year 1915, cited above.

See ante, § 4356, and notes thereunder.

The Revenue Cutter Service and the Life Saving Service were abolished, and the Coast Guard created in lieu thereof, by Act Jan. 28, 1915, c. 20, set forth post, under Title LV A, "The Coast Guard."

Notes of Decisions

Purpose and scope of act.—The act applies only to those who are in the service when application is made, or are still eligible for re-enlistment with

the benefits enjoyed by citizens. In re Schrape (D. C. 1914) 217 Fed. 142.

The purpose of the act was to enable all those who were serving in the navy, and who were not citizens, but were otherwise qualified to become such, to do so, and thereby obtain the increased pay reserved to citizens. Id.; In re Sterbuck (D. C. 1914) 224 Fed. 1013; In re Giralde (D. C. 1915) 226 Fed. 826.

(R. S. § 2167. Repealed.)

This section provided for the naturalization of an alien who had resided in the United States 3 years next preceding his arriving at the age of 21 years, without having previously made a declaration of intention. It was repealed by Act June 29, 1906, c. 3592, § 26, post, § 4381.

(R. S. § 2168. Repealed.)

This section provided for the naturalization of the widow and children of an alien, who died after making a declaration of intention, but before naturalization. It was repealed by Act June 29, 1906, c. 3592, § 26, post, § 4381, and a somewhat similar provision was made by section 4, subsec. 6, of that act, ante, § 4352 (6).

§ 4357. (R. S. § 2174.) Naturalization of seamen.

Every seaman, being a foreigner, who declares his intention of becoming a citizen of the United States in any competent court, and shall have served three years on board of a merchant-vessel of the United States subsequent to the date of such declaration, may, on his application to any competent court, and the production of his certificate of discharge and good conduct during that time, together with the certificate of his declaration of intention to become a citizen, be admitted a citizen of the United States; and every seaman, being a foreigner, shall, after his declaration of intention to become a citizen of the United States, and after he shall have served such three years, be deemed a citizen of the United States for the purpose of manning and serving on board any merchant-vessel of the United States, anything to the contrary in any act of Congress notwithstanding; but such seaman shall, for all purposes of protection as an American citizen, be deemed such, after the filing of his declaration of intention to become such citizen.

Act June 7, 1872, c. 322, § 29, 17 Stat. 268.

Notes of Decisions

Repeal.—Naturalization Act June 29, 1906, c. 3592, 34 Stat. 603, did not repeal this section. U. S. v. Rodiek (1908) 162 Fed. 469, 471, 89 C. C. A. 389; Bessho v. U. S. (1910) 178 Fed. 245, 247, 101 C. C. A. 605.

Nature of service.—This section is sufficiently broad to embrace every seaman who has served the required time on an American vessel, coastwise or other. In re Lind (C. C. 1911) 192 Fed. 209, 211. And includes service on the Great Lakes. In re Sutherland (D. C. 1912) 197 Fed. 841. But does not extend to the naval service. Ex parte Gormly (Pa. 1880) 14 Phila. 211, 9 Wkly. Notes Cas. 96.

Certificate of discharge.—Certificates of discharge showing good conduct, issued to a seaman for service for three years and nineteen days after his declaration of intention to become a citizen, held sufficient. In re Sutherland (D. C. 1912) 197 Fed. 841.

Certificate of declaration of intention.—The certificate of declaration of intention to become a citizen refers to the oath required by the first subdivision of section 4352, ante, and consists of what is popularly known as "first papers." Dolan v. U. S. (1904) 133 Fed. 440, 448, 69 C. C. A. 274.

Effect of declaration.—An alien seaman, who produces the evidence of declaration of intention and of service on an American merchant vessel required by this section, is entitled to admission as a citizen without further proof. In re Tancrel (D. C. 1915) 227 Fed. 329.

An alien seaman, though he has declared his intention to become a citizen of the United States, and has served three years on vessels of the United States, is ineligible to the position of an officer of an American vessel. For that full citizenship is required. (1883) 17 Op. Atty. Gen. 534.

§ 4358. (R. S. § 2169, as amended, Act Feb. 18, 1875, c. 80, § 1.) Aliens of African nativity and descent.

The provisions of this Title shall apply to aliens being free white

persons, and to aliens of African nativity and to persons of African descent.

Act July 14, 1870, c. 254, § 7, 16 Stat. 256. Act Feb. 18, 1875, c. 80, § 1, 18 Stat. 318.

This section was amended by Act Feb. 18, 1875, c. 80, cited above, by inserting after the words "The provisions of this Title shall apply to aliens" the words "being free white persons, and to aliens," as set forth here.

Notes of Decisions

1. In general.
2. Married women.
3. Free white persons.
4. —— Armenians.
5. —— Hawaiians.
6. —— Hindus.
7. —— Indians.
8. —— Malays.
9. —— Mexicans.
10. —— Mongolians.
11. —— Parsees.
12. —— Syrians.
13. Africans.
14. Repeal.

1. In general.—An alien's right to citizenship depends upon parentage and blood, and not upon nationality or status. In re Young (D. C. 1912) 195 Fed. 645, order affirmed on rehearing (D. C. 1912) 198 Fed. 715.

The immigration laws have not added to the classes of persons incapable in their own right of naturalization. (1909) 27 Op. Atty. Gen. 507.

2. Married women.—The alien wife of an alien husband cannot become a naturalized citizen of the United States. U. S. v. Cohen (1910) 179 Fed. 834, 103 C. C. A. 28, 29 L. R. A. (N. S.) 829; Pintsch Compressing Co. v. Bergin (C. C. 1897) 84 Fed. 140; In re Rionda (D. C. 1908) 164 Fed. 368. CONTRA, Ex parte Pic (C. C. 1806) Fed. Cas. No. 11,118; Priest v. Cummings (N. Y. 1837) 16 Wend. 617.

3. Free white persons.—"Free white persons" includes members of the white or Caucasian race, as distinct from the black, red, yellow, and brown races. U. S. v. Balsara (1910) 180 Fed. 694, 695, 103 C. C. A. 660 (affirming judgment In re Balsara [C. C. 1909] 171 Fed. 294); In re Najour (C. C. 1909) 174 Fed. 735; In re Ellis (D. C. 1910) 179 Fed. 1002, 1003; In re Alverto (D. C. 1912) 198 Fed. 688; In re Akhay Kumar Mozumdar (D. C. 1913) 207 Fed. 115.

The term includes, as commonly understood, all European races and those Caucasians belonging to the races around the Mediterranean Sea, whether they are considered as fair whites or dark whites, and though certain of the eastern and southern European races are technically classified as of Mongolian or Tartar origin. In re Halladjian (C. C. 1909) 174 Fed. 834; In re Young (D. C. 1912) 198 Fed. 715. But it was held in Ex parte Dow (D. C. 1914) 211 Fed. 486, and 213 Fed. 355, that the words do not mean a person white in color, nor do they designate racial distinction, meaning Caucasian or Indo-European, but are to be construed rather as a geographical term referring to the peoples who were commonly known in the United States as those inhabiting Europe and whose descendants, at the time of the passage of the act of 1790, formed the inhabitants of the United States, excluding Africans.

Naturalization acts, commencing with Act April 14, 1802, c. 28, and ending with Act July 14, 1870, c. 254, incorporated in part in this title, disclosed that the acts had in view the preventing of all aliens not free white persons from becoming citizens, and from and including Act July 14, 1870, to and inclusive of Act June 29, 1906, except the period between the revision of 1873 and the amendment thereto of 1875, the intention was to exclude from naturalization all aliens except those of the Caucasian and African races. Bessho v. U. S. (1910) 178 Fed. 245, 101 C. C. A. 605.

4. —— Armenians.—"Free white persons" includes Armenians born in Asiatic Turkey and on the west side of the Bosphorus. In re Halladjian (C. C. 1909) 174 Fed. 834.

5. —— Hawaiians.—This section is not modified by section 4359, post, which was only intended to remove doubts as to the eligibility of Chinese to citizenship, and hence a native of the Hawaiian Islands cannot be naturalized, as he belongs to neither of the races mentioned. In re Kanaka Nian (1889) 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726.

6. —— Hindus.—An applicant who testifies that he is a high-caste Hindu of pure blood, and that such Hindus have always considered themselves as members of the Aryan race, is entitled to naturalization as a white person. In re Akhay Kumar Mozumdar (D. C. 1913) 207 Fed. 115.

7. —— Indians.—A person of half white and half Indian blood is not a white person. In re Camille (C. C. 1880) 6 Fed. 256, 257.

The general statutes of naturalization do not apply to Indians, but they may be naturalized by special act of Congress or by treaty. (1856) 7 Op. Atty. Gen. 746.

An Indian born in British Columbia will not be admitted to citizenship by naturalization in the United States. In re Burton (1900) 1 Alaska, 111.

8. —— Malays.—A citizen of the Philippines, who was one-fourth white and

three-fourths brown or Malay, could not be naturalized. In re Alverto (D. C. 1912) 198 Fed. 688.

9. —— Mexicans.—Native citizens of Mexico, whatever may be their status from the standpoint of the ethnologist, are eligible to American citizenship, and may be individually naturalized by complying with the provisions of the naturalization laws. In re Rodriguez (D. C. 1897) 81 Fed. 337.

10. —— Mongolians.—A native of Japan or China, of the Mongolian race, is not a "white person." Fong Yue Ting v. U. S. (1893) 13 Sup. Ct. 1016, 1023, 149 U. S. 698, 37 L. Ed. 905; U. S. v. Wong Kim Ark (1898) 18 Sup. Ct. 456, 457, 169 U. S. 649, 42 L. Ed. 890; In re Ah Yup (C. C. 1878) Fed. Cas. No. 104; In re Saito (C. C. 1894) 62 Fed. 126; In re Gee Hop (D. C. 1895) 71 Fed. 274, 275; In re Hong Yen Chang (1890) 84 Cal. 163, 24 Pac. 156; In re Takuji Yamashita (1902) 70 P. 482, 30 Wash. 234, 59 L. R. A. 671. Nor is an alien born in Japan, at a place under German dominion, whose father was a German, and whose mother was a Japanese woman. In re Young (D. C. 1912) 195 Fed. 645, order affirmed on rehearing (D. C. 1912) 198 Fed. 715. Nor the Burmese, being of the Mongolian race. In re Po (City Ct. Alb. 1894) 7 Misc. Rep. 471, 28 N. Y. S. 383. And the fact that an alien of the Japanese race has served in the United States army or navy does not entitle him to naturalization. Bessho v. U. S. (1910) 178 Fed. 245, 248, 101 C. C. A. 605; In re Buntaro Kumagai (D. C. 1908) 163 Fed. 922.

11. —— Parsees.—"Free white persons," includes a Parsee. In re Balsara (C. C. 1909) 171 Fed. 294, order affirmed U. S. v. Balsara (1910) 180 Fed. 694, 103 C. C. A. 660.

12. —— Syrians.—The term "white persons," as used in Naturalization Act March 26, 1790, as amended by Act Feb. 18, of 1875, includes a Syrian. Dow v. U. S. (C. C. A. 1915) 226 Fed. 145, reversing (D. C. 1914) 213 Fed. 355, and (D. C. 1914) 211 Fed. 486. A Syrian from Mt. Lebanon, near Beirut, In re Najour (C. C. 1909) 174 Fed. 735; one born in Damascus, In re Mudarri (C. C. 1910) 176 Fed. 465; and one who is a native of Palestine and a Maronite, In re Ellis (D. C. 1910) 179 Fed. 1002—have been held "free white persons." But see Ex parte Shahid (D. C. 1913) 205 Fed. 812.

13. Africans.—A native of Japan is not a person of "African nativity or of African descent." In re Takuji Yamashita (1902) 70 P. 482, 30 Wash. 234, 59 L. R. A. 671, 94 Am. St. Rep. 860.

14. Repeal.—Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596, did not impliedly repeal this section. In re Balsara (C. C. 1909) 171 Fed. 294, order affirmed U. S. v. Balsara (1910) 180 Fed. 694, 103 C. C. A. 660; In re Alverto (D. C. 1912) 198 Fed. 688.

Cited without definite application, Scott v. Sandford (1856) 19 How. 393, 419, 15 L. Ed. 691; U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389.

§ 4359. (Act May 6, 1882, c. 126, § 14.) Chinese not to be naturalized.

Hereafter no State court or court of the United States shall admit Chinese to citizenship; and all laws in conflict with this act are hereby repealed. (22 Stat. 61.)

Notes of Decisions

See notes under § 4358, ante.

Purpose of act.—This section was enacted to dispel any doubt as to the sufficiency of the legislation on the subject of naturalization then in force, to prevent Chinese from being admitted as citizens. Bessho v. U. S. (1910) 178 Fed. 245, 101 C. C. A. 605; In re Kanaka Nian (1889) 6 Utah, 259, 21 Pac. 993, 4 L. R. A. 726.

Cited without definite application, In re Rodriguez (D. C. 1897) 81 Fed. 337, 349; In re Young (D. C. 1912) 198 Fed. 715; (1894, 1897) 21 Op. Atty. Gen. 37, 581.

§ 4360. (R. S. § 2170.) Residence of five years in United States.

No alien shall be admitted to become a citizen who has not for the continued term of five years next preceding his admission resided within the United States.

Act March 3, 1813, c. 42, § 12, 2 Stat. 811.

Notes of Decisions

See notes under § 4352.

Repeal.—Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596, does not repeal this section. Bessho v. U. S. (1910) 178 Fed. 245, 247, 101 C. C. A. 605.

Cited without definite application, Johannessen v. U. S. (1912) 32 Sup. Ct. 613, 614, 615, 225 U. S. 227, 56 L. Ed. 1066; U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389; Same v. Spohrer (C. C. 1910) 175 Fed. 440; Same v. Mansaur (D. C. 1908) 170 Fed. 671.

§ 4361. (Act April 30, 1900, c. 339, § 100, as amended, Act May 27, 1910, c. 258, § 9.) Residence in Hawaiian Islands equivalent to residence in United States.

For the purposes of naturalization under the laws of the United States residence in the Hawaiian Islands prior to the taking effect of this Act shall be deemed equivalent to residence in the United States and in the Territory of Hawaii, and the requirement of a previous declaration of intention to become a citizen of the United States and to renounce former allegiance shall not apply to persons who have resided in said islands at least five years prior to the taking effect of this Act; but all other provisions of the laws of the United States relating to naturalization shall, so far as applicable, apply to persons in the said islands.

All records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded, or issued prior to the taking effect of the naturalization Act of June twenty-ninth, nineteen hundred and six, in or from any circuit court of the Territory of Hawaii, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized. (31 Stat. 161. 36 Stat. 448.)

This section was part of the act to organize the Territory of Hawaii, cited above.

This section, as originally enacted, contained only the first paragraph set forth here, relating to naturalization of residents in the Hawaiian Islands. The further paragraph, in regard to records relating to naturalization, etc., was added by amendment by Act May 27, 1910, c. 258, § 9, last cited above.

Notes of Decisions

Repeal.—The provision of this section which authorizes the naturalization of persons who had resided in Hawaii for five years prior to its taking effect without a previous declaration of intention was repealed by the Naturalization Act June 29, 1906, c. 3592, 34 Stat. 596. U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389.

§ 4362. (R. S. § 2171.) Alien enemies not admitted.

No alien who is a native citizen or subject, or a denizen of any country, state, or sovereignty with which the United States are at war, at the time of his application, shall be then admitted to become a citizen of the United States.

Act April 14, 1802, c. 28, § 1, 2 Stat. 153. Act July 30, 1813, c. 36, 3 Stat. 53.

This section, as enacted in the Revised Statutes, contained a further provision that persons resident within the United States or its territories on June 18, 1812, who had before that day made declaration of intention to become citizens, or who were entitled to become citizens without such declaration, might be naturalized notwithstanding they were alien enemies at the time, and also a provision that nothing in the act should be construed to prevent the removal, agreeably to law, of any alien enemy at any time previous to his naturalization. These provisions are omitted as obsolete.

Notes of Decisions

Declaration of intention.—An alien enemy cannot be permitted to make the declaration required by law, preparatory to naturalization. Ex parte Newman (C. C. 1813) Fed. Cas. No. 10,174. CONTRA, Little's Case (Pa. 1812) 2 Browne, 218.

Repeal.—Naturalization Act June 29, 1906, c. 3492, 34 Stat. 596, does not repeal this section. Bessho v. U. S. (1910) 178 Fed. 245, 247, 101 C. C. A. 605.

Cited without definite application, U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389; Pintsch Compressing Co. v. Bergin (C. C. 1897) 84 Fed. 140, 141.

§ 4363. (Act June 29, 1906, c. 3592, § 7.) Persons disbelieving or opposed to organized government, etc., or advocating, etc., the unlawful assaulting or killing of officers of government, or polygamists, not to be naturalized.

No person who disbelieves in or who is opposed to organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States, or of any other organized government, because of his or their official character, or who is a polygamist, shall be naturalized or be made a citizen of the United States. (34 Stat. 598.)

See notes to section 3 of this act, ante, § 4351.

Previous provisions similar to those of this section were contained in Act March 3, 1903, c. 1012, § 39, 32 Stat. 1222, repealed by section 26 of this act, post, § 4381.

Persons such as those described in and excluded from naturalization by this section, other than polygamists, are not to be permitted to enter the United States, and aiding or assisting any such person unlawfully to do so was made punishable by Act Feb. 20, 1907, c. 1134, § 38, ante, § 4287.

Notes of Decisions

Certificate of naturalization.—A certificate of naturalization which states "and said applicant having personally appeared in court, producing such evidence and affidavits and making such declarations and renunciation, and taking such oaths as are by the said acts required; and all of said papers being filed and recorded, it was ordered that he be admitted to citizenship," meets the requirement of section 39 of the Immigration Act of March 3, 1903 (32 Stat. 1222). (1903) 25 Op. Atty. Gen. 23.

Cited without definite application, U. S. v. Olsson (D. C. 1912) 196 Fed. 562; Ex parte Shahid (D. C. 1913) 205 Fed. 812.

§ 4364. (Act June 29, 1906, c. 3592, § 8.) Persons who cannot speak English language not to be naturalized; physical inability; prior declarations of intention; aliens making homestead entries on public lands.

No alien shall hereafter be naturalized or admitted as a citizen of the United States who can not speak the English language: Provided, That this requirement shall not apply to aliens who are physically unable to comply therewith, if they are otherwise qualified to become citizens of the United States: And provided further, That the requirements of this section shall not apply to any alien who has prior to the passage of this Act declared his intention to become a citizen of the United States in conformity with the law in force at the date of making such declaration: Provided further, That the requirements of section eight shall not apply to aliens who shall hereafter declare their intention to become citizens and who shall make homestead entries upon the public lands of the United States and comply in all respects with the laws providing for homestead entries on such lands. (34 Stat. 599.)

See note to section 3 of this act, ante, § 4351.

Notes of Decisions

Knowledge of English.—Prior to the act of 1906, it was held that an alien though ignorant and unable to read and write, and who could not explain the principles of the constitution, was entitled to be naturalized, where it was clearly shown that he was a thoroughly law-abiding and industrious man, of good moral character. In re Rodriguez (D. C. 1897) 81 Fed. 337.

One who could neither read nor write English, and spoke and understood English very imperfectly, had no understanding of the manner and methods of government in America, or the responsibilities of a citizen, and could not be made to understand questions as to whether he was a polygamist or a disbeliever in organized government, was not entitled to naturalization. Ex parte Shahid (D. C. 1913) 205 Fed. 812.

§ 4365. (Act Feb. 24, 1911, c. 151.) Naturalization of wife making homestead entry and minor children of aliens becoming insane after declaration of intention before being actually naturalized.

When any alien, who has declared his intention to become a citizen of the United States, becomes insane before he is actually naturalized, and his wife shall thereafter make a homestead entry under the land laws of the United States, she and their minor children may, by complying with the other provisions of the naturalization laws be naturalized without making any declaration of intention. (36 Stat. 929.)

This was an act entitled "An act providing for the naturalization of the wife and minor children of insane aliens, making homestead entries under the land laws of the United States."

A similar provision in case of death of an alien after declaration of intention was made by Act June 29, 1906, c. 3592, § 4, subd. 6, ante, § 4352 (6).

§ 4366. (Act June 29, 1906, c. 3592, § 30.) Naturalization of persons not citizens who owe permanent allegiance to United States.

All the applicable provisions of the naturalization laws of the United States shall apply to and be held to authorize the admission to citizenship of all persons not citizens who owe permanent allegiance to the United States, and who may become residents of any State or organized Territory of the United States, with the following modifications: The applicant shall not be required to renounce allegiance to any foreign sovereignty; he shall make his declaration of intention to become a citizen of the United States at least two years prior to his admission; and residence within the jurisdiction of the United States, owing such permanent allegiance, shall be regarded as residence within the United States within the meaning of the five years' residence clause of the existing law. (34 Stat. 606.)

See notes to section 3 of this act, ante, § 4351.

Rev. St. § 2170, ante, § 4360, forbids naturalization of an alien "who has not for the continued term of five years next preceding his admission resided within the United States."

Notes of Decisions

Persons entitled.—Under this section, construed in connection with section 4358, ante, a citizen of the Philippine Islands, who was one-fourth white and three-fourths brown or Malay, could not be naturalized. In re Alverto (D. C. 1912) 198 Fed. 688.

Under Naval Appropriation Act, and in view of this section, a native of Porto Rico, who in 1903 enlisted in the Coast Guard Service, and who had made no declaration of intention, was entitled to naturalization. In re Giralde (D. C. 1915) 226 Fed. 826.

This section provides for the naturalization of native Filipinos owing permanent allegiance to the United States, who are residents of one of the states or territories of the United States. (1908) 27 Op. Atty. Gen. 12.

Declaration of intention.—The declaration of intention required by this section must be made, since the passage of the act, at least two years before application for naturalization, and applicant must have resided five years within one of the insular possessions of the United States. (1908) 27 Op. Atty. Gen. 12.

§ 4367. (R. S. § 2172.) Children of persons naturalized under certain laws to be citizens.

The children of persons who have been duly naturalized under any law of the United States, or who, previous to the passing of any law on that subject, by the Government of the United States, may have become citizens of any one of the States, under the laws thereof, being under the age of twenty-one years at the time of the naturalization of their parents, shall, if dwelling in the United States, be considered as citizens thereof; and the children of persons who now are, or have been, citizens of the United States, shall, though born out of

the limits and jurisdiction of the United States, be considered as citizens thereof.

Act April 14, 1802, c. 28, § 4, 2 Stat. 155.

The provisions of the first clause of this section, in so far as they apply to children of aliens born outside the United States, were superseded by somewhat similar provisions applicable to such children, of Act March 2, 1907, c. 2534, § 5, ante, § 3962.

Provisions somewhat similar to those of this section, relating to the children of citizens born outside of the United States, were made by R. S. § 1993, ante, § 3948; but such children who continue to reside outside the United States, in order to receive the protection of the Government, were required, upon attaining the age of 18 years, to record at an American consulate their intention to become residents and remain citizens of the United States, and, upon attaining their majority, to take the oath of allegiance to the United States, by Act March 2, 1907, c. 2534, § 6, ante, § 3963.

The last clause of this section provided that no person proscribed by any State or legally convicted of having joined the army of Great Britain during the Revolutionary War should be admitted to become a citizen without the consent of the legislature of the State in which such person was proscribed. It is omitted as obsolete.

Notes of Decisions

See §§ 3947, 3962, ante, and notes.

Prospective operation of statute.—This section is not limited to the children of persons already naturalized when it was passed, but operates prospectively. Boyd v. Nebraska (1892) 12 Sup. Ct. 375, 387, 143 U. S. 135, 36 L. Ed. 103; U. S. v. Kellar (C. C. 1882) 13 Fed. 82; State v. Penney (1850) 10 Ark. (5 Eng.) 621; O'Connor v. State (1860) 9 Fla. 215; West v. West (N. Y. 1840) 8 Paige, 433. CONTRA, Brown v. Shilling (1856) 9 Md. 74.

Naturalization of parents during minority of children dwelling in United States.—This section makes children of persons duly naturalized in the United States, who were minors at the time of such naturalization, citizens, if dwelling in the United States. Campbell v. Gordon (1810) 6 Cranch, 176, 183, 3 L. Ed. 190; Boyd v. Nebraska (1892) 12 Sup. Ct. 375, 387, 143 U. S. 135, 36 L. Ed. 103; U. S. v. Rodgers (1911) 185 Fed. 334, 337, 107 C. C. A. 452, affirming (D. C. 1910) 182 Fed. 274; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 527; Gribble v. Pioneer Press Co. (C. C. 1883) 15 Fed. 689, 691; (1862) 10 Op. Atty. Gen. 329; State v. Penney (1850) 10 Ark. (5 Eng.) 621; Dorsey v. Brigham (1898) 52 N. E. 303, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228; Rexroth v. Schein (1903) 69 N. E. 240, 206 Ill. 80; State v. Mims (1879) 26 Minn. 183, 2 N. W. 494, 683; In re Application to Condemn Land in Rock County (Minn. 1913) 141 N. W. 801; State v. Andriano (1887) 92 Mo. 70, 4 S. W. 263; Conover v. Old (1910 80 N. J. Law, 535, 77 A. 1070; In re Application of Morrison (N. Y. 1861) 22 How. Prac. 99; Marshall v. Baldwin (Pa. 1875) 11 Phila. 403, 32 Leg. Int. 208, 2 Leg. Rec. Rep. 247; North v. Valk (S. C. 1838) Dud. Eq. 212; Savage v. Umphries (Tex. Civ. App. 1909) 118 S. W. 893. It does not affect the citizenship of a minor, who did not come to this country until after his father had been naturalized. Behrensmeyer v. Kreitz (1891) 135 Ill. 501, 26 N. E. 704. Nor does it confer citizenship upon a child who has attained his majority before naturalization of the father. Dorsey v. Brigham (1898) 52 N. E. 303, 177 Ill. 250, 42 L. R. A. 809, 69 Am. St. Rep. 228. State v. Boyd (1891) 31 Neb. 682, 48 N. W. 739 (reversed in [1892] 143 U. S. 135, 12 Sup. Ct. 375, 36 L. Ed. 103); Dryden v. Swinburne (1882) 20 W. Va. 89.

The section applies to the minor children of a widow marrying a citizen, or an alien who becomes naturalized during the minority of the children. U. S. v. Kellar (C. C. 1882) 13 Fed. 82, 83; Same v. Rodgers (D. C. 1906) 144 Fed. 711; Kreitz v. Behrensmeyer (1888) 125 Ill. 141, 17 N. E. 232; Brown v. Shilling (1856) 9 Md. 74; Gumm v. Hubbard (1889) 97 Mo. 311, 11 S. W. 61, 10 Am. St. Rep. 312; People v. Newell (N. Y. 1884) 1 How. Prac. (N. S.) 8; People v. Newell (N. Y. 1885) 38 Hun, 78.

An alien minor child, who has never dwelt in the United States, is not, when coming to join a naturalized parent, exempt from the provision of section 4244, ante, as to contagious diseases, on the theory that she was invested with citizenship by virtue of this section. Zartarian v. Billings (1907) 27 Sup. Ct. 182, 183, 204 U. S. 170, 51 L. Ed. 428.

Where children are born in a foreign country of alien parents, their status as aliens is not changed by the naturalization of their father while the children are detained in custody as immigrants at Ellis Island. U. S. v. Williams (C. C. 1904) 132 Fed. 894.

Where an alien gave bond for hospital treatment of his daughter, who was denied admission because she was suffering with a contagious disease, the alien's naturalization would not confer citizenship on the daughter. In re Camaras (D. C. 1913) 202 Fed. 1019.

A Spanish subject by birth was naturalized in the United States in February 1876, and thereupon his son, aged 20,

who was born in the island of Cuba, applied to the State Department for a passport, stating that he had resided in the United States for five years, but that it was his intention to reside in the country of his nativity and engage in business there. Held, that the son, being a minor at the time of the naturalization of his father, must be considered a citizen of the United States, and entitled to a passport. (1876) 15 Op. Atty. Gen. 114.

This section includes an alleged illegitimate foreign-born person, who came to this country as a member of the family of his reputed father, whose wife was the mother of the boy, where the reputed father was naturalized while the alleged illegitimate child was an infant. Dale v. Irwin (1875) 78 Ill. 170.

The residence of a minor child with his father, within the United States, during the whole Revolutionary War, and until after the treaty of peace of 1783, entitles such child to all the rights of citizenship of the United States. Calais v. Marshfield (1849) 30 Me. (17 Shep.) 511.

The statute does not extend to children of those who left the country before the Declaration of Independence. Manchester v. Boston (1819) 16 Mass. 230.

Declaration of intention during minority of children is not alone sufficient. Berry v. Hull (1892) 6 N. M. 643, 30 Pac. 936; In re Conway (1863) 17 Wis. 526.

The minor daughter of a colonist in Texas who became a naturalized citizen is not an alien, though she has never been in Texas, and lives in an alien country. Franks v. Hancock (Tex. 1880) 1 Posey, Unrep. Cas. 554.

Repudiation.—A minor by the declaration of his parents acquires an inchoate status, but on attaining his majority he has an election and may repudiate the status, and his application for naturalization many years after he attained his majority negatives the presumption of an earlier election to become a citizen. Trabing v. U. S. (1897) 32 Ct. Cl. 440.

Treaties.—The minor child of one who became a citizen under Jay's treaty, if residing in the United States at the time, would thereby become a citizen. A treaty is just as much a "law of the United States," within the meaning of this provision as an act of congress. Crane v. Reeder (1872) 25 Mich. 303.

Cited without definite application, U. S. v. Wong Kim Ark (1898) 18 Sup. Ct. 456, 466, 169 U. S. 649, 42 L. Ed. 890; De Lamar's Nevada Gold Min. Co. v. Nesbitt (1900) 20 Sup. Ct. 715, 717, 177 U. S. 523, 44 L. Ed. 872; U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389; Bessho v. U. S. (1910) 178 Fed. 245, 247, 101 C. C. A. 605; Pequignot v. Detroit (C. C. 1883) 16 Fed. 211, 216; Ware v. Wisner (C. C. 1883) 50 Fed. 310, 312; Pintsch Compressing Co. v. Bergin (C. C. 1892) 84 Fed. 140, 141; In re Schmidt (D. C. 1908) 161 Fed. 231; In re Robertson (D. C. 1910) 179 Fed. 131, 132; (1876) 15 Op. Atty. Gen. 115.

(R. S. § 2173. Repealed.)

This section provided that the police court of the District of Columbia should have no power to naturalize foreigners. It was repealed by Act June 29, 1906, c. 3592, § 26, post, § 4381. The courts which should have jurisdiction to naturalize aliens were specified in section 3 of that act, ante, § 4351.

§ 4368. (Act June 29, 1906, c. 3592, § 9.) Final hearing on petition in open court; record of final order; examination of applicant and witnesses.

Every final hearing upon such petition shall be had in open court before a judge or judges thereof, and every final order which may be made upon such petition shall be under the hand of the court and entered in full upon a record kept for that purpose, and upon such final hearing of such petition the applicant and witnesses shall be examined under oath before the court and in the presence of the court. (34 Stat. 599.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

Examination of witnesses.—This section is mandatory, and depositions cannot be received or considered, except under circumstances mentioned in the succeeding section. U. S. v. Nisbet (D. C. 1909) 168 Fed. 1005; Same v. Kolodner (D. C. 1912) 199 Fed. 809.

This law requires that each applicant and his witness shall be separately and individually examined under oath like a witness in the trial of a case. U. S. v. Janke (D. C. 1910) 183 Fed. 277.

An affidavit on which a proceeding for the cancellation of a naturalization certificate was based held sufficient to charge a violation of this section. U. S. v. Leles (D. C. 1915) 227 Fed. 189.

Judgment or order.—The proceedings in a court of record are judicial, and result in a judgment which can be im-

peached only as other judicial judgments are. U. S. v. Gleason (C. C. 1897) 78 Fed. 396, 397 (affirmed [1898] 90 Fed. 778, 33 C. C. A. 272); Pintsch Compressing Co. v. Bergin (C. C. 1897) 84 Fed. 140, 141; The Acorn (D. C. 1870) Fed. Cas. No. 29; U. S. v. Aakervik (D. C. 1910) 180 Fed. 137; Same v. Stoller (D. C. 1910) 180 Fed. 910; State v. Penney (1850) 10 Ark. (5 Eng.) 621; In re Tinn (1906) 84 P. 152, 148 Cal. 773, 113 Am. St. Rep. 354; City of Rockland v. Inhabitants of Hurricane Isle (1909) 106 Me. 169, 76 A. 286; In re O'Sullivan (Mo. App. 1909) 117 S. W. 651; In re Christern (N. Y. 1878) 43 N. Y. Super. Ct. (11 Jones & S.) 523.

A certificate that an alien has taken the oath prescribed is sufficient without an order admitting him to become a citizen. Campbell v. Gordon (1810) 6 Cranch, 176, 182, 3 L. Ed. 190.

An alien is not naturalized until the order divesting him of his former nationality and making him a citizen of the United States has been signed by a judge of a court having jurisdiction of such cases. (1908) 26 Op. Atty. Gen. 611.

An order of the court of common pleas in Ohio stating that a certain person named, an alien and native of Germany, proved to the satisfaction of the court that he had made two years before the requisite declaration of his intention to become a citizen, and that he has resided in the United States for five years last past, and that during all that time he has behaved as a man of good moral character, attached to the principles of the Constitution of the United States, and in open court has made solemn oath to support such Constitution, and that he does renounce all allegiance to every foreign prince, potentate, or power, particularly to the crown of Germany, is a sufficient judgment admitting to citizenship the person therein named. State v. Webber (1905) 105 N. W. 490, 96 Minn. 422, 113 Am. St. Rep. 630.

The court cannot make its order of naturalization retroactive. Dryden v. Swinburne (1882) 20 W. Va. 89.

—— **Record.**—A record of naturalization need not show that all the legal prerequisites were complied with, the judgment being conclusive of such compliance. Starke v. Chesapeake Ins. Co. (1813) 11 U. S. (7 Cranch) 420, 3 L. Ed. 391; Spratt v. Spratt (1830) 29 U. S. (4 Pet.) 406, 7 L. Ed. 897; In re Coleman (C. C. 1879) Fed. Cas. No. 2,980; In re Symanowsski (C. C. 1909) 168 Fed. 978; Ritchie v. Putnam (N. Y. 1835) 13 Wend. 524; Towle's Case (Va. 1835) 5 Leigh, 743. It need not contain the declaration of intention. In re Symanowsski (C. C. 1909) 168 Fed. 978; McDaniel v. Richards (S. C. 1821) 1 McCord, 187. It need not show jurisdiction. In re Symanowsski (C. C. 1909) 168 Fed. 978. CONTRA, Ex parte Lange (D. C. 1912) 197 Fed. 769. Nor residence in the state for the required time. City of Rockland v. Inhabitants of Hurricane Isle (Me. 1909) 76 A. 286.

Judgments whether adverse or favorable to the petitioners, should be formally entered. In re Bodek (C. C. 1894) 63 Fed. 813; City of Rockland v. Inhabitants of Hurricane Isle (1909) 106 Me. 169, 76 A. 286. But a failure to enter is not fatal. In re Christern (N. Y. 1878) 43 N. Y. Super. Ct. (11 Jones & S.) 523.

The validity of a judgment admitting a person to citizenship is not impaired by inaccurate recitals, not intended to deceive, it being clear that the applicant was entitled to naturalization. In re McCoppin (C. C. 1869) Fed. Cas. No. 8,713.

The question as to what constitutes a record of naturalization considered. In re Coleman (C. C. 1879) Fed. Cas. No. 2,980.

The provision as to record is directory. Id.; U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

The act of admission is in the nature of a judgment, of which the preliminary proofs, judge's allocatur, and oath of allegiance, duly filed, are the record. Entry in a book is not necessary. In re Christern (1878) 56 How. Pr. 5, 43 N. Y. Super. Ct. (11 Jones & S.) 523.

—— **Entry nunc pro tunc.**—A judgment of naturalization which has never been recorded, or, if recorded, the record of which has been lost, cannot be entered by a common-law court nunc pro tunc, 33 years after its rendition, when no entry or memorandum appeared upon the record or files at the time the original judgment is supposed to have been rendered, especially where the declaration of intention was made before another court, in another state, and the territorial court which is alleged to have entered the judgment has itself been abolished and a state court substituted in its place. Gagnon v. U. S. (1904) 24 Sup. Ct. 510, 512, 193 U. S. 451, 48 L. Ed. 745, affirming judgment (1902) 38 Ct. Cl. 10.

Issuance of certificate before entry of order as required by section 4375, post, held subject to correction nunc pro tunc. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

The extent of the record and manner of keeping it is very much in the discretion of the court. Even if the absence of a record in the minute book could be deemed a defect, it would be an immaterial one, and a motion to perfect the record nunc pro tunc, by making an entry in the minute book of the fact of admission, will therefore be denied. In re Christern (1878) 56 How. Prac. 5. 43 N. Y. Super. Ct. (11 Jones & S.) 523.

Where the record fails to show the proceedings necessary to the issue of a certificate of naturalization, the court cannot make up the record nunc pro tunc, and issue the certificate accordingly. In re Desty (N. Y. 1880) 8 Abb. N. C. 250.

—— **Modification or correction.**—Where an alien was naturalized as "Frederick Persky" in 1898, and in 1912 his name was changed to "Perkins" by an order of the state court, he was not entitled thereafter to a modification of the naturalization decree to conform to such change of name. In re Perkins (D. C. 1913) 204 Fed. 350.

The court has full power to amend its record in naturalization proceedings, nunc pro tunc, to make the record conform to the facts. State v. Macdonald (1877) 24 Minn. 48; In re Macoluso's Naturalization (1912) 85 A. 149, 237 Pa. 132.

A record was not subject to correction as to the alien's name claimed to be erroneous, in the absence of any entry or memorandum among the files of the court or in the office of the clerk establishing the alleged error. In re O'Sullivan (Mo. App. 1909) 117 S. W. 651.

Where a record purported to record the naturalization of "Mike O'Sullivan" on a specified date, an alleged certified copy of the record under the seal of the court and signed by its clerk showing the naturalization of "Miles O'Sullivan" was inadmissible to correct the record as to the name; there being no record or court entry to sustain the certificate. Id.

The proceedings, being in rem, cannot be corrected at a subsequent term. In re O'Sullivan (1909) 137 Mo. App. 214, 117 S. W. 651.

The record may, if necessary, be amended by directing an entry in the minute book of the fact of such admission nunc pro tunc. In re Christern (1878) 43 N. Y. Super. Ct. (11 Jones & S.) 523.

—— **Collateral attack.**—A record of naturalization or a certificate of citizenship, made by a court of competent jurisdiction, cannot be impeached, in a collateral proceeding, by showing that the preliminary steps required by law had not, in fact, been taken. Preston v. Culbertson (1881) 58 Cal. 198; People v. McGowan (1875) 77 Ill. 644, 20 Am. Rep. 254; Ackerman v. Haenck (1893) 147 Ill. 514, 35 N. E. 381; Andres v. Arnold (1889) 43 N. W. 857, 77 Mich. 85, 6 L. R. A. 238; State v. Macdonald (1877) 24 Minn. 48; In re Wagner (1912) 135 N. Y. S. 678, 75 Misc. Rep. 419; Esker v. McCoy (1878) 5 Ohio Dec. 573, 6 Am. Law Rec. 694; Commonwealth v. The Sheriff (Pa. 1868) 1 Brewst. 183; Same v. Leary (Pa. 1868) 1 Brewst. 270.

The correctness of a general certificate of naturalization cannot be inquired into or impeached collaterally. In re Contested Elections (Pa. 1868) 2 Bewst. 1; Commonwealth v. Lee (Pa. 1869) 1 Brewst. 273, Brightly, Elect. Cas. 98; In re Election and Registry Acts (Pa. 1869) 2 Brewst. 138; Fowler v. Felthoff (Pa. 1879) 1 Leg. Rec. Rep. 105; Glazier v. Merringer (Pa. 1880) 12 Lanc. Bar, 61; Conway v. Carpenter (Pa. 1881) 11 Wkly. Notes Cas. 169; In re Beamish's Contest (Pa. 1885) 7 Law T. (N. S.) 17; Commonwealth v. Towles (Va. 1835) 5 Leigh, 743; State v. Stumpf (1869) 23 Wis. 630; Same v. Hoeflinger (1874) 35 Wis. 393. Nor for mere failure of the court to comply with directory provisions of the statute. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

In collateral proceedings technical rules should not be applied when determining whether or not the disability arising from alienage has been removed by proceedings under the naturalization laws. State v. Barrett (1889) 40 Minn. 65, 41 N. W. 459.

Notwithstanding the absence of a law admitting a minor to be naturalized, a judgment of a court of competent jurisdiction naturalizing a minor, though erroneous, is not void, and cannot be attacked collaterally, but can only be annulled or set aside, by appeal or writ of error, taken for that purpose. State ex rel. Lacy v. Brandhorst (1900) 56 S. W. 1094, 156 Mo. 457, 79 Am. St. Rep. 538.

On a question of title, the court may inquire into the regularity of an alien's proceedings in obtaining a certificate of citizenship. Vaux v. Nesbit (S. C. 1826) 1 McCord, Eq. 370.

A judgment of naturalization, void on its face, may be attacked in a subsequent proceeding by the alien to be admitted to practice as an attorney. In re Takuji Yamashita (1902) 70 P. 482, 30 Wash. 234, 59 L. R. A. 671.

Renaturalization.—A naturalized alien cannot maintain a petition for renaturalization on destruction of the court records; his remedy being by proceedings to restore the record. In re Buck (D. C. 1913) 204 Fed. 701.

One who has been improperly naturalized may surrender his certificate and present a new petition. Commonwealth v. Paper (Pa. 1868) 1 Brewst. 263.

Cited without definite application, U. S. v. Doyle (1910) 179 Fed. 687, 103 C. C. A. 233.

§ 4369. (Act June 29, 1906, c. 3592, § 10.) Evidence of residence in petition and at hearing.

In case the petitioner has not resided in the State, Territory, or district for a period of five years continuously and immediately

preceding the filing of his petition he may establish by two witnesses, both in his petition and at the hearing, the time of his residence within the State, provided that it has been for more than one year, and the remaining portion of his five years' residence within the United States required by law to be established may be proved by the depositions of two or more witnesses who are citizens of the United States, upon notice to the Bureau of Immigration and Naturalization and the United States attorney for the district in which said witnesses may reside. (34 Stat. 599.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

District defined.—The word "district," in the phrase "state, territory, or district," refers to the District of Columbia, and not to the judicial district in which a petition for naturalization is filed. U. S. v. Kolodner (1913) 204 Fed. 240, 124 C. C. A. 1.

Depositions.—On application by an honorably discharged soldier for naturalization, his proof of residence within the United States for one year prior to his application may be made by depositions. In re McNabb (D. C. 1909) 175 Fed. 511.

Under this section, where an applicant for naturalization has not lived for five years continuously in the state, territory, or district, in which he applies, he may prove the portion of such residence in another state, or district, necessary to make up the five years' residence, by deposition. U. S. v. Kolodner (D. C. 1912) 199 Fed. 809.

Cited without definite application, U. S. v. Nisbet (D. C. 1909) 168 Fed. 1005; Same v. Plaistow (D. C. 1910) 189 Fed. 1006; U. S. v. Cantini (D. C. 1912) 199 Fed. 859; In re Manning (D. C. 1913) 209 Fed. 499.

§ 4370. (Act June 29, 1906, c. 3592, § 11.) Appearance by United States and proceedings in opposition to granting of petition.

The United States shall have the right to appear before any court or courts exercising jurisdiction in naturalization proceedings for the purpose of cross-examining the petitioner and the witnesses produced in support of his petition concerning any matter touching or in any way affecting his right to admission to citizenship, and shall have the right to call witnesses, produce evidence, and be heard in opposition to the granting of any petition in naturalization proceedings. (34 Stat. 599.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

Duties of United States attorney.—The court will ordinarily admit a petioner to citizenship in the absence of declared opposition by the United States, and hence it is the duty of the United States attorney to specify his objections and to support the same by argument. In re Mudarri (C. C. 1910) 176 Fed. 465.

§ 4371. (Act June 29, 1906, c. 3592, § 12.) Duties of clerks of courts; duplicates, etc., of declarations, certificates, petitions, etc.; penalty for failure to comply with provisions; responsibility for blank certificates of citizenship.

It is hereby made the duty of the clerk of each and every court exercising jurisdiction in naturalization matters under the provisions of this Act to keep and file a duplicate of each declaration of intention made before him and to send to the Bureau of [Immigration and] Naturalization at Washington, within thirty days after the issuance of a certificate of citizenship, a duplicate of such certificate, and to make and keep on file in his office a stub for each certificate so issued by him, whereon shall be entered a memorandum of all the essential facts set forth in such certificate. It shall also be the duty of the clerk of each of said courts to report to the said Bureau, within thirty days after the final hearing and decision of the court, the name of each and every alien who shall be denied naturalization, and to furnish to said Bureau duplicates of all petitions within thirty days after the filing of the same, and

certified copies of such other proceedings and orders instituted in or issued out of said court affecting or relating to the naturalization of aliens as may be required from time to time by the said Bureau.

In case any such clerk or officer acting under his direction shall refuse or neglect to comply with any of the foregoing provisions he shall forfeit and pay to the United States the sum of twenty-five dollars in each and every case in which such violation or omission occurs, and the amount of such forfeiture may be recovered by the United States in an action of debt against such clerk.

Clerks of courts having and exercising jurisdiction in naturalization matters shall be responsible for all blank certificates of citizenship received by them from time to time from the Bureau of [Immigration and] Naturalization, and shall account for the same to the said Bureau whenever required so to do by such Bureau. No certificate of citizenship received by any such clerk which may be defaced or injured in such manner as to prevent its use as herein provided shall in any case be destroyed, but such certificate shall be returned to the said Bureau; and in case any such clerk shall fail to return or properly account for any certificate furnished by the said Bureau, as herein provided, he shall be liable to the United States in the sum of fifty dollars, to be recovered in an action of debt, for each and every certificate not properly accounted for or returned. (34 Stat. 599.)

See notes to section 3 of this act, ante, § 4351.

The words "Immigration and," inclosed in brackets where they occur twice in this section were superseded by the division of the Bureau of Immigration and Naturalization, theretofore in the Department of Commerce and Labor, into two bureaus to be known as the Bureau of Immigration and the Bureau of Naturalization in the Department of Labor, by the act creating the latter department, Act March 4, 1913, c. 141, § 3, ante, § 934.

Possession of blank certificates of citizenship with intent unlawfully to use the same was made punishable, by section 19 of this act, which was re-enacted as Crim. Code, § 77, post, § 10245, and was repealed by Crim. Code, § 341, post, § 10515.

Notes of Decisions

Failure of clerk to report.—An applicant for naturalization is not affected by any failure of the clerk to report to the Department of Commerce and Labor any details which he ought to report. U. S. v. Erickson (D. C. 1910) 188 Fed. 747.

§ 4372. (Act June 29, 1906, c. 3592, § 13, as amended, Act June 25, 1910, c. 401, § 1.) Fees of clerks of courts; disposition of fees collected; deposit by petitioner for expenses and fees of witnesses; compensation from fees for additional clerical force required.

The clerk of each and every court exercising jurisdiction in naturalization cases shall charge, collect, and account for the following fees in each proceeding:

For receiving and filing a declaration of intention and issuing a duplicate thereof, one dollar.

For making, filing, and docketing the petition of an alien for admission as a citizen of the United States and for the final hearing thereon, two dollars; and for entering the final order and the issuance of the certificate of citizenship thereunder, if granted, two dollars.

The clerk of any court collecting such fees is hereby authorized to retain one-half of the fees collected by him in such naturalization proceeding; the remaining one-half of the naturalization fees in each case collected by such clerks, respectively, shall be accounted for in their quarterly accounts, which they are hereby required to render the Bureau of [Immigration and] Naturalization, and paid over to such Bureau within thirty days from the close of each quarter in each

and every fiscal year, and the moneys so received shall be paid over to the disbursing clerk of the Department of [Commerce and] Labor, who shall thereupon deposit them in the Treasury of the United States, rendering an account therefor quarterly to the Auditor for the State and other Departments, and the said disbursing clerk shall be held responsible under his bond for said fees so received.

In addition to the fees herein required, the petitioner shall, upon the filing of his petition to become a citizen of the United States, deposit with and pay to the clerk of the court a sum of money sufficient to cover the expenses of subpœnaing and paying the legal fees of any witnesses for whom he may request a subpœna, and upon the final discharge of such witnesses they shall receive, if they demand the same from the clerk, the customary and usual witness fees from the moneys which the petitioner shall have paid to such clerk for such purpose, and the residue, if any, shall be returned by the clerk to the petitioner: Provided, That the clerks of courts exercising jurisdiction in naturalization proceedings shall be permitted to retain one-half of the fees in any fiscal year up to the sum of three thousand dollars, and that all fees received by such clerks in naturalization proceedings in excess of such amount shall be accounted for and paid over to said Bureau as in case of other fees to which the United States may be entitled under the provisions of this Act. The clerks of the various courts exercising jurisdiction in naturalization proceedings shall pay all additional clerical force that may be required in performing the duties imposed by this Act upon the clerks of courts from fees received by such clerks in naturalization proceedings. And in case the clerk of any court exercising naturalization jurisdiction collects fees in excess of the sum of six thousand dollars in any fiscal year the Secretary of [Commerce and] Labor may allow salaries, for naturalization purposes only, to pay for clerical assistance, to be selected and employed by that clerk, additional to the clerical force, for which clerks of courts are required by this section to pay from fees received by such clerks in naturalization proceedings, if in the opinion of said Secretary the naturalization business of such clerk warrants further additional assistance: Provided, That in no event shall the whole amount allowed the clerk of a court and his assistants exceed the one-half of the gross receipts of the office of said clerk from naturalization fees during such fiscal year: Provided further, That when, at the close of any fiscal year, the business of such clerk of court indicates in the opinion of the Secretary of [Commerce and] Labor that the naturalization fees for the succeeding fiscal year will exceed six thousand dollars the Secretary of [Commerce and] Labor may authorize the continuance of the allowance of salaries for the additional clerical assistance herein provided for and employed on the last day of the fiscal year until such time as the remittances indicate in the opinion of said Secretary that the fees for the then current fiscal year will not be sufficient to allow the additional clerical assistance authorized by this Act.

That payment for the additional clerical assistance herein authorized shall be in the manner and under such regulations as the Secretary of [Commerce and] Labor may prescribe. (34 Stat. 600. 36 Stat. 829.)

See notes to section 3 of this act, ante, § 4351.

The words "Immigration and," inclosed in brackets in this section, were superseded by the division of the Bureau of Immigration and Naturalization, theretofore in the Department of Commerce and Labor, into two bureaus to be known as the Bureau of Immigration and the Bureau of Naturalization in the Department of Labor by the act creating the latter department, Act March 4, 1913, c. 141, § 3, ante, § 934. The words "Commerce and," also inclosed

in brackets in the several places where they occur in this section, were superseded by the transfer to and conferring upon the head of the Department of Labor of all duties and powers possessed or exercised by the head of any department from which a bureau was transferred to the Department of Labor, by Act March 4, 1913, c. 141, § 8, ante, § 940.

The amendment of this section by Act June 25, 1910, c. 401, § 1, cited above, consisted in striking out the last sentence of the section as originally enacted, which read as follows: "And in case the clerk of any court collects fees in excess of the sum of six thousand dollars in any one year, the Secretary of Commerce and Labor may allow to such clerk from the money which the United States shall receive additional compensation for the employment of additional clerical assistance, but for no other purpose, if in the opinion of the said Secretary the business of such clerk warrants such allowance," and inserting in lieu thereof the provision beginning "And in case the clerk of any court exercising naturalization jurisdiction," etc., to and including the two provisos following, to the end of the section as set forth here.

A provision of Act March 4, 1909, c. 299, § 1, 35 Stat. 983, limiting the compensation for additional clerical assistance and providing for regulation of expenditures therefor, was superseded by said amendment of this section.

Provisions for payment for such additional clerical assistance employed during the period from Sept. 27, 1906, to June 30, 1907, were contained in section 2 of said amendatory act, Act June 25, 1910, c. 401, § 2, 36 Stat. 830.

Any clerk or other officer willfully neglecting to account for moneys received by him for naturalization proceedings, or to pay over any balance thereof due, was to be deemed guilty of embezzlement, and punishable therefor, by section 20 of this act, post, § 4376.

The demand, etc., or receipt by a clerk, etc., of other or additional fees or moneys in naturalization proceedings save those specified herein was made a misdemeanor and punishable by section 21 of this act, post, § 4377.

Notes of Decisions

Fees of clerks.—The provision of Naturalization Act April 14, 1802, c. 28, 2 Stat. 153, for clerks' fees, was omitted in the later naturalization acts. U. S. v. McMillan (1897) 17 Sup. Ct. 395, 399, 165 U. S. 504, 41 L. Ed. 805.

The services performed by the clerk do not require any precedent action of the court of claims, and the fees prescribed are exclusive. Jaynes v. U. S. (1912) 47 Ct. Cl. 523.

The fees fixed by congress control the naturalization proceedings, to the exclusion of state legislation. State v. Libby (Wash. 1907) 92 P. 350.

—— **Disposition.**—Clerks of state courts, who by state law are on a salary basis and are required to account for moneys coming into their hands, cannot retain fees in naturalization cases for their personal use. Mulcrevy v. San Francisco (1914) 34 Sup. Ct. 260, 231 U. S. 669, 58 L. Ed. 425; Berkshire County v. Cande (Mass. 1915) 109 N. E. 838; Barron County v. Beckwith (1910) 124 N. W. 1030, 142 Wis. 519. CONTRA, Fields v. Multnomah County, Oregon (Or. 1913) 128 Pac. 1045; Eldredge v. Salt Lake County (Utah, 1910) 106 Pac. 939.

A decision of the United States Supreme Court adjudging the right of clerks of courts in naturalization proceedings to fees under the naturalization act, though controlling on a state court as to the construction of the naturalization act, is not controlling as to the construction of a state statute for the disposition of fees of clerks of state courts in naturalization proceedings. Freeholders of Passaic v. Slater (N. J. 1914) 90 Atl. 377, reversing judgment (1913) 88 Atl. 213, 84 N. J. Law, 589.

—— **Payment.**—Where the right of an alien to naturalization is doubtful, he may properly have the matter determined by means of a motion for leave to file a petition setting out the facts, and on notice to the United States attorney, without payment of the fees required on the filing of a petition. In re Guliano (D. C. 1907) 156 Fed. 420.

§ 4373. (Act June 29, 1906, c. 3592, § 14.) Binding declaration of intention and petitions for naturalization as records of court; reference in certificate of naturalization to record of petition and stub of certificate.

The declarations of intention and the petitions for naturalization shall be bound in chronological order in separate volumes, indexed, consecutively numbered, and made part of the records of the court. Each certificate of naturalization issued shall bear upon its face, in a place prepared therefor, the volume number and page number of the petition whereon such certificate was issued, and the

volume number and page number of the stub of such certificate. (34 Stat. 601.)

See notes to section 8 of this act, ante, § 4351.

Notes of Decisions

Failure to comply with law.—This section merely defines the duties of the officers having naturalization in charge, and if they have so prepared the applications for naturalization that the provisions of the section cannot be observed, it should not affect the right of an applicant who has complied with the formalities of the law and has shown himself entitled to admission. In re Freeze (D. C. 1911) 189 Fed. 1022.

§ 4374. (Act June 29, 1906, c. 3592, § 15.) Cancellation of certificates fraudulently or illegally procured, or of certificates of persons taking permanent residence in foreign country; proceedings, order and judgment, records, etc.; certificates issued under prior laws.

It shall be the duty of the United States district attorneys for the respective districts, upon affidavit showing good cause therefor, to institute proceedings in any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit, for the purpose of setting aside and canceling the certificate of citizenship on the ground of fraud or on the ground that such certificate of citizenship was illegally procured. In any such proceedings the party holding the certificate of citizenship alleged to have been fraudulently or illegally procured shall have sixty days personal notice in which to make answer to the petition of the United States; and if the holder of such certificate be absent from the United States or from the district in which he last had his residence, such notice shall be given by publication in the manner provided for the service of summons by publication or upon absentees by the laws of the State or the place where such suit is brought.

If any alien who shall have secured a certificate of citizenship under the provisions of this Act shall, within five years after the issuance of such certificate, return to the country of his nativity, or go to any other foreign country, and take permanent residence therein, it shall be considered prima facie evidence of a lack of intention on the part of such alien to become a permanent citizen of the United States at the time of filing his application for citizenship, and, in the absence of countervailing evidence, it shall be sufficient in the proper proceeding to authorize the cancellation of his certificate of citizenship as fraudulent, and the diplomatic and consular officers of the United States in foreign countries shall from time to time, through the Department of State, furnish the Department of Justice with the names of those within their respective jurisdictions who have such certificates of citizenship and who have taken permanent residence in the country of their nativity, or in any other foreign country, and such statements, duly certified, shall be admissible in evidence in all courts in proceedings to cancel certificates of citizenship.

Whenever any certificate of citizenship shall be set aside or canceled, as herein provided, the court in which such judgment or decree is rendered shall make an order canceling such certificate of citizenship and shall send a certified copy of such order to the Bureau of [Immigration and] Naturalization; and in case such certificate was not originally issued by the court making such order it shall direct the clerk of the court to transmit a copy of such order and judgment to the court out of which such certificate of citizenship shall have been originally issued. And it shall thereupon be the duty of the clerk of the court receiving such certified copy of the order and judgment of the court to enter the same of record and to cancel such original certificate of citizenship upon the records and to no-

tify the [Bureau of Immigration] and Naturalization of such cancellation.

The provisions of this section shall apply not only to certificates of citizenship issued under the provisions of this Act, but to all certificates of citizenship which may have been issued heretofore by any court exercising jurisdiction in naturalization proceedings under prior laws. (34 Stat. 601.)

See notes to section 3 of this act, ante, § 4351.

The words "Immigration and," inclosed in brackets where they occur twice in this section, were superseded by the division of the Bureau of Immigration and Naturalization, theretofore in the Department of Commerce and Labor, into two Bureaus to be known as the Bureau of Immigration and the Bureau of Naturalization in the Department of Labor, by the act creating the latter department, Act March 4, 1913, c. 141, § 3, ante, § 934.

On conviction of any person of knowingly procuring naturalization in violation of the provisions of this act, the order admitting such person to citizenship is to be adjudged void, by section 23 of this act, post, § 4378.

A naturalized citizen who resides for two years in the foreign state from which he came, or for five years in any other foreign state, is to be presumed to have ceased to be an American citizen, by Act March 2, 1907, c. 2534, § 2, ante, § 3959.

Notes of Decisions

1. In general.
2. Validity of statute.
3. Certificates fraudulently or illegally procured.
4. Certificates of persons taking permanent residence in foreign country.
5. Certificates previously issued.
6. Nature of proceeding.
7. Right to institute proceedings.
8. Jurisdiction.
9. Time for proceedings.
10. Affidavit.
11. Notice.
12. Pleading.
13. Evidence.
14. Trial by jury.
15. Appeal.
16. Surrender of certificate.

1. In general.—Naturalization proceedings, like ordinary judicial proceedings, are properly sustained if defects asserted are merely technical and formal. U. S. v. Erickson (D. C. 1910) 188 Fed. 747.

This section does not forfeit the naturalized alien's right to citizenship, but merely confers jurisdiction on the courts of naturalization to cancel a previous certificate for fraud or illegal procurement in its inception. U. S. v. Luria (D. C. 1911) 184 Fed. 643.

This section does not detract from or add to the rights and remedies of the government as they existed prior to the statute, and the design of the statute is to enable the government to exercise some supervision over naturalization proceedings and in its discretion to oppose, contest, and convert the proceedings into those actually adversary. U. S. v. Albertini (D. C. 1913) 206 Fed. 133.

2. Validity of statute.—This section is not unconstitutional. Johannessen v. U. S. (1912) 32 Sup. Ct. 613, 614, 617, 225 U. S. 227, 56 L. Ed. 1066; Luria v. Same (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101; U. S. v. Simon (C. C. 1909) 170 Fed. 680; Same v. Spohrer (C. C. 1910) 175 Fed. 440; Same v. Ellis (C. C. 1911) 185 Fed. 546; Same v. Mansour (D. C. 1908) 170 Fed. 671; Same v. Luria (D. C. 1911) 184 Fed. 643.

3. Certificates fraudulently or illegally procured.—Certificate of naturalization may be canceled, if fraudulently and illegally procured. Johannessen v. U. S. (1912) 32 Sup. Ct. 613, 614, 225 U. S. 227, 56 L. Ed. 1066.

A certificate cannot be set aside upon the ground that the facts were falsely represented to the court. U. S. v. Gleason (C. C. 1897) 78 Fed. 396, decree affirmed (1898) 90 Fed. 778, 33 C. C. A. 272.

Five years' continuous residence necessary for naturalization is broken by a physical absence for seven months, during which time an alien obtains naturalization into another allegiance, and a certificate granted under such circumstances is subject to cancellation either on ground of fraud, if he misrepresented the facts, or on ground that it was illegally procured. U. S. v. Simon (C. C. 1909) 170 Fed. 680.

A certificate will not be canceled, as having been illegally procured, on ground that the holder had not during 5 years immediately preceding application behaved as a man of good moral character, on a showing that prior to such period he had several times, and once thereafter, been arrested and convicted for drunkenness, where it is clearly shown he reformed, and remained sober for more than 4½ years prior thereto. U. S. v. Dwyer (C. C. 1909) 170 Fed. 686.

Where one admitted to citizenship did not in good faith intend to become a permanent citizen, and he made his oath with a mental reservation to that effect, he was guilty of fraud in procuring the decree. U. S. v. Ellis (C. C. 1911) 185 Fed. 546.

Naturalization papers will be canceled as improvidently issued where it is

made to appear to the court that the affidavit and the testimony on which the papers were issued were false, and that the applicant was not in fact eligible to citizenship. U. S. v. Kornmehl (D. C. 1898) 89 Fed. 10.

Want of jurisdiction. U. S. v. Schurr (D. C. 1908) 163 Fed. 648; Same v. Van Der Molen, Id. 650; Same v. Wayer, Id. 650.

A certificate granted an alien who had not been a bona fide resident for the next preceding five years, and who did not intend to become such, but desired citizenship for protection in a foreign country, will be canceled for fraud. U. S. v. Mansour (D. C. 1908) 170 Fed. 671.

A certificate of citizenship may be set aside for fraud or illegality in its procurement, comprehending false testimony under which the certificate was procured as well as error in rendering judgment on a given state of facts. U. S. v. Aakervik (D. C. 1910) 180 Fed. 137.

Certificate issued after judgment admitting an alien, but before the judgment has been signed or entered, is not void. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

Where a decree of naturalization issued by an Ohio court of original jurisdiction recited that the alien naturalized was then 25 years of age, and that it appeared to the court that he had made his declaration of intention to become a citizen of the United States according to law, it should be construed as finding that all other requirements necessary to sustain his application were found to exist; and hence the order could not be attacked on the ground that he had not declared his intention at least two years prior to his admission to citizenship, under the rule that a judgment may not be impeached for any facts, whether involving fraud, collusion, or perjury, which were necessarily before the court entering the judgment and passed upon. U. S. v. Nechman (D. C. 1910) 183 Fed. 788.

A naturalization certificate should not be vacated as having been obtained illegally or through fraud, because, on ineligibility of one of two witnesses appearing, his name was erased from the witnesses' affidavit, and another name substituted, and the date of the affidavit changed to that when the new witness verified, though no duplicate of the affidavit as so changed was forwarded to the Department of Commerce and Labor. U. S. v. Erickson (D. C. 1910) 188 Fed. 747.

Where a certificate of citizenship was issued by a state court to an alien who had not served a full term of enlistment in the Marine Corps, on a certificate of his honorable discharge and proof of good character, without his having previously declared his intention to become a citizen, such certificate was subject to vacation in a suit in a federal court at the instance of the United States. U. S. v. Plaistow (D. C. 1910) 189 Fed. 1006.

The term "illegally procured" means procured by subornation or some other illegal means used to impose on the court, and not that the certificate was issued through error of law. U. S. v. Plaistow (D. C. 1910) 189 Fed. 1006; Same v. Luria (D. C. 1911) 184 Fed. 643; Same v. Albertini (D. C. 1913) 206 Fed. 133.

A certificate of citizenship, issued to an alien on his petition, in which he stated that he was unmarried, when in fact he had a wife and children, whom he deserted and left in his native country, is subject to cancellation for fraud. U. S. v. Albertini (D. C. 1913) 206 Fed. 133.

A state court having granted a petition for naturalization over objection that it was signed by mark only, a federal court of concurrent jurisdiction would not entertain a bill to set aside the decree on the ground that it had been "illegally procured." U. S. v. Lenore (D. C. 1913) 207 Fed. 865.

Where defendant's naturalization for want of a certificate of physical examination, etc., was opposed, but he was admitted to citizenship, the omission of the certificate was not an "illegality" for which the judgment could be annulled, and the judgment was res judicata in a federal court of co-ordinate jurisdiction. U. S. v. Ness (D. C. 1914) 217 Fed. 169.

Certificate of naturalization held not illegally procured, so as to be subject to cancellation, where declaration of intention containing misstatements was amended when application for naturalization was made. U. S. v. Orend (D. C. 1915) 221 Fed. 777.

Certificate of citizenship granted native-born citizen held not subject to cancellation, because declaration of intention was made before a British certificate of naturalization previously applied for was issued. U. S. v. Hodgman (D. C. 1915) 221 Fed. 1018.

Certificate of citizenship, granted to an alien, held subject to cancellation, as having been fraudulently and illegally procured, on the ground that he was not a man of good moral character when admitted. U. S. v. Raverat (D. C. 1915) 222 Fed. 1018.

A proceeding to cancel a naturalization certificate issued in violation of Naturalization Act, § 9, ante, § 4368, cannot be defeated on the ground that the invalidity relied on consisted merely of irregularities, which could be corrected on appeal. U. S. v. Leles (D. C. 1915) 227 Fed. 189.

That applicant was under 21 when naturalized held not ground for canceling certificate, in the absence of fraud. U. S. v. Butikofer (D. C. 1916) 228 Fed. 918.

Error in proceeding for naturaliza-

tion in determining fact as to age of applicant held not reviewable in proceeding to cancel the certificate. Id.

Where a certificate is granted by a court of competent jurisdiction, it cannot be impeached by proof that it was improperly granted, or was obtained by false and perjured testimony. Behrensmeyer v. Kreitz (1891) 135 Ill. 591, 26 N. E. 704.

Where it is clearly inferable from a record of naturalization that the alien had not, at least three years previous to the date thereof, declared on oath his intention to become a citizen of the United States, and to renounce all allegiance to any foreign prince or sovereignty, and particularly to the king of the country of which he was a subject, as required by the act of 1802, but that the court has mistaken the registry of the arrival of the alien in the United States for such a declaration of intention, it seems that the naturalization is invalid. Banks v. Walker (N. Y. 1848) 3 Barb. Ch. 438.

A certificate of naturalization irregularly obtained may be set aside. Richards v. McDaniel (S. C. 1820) 2 Nott & McC. 351.

4. Certificates of persons taking permanent residence in foreign country.—The right to naturalization under sections 4355–4360, ante, was by necessary implication conferred upon such aliens only as contemplated the continuance of a residence already established in the United States. Luria v. U. S. (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101 (affirming U. S. v. Luria [D. C. 1911] 184 Fed. 643); U. S. v. Ellis (C. C. 1911) 185 Fed. 546.

Constitutional rights are not invaded by the provision authorizing cancellation of the certificate of one taking up a permanent residence in a foreign country within five years after the issuance of a certificate of citizenship. Luria v. U. S. (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101, affirming U. S. v. Luria (D. C. 1911) 184 Fed. 643.

This provision applies to certificates issued prior to enactment of this law, as well as to certificates subsequently issued. Id.

Where an alien was naturalized in August, 1899, and he arrived in a foreign country November 23d following, and engaged in business there, where he continuously resided until after the institution of a suit in March, 1910, to cancel his certificate of citizenship and it appeared that he had stated that he could not tell when he could leave the foreign country and return to the United States, and that he was not engaged solely as a representative of American trade and commerce, and that his residence in the foreign country was not for reasons of health or education, a decree setting aside the judgment of naturalization and canceling his certificate of citizenship was authorized. U. S. v. Ellis (C. C. 1911) 185 Fed. 546.

5. Certificates previously issued.—Certificates issued prior to this act are liable to impeachment when fraudulently procured. Johannessen v. U. S. (1912) 32 Sup. Ct. 613, 617, 225 U. S. 227, 56 L. Ed. 1066. Or for taking up permanent residence in a foreign country within five years after the issuance of the certificate. Luria v. U. S. (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101.

The provision authorizing cancellation of certificates previously issued does not deprive a citizen of a vested right. U. S. v. Ellis (C. C. 1911) 185 Fed. 546.

6. Nature of proceeding.—The proceeding for the cancellation of a naturalization certificate fraudulently or illegally procured is a suit in equity, and not one at common law. Luria v. U. S. (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101; U. S. v. Luria (D. C. 1911) 184 Fed. 643.

A suit to cancel a certificate is a special proceeding, and, while proof must be of kind and force required to set aside a judgment, pleadings and procedure may be molded as best calculated to meet ends of justice. U. S. v. Mansour (D. C. 1909) 170 Fed. 676.

7. Right to institute proceedings.—A private individual cannot maintain a proceeding to set aside an order admitting an alien to citizenship. Pintsch Compressing Co. v. Bergin (C. C. 1897) 84 Fed. 140; McKenna, In re (1894) 29 N. Y. S. 582, 8 Misc. Rep. 482, 23 L. R. A. 835, 31 Abb. N. C. 416; McCarran v. Cooper (1900) 57 N. E. 1116, 162 N. Y. 654 (affirming judgment and order [1897] 44 N. Y. S. 695, 16 App. Div. 311); Commonwealth v. Paper (Pa. 1868) 1 Brewst. 263; In re Shaw (1892) 2 Pa. Dist. R. 250.

This section makes it the duty of the United States district attorney, and not of the Bureau of Immigration and Naturalization, or its representatives, to prosecute proceedings for the cancellation of certificates of naturalization. U. S. v. Andersen (D. C. 1909) 169 Fed. 201.

That the Bureau of Naturalization was represented in the state court when defendant was granted citizenship does not estop the government from having the certificate of naturalization canceled; it not being authorized under the law. U. S. v. Nopoulos (D. C. 1915) 225 Fed. 656.

The right to make laws admitting aliens to citizenship being vested in Congress, and the state courts in enforcing such laws being mere federal agents, the state is not entitled to intervene, after the admission of an alien to citizenship, and procure a vacation of the judgment, because procured by

fraud and perjury. Petersen v. State (Tex. Civ. App. 1905) 89 S. W. 81.

8. Jurisdiction.—This section confers jurisdiction to cancel a certificate on "any court having jurisdiction to naturalize aliens in the judicial district in which the naturalized citizen may reside at the time of bringing the suit," whether granted by that or any other court, state or federal. U. S. v. Norsch (C. C. 1890) 42 Fed. 417; Same v. Simon (C. C. 1909) 170 Fed. 680; Same v. Spohrer (C. C. 1910) 175 Fed. 440; Same v. Nisbet (D. C. 1909) 168 Fed. 1005; Same v. Meyer (D. C. 1909) 170 Fed. 983; Same v. Aakervik (D. C. 1910) 180 Fed. 137; Same v. Plaistow (D. C. 1910) 189 Fed. 1006; Same v. Nopoulos (D. C. 1915) 225 Fed. 656. The conferring of such jurisdiction is within power of Congress. U. S. v. Mansour (D. C. 1908) 170 Fed. 671; U. S. v. Luria (D. C. 1911) 184 Fed. 643.

Since the construction of state laws is primarily within the authority of the state courts, a court of the state having held that it had jurisdiction under a state statute of naturalization petition, and having granted a certificate of citizenship, a federal District Court of concurrent jurisdiction, in a proceeding by the government to cancel the certificate for alleged want of jurisdiction of the state court on considerations of comity, would reach a conclusion as to the construction of the state law in conformity with that of the state court. U. S. v. Andersen (D. C. 1909) 169 Fed. 201.

Where, in naturalization proceedings in a state court, that court reached a conclusion favorable to its jurisdiction and adverse to the government's contention, and no steps were taken for a review by the Supreme Court of the state, which alone could give an authoritative construction of the local law on which the jurisdiction depended, a federal District Court would not take jurisdiction of an application by the government to set aside the certificate of naturalization granted in the state court proceedings, having only concurrent and not revisory jurisdiction. Id.

The word "reside" as used in this section, whether requiring a domicile or mere abode, contemplates at least a choice on the part of the naturalized citizen, to wit, a voluntary sojourning on his part; and hence a federal court of a district in which a naturalized citizen was incarcerated in a federal penitentiary, other than that in which he had previously resided, had no jurisdiction to cancel his certificate of naturalization. U. S. v. Gronich (D. C. 1914) 211 Fed. 548.

This act does not deprive a state court of authority to annul a forged certificate of citizenship upon a private petition joined in by the district attorney of the county. In re Macoluso's Naturalization (1912) 85 A. 149, 237 Pa. 132, Ann. Cas. 1914B, 226.

9. Time for proceedings.—Where the proceedings are regular on the face of the record, a judgment admitting a woman to citizenship cannot be reviewed or annulled at a subsequent term on petition of a third person, alleging that during the larger part of the two years prior to her application she was under the disability of coverture, her husband being an alien, and therefore could not have had during that time a bona fide intention to become a citizen. Pintsch Compressing Co. v. Bergin (C. C. 1897) 84 Fed. 140, 142.

The defense of laches cannot be pleaded against the United States in a suit to cancel a naturalization certificate. U. S. v. Spohrer (C. C. 1910) 175 Fed. 440.

The time for vacating an order admitting to citizenship, for an error of law having expired before the act of 1906, suit does not now lie to vacate it, though this section authorizes suits to vacate certificates of citizenship. U. S. v. Aakervik (D. C. 1910) 180 Fed. 137.

10. Affidavit.—The affidavit necessary in instituting a proceeding to cancel certificates of naturalization is not a pleading, and one setting up that naturalization was illegally procured is sufficient, though not stating the facts with exactitude. U. S. v. Leles (D. C. 1915) 227 Fed. 189.

The affidavit may be made on information and belief. Id.

11. Notice.—Where the law of a state provides for the appointment of an attorney at law as curator ad hoc to represent an absentee, service on him is sufficient. U. S. v. Ellis (C. C. 1911) 185 Fed. 546.

A ten days' service on a son of the person named in the certificate by a justice of the peace in the county where the son resides is sufficient. In re Macoluso's Naturalization (1912) 85 A. 149, 237 Pa. 132, Ann. Cas. 1914B, 226.

12. Pleading.—Requisites of a petition for cancellation of a certificate considered. U. S. v. Rockteschell (1913) 208 Fed. 530, 125 C. C. A. 532.

A bill in the federal court, to cancel the decree of naturalization of a state court, which merely alleges that defendant was admitted to become a citizen on his own application, without the examination of witnesses, and without inquiry by the court as to his qualifications; that defendant knew the facts stated in the decree were false; and that the decree was obtained by fraud practiced on the court—is demurrable for want of facts as to fraud, though it shows the decree to have been erroneous. U. S. v. Norsch (C. C. 1890) 42 Fed. 417.

A bill to set aside a naturalization de-

cree, based solely on the fact that the witnesses who made affidavits to the petition and testified at the hearing did not have personal knowledge of defendant's residence in the United States and in Iowa for the requisite time to authorize him to be naturalized, held demurrable for want of facts. U. S. v. Rose (C. C. 1909) 166 Fed. 999.

A complaint to cancel a certificate for fraud was insufficient, where it failed to tender the material issue of fraud, alleging merely a change of residence, which by statute is only prima facie evidence on that issue. U. S. v. Luria (D. C. 1911) 184 Fed. 643.

13. Evidence.—Where a bill did not allege that defendant had not in fact continuously resided in the United States for five years and within the state for a year immediately prior to the filing of his petition, or that he was not entitled to be admitted as a citizen, or that the affidavits attached to the petition did not comply with the naturalization act or were in any manner insufficient, it would be presumed that the petition was sufficient to confer such jurisdiction. U. S. v. Rose (C. C. 1909) 166 Fed. 999.

Evidence held to justify a finding that the alien within five years after being admitted to citizenship left the country and had taken up his permanent residence in South Africa, and that the government was therefore entitled to decree of cancellation. U. S. v. Luria (D. C. 1911) 184 Fed. 643, affirmed Luria v. U. S. (1913) 231 U. S. 9, 34 Sup. Ct. 10, 58 L. Ed. 101.

Defendant's expressions of a definite desire to retain his citizenship in the United States during his continued residence in a foreign country was not determinative of his residence. Id.

Statements of consular agents abroad that defendant had established a permanent residence abroad, etc., were admissible. Id.

Evidence held to show fraud. U. S. v. Olsson (D. C. 1912) 196 Fed. 562.

On petition to the District Court to set aside a certificate of citizenship issued by a state court, there is a presumption that the findings of fact by the lower court were correct, which presumption is not conclusive, and any errors of law will be reviewed. U. S. v. Nopoulos (D. C. 1915) 225 Fed. 656.

In a proceeding to cancel a certificate of citizenship, it must be presumed that the court, in finding that the applicant was of such age as to be entitled to naturalization, acted upon competent evidence. U. S. v. Butikofer (D. C. 1916) 228 Fed. 918.

14. Trial by jury.—Defendant is not entitled as of right to a jury trial. Luria v. U. S. (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101; U. S. v. Mansour (D. C. 1908) 170 Fed. 671; Same v. Luria (D. C. 1911) 184 Fed. 643.

15. Appeal.—The sufficiency of the petition to cancel a naturalization certificate, to tender the issue of fraud on which the case was heard and determined below, cannot be raised for the first time on appeal. Luria v. U. S. (1913) 34 Sup. Ct. 10, 231 U. S. 9, 58 L. Ed. 101.

16. Surrender of certificate.—One who has been improperly naturalized may surrender his certificate and present a new petition. Commonwealth v. Paper (Pa. 1868) 1 Brewst. 263.

Cited without definite application, U. S. v. Dolla (1910) 177 Fed. 101, 100 C. C. A. 521, 21 Ann. Cas. 665.

§ 4375. (Act June 29, 1906, c. 3592, § 18.) Issuance of certificate of citizenship contrary to provisions of act, a felony; punishment.

It is hereby made a felony for any clerk or other person to issue or be a party to the issuance of a certificate of citizenship contrary to the provisions of this Act, except upon a final order under the hand of a court having jurisdiction to make such order, and upon conviction thereof such clerk or other person shall be punished by imprisonment for not more than five years and by a fine of not more than five thousand dollars, in the discretion of the court. (34 Stat. 602.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

Directory provisions.—Where the court has rendered judgment admitting an alien to citizenship, the fact that the clerk issued a naturalization certificate before the final judgment had been signed and entered did not render such proceeding void; such requirement being directory only and subject to correction nunc pro tunc. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

Offense.—This section does not make it a felony to issue a naturalization certificate without final order under the hand of the court, but the felony consists in issuing it contrary to the provisions of the act, unless it be on a final order under the hand of the court. U. S. v. Stoller (D. C. 1910) 180 Fed. 910.

§ 4376. (Act June 29, 1906, c. 3592, § 20.) Neglect of clerk or other officer to account for or pay over balance of moneys received for naturalization proceedings, embezzlement; punishment.

Any clerk or other officer of a court having power under this Act to naturalize aliens, who willfully neglects to render true accounts of moneys received by him for naturalization proceedings or who willfully neglects to pay over any balance of such moneys due to the United States within thirty days after said payment shall become due and demand therefor has been made and refused, shall be deemed guilty of embezzlement of the public moneys, and shall be punishable by imprisonment for not more than five years, or by a fine of not more than five thousand dollars, or both. (34 Stat. 602.)

See notes to section 3 of this act, ante, § 4351.

§ 4377. (Act June 29, 1906, c. 3592, § 21.) Demand, etc., or receipt by clerk, etc., of fees or moneys other than those specified in act, a misdemeanor; punishment.

It shall be unlawful for any clerk of any court or his authorized deputy or assistant exercising jurisdiction in naturalization proceedings, or to demand, charge, collect, or receive any other or additional fees or moneys in naturalization proceedings save the fees and moneys herein specified; and a violation of any of the provisions of this section or any part thereof is hereby declared to be a misdemeanor and shall be punished by imprisonment for not more than two years, or by a fine of not more than one thousand dollars, or by both such fine and imprisonment. (34 Stat. 602.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

Effect of state laws.—Fees fixed by congress control to the exclusion of state legislation. State v. Libby (1907) 47 Wash. 11, 92 Pac. 350.

§ 4378. (Act June 29, 1906, c. 3592, § 22.) False certification by clerk, etc., of appearance, oath, acknowledgment, etc., punishable.

The clerk of any court exercising jurisdiction in naturalization proceedings, or any person acting under authority of this Act, who shall knowingly certify that a petitioner, affiant, or witness named in an affidavit, petition, or certificate of citizenship, or other paper or writing required to be executed under the provisions of this Act, personally appeared before him and was sworn thereto, or acknowledged the execution thereof or signed the same, when in fact such petitioner, affiant, or witness did not personally appear before him, or was not sworn thereto, or did not execute the same, or did not acknowledge the execution thereof, shall be punished by a fine not exceeding five thousand dollars, or by imprisonment not to exceed five years. (34 Stat. 603.)

See notes to section 3 of this act, ante, § 4351.

§ 4379. (Act June 29, 1906, c. 3592, § 23.) Procuring naturalization illegally punishable, and on conviction thereof, order admitting to citizenship to be adjudged void; aiding, etc., unauthorized proceedings for naturalization, or procuring or giving false testimony, etc., therein, punishable.

Any person who knowingly procures naturalization in violation of the provisions of this Act shall be fined not more than five thousand dollars, or shall be imprisoned not more than five years, or both, and upon conviction the court in which such conviction is had shall thereupon adjudge and declare the final order admitting such person to citizenship void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense

to make such adjudication. Any person who knowingly aids, advises, or encourages any person not entitled thereto to apply for or to secure naturalization, or to file the preliminary papers declaring an intent to become a citizen of the United States, or who in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars, or imprisoned not more than five years, or both. (34 Stat. 603.)

See notes to section 3 of this act, ante, § 4351.

Notes of Decisions

False affidavits.—Perjury, see Schmidt v. U. S. (1904) 133 Fed. 257, 66 C. C. A. 389; U. S. v. Severino (C. C. 1903) 125 Fed. 949; Same v. Grottkau (D. C. 1887) 30 Fed. 672; Same v. Dupont (D. C. 1910) 176 Fed. 823; People v. Sweetman (N. Y. 1857) 3 Park Cr. R. 358.

This section is to be regarded as an amendment of section 10248, post. U. S. v. Dupont (D. C. 1910) 176 Fed. 823.

A state court granted naturalization to a woman who had been dead over four years, and the certificate was issued by the clerk. No hearing was had nor evidence taken in open court, as required by section 4368, ante; but affidavits in support of the petition were made out by the clerk, and subscribed and sworn to by defendants, the material statements in which were false. Defendants, however, did not understand the English language, and were not informed of the contents of the affidavits, but signed the same as directed by the clerk. Held, that they were not guilty of "knowingly" giving false testimony. U. S. v. Janke (D. C. 1910) 183 Fed. 277.

Cited without definite application, U. S. v. Bressi (D. C. 1913) 208 Fed. 369.

§ 4380. (Act June 29, 1906, c. 3592, § 24.) Limitation of prosecutions for crimes arising under provisions of act.

No person shall be prosecuted, tried, or punished for any crime arising under the provisions of this Act unless the indictment is found or the information is filed within five years next after the commission of such crime. (34 Stat. 603.)

See notes to section 3 of this act, ante, § 4351.

§ 4381. (Act June 29, 1906, c. 3592, § 26.) Repeal.

Sections twenty-one hundred and sixty-five, twenty-one hundred and sixty-seven, twenty-one hundred and sixty-eight, twenty-one hundred and seventy-three, of the Revised Statutes of the United States of America, and section thirty-nine of chapter one thousand and twelve of the Statutes at Large of the United States of America for the year nineteen hundred and three, and all Acts or parts of Acts inconsistent with or repugnant to the provisions of this Act are hereby repealed. (34 Stat. 603.)

See notes to section 3 of this act, ante, § 4351.

Act March 3, 1903, c. 1012, § 39, 32 Stat. 1222, repealed by this section, contained provisions similar to those of sections 7 and 23 of this act, ante, §§ 4363, 4379.

The then existing naturalization laws remained in full force and effect for the purpose of the prosecution of offenses committed prior to the going into effect of this act, by section 25 of this act, 34 Stat. 603, which is omitted as temporary merely.

Notes of Decisions

Repeal.—As to extent of repeal, see U. S. v. Rodiek (1908) 162 Fed. 469, 89 C. C. A. 389.

§ 4382. (Act June 29, 1906, c. 3592, § 27.) Forms; declaration of intention; petition for naturalization; affidavit of witnesses; certificate of naturalization; stub of certificate.

Substantially the following forms shall be used in the proceedings to which they relate:

Declaration of Intention.

(Invalid for all purposes seven years after the date hereof.)

———, ss:

I, ———, aged ——— years, occupation ———, do declare on oath (affirm) that my personal description is: Color ———, complexion ———, height ———, weight ———, color of hair ———, color of eyes ———, other visible distinctive marks ———; I was born in ——— on the ——— day of ———, anno Domini ———; I now reside at ———; I emigrated to the United States of America from ——— on the vessel ———; my last foreign residence was ———. It is my bona fide intention to renounce forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ———, of which I am now a citizen (subject); I arrived at the (port) of ———, in the State (Territory or District) of ——— on or about the ——— day of ——— anno Domini ———; I am not an anarchist; I am not a polygamist nor a believer in the practice of polygamy; and it is my intention in good faith to become a citizen of the United States of America and to permanently reside therein. So help me God.

(Original signature of declarant) ———.

Subscribed and sworn to (affirmed) before me this ——— day of ———, anno Domini ———.

[L. S.] ———.

(Official character of attestor.)

Petition for Naturalization.

——— Court of ———.

In the matter of the petition of ——— to be admitted as a citizen of the United States of America.

To the ——— Court:

The petition of ——— respectfully shows:

First. My full name is ———.

Second. My place of residence is number ——— street, city of ———, State (Territory or District) of ———.

Third. My occupation is ———.

Fourth. I was born on the ——— day of ——— at ———.

Fifth. I emigrated to the United States from ———, on or about the ——— day of ———, anno Domini ———, and arrived at the port of ———, in the United States, on the vessel ———.

Sixth. I declared my intention to become a citizen of the United States on the ——— day of ——— at ———, in the ——— court of ———.

Seventh. I am — married. My wife's name is ———. She was born in ——— and now resides at ———. I have ——— children, and the name, date, and place of birth and place of residence of each of said children is as follows: ———; ———; ———.

Eighth. I am not a disbeliever in or opposed to organized government or a member of or affiliated with any organization or body of persons teaching disbelief in organized government. I am not a polygamist nor a believer in the practice of polygamy. I am attached to the principles of the Constitution of the United States, and it is my intention to become a citizen of the United States and to renounce

absolutely and forever all allegiance and fidelity to any foreign prince, potentate, state, or sovereignty, and particularly to ———, of which at this time I am a citizen (or subject), and it is my intention to reside permanently in the United States.

Ninth. I am able to speak the English language.

Tenth. I have resided continuously in the United States of America for a term of five years at least immediately preceding the date of this petition, to wit, since ———, anno Domini ———, and in the State (Territory or District) of ——— for one year at least next preceding the date of this petition, to wit, since ——— day of ———, anno Domini ———.

Eleventh. I have not heretofore made petition for citizenship to any court. (I made petition for citizenship to the ——— court of ——— at ———, and the said petition was denied by the said court for the following reasons and causes, to wit, ———, and the cause of such denial has since been cured or removed.)

Attached hereto and made a part of this petition are my declaration of intention to become a citizen of the United States and the certificate from the Department of [Commerce and] Labor required by law. Wherefore your petitioner prays that he may be admitted a citizen of the United States of America.

Dated ———.

(Signature of petitioner) ———.

———, ss:

———, being duly sworn, deposes and says that he is the petitioner in the above-entitled proceeding; that he has read the foregoing petition and knows the contents thereof; that the same is true of his own knowledge, except as to matters therein stated to be alleged upon information and belief, and that as to those matters he believes it to be true.

Subscribed and sworn to before me this ——— day of ———, anno Domini ———.

[L. S.] ———,

Clerk of the ——— Court.

Affidavit of Witnesses.

——— Court of ———.

In the matter of the petition of ——— to be admitted a citizen of the United States of America.

———, ss:

———, occupation ———, residing at ———, and ——— ———, occupation ———, residing at ———, each being severally, duly, and respectively sworn, deposes and says that he is a citizen of the United States of America; that he has personally known ——— ———, the petitioner above mentioned, to be a resident of the United States for a period of at least five years continuously immediately preceding the date of filing his petition, and of the State (Territory or District) in which the above-entitled application is made for a period of ——— years immediately preceding the date of filing his petition; and that he has personal knowledge that the said petitioner is a person of good moral character, attached to the principles of the Constitution of the United States, and that he is in every way qualified, in his opinion, to be admitted as a citizen of the United States.

———.

———.

Subscribed and sworn to before me this ——— day of ———, nineteen hundred and ———.

[L. S.] ———,

(Official character of attestor).

Certificate of Naturalization.

Number ———.
Petition, volume ———, page ———.
Stub, volume ———, page ———.

(Signature of holder) ————.

Description of holder: Age, ———; height, ———; color, ———; complexion, ———; color of eyes, ———; color of hair, ———; visible distinguishing marks, ———. Name, age, and place of residence of wife, ———, ———, ———. Names, ages, and places of residence of minor children, ———, ———, ———; ———, ———, ———; ———, ———, ———.

————, ss:

Be it remembered, that at a ——— term of the ——— court of ———, held at ——— on the ——— day of ———, in the year of our Lord nineteen hundred and ———, ———, who previous to his (her) naturalization was a citizen or subject of ———, at present residing at number ———— street, ——— city (town), ——— State (Territory or District), having applied to be admitted a citizen of the United States of America pursuant to law, and the court having found that the petitioner had resided continuously within the United States for at least five years and in this State for one year immediately preceding the date of the hearing of his (her) petition, and that said petitioner intends to reside permanently in the United States, had in all respects complied with the law in relation thereto, and that —he was entitled to be so admitted, it was thereupon ordered by the said court that —he be admitted as a citizen of the United States of America.

In testimony whereof the seal of said court is hereunto affixed on the ——— day of ———, in the year of our Lord nineteen hundred and ———, and of our independence the ———.

[L. S.] ————,

(Official character of attestor).

Stub of Certificate of Naturalization.

No. of certificate, ———.
Name ————; age, ———.
Declaration of intention, volume ———, page ———.
Petition, volume ———, page ———.
Name, age, and place of residence of wife, ———, ———, ———.
Names, ages, and places of residence of minor children, ———, ———, ———; ———, ———, ———, ———, ———, ———.

———————————————————————————

———————————————————————————

Date of order, volume ———, page ———.

(Signature of holder) ————.

(34 Stat. 603.)

See notes to section 3 of this act, ante, § 4351.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer from the Department of Commerce and Labor to the Department of Labor of the Bureau of Immigration and Naturalization, and by the transfer to and conferring upon the head of the Department of Labor all duties and powers performed, possessed or exercised, in and over any bureau transferred to the Department of Labor, by the head of any department from which it was transferred, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 3, 8, ante, § 940.

Notes of Decisions

Certificate of naturalization.—Naturalization Act June 29, 1906, § 4, ante, § 4352, when construed with reference to this section, does not prevent citizenship because slight variations from the exact language of the act in naturalization proceedings. U. S. v. Viaropulos (D. C. 1915) 221 Fed. 485.

A certificate of naturalization in these words, "I, A. B., clerk," etc., "hereby certify that at a superior court held at Savannah," etc., "before X. Y.,

judge," etc., "on a certain day. C. D., an alien, petitioned the court to be admitted a citizen, and, having in all things complied with the law in such case," etc., "the said C. D. was accordingly admitted a citizen of the United States, having first taken and subscribed in open court the oath of naturalization. Given under my hand and seal of the said court," etc.—held insufficient to show that C. D. was naturalized. Miller v. Reinhart (1855) 18 Ga. 239.

The fact that a certificate includes the names of two persons, though an informality, does not invalidate it. Behrensmeyer v. Kreitz (1891) 135 Ill. 591, 26 N. E. 704.

Naturalization papers issued by a county clerk or by a justice of the peace, without the order of any court, are void. Id.

A naturalized alien, who subsequently obtains an order of court changing his name, is not entitled to have his naturalization certificate amended to conform to the change. In re Nigri (1900) 66 N. Y. S. 182, 32 Misc. Rep. 392.

A certificate of naturalization must be attested by a prothonotary or clerk; attestation by a deputy not being sufficient. Anonymous (Pa. 1869) 2 Brewst. 138.

A certificate stated that the party "took the oath in such case required by the act of congress." Held, that this imported that he took the oath required in the very words prescribed by the statute, and so the act of naturalization was good. Towles' Case (Va. 1835) 5 Leigh, 743.

Cited without definite application, U. S. v. Dupont (D. C. 1910) 176 Fed. 823.

§ 4383. (Act June 29, 1906, c. 3592, § 28.) Regulations for execution of provisions of act; certified copies of papers, etc., and records required under act, as evidence.

The Secretary of [Commerce and] Labor shall have power to make such rules and regulations as may be necessary for properly carrying into execution the various provisions of this Act. Certified copies of all papers, documents, certificates, and records required to be used, filed, recorded, or kept under any and all of the provisions of this Act shall be admitted in evidence equally with the originals in any and all proceedings under this Act and in all cases in which the originals thereof might be admissible as evidence. (34 Stat. 606.)

See notes to section 3 of this act, ante, § 4351.

The words "Commerce and," inclosed in brackets in this section, were superseded by the transfer from the Department of Commerce and Labor to the Department of Labor of the Bureau of Immigration and Naturalization, and by the vesting in the head of the Department of Labor of all duties and powers performed or exercised, in and over any bureau so transferred, by the head of the department from which it was transferred, by the act creating the Department of Labor, Act March 4, 1913, c. 141, §§ 3, 8, ante, §§ 934, 940.

Notes of Decisions

Records and certified copies as evidence.—No express statutory provision is necessary to authorize courts to keep a record of their proceedings, nor does the absence of such authority affect in any way the evidential force of a transcript of such records. Dolan v. U. S. (1904) 133 Fed. 440, 452, 69 C. C. A. 274.

An alleged copy of a naturalization record, certified to be a true and complete transcript of the record, and duly attested by the seal of the court, was not overthrown by testimony of a deputy clerk seven years later that he had made a thorough search and was unable to find any such record, but that the naturalization records of the court were very poorly kept. U. S. v. Brelin (1908) 166 Fed. 104, 92 C. C. A. 88.

A certificate of the clerk of the district court, reciting that the applicant has been duly admitted to citizenship, but failing to show any extract from the record, or minute of the action of the court, is not competent to show naturalization. Charles Green's Son v. Salas (C. C. 1887) 31 Fed. 106.

The fact of naturalization or of declaration of intention to become a citizen must be proved by the record of some court of competent jurisdiction where the fact is of recent occurrence, and there is no presumption of citizenship in the absence of proof by the record. Wood v. Aspen Mining & Smelting Co. (C. C. 1888) 36 Fed. 25, 26.

The essential fact of declaration is always decisively shown by the production of the record, or due certification thereof. In re Fronascone (C. C. 1900) 99 Fed. 48, 49.

Exemplified copy of record of naturalization sufficient prima facie proof of citizenship on information for violation of registry laws. The Acorn (D. C. 1870) Fed. Cas. No. 29.

Rules and regulations made by the Secretary of Labor under authority of this act, if not contrary to its terms, have the same weight as the

law itself. In re Brefo (D. C. 1914) 217 Fed. 131.

The copy of a record of naturalization by a court in another state is not evidence that the person therein named has been admitted as a citizen of the United States, unless the same is attested by the clerk of the court where the record exists, with the seal of the court annexed, if there be a seal, and certified by the judge, chief justice, or presiding magistrate of the court to be attested in due form. Caulfield v. Bullock (1857) 57 Ky. (18 B. Mon.) 494.

The original affidavit of a declaration of intention to become a citizen of the United States, or a copy, properly certified by the clerk or deputy clerk of a district court of Minnesota, attested by its seal, is competent evidence of the declaration of intention. State v. Barrett (1889) 40 Minn. 65, 41 N. W. 459.

The record of the naturalization of a supposed alien is not conclusive on the question of his nativity in a distinct proceeding having nothing to do with his citizenship. In re Colbert's Estate (Mont. 1915) 153 Pac. 1022.

The certificate of declaration of intention to become a citizen is the only competent evidence of such fact. Berry v. Hull (1892) 6 N. M. 643, 30 Pac. 936.

The legitimate and proper evidence of naturalization is a certified copy of the record of the court in which one is naturalized. State v. O'Hearn (1886) 58 Vt. 718, 6 Atl. 606.

The fact that three years have expired since a person of foreign birth "declared his intention" does not raise a presumption that he has actually become a citizen. State v. Olin (1868) 23 Wis. 309.

Parol and secondary evidence.—Naturalization cannot be proved by parol. Charles Green's Son v. Salas (C. C. 1887) 31 Fed. 106; Bode v. Trimmer (1890) 82 Cal. 513, 23 Pac. 187; Prentice v. Miller (1890) 82 Cal. 570, 23 Pac. 189; State v. O'Hearn (1886) 58 Vt. 718, 6 Atl. 606; Dryden v. Swinburne (1882) 20 W. Va. 89.

When no record can be produced showing the naturalization of a foreigner, naturalization may be inferred from the fact that for a long time he voted, held office, and exercised all the rights and privileges of a citizen. Boyd v. Nebraska (1892) 12 Sup. Ct. 375, 389, 143 U. S. 135, 36 L. Ed. 103.

Proof that a foreigner, now deceased, resided in this country, owned parts of vessels, and acted as master of coasting vessels here, and that the records of shipping of the port where he resided had been destroyed, is not sufficient to be submitted to the jury as evidence of his having been naturalized during that period, without proof of a search among his papers for a certificate of naturalization, or some evidence that such a certificate once existed. Dennis v. Brewster (1856) 73 Mass. (7 Gray) 351.

The undisputed testimony of a petitioner to condemn land for a school that when 16 years old he came from Norway and understood that his father became a naturalized citizen before witness became of age, and that witness had voted in Minnesota for many years, believing he was a citizen because of his father's naturalization, held to sustain a finding that he was a citizen and entitled to sign the petition. In re Application to Condemn Land in Rock County (Minn. 1913) 141 N. W. 801.

The record of naturalization, reciting that a previous declaration of intention to become a citizen was made, may be disproved by parol evidence. McCarty v. Hodges (N. Y. 1846) 2 Edm. Sel. Cas. 433.

Where a person claims to be a citizen by virtue of the naturalization of his parents, the best evidence of the naturalization of the parent would be the original certificate of naturalization, or a duplicate thereof, when it can be obtained. But a party may, in the matter of proving his citizenship, resort to secondary evidence when preliminary evidence cannot be obtained. People v. McNally (N. Y. 1880) 59 How. Prac. 500.

That decedent, an alien by birth, came to this country in 1865, and lived here until his death, in 1899, during which time he participated in national and state elections, and at his death held a liquor-tax certificate, which could lawfully be issued only to a citizen, is sufficient to show prima facie that he had been in fact naturalized, and was a citizen at his death. Fay v. Taylor (1900) 63 N. Y. S. 572, 31 Misc. Rep. 32.

The fact that an alien assumed to make leases and perform other acts which only a citizen might do was of no probative force in establishing his naturalization. Richardson v. Amsdon (1903) 85 N. Y. S. 342.

An affidavit attached to a deposition, wherein deponent stated that an alien "took up his citizenship in the United States," was of no probative force in establishing the naturalization of the alien. Id.

On an issue whether one born abroad had become a citizen of the United States by naturalization, it appeared that he had declared under oath in the Marine Court of the city of New York in 1835 his intention to become a citizen, and at the foot of the "first papers" issued to him was a note in his handwriting to the effect that he might take up his citizenship or not. It appeared that in 1836 he filed with the Secretary of State an oath of intention to reside in the United States and to become a citizen. There was no record in the Marine Court of the taking out of final papers, and the first papers remained in his possession. It was

shown that it was not the practice of the Marine Court to require the surrender of the first papers. Held, that no presumption that the naturalization was not contested arose from the fact that there was no record of the final papers, and that the first ones were not on file. Id.

The burden of proving naturalization could not be sustained by such negative evidence. Id.

Where a party is shown to have been an alien, proof that he has voted overcomes the presumption of alienage, and raises a presumption of naturalization. Kadlec v. Pavik (1900) 83 N. W. 5, 9 N. D. 278.

After a great lapse of time, the question whether a foreigner had actually become a citizen, by taking the oath formerly required by state laws (or otherwise), may be decided by facts and circumstances leading to a presumption that he had. Nalle v. Fenwick (Va. 1826) 4 Rand. 585.

Evidence that one who testified that he was a citizen and had come to this country from England, and had never completed his naturalization, is insufficient to establish alienage, where it was not shown that his parents during his minority had not become naturalized. Schuster v. State (1891) 80 Wis. 107, 49 N. W. 30.

§ 4384. (Act June 29, 1906, c. 3624, § 1.) Naturalization certificates failing to show compliance with requirements of Act March 3, 1903, c. 1012, § 39, to be valid upon compliance therewith.

Naturalization certificates issued after the Act approved March third, nineteen hundred and three, entitled "An Act to regulate the immigration of aliens into the United States," went into effect, which fail to show that the courts issuing said certificates complied with the requirements of section thirty-nine of said Act, but which were otherwise lawfully issued, are hereby declared to be as valid as though said certificates complied with said section: Provided, That in all such cases applications shall be made for new naturalization certificates, and when the same are granted, upon compliance with the provisions of said Act of nineteen hundred and three, they shall relate back to the defective certificates, and citizenship shall be deemed to have been perfected at the date of the defective certificate. (34 Stat. 630.)

This was the first section of an act entitled "An act to validate certain certificates of naturalization."

Act March 3, 1903, c. 1012, § 39, mentioned in this section, was not to be enforced, by a provision contained therein, until 90 days after the approval of the act. It was repealed by Act June 29, 1906, c. 3592, § 26, ante, § 4381. It was as follows:

"Sec. 39. That no person who disbelieves in or who is opposed to all organized government, or who is a member of or affiliated with any organization entertaining and teaching such disbelief in or opposition to all organized government, or who advocates or teaches the duty, necessity, or propriety of the unlawful assaulting or killing of any officer or officers, either of specific individuals or of officers generally, of the Government of the United States or of any other organized government, because of his or their official character, or who has violated any of the provisions of this Act, shall be naturalized or be made a citizen of the United States. All courts and tribunals and all judges and officers thereof having jurisdiction of naturalization proceedings or duties to perform in regard thereto shall, on the final application for naturalization, make careful inquiry into such matters, and before issuing the final order or certificate of naturalization cause to be entered of record the affidavit of the applicant and of his witnesses so far as applicable, reciting and affirming the truth of every material fact requisite for naturalization. All final orders and certificates of naturalization hereafter made shall show on their face specifically that said affidavits were duly made and recorded, and all orders and certificates that fail to show such facts shall be null and void.

"That any person who purposely procures naturalization in violation of the provisions of this section shall be fined not more than five thousand dollars, or shall be imprisoned not less than one nor more than ten years, or both, and the court in which such conviction is had shall thereupon adjudge and declare the order or decree and all certificates admitting such person to citizenship null and void. Jurisdiction is hereby conferred on the courts having jurisdiction of the trial of such offense to make such adjudication.

"That any person who knowingly aids, advises, or encourages any such person to apply for or to secure naturalization or to file the preliminary papers declaring an intent to become a citizen of the United States, or who

in any naturalization proceeding knowingly procures or gives false testimony as to any material fact, or who knowingly makes an affidavit false as to any material fact required to be proved in such proceeding, shall be fined not more than five thousand dollars or imprisoned not less than one nor more than ten years, or both.

"The foregoing provisions concerning naturalization shall not be enforced until ninety days after the approval hereof."

Section 2 of this act was as follows:

"That all the records relating to naturalization, all declarations of intention to become citizens of the United States, and all certificates of naturalization filed, recorded or issued prior to the time when this act takes effect in or from the criminal court of Cook County, Illinois, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this Act further validated or legalized." It is omitted as local and temporary.

Section 9 of the sundry civil appropriation act for the fiscal year 1913, Act Aug. 24, 1912, c. 355, § 9, 37 Stat. 487, was as follows:

"All of the records relating to naturalization or declarations of intention to become citizens of the United States and all certificates of naturalization filed, recorded, or issued prior to an Act to validate certain certificates of naturalization, approved June twenty-ninth, nineteen hundred and six, in or from the Louisville city court, sometimes called the Louisville police court, Kentucky, shall for all purposes be deemed to be and to have been made, filed, recorded, or issued by a court with jurisdiction to naturalize aliens, but shall not be by this act further validated or legalized."

It is omitted as temporary merely.

(5262)

TITLE XXXI

THE CENSUS

This title of the Revised Statutes included sections 2175–2206 thereof, in which were incorporated provisions of acts for taking previous censuses, principally Act May 23, 1850, c. 11, 9 Stat. 428. It was made applicable to any subsequent census, unless otherwise provided, by the first section of the Title, as follows:

"Sec. 2175. If no other law be passed providing for the taking of any subsequent census of the United States, on or before the first day of January of any year, when, by the Constitution of the United States, any future enumeration of the inhabitants thereof is required to be taken, such census shall, in all things, be taken and completed according to the provisions of this Title."

The entire title was superseded by Act March 3, 1879, c. 195, 20 Stat. 473, entitled "An act to provide for taking the Tenth and subsequent censuses," which made similar provisions for the Tenth Census, and the last section of which (section 24, 20 Stat. 481) repealed all laws and parts of laws inconsistent with the provisions of the act, and provided that "all censuses subsequent to the Tenth Census shall be taken in accordance with the provisions of this act, unless Congress shall hereafter otherwise provide." But that act was in like manner superseded by Act March 1, 1889, c. 319, entitled "An act to provide for taking the Eleventh and subsequent censuses," 25 Stat. 760, the last section of which (section 25, 25 Stat. 767) expressly repealed Act March 3, 1879, c. 195, and all laws and parts of laws inconsistent with its own provisions, and provided that "all censuses subsequent to the Eleventh census shall be taken in accordance with the provisions of this act, unless Congress shall hereafter otherwise provide." That act was in turn superseded by Act March 3, 1899, c. 419, 30 Stat. 1014, entitled "An act to provide for taking the Twelfth and subsequent censuses," the last section of which (section 33, 30 Stat. 1021) expressly repealed Act March 1, 1889, c. 319, and all laws and parts of laws inconsistent with its own provisions; but this latest act, unlike the previous acts mentioned, contained no provision relating to subsequent censuses, and, by a proviso to section 2 thereof, "nothing herein contained shall be construed to establish a Census Bureau permanent beyond the Twelfth Census" (30 Stat. 1014), and said act was repealed by Act July 2, 1909, c. 2, § 33, post, § 4419. A permanent Census Office was established by Act March 6, 1902, c. 139, 32 Stat. 51, and provisions for taking the Thirteenth and subsequent decennial censuses were made by Act July 2, 1909, c. 2, 36 Stat. 1.

This Title includes the provisions of said Act March 6, 1902, c. 139, and Act July 2, 1909, c. 2, relating to the taking of the census and matters incidental thereto, and subsequent provisions amendatory thereof or additional thereto. Other provisions of said acts and other acts relating to the Census Office are set forth ante, under Title XII A, "The Department of Commerce," Chapter G.

Sec.

4385. Census to be taken in the year 1910 and every 10 years thereafter.

4386. Decennial census period.

4387. Scope of Thirteenth Census; schedules, and contents thereof; collection of statistics by special agents or detailed employés; form and subdivision of inquiries.

4388. Scope of Thirteenth Census; schedules relating to population; nationality or mother tongue of persons of foreign birth.

4389. Collection of special statistics decennially; special agents to secure statistics.

4390. Collection of vital statistics annually.

4391. Collection of statistics of manufactures under factory system in year 1905 and every ten years thereafter; collection of statistics of cotton production annually; additional special collections of statistics as required by Congress.

4392. Co-operation with state officials in collection of statistics of manufactures.

4393. Appointment of supervisors of census.

4394. Duties of supervisors.

4395. Compensation of supervisors.

4396. Duties of enumerators.

Sec.
4397. Enumeration districts; assignments of enumerators to two or more districts, and to institutions.
4398. Removal of enumerators; filling vacancies; incomplete or erroneous enumeration.
4399. Interpreters to assist enumerators; employment; compensation.
4400. Compensation of enumerators.
4401. Death of supervisor or enumerator; compensation for services rendered.
4402. Special agents; appointment; authority; compensation.
4403. Amendment of Act March 3, 1899, c. 419, § 17; special agents; authority; compensation; employment of clerical force for field work; employés of Census Office to be citizens.
4404. Compensation of special agents.
4405. Oath of supervisors, enumerators, special agents, etc., and other employés; appointment or employment where examination required to be solely with reference to fitness.
4406. Date as to which enumeration to be taken; time of commencement and completion thereof.
4407. Receiving compensation for appointment or employment of supervisor, enumerator, clerk, or other employé, etc., punishable; penalty.
4408. Neglect or refusal to perform duties by officers or employés, publishing or communicating information, false swearing, making false certificate or fictitious return, furnishing false statement or false information, punishable; penalties.
4409. Persons required to answer questions; refusal punishable; penalty.
4410. Duty of owner or officer, etc., of manufacturing establishment, etc., to answer questions; refusal punishable.
4411. Information furnished under preceding section to be used only for statistical purposes.
4412. Enforcement of fines and penalties imposed by act.
4413. Expenditures to be authorized by Director of Census.
4414. Census printing office abolished; bulletins and reports to be printed, etc., by Public Printer.
4415. Printing of blanks, schedules, etc., and other miscellaneous printing, and printing of bulletins and reports and publishing and distributing thereof, by Public Printer.
4416. Information from other Departments or offices.

Sec.
4417. (Repealed.)
4418. Certified copies from population or agricultural returns to be furnished to Governor of state or territory or to court of record; data for genealogical, etc., purposes to be furnished to individuals.
4419. Repeal.
4420. Publication of names of heads of families returned in First Census; sale of publications; report.
4420a. Division of cotton and tobacco statistics.
4421. Collection of tobacco statistics; semi-annual reports of quantities in hands of dealers and manufacturers; manufacturers exempt.
4422. Types of tobacco to be specified; Director of Census to prepare blanks.
4423. Reports required; penalty for failure to report; demand for report; notice of demand; corporation officers subject to penalties.
4424. Punishment for false reports; corporation officers liable.
4425. "Person" defined.
4426. Information as to quantity of tobacco on hand to be used only for statistical purposes.
4427. Co-operation of Commissioner of Internal Revenue with Director of Census.
4428. Publication of tobacco reports.
4428a. Collection of tobacco statistics; information by mail or by special agents.
4429. Collection and publication of additional cotton statistics authorized.
4430. Periods for quantity of cotton ginned; publication; monthly reports of other statistics; details of reports; distribution of publications; statistics furnished to Agricultural Department.
4431. Information concerning cotton confidential; penalty for divulging information by employé of Census Bureau.
4432. Owners and officers of cotton ginneries, factories, etc., to furnish information; demand; notice; penalty for willful refusal.
4433. Compilation of information concerning production, consumption and stocks of cotton in foreign countries; publication of abstract of information with reports.
4434. Repeal.
4434a. Monthly statistics of cotton seed products thereof.
4434b. Information furnished for cotton seed statistics confidential; divulgence; punishment.

Sec.
4434c. Information to be furnished by owners, etc., of cottonseed-oil mills, etc.; requests for; refusal to furnish and furnishing false information; punishment.
4434d. Statistics of raw and prepared cotton and linters, cotton waste, and hull fiber used in manufacture of explosives, and absorbent and medicated cotton.

(R. S. §§ 2175–2206. Superseded.)

See note at beginning of this Title.

§ 4385. (Act July 2, 1909, c. 2, § 1.) Census to be taken in the year 1910 and every 10 years thereafter.

A census of the population, agriculture, manufactures, and mines and quarries of the United States shall be taken by the Director of the Census in the year nineteen hundred and ten and every ten years thereafter. The census herein provided for shall include each State and Territory on the mainland of the United States, the District of Columbia, and Alaska, Hawaii, and Porto Rico. (36 Stat. 1.)

This was the first section of an act entitled "An act to provide for the Thirteenth and subsequent censuses."

Sections 2, 8–28, 30–33 of the act are set forth post, §§ 4386, 4387, 4393–4402, 4405–4413, 4415–4519.

Sections 3–7 of the act, providing for the appointment, qualifications, and compensation of additional officers, clerks and employés in the Census Office during the decennial census period, are set forth ante, §§ 915–919.

Section 29 of the act, providing for the free transmission of official mail matter relating to the census and addressed to the Census Office, and for its free registry, if necessary, is set forth post, § 7376.

Notes of Decisions

Compilation of statistics.—Under the authority merely to make an enumeration by persons in the states and territories, congress may compile statistics regarding the people. The Legal Tender Cases (1870) 12 Wall. 457, 536, 20 L. Ed. 287.

Employment of noncitizens.—See (1910) 28 Op. Atty. Gen. 227; note under section 4403, post.

Census returns as evidence.—The courts will take judicial notice of the results of the United States census, as shown by the returns. People v. Williams (1883) 64 Cal. 87, 27 Pac. 939; Worcester Nat. Bank v. Cheney (1880) 94 Ill. 430; Stultz v. State (1879) 65 Ind. 492; Hawkins v. Thomas (1891) 3 Ind. App. 399, 29 N. E. 157; State ex rel. Harris v. Herrmann (1882) 75 Mo. 340; State ex rel. Board of Managers of Reform School of Jackson County v. Jackson County Court (1886) 89 Mo. 237, 1 S. W. 307; State ex rel. Dickason v. Marion County Court (1895) 128 Mo. 427, 30 S. W. 103, 31 S. W. 23; State ex inf. Crow v. Evans (1902) 66 S. W. 355, 166 Mo. 347; Russell v. Poor (1908) 119 S. W. 433, 133 Mo. App. 723; Kokes v. State (1898) 76 N. W. 467, 55 Neb. 691; Stratton v. City of Oregon City (1900) 60 Pac. 905, 35 Or. 409; Page v. McClure (1906) 64 A. 451, 79 Vt. 83; Welch v. County Court (1886) 1 S. E. 337, 29 W. Va. 63.

The federal census is competent evidence to prove the population. Fulham v. Howe (1888) 60 Vt. 351, 14 Atl. 652; State v. Neal (1901) 65 Pac. 188, 68 Pac. 1135, 25 Wash. 264.

A copy of the United States census returns, or any part thereof, certified to by the superintendent of the census, is admissible in evidence to show the results of the census. People v. Williams (1883) 64 Cal. 87, 27 Pac. 939.

§ 4386. (Act July 2, 1909, c. 2, § 2.) Decennial census period.

The period of three years beginning the first day of July next preceding the census provided for in section one of this Act shall be known as the decennial census period, and the reports upon the inquiries provided for in said section shall be completed and published within such period. (36 Stat. 2.)

See notes to section 1 of this act, ante, § 4385.

§ 4387. (Act July 2, 1909, c. 2, § 8, as amended, Act Feb. 25, 1910, c. 63.) Scope of Thirteenth Census; schedules, and contents thereof; collection of statistics by special agents or detailed employés; form and subdivision of inquiries.

The Thirteenth Census shall be restricted to inquiries relating

to population, to agriculture, to manufactures, and to mines and quarries. The schedules relating to population shall include for each inhabitant the name, relationship to head of family, color, sex, age, conjugal condition, place of birth, place of birth of parents, number of years in the United States, citizenship, occupation, whether or not employer or employee, and, if employee, whether or not employed at the date of enumeration and the number of months unemployed during the preceding calendar year, whether or not engaged in agriculture, school attendance, literacy, and tenure of home and whether or not a survivor of the Union or Confederate Army or Navy; and the name and address of each blind or deaf and dumb person; and for the enumeration of institutions, shall include paupers, prisoners, juvenile delinquents, insane, feeble-minded, blind, deaf and dumb, and inmates of benevolent institutions.

The schedules relating to agriculture shall include name, color and country of birth of occupant of each farm, tenure, acreage of farm, acreage of land under irrigation, acreage of woodland and character of timber thereon, value of farm and improvements, value of farm implements, number and value of live stock on farms and ranges, number and value of domestic animals not on farms and ranges, and the acreage of crops planted and to be planted during the year of enumeration, and the acreage of crops and the quantity and value of crops and other farm products for the year ending December thirty-first next preceding the enumeration.

The schedules of inquiries relating to manufactures and to mines and quarries shall include the name and location of each establishment; character of organization, whether individual, cooperative, or other form; character of business or kind of goods manufactured; amount of capital actually invested; number of proprietors, firm members, copartners, stockholders, and officers and the amount of their salaries; number of employees and the amount of their wages; quantity and cost of materials used in manufactures; amount of miscellaneous expenses; quantity and value of products; time in operation during the census year; character and quantity of power used, and character and number of machines employed. Inquiries shall also be made as to the location and character of irrigation enterprises; quantity of land irrigated in the arid region of the United States and in each State and county in that section under state and federal laws; the price at which these lands, including water right, are obtainable; the character and value of crops produced on irrigated lands, the amount of water used per acre for said irrigation and whether it was obtainable from national, state, or private works; the location of the various projects and method of construction with facts as to their physical condition; the amount of capital invested in such irrigation works.

The census of manufactures and of mines and quarries shall relate to the year ending December thirty-first next preceding the enumeration of population and shall be confined to mines and quarries and manufacturing establishments which were in active operation during all or a portion of that year. The census of manufactures shall furthermore be confined to manufacturing establishments conducted under what is known as the factory system, exclusive of the so-called neighborhood household and hand industries: Provided, That the census shall also include an enumeration of the number of cattle, calves, sheep, lambs, hogs, goats, and kids slaughtered for food purposes, and all hides produced, whether taken from animals slaughtered for food purposes or otherwise, during the year next preceding the year of the enumeration of population, irrespective of the character of the establishment in which slaughtered or produced.

The inquiry concerning manufactures shall cover the production of turpentine and rosin, and the report concerning this industry shall

show, in addition to the other facts covered by the regular schedule of manufactures, the quantity and quality of turpentine and rosin manufactured and marketed, the sources, methods, and extent of the industry.

Whenever he shall deem it expedient, the Director of the Census may charge the collection of these statistics upon special agents or upon detailed employees, to be employed without respect to locality.

The form and subdivision of inquiries necessary to secure the information under the foregoing topics shall be determined by the Director of the Census. (36 Stat. 3. 36 Stat. 227.)

See notes to section 1 of this act, ante, § 4385.

The amendment of this section by Act Feb. 25, 1910, c. 63, cited above, consisted chiefly in additions to the matters to be included in the schedules relating to agriculture and to manufactures and mines.

The schedules relating to population were to provide inquiries respecting the nationality or mother tongue of persons born in foreign countries and of parents of foreign births of persons enumerated, by Res. March 24, 1910, No. 17, post, § 4388.

§ 4388. (Res. March 24, 1910, No. 17.) Scope of Thirteenth Census; schedules relating to population; nationality or mother tongue of persons of foreign birth.

The schedules relating to population for the Thirteenth Decennial Census, in addition to the inquiries required by the Act entitled "An Act to amend section eight of an Act to provide for the Thirteenth and subsequent decennial censuses, approved July second, nineteen hundred and nine," approved February twenty-fifth, nineteen hundred and ten, shall provide inquiries respecting the nationality or mother tongue of all persons born in foreign countries, and of the nationality or mother tongue of parents of foreign birth of persons enumerated. (36 Stat. 877.)

Act July 2, 1909, c. 2, § 8, mentioned in this resolution, as amended by Act Feb. 25, 1910, c. 63, also mentioned in this resolution, is set forth ante, § 4387.

§ 4389. (Act March 6, 1902, c. 139, § 7, as amended, Act June 7, 1906, c. 3048.) Collection of special statistics decennially; special agents to secure statistics.

After the completion and return of the enumeration and of the work upon the schedules relating to the products of agriculture and to manufacturing and mechanical establishments provided for in section seven of the Act of March third, eighteen hundred and ninety-nine, entitled "An Act to provide for taking the Twelfth and subsequent censuses," the Director of the Census is hereby authorized decennially to collect statistics relating to the defective, dependent, and delinquent classes; to crime, including judicial statistics pertaining thereto, provided that such statistics shall include information upon the following questions, namely: Age, sex, color, race, nativity, parentage, literacy by race, color, nativity, and parentage, and such other questions relating to these subjects as the Director in his discretion may deem proper; to social statistics of cities; to public indebtedness, valuation, taxation, and expenditures; to religious bodies; to transportation by water, and express business; to mines, mining, quarries, and minerals, and the production and value thereof, including gold in divisions of placer and vein, and silver mines, and the number of men employed, the average daily wage, average working time, and aggregate earnings in the various branches and aforesaid divisions of the mining and quarrying industries; to savings banks and other savings institutions, mortgage, loan, and investment companies, and similar institutions; to the fishing industry in cooperation with the Bureau of Fisheries; and every five years to collect statistics relating to street railways, electric light and power, telephone, and telegraph business. And the Director of the Census shall prepare schedules containing such interrogatories as shall in his judgment be best adapted to elicit the information required

under the subjects, with such specifications, divisions, and particulars under each head as he shall deem necessary to that end; and all reports prepared under the provisions of this section shall be designated as "Special Reports of the Census Office." For the purpose of securing the statistics required by this section the Director of the Census may appoint special agents when necessary, and such special agents shall receive compensation as hereinafter provided. (32 Stat. 52. 34 Stat. 218.)

This was part of section 7 of an act entitled "An act to provide for a permanent Census Office," cited above, as amended by Act June 7, 1906, c. 3048, also cited above.

A further provision of this section, as so amended, that the Director of the Census shall edit, index, and publish the Official Register, is set forth ante, § 912.

This section, as originally enacted in March 6, 1902, c. 139, cited above, amended Act March 3, 1899, c. 419, § 8, 30 Stat. 1016. It read as follows:

"Sec. 7. That section eight of the Act of March third, eighteen hundred and ninety-nine, is hereby amended so as to read as follows: That after the completion and return of the enumeration and of the work upon the schedules relating to the products of agriculture and to manufacturing and mechanical establishments provided for in section seven of this Act, the Director of the Census is hereby authorized decennially to collect statistics relating to special classes, including the insane, feeble-minded, deaf, dumb, and blind; to crime, pauperism, and benevolence, including prisoners, paupers, juvenile delinquents, and inmates of benevolent and reformatory institutions; to social statistics of cities; to public indebtedness, valuation, taxation, and expenditures; to religious bodies; to electric light and power, telephone, and telegraph business; to transportation by water, express business, and street railways; to mines, mining, quarries and minerals and the production and value thereof, including gold in divisions of placer and vein, and silver mines, and the number of men employed, the average daily wage, average working time, and aggregate earnings in the various branches and aforesaid divisions of the mining and quarrying industries until July first, nineteen hundred and four. And the Director of the Census shall prepare schedules containing such interrogatories as shall in his judgment be best adapted to elicit the information required under these subjects, with such specifications, divisions, and particulars under each head as he shall deem necessary to that end; and all reports prepared under the provisions of this section shall be designated as 'Special reports of the Census Office.' For the purpose of securing the statistics required by this section, the Director of the Census may appoint special agents when necessary, and such special agents shall receive compensation as hereinafter provided: Provided, That the statistics of special classes, and of crime, pauperism, and benevolence specified in this section, shall be restricted to institutions containing such classes and the Director of the Census is authorized and directed to collect statistics relating to all of the deaf, dumb, and blind, notwithstanding the restrictions and limitations contained in section eight of said Act entitled 'An Act to provide for taking the Twelfth and subsequent censuses': Provided, That in taking the census of said classes the inquiries shall be confined to the following four questions, namely: Name, age, sex, and post-office address."

The first five sections of this act, which made permanent the Census Office temporarily established for taking the Twelfth Census, and provided for the appointment and compensation of the Director of the Census and the other officers, clerks, and employés of the Census Office, are set forth, ante, §§ 909–911, 913, 914.

Section 6 of this act provided that the provisions of Act March 3, 1899, c. 419, 30 Stat. 1014, relating to the Twelfth Census, not inconsistent with the provisions of this act, should remain in force for the taking of the Thirteenth and subsequent censuses. It was superseded by the repeal of said Act March 3, 1899, c. 419, by Act July 2, 1909, c. 2, § 33, post, § 4419.

Sections 8–11 of this act are set forth in this chapter, post, §§ 4390, 4391, 4403–4414.

Section 12 of this act, 32 Stat. 53, repealed several supplemental acts amendatory of Act March 3, 1899, c. 419, 30 Stat. 1014, and all provisions of said act inconsistent with this act.

The clerical force of the Census Office may be employed for such field work as may be required to carry out the provisions of this section, in lieu of employing special agents for the purpose, by a proviso annexed to section 17 of Act March 3, 1899, c. 419, as amended by section 10 of this act, post, § 4403.

Act March 3, 1899, c. 419, mentioned in this section, section 8 of which was amended by this section as originally enacted, was repealed by Act July 2, 1909, c. 2, § 33, post, § 4419.

The Thirteenth Census was restricted to inquiries relating to population,

agriculture, manufactures, and mines and quarries, prescribed by Act July 2, 1909, c. 2, § 8, ante, § 4387.

Subsequent provisions relating to special agents to carry out the provisions of this act and the act to provide for the Thirteenth and subsequent censuses were made by section 18 of the latter act, Act July 2, 1909, c. 2, § 18, post, § 4402.

Notes of Decisions

Special agents.—The Director of the Census is authorized, under this section, to employ special agents temporarily in the Census Office at Washington upon special work not clerical in its nature. (1902) 24 Op. Atty. Gen. 78.

—— **Oath or affirmation.**—The special agents of the Census Office appointed to collect the statistics referred to in this and the two following sections "to provide for a permanent Census Office," are required, under section 18 of the act of March 3, 1899 (30 Stat. 1019), to take an oath or affirmation before entering upon the discharge of their duties. (1904) 25 Op. Atty. Gen. 228.

§ 4390. (Act March 6, 1902, c. 139, § 8, as amended, Act April 27, 1904, c. 1626.) Collection of vital statistics annually.

There shall be a collection of the statistics of the births and deaths in registration areas for the year nineteen hundred and two, and annually thereafter, the date for which shall be obtained only from and restricted to such registration records of such States and municipalities as in the discretion of the Director possess records affording satisfactory data in necessary detail, the compensation for the transcription of which shall not exceed four cents for each birth or death reported; or a minimum compensation of twenty-five dollars may be allowed, in the discretion of the Director, in States or cities registering less than five hundred deaths or five hundred births during the preceding year. (32 Stat. 52. 33 Stat. 362.)

See note to section 7 of this act, ante, § 4389.

In this section, as originally enacted, the concluding clause relating to the compensation for transcription of registration records was, "the compensation for the transcription of which shall not exceed two cents for each birth or death reported." It was amended by Act April 27, 1904, cited above, to read as set forth here. In the section as so amended, the word "date" in the third line thereof was substituted, apparently by error, for the word "data" in the section originally enacted.

Provisions for collection of statistics of deaths and births in registration areas were made by Act March 3, 1899, c. 419, § 7, and by § 8, before the amendment of the latter section by section 7 of this act.

Co-operation of state authorities in securing a uniform system of registration of births and deaths was requested by Res. Feb. 11, 1903, No. 7, 32 Stat. 1231, which was as follows:

"Whereas the registration of deaths at the time of their occurrence furnishes official record information of much value to individuals; and

"Whereas the registration of births and deaths, with information upon certain points, is essential to the progress of medical and sanitary science in preventing and restricting disease and in devising and applying remedial agencies; and

"Whereas all of the principal countries of the civilized world recognize the necessity for such registration and enforce the same by general laws; and

"Whereas registration in the United States is now confined to a few States, as a whole, and the larger cities, under local laws and ordinances which differ widely in their requirements; and

"Whereas it is most important that registration should be conducted under laws that will insure a practical uniformity in the character and amount of information available from the records; and

"Whereas the American Public Health Association and the United States Census Office are now co-operating in an effort to extend the benefits of registration and to promote its efficiency by indicating the essential requirements of legislative enactments designed to secure the proper registration of all deaths and births and the collection of accurate vital statistics, to be presented to the attention of the legislative authorities in nonregistration States, with the suggestion that such legislation be adopted; Now, therefore,

"Resolved, &c., That the Senate and House of Representatives of the United States hereby expresses approval of this movement and requests the favorable consideration and action of the State authorities, to the end that the United States may attain a complete and uniform system of registration."

A collection of statistics of marriages and deaths in all the states, terri-

tories, and the District of Columbia, since 1887, was provided for by Res. Feb. 9, 1905, No. 16, 33 Stat. 1282, which was repealed by Act of July 22, 1912, c. 249, § 6, post, § 4434.

Notes of Decisions

Oath or affirmation.—See (1904) 25 Op. Atty. Gen. 228; note under section 4389, ante.

§ 4391. (Act March 6, 1902, c. 139, § 9.) Collection of statistics of manufactures under factory system in year 1905 and every ten years thereafter; collection of statistics of cotton production annually; additional special collections of statistics as required by Congress.

In the year nineteen hundred and five, and every ten years thereafter, there shall be a collection of the statistics of manufactures, confined to manufacturing establishments conducted under what is known as the factory system, exclusive of the so-called neighborhood and mechanical industries; and the Director is hereby authorized to prepare such schedules as in his judgment may be necessary to carry out the provisions of this section; and that in addition to the statistics now provided for by law the Director of the Census shall annually collect the statistics of the cotton production of the country as returned by the ginners and bulletins giving the results of the same shall be issued weekly beginning September first of each year and continued till February first following; and that the Director of the Census shall make, from time to time, any additional special collections of statistics relating to any branch of agriculture, manufacture, mining, transportation, fisheries, or any other branch of industry that may be required of him by Congress. (32 Stat. 52.)

See notes to section 7 of this act, ante, § 4389.

Co-operation with state officials in the collection of statistics of manufactures was authorized by Act March 1, 1904, c. 388, post, § 4392.

The provisions of this section for collection of statistics of cotton production were superseded by subsequent provisions for collection of such statistics made by Res. Feb. 9, 1905, No. 16, 33 Stat. 1282, and Res. March 2, 1909, No. 21, 35 Stat. 1168, and by Act July 22, 1912, c. 249, post, §§ 4429–4434, section 6 of which act repealed said resolutions.

Provisions for the collection and publication of additional statistics as to the quantity of tobacco in the hands of manufacturers and dealers were made by Act April 30, 1912, c. 102, post, §§ 4421–4428a.

An independent division of cotton and tobacco statistics was created by Act May 10, 1916, c. 117, § 1, post, § 4420a.

Notes of Decisions

Oath or affirmation.—See (1904) 25 Op. Atty. Gen. 228; note under section 4389, ante.

§ 4392. (Act March 1, 1904, c. 388.) Co-operation with state officials in collection of statistics of manufactures.

The Director of the Census is hereby authorized and empowered to co-operate with the secretary of state of the State of Michigan in taking the census of manufactures and shall equitably share the expenses thereof, the results of which may be accepted by the United States as its census of manufactures for that State for the year nineteen hundred and five: Provided, That the expenditures incident to this co-operation shall not exceed twenty thousand dollars, such expenditures to be paid from the fund appropriated for the expenses of the field work of the census for the fiscal year ending June thirtieth, nineteen hundred and five. And the Director of the Census may, in his discretion, co-operate with the officials of other States which take a like census in so far as it may aid in the collection of statistics of manufactures required by existing law. (33 Stat. 58.)

This was an act entitled "An act to authorize the Director of the Census to co-operate with the Secretary of State of the State of Michigan and with officials of other States in taking the census of manufactures."

Previous provisions for collection of statistics of manufactures were made by Act March 6, 1902, c. 139, § 9, ante, § 4391.

§ 4393. (Act July 2, 1909, c. 2, § 9.) Appointment of supervisors of census.

The Director of the Census shall, at least six months prior to the date fixed for commencing the enumeration at the Thirteenth and each succeeding decennial census, designate the number, whether one or more, of supervisors of census for each State and Territory, the District of Columbia, Alaska, and Porto Rico, and shall define the districts within which they are to act; except that the Director of the Census, in his discretion, need not designate supervisors for Alaska and the Territory of Hawaii, but in lieu thereof may employ special agents as hereinafter provided. The supervisors shall be appointed by the President, by and with the advice and consent of the Senate: Provided, That the whole number of supervisors shall not exceed three hundred and thirty: And provided further, That so far as practicable and desirable the boundaries of the supervisors' districts shall conform to the boundaries of the congressional districts: And provided further, That if in any supervisor's district the supervisor has not been appointed and qualified ninety days preceding the date fixed for the commencement of the enumeration, or if any vacancy shall occur thereafter, either through death, removal, or resignation of the supervisor, or from any other cause, the Director of the Census may appoint a temporary supervisor or detail an employee of the Census Office to act as supervisor for that district. (36 Stat. 4.)

See note to section 1 of this act, ante, § 4385.

§ 4394. (Act July 2, 1909, c. 2, § 10.) Duties of supervisors.

Each supervisor of census shall be charged with the performance, within his own district, of the following duties: To consult with the Director of the Census in regard to the division of his district into subdivisions most convenient for the purpose of the enumeration, which subdivisions or enumeration districts shall be defined and the boundaries thereof fixed by the Director of the Census; to designate to the Director suitable persons, and, with his consent, to employ such persons as enumerators, one or more for each subdivision; to communicate to enumerators the necessary instructions and directions relating to their duties; to examine and scrutinize the returns of the enumerators, and in the event of discrepancies or deficiencies appearing in any of the said returns to use all diligence in causing the same to be corrected or supplied; to forward the completed returns of the enumerators to the Director at such time and in such manner as shall be prescribed, and to make up and forward to the Director the accounts of each enumerator in his district for service rendered, which accounts shall be duly certified to by the enumerator, and the same shall be certified as true and correct, if so found, by the supervisor, and said accounts so certified shall be accepted and paid by the Director. The duties imposed upon the supervisor by this Act shall be performed in any and all particulars in accordance with the orders and instructions of the Director of the Census. (36 Stat. 5.)

See notes to section 1 of this act, ante, § 4385.

Notes of Decisions

Correcting schedules under former law.—Act March 3, 1899, providing for the twelfth census, authorized a supervisor, acting on advice that names had been erroneously omitted by an enumerator from his schedules, to return such schedules for correction after the expiration of the 30 days prescribed for making the enumeration; and, in making such corrections or any additions to his schedules after their return, the enumerator acted in his official capacity, and subject to the penalties prescribed by section 21 of the act for making false returns. Ching v. U. S. (1902) 118 Fed. 538, 55 C. C. A. 304, writ of certiorari denied (1903) 23 Sup. Ct. 849, 189 U. S. 509, 47 L. Ed. 923.

§ 4395. (Act July 2, 1909, c. 2, § 11.) Compensation of supervisors.

Each supervisor of the census shall, upon the completion of his duties to the satisfaction of the Director of the Census, receive the sum of one thousand five hundred dollars and, in addition thereto, one dollar for each thousand or majority fraction of a thousand of population enumerated in his district, such sums to be in full compensation for all services rendered and expenses incurred by him: Provided, That of the above-named compensation a sum not to exceed six hundred dollars, in the discretion of the Director of the Census, may be paid to any supervisor prior to the completion of his duties in one or more payments, as the Director of the Census may determine: Provided further, That in emergencies arising in connection with the work of preparation for, or during the progress of, the enumeration in his district, or in connection with the reenumeration of any subdivision, a supervisor may, in the discretion of the Director of the Census, be allowed actual and necessary traveling expenses and an allowance in lieu of subsistence not exceeding four dollars per day during his necessary absence from his usual place of residence: And provided further, That an appropriate allowance to supervisors for clerk hire may be made when deemed necessary by the Director of the Census. (36 Stat. 5.)

See notes to section 1 of this act, ante, § 4385.

§ 4396. (Act July 2, 1909, c. 2, § 12.) Duties of enumerators.

Each enumerator shall be charged with the collection in his subdivision of the facts and statistics required by the population and agricultural schedules and such other schedules as the Director of the Census may determine shall be used by him in connection with the census, as provided in section eight of this Act. It shall be the duty of each enumerator to visit personally each dwelling house in his subdivision, and each family therein, and each individual living out of a family in any place of abode, and by inquiry made of the head of each family, or of the member thereof deemed most competent and trustworthy, or of such individual living out of a family, to obtain each and every item of information and all particulars required by this Act as of date April fifteenth of the year in which the enumeration shall be made; and in case no person shall be found at the usual place of abode of such family, or individual living out of a family, competent to answer the inquiries made in compliance with the requirements of this Act, then it shall be lawful for the enumerator to obtain the required information as nearly as may be practicable from families or persons living in the neighborhood of such place of abode. It shall be the duty also of each enumerator to forward the original schedules, properly filled out and duly certified, to the supervisor of his district as his returns under the provisions of this Act; and in the event of discrepancies or deficiencies being discovered in these schedules he shall use all diligence in correcting or supplying the same. In case an enumeration district embraces all or any part of any incorporated borough, village, town, or city, and also other territory not included within the limits of such incorporated borough, village, town, or city, it shall be the duty of the enumerator to clearly and plainly distinguish and separate, upon the population schedules, the inhabitants of such borough, village, town, or city from the inhabitants of the territory not included therein. No enumerator shall be deemed qualified to enter upon his duties until he has received from the supervisor of the district to which he belongs a commission, signed by the supervisor, authorizing him to perform the duties of an enumerator, and setting forth the boundaries of the subdivision within which such duties are to be performed. (36 Stat. 5.)

See notes to section 1 of this act, ante, § 4385.

§ 4397. (Act July 2, 1909, c. 2, § 13.) Enumeration districts; assignments of enumerators to two or more districts, and to institutions.

The territory assigned to each supervisor shall be divided into as many enumeration districts as may be necessary to carry out the purposes of this Act, and, in the discretion of the Director of the Census, two or more enumeration districts may be given to one enumerator, and the boundaries of all the enumeration districts shall be clearly described by civil divisions, rivers, roads, public surveys, or other easily distinguishable lines: Provided, That enumerators may be assigned for the special enumeration of institutions, when desirable, without reference to the number of inmates. (36 Stat. 6.)

See notes to section 1 of this act, ante, § 4385.

§ 4398. (Act July 2, 1909, c. 2, § 14.) Removal of enumerators; filling vacancies; incomplete or erroneous enumeration.

Any supervisor of census may, with the approval of the Director of the Census, remove any enumerator in his district and fill the vacancy thus caused or otherwise occurring. Whenever it shall appear that any portion of the census provided for in this Act has been negligently or improperly taken, and is by reason thereof incomplete or erroneous, the Director of the Census may cause such incomplete and unsatisfactory enumeration and census to be amended or made anew. (36 Stat. 6.)

See notes to section 1 of this act, ante, § 4385.

§ 4399. (Act July 2, 1909, c. 2, § 15.) Interpreters to assist enumerators; employment; compensation.

The Director of the Census may authorize and direct supervisors of census to employ interpreters to assist the enumerators of their respective districts in the enumeration of persons not speaking the English language, but no authorization shall be given for such employment in any district until due and proper effort has been made to secure an enumerator who can speak the language or languages for which the services of an interpreter would otherwise be required. The compensation of such interpreters shall be fixed by the Director of the Census in advance, and shall not exceed five dollars per day for each day actually and necessarily employed. (36 Stat. 6.)

See notes to section 1 of this act, ante, § 4385.

§ 4400. (Act July 2, 1909, c. 2, § 16.) Compensation of enumerators.

The compensation of enumerators shall be determined by the Director of the Census as follows: In subdivisions where he shall deem such remuneration sufficient, an allowance of not less than two nor more than four cents for each inhabitant; not less than twenty nor more than thirty cents for each farm reported; ten cents for each barn and inclosure containing live stock not on farms, and not less than twenty nor more than thirty cents for each establishment of productive industry reported. In other subdivisions the Director of the Census may fix a mixed rate of not less than one nor more than two dollars per day and, in addition, an allowance of not less than one nor more than three cents for each inhabitant enumerated, and not less than fifteen nor more than twenty cents for each farm and each establishment of productive industry reported. In other subdivisions per diem rates shall be fixed by the Director according to the difficulty of enumeration, having special reference to the regions to be canvassed and the sparsity of settlement or other considerations pertinent thereto. The compensation allowed to an enumerator in any such district shall be not less than three nor more than six dollars per day of eight hours actual field work, and no payment shall be made for time in ex-

cess of eight hours for any one day. The subdivisions or enumeration districts to which the several rates of compensation shall apply shall be designated by the Director of the Census at least two weeks in advance of the enumeration. No claim for mileage or traveling expenses shall be allowed any enumerator in either class of subdivisions, except in extreme cases, and then only when authority has been previously granted by the Director of the Census; and the decision of the Director as to the amount due any enumerator shall be final. (36 Stat. 6.)

See notes to section 1 of this act, ante, § 4385.

§ 4401. (Act July 2, 1909, c. 2, § 17.) Death of supervisor or enumerator; compensation for services rendered.

In the event of the death of any supervisor or enumerator after his appointment and entrance on his duties, the Director of the Census is authorized to pay to his widow or his legal representative such sum as he may deem just and fair for the services rendered by such supervisor or enumerator. (36 Stat. 7.)

See notes to section 1 of this act, ante, § 4385.

§ 4402. (Act July 2, 1909, c. 2, § 18, as amended, Res. Feb. 15, 1910, No. 9.) Special agents; appointment; authority; compensation.

Special agents may be appointed by the Director of the Census to carry out the provisions of this Act and of the Act to provide for a permanent Census Office approved March sixth, nineteen hundred and two, and Acts amendatory thereof or supplementary thereto. The special agents thus appointed shall have like authority with the enumerators in respect to the subjects committed to them under this Act, and shall receive compensation at rates to be fixed by the Director of the Census: Provided, That the same shall in no case exceed six dollars per day and actual necessary traveling expenses, and an allowance in lieu of subsistence not exceeding three dollars per day during necessary absence from their usual place of residence: Provided further, That no pay or allowance in lieu of subsistence shall be allowed special agents when employed in the Census Office on other than the special work committed to them, and no appointments of special agents shall be made for clerical work: And provided further, That the Director of the Census shall have power, and is hereby authorized, to appoint special agents to assist the supervisors whenever he may deem it proper, in connection with the work of preparation for, or during the progress of, the enumeration or in connection with the reenumeration of any district or a part thereof; or he may, in his discretion, employ for this purpose any of the permanent or temporary employees of the Census Office: And provided further, That the Director of the Census may, in his discretion, fix the compensation of special agents on a piece-price basis which may include a minimum and maximum rate of per diem compensation to be fixed by him, the maximum rate in such cases not to exceed an average of six dollars per diem for the period of employment, and actual necessary traveling expenses and an allowance in lieu of subsistence not exceeding three dollars per diem during necessary absence from their usual place of residence. (36 Stat. 7. 36 Stat. 874.)

See notes to section 1 of this act, ante, § 4385.

The amendment of this section by Res. Feb. 15, 1910, No. 9, cited above, consisted in the addition, in the last proviso thereof, of the words beginning "which may include a minimum and maximum rate," etc., to the end of the section as set forth here.

Act March 6, 1902, c. 139, mentioned in this section, is set forth ante, §§ 909–911, and §§ 4389–4391. The provisions of section 10 of that act, amending Act March 3, 1899, c. 419, § 17, were to a great extent superseded by those of this section, and said Act March 3, 1899, c. 419, was wholly repealed by section 33 of this act, post, § 4419.

The compensation of not to exceed 20 of the special agents provided for in this section may be fixed at not to exceed $8 per day, by a provision of Act Aug. 5, 1909, c. 7, post, § 4404.

Notes of Decisions

Right to subsistence.—An agent of the Census Office, whose duties are to be performed at his own residence and whose compensation is expressly stated to be a per diem, is not entitled to subsistence. Ebert v. U. S. (1894) 29 Ct. Cl. 183.

§ 4403. (Act March 6, 1902, c. 139, § 10.) Amendment of Act March 3, 1899, c. 419, § 17; special agents; authority; compensation; employment of clerical force for field work; employés of Census Office to be citizens.

Section seventeen of the act of March third, eighteen hundred and ninety-nine, is hereby amended so as to read as follows:

"Sec. 17. That the special agents appointed under the provisions of this Act have like authority with the enumerators in respect to the subjects committed to them under this Act and shall receive compensation at rates to be fixed by the Director of the Census: Provided, That the same shall in no case exceed six dollars per day and actual necessary traveling expenses and an allowance in lieu of subsistence not exceeding three dollars per day during their necessary absence from their usual place of residence: And provided further, That no pay or allowance in lieu of subsistence shall be allowed special agents when employed in the Census Office on other than the special work committed to them, and no appointments of special agents shall be made for clerical work: And provided further, That the Director of the Census is hereby authorized in his discretion to employ the clerical force of the Census Office for such field work as may be required to carry out the provisions of sections seven, eight, and nine, in lieu of employing special agents for that purpose; and such employees when so employed shall be allowed, in addition to their regular compensation, actual necessary traveling expenses and an allowance in lieu of subsistence not exceeding three dollars per day during their necessary absence from the Census Office. All employees of the Census Office shall be citizens of the United States." (32 Stat. 53.)

Act March 3, 1899, c. 419, section 17 of which was amended by this section was repealed by Act July 2, 1909, c. 2, § 33, post, § 4419. The provisions of said original section were re-enacted, and those of the amended section set forth here were to a great extent superseded, by those of section 18 of said Act July 2, 1909, c. 2, ante, § 4402.

Notes of Decisions

Employés of census office.—See (1909) 27 Op. Atty. Gen. 546, 566, 567.

Employment of noncitizens.—This section does not prevent the employment of persons as enumerators and interpreters who are not such citizens. (1910) 28 Op. Atty. Gen. 227.

The expression "all employés of the census office," in this section, does not relate to enumerators or interpreters. Id.

The provision referred to was not, however, repealed by the act of July 2, 1909 (36 Stat. 1). Id.

§ 4404. (Act Aug. 5, 1909, c. 7.) Compensation of special agents.

The Director of the Census may fix the compensation of not to exceed twenty of the special agents provided for in section eighteen of "An Act to provide for the thirteenth and subsequent decennial censuses," approved July second, nineteen hundred and nine, at an amount not to exceed eight dollars per day: Provided, That such special agents shall be persons of known and tried experience in statistical work. (36 Stat. 126.)

This was a provision of the urgent deficiency act for the fiscal year 1909, cited above.

Act July 2, 1909, c. 2, § 18, mentioned in this provision, is set forth ante, § 4402.

§ 4405. (Act July 2, 1909, c. 2, § 19.) Oath of supervisors, enumerators, special agents, etc., and other employés; appointment or employment where examination required to be solely with reference to fitness.

Every supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other employee shall take and subscribe to an oath or affirmation, to be prescribed by the Director of the Census. All appointees and employees provided for in this Act shall be appointed or employed, and examined, if examination is required by this Act, solely with reference to their fitness to perform the duties required of them by the provisions of this Act, and without reference to their political party affiliations. (36 Stat. 7.)

See notes to section 1 of this act, ante, § 4385.

§ 4406. (Act July 2, 1909, c. 2, § 20.) Date as to which enumeration to be taken; time of commencement and completion thereof.

The enumeration of the population required by section one of this Act shall be taken as of the fifteenth day of April; and it shall be the duty of each enumerator to commence the enumeration of his district on that day, unless the Director of the Census in his discretion shall defer the enumeration in said district by reason of climatic or other conditions which would materially interfere with the proper conduct of the work; but in any event it shall be the duty of each enumerator to prepare the returns hereinbefore required to be made, except those relating to paupers, prisoners, juvenile delinquents, insane, feeble-minded, blind, deaf and dumb, and inmates of benevolent institutions, and to forward the same to the supervisor of his district, within thirty days from the commencement of the enumeration of his district: Provided, That in any city having five thousand inhabitants or more under the preceding census the enumeration of the population shall be commenced on the fifteenth day of April aforesaid and shall be completed within two weeks thereafter. (36 Stat. 7.)

See notes to section 1 of this act, ante, § 4385.

§ 4407. (Act July 2, 1909, c. 2, § 21.) Receiving compensation for appointment or employment of supervisor, enumerator, clerk, or other employé, etc., punishable; penalty.

If any person shall receive or secure to himself any fee, reward, or compensation as a consideration for the appointment or employment of any person as supervisor, enumerator or clerk or other employee, or shall in any way receive or secure to himself any part of the compensation paid to any supervisor, enumerator or clerk or other employee, he shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not more than three thousand dollars and be imprisoned not more than five years. (36 Stat. 8.)

See notes to section 1 of this act, ante, § 4385.

§ 4408. (Act July 2, 1909, c. 2, § 22.) Neglect or refusal to perform duties by officers or employés, publishing or communicating information, false swearing, making false certificate or fictitious return, furnishing false statement or false information, punishable; penalties.

Any supervisor, supervisor's clerk, enumerator, interpreter, special agent, or other employee, who, having taken and subscribed the oath of office required by this Act, shall, without justifiable cause, neglect or refuse to perform the duties enjoined on him by this Act, shall be deemed guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars; or if he shall, without the authority of the Director of the Census, publish or communicate any information coming into his possession by reason of his employment under the provisions of this Act, or the Act to provide

for a permanent Census Office, or Acts amendatory thereof or supplemental thereto, he shall be guilty of a misdemeanor and shall upon conviction thereof be fined not to exceed one thousand dollars, or be imprisoned not to exceed two years, or both so fined and imprisoned, in the discretion of the court; or if he shall willfully and knowingly swear to or affirm falsely, he shall be deemed guilty of perjury, and upon conviction thereof shall be imprisoned not exceeding five years and be fined not exceeding two thousand dollars; or if he shall willfully and knowingly make a false certificate or a fictitious return, he shall be guilty of a misdemeanor, and upon conviction of either of the last-named offenses he shall be fined not exceeding two thousand dollars and be imprisoned not exceeding five years; or if any person who is or has been an enumerator shall knowingly or willfully furnish, or cause to be furnished, directly or indirectly, to the Director of the Census, or to any supervisor of the census, any false statement or false information with reference to any inquiry for which he was authorized and required to collect information, he shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding two thousand dollars and be imprisoned not exceeding five years. (36 Stat. 8.)

See notes to section 1 of this act, ante, § 4385.

The publication or communication by an employé of the Bureau of Census of any information received by him by reason of his employment, under the provisions of Act July 22, 1912, c. 249, post, §§ 4429–4434, was made punishable by section 3 of that act, post, § 4431.

Notes of Decisions

Constitutionality of former law.—So far as the government seeks voluntary information relating to manufacturing and mechanical establishments, Census Act March 3, 1899, c. 419, 30 Stat. 1014, is not violative of the provision of the federal constitution that private property shall not be taken for public use without compensation. U. S. v. Moriarity (C. C. 1901) 106 Fed. 886.

Offense under former law.—Persons who conspire to commit the acts made misdemeanors by section 13 of the census act (Act March 1, 1889), with another person who is capable of committing the offense defined therein, may be punished under section 10201, post, though they themselves are incapable of committing the offenses defined in section 13. U. S. v. Stevens (D. C. 1890) 44 Fed. 132.

Indictment under former law.—An indictment for making a false and fictitious census return is sufficient though it fails to state that the form on which it was made was prescribed by the director of the census, the presumption being that no other form was used, in the absence of allegations to the contrary. U. S. v. Moriarity (C. C. 1901) 106 Fed. 886.

An indictment under Census Act March 3, 1899, c. 419, 30 Stat. 1020, is not bad because it charges the making of a false and fictitious return, since there may be a false certificate without a fictitious return, but there cannot be a fictitious return that is not false. Id.

An indictment for making a false and fictitious census return is not defective because a portion of such return contains information not required by statute, and omits information demanded. Id.

An indictment for making a false and fictitious census return is sufficient, though it fails to charge that it was made to the supervisor of the district, since that official is the only one authorized to receive it. Id.

Defense.—A person sworn to obtain information relating to manufacturing and mechanical establishments cannot escape punishment for making a fictitious return on the ground that the act violates the provision of the federal constitution prohibiting the taking of private property for public use without compensation. U. S. v. Moriarity (C. C. 1901) 106 Fed. 886.

§ 4409. (Act July 2, 1909, c. 2, § 23.) Persons required to answer questions; refusal punishable; penalty.

It shall be the duty of all persons over twenty-one years of age when requested by the Director of the Census, or by any supervisor, enumerator, or special agent, or other employee of the Census Office, acting under the instructions of the said Director, to answer correctly, to the best of their knowledge, all questions on the census schedules applying to themselves and to the family to which they

belong or are related, and to the farm or farms of which they or their families are the occupants; and any person over twenty-one years of age who, under the conditions hereinbefore stated, shall refuse or willfully neglect to answer any of these questions, or shall willfully give answers that are false, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding one hundred dollars.

And it shall be the duty of every owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building, when requested by the Director of the Census, or by any supervisor, enumerator, special agent, or other employee of the Census Office, acting under the instructions of the said Director, to furnish the names of the occupants of said hotel, apartment house, boarding or lodging house, tenement, or other building, and to give thereto free ingress and egress to any duly accredited representative of the Census Office, so as to permit of the collection of statistics for census purposes including the proper and correct enumeration of all persons having their usual place of abode in said hotel, apartment house, boarding or lodging house, tenement, or other building; and any owner, proprietor, manager, superintendent, or agent of a hotel, apartment house, boarding or lodging house, tenement, or other building who shall refuse or willfully neglect to give such information or assistance under the conditions hereinbefore stated shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding five hundred dollars. (36 Stat. 8.)

See notes to section 1 of this act, ante, § 4385.

Notes of Decisions

Offense under former law.—Act March 1, 1889, § 15, provided that every member of a family above the age of 20 years who shall refuse to render to the census enumerator a true account "of every person belonging to such family in the particulars required by law" shall be guilty of a misdemeanor. Held, that it was within the offense thereby created to refuse to furnish the particulars required by R. S. § 2206, in regard to a farm belonging to one's wife. U. S. v. Sarle (C. C. 1891) 45 Fed. 191.

The provision of the act of July 6, 1892, imposing a penalty for refusal to answer questions upon officers of corporations engaged in productive industry, from which or from whom answers "are herein required," is ineffective, because there is no provision, in that or any other act, requiring such corporations or their officers to answer the questions. U. S. v. Mitchell (D. C. 1893) 58 Fed. 993.

§ 4410. (Act July 2, 1909, c. 2, § 24.) Duty of owner or officer, etc., of manufacturing establishment, etc., to answer questions; refusal punishable.

It shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any manufacturing establishment, mine, quarry, or other establishment of productive industry, whether conducted as a corporation, firm, limited liability company, or by private individuals, when requested by the Director of the Census or by any supervisor, enumerator, special agent, or other employee of the Census Office acting under the instructions of the said Director, to answer completely and correctly to the best of his knowledge all questions on any census schedule applying to such establishment; and any owner, president, secretary, director, or other officer or agent of any manufacturing establishment, mine, quarry, or other establishment of productive industry, who under the conditions hereinbefore stated shall refuse or willfully neglect to answer any of these questions, or shall willfully give answers that are false, shall be guilty of a misdemeanor, and upon conviction thereof shall be fined not exceeding ten thousand dollars, or imprisoned for a period not exceeding one year, or both so fined and imprisoned, at the discretion of the court. The provisions of this section shall also apply to the collection of the information required and authorized by the Act entitled "An

Act to provide for a permanent Census Office," and by Acts amendatory thereof or supplemental thereto. (36 Stat. 9.)

See notes to section 1 of this act, ante, § 4385.

The act to provide for a permanent Census Office, Act March 6, 1902, c. 139, and the acts amendatory thereof or supplemental thereto, mentioned in this section, are set forth ante, §§ 909–920, and §§ 4389–4391.

Tobacco manufacturers and dealers were required to make reports as to the quantity of tobacco on hand twice each year, and a penalty was imposed for their failure to do so, by Act April 30, 1912, c. 102, § 3, post, § 4423, and the making of a false report was made punishable by section 4 of the same act, post, § 4424.

The owners of cotton ginneries, factories, etc., were required to furnish information as to the quantity of cotton ginned, consumed, or on hand, and a penalty was imposed for refusal or willful neglect to give such information, or for giving false answers, by Act July 22, 1912, c. 249, § 4, post, § 4432.

Notes of Decisions

Information concerning manufacturing establishments.—Decision under former law, see U. S. v. Moriarity (C. C. 1901) 106 Fed. 886.

§ 4411. (Act July 2, 1909, c. 2, § 25.) Information furnished under preceding section to be used only for statistical purposes.

The information furnished under the provisions of the next preceding section shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Census Office whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports. (36 Stat. 9.)

See notes to section 1 of this act, ante, § 4385.

Similar provisions as to the information concerning tobacco in the hands of dealers and manufacturers were contained in Act April 30, 1912, c. 102, § 6, post, § 4426.

It was provided that the information as to the production, consumption, and stocks of cotton should be confidential and for statistical purposes only by Act July 22, 1912, c. 249, § 3, post, § 4431.

§ 4412. (Act July 2, 1909, c. 2, § 26.) Enforcement of fines and penalties imposed by act.

All fines and penalties imposed by this Act may be enforced by indictment or information in any court of competent jurisdiction. (36 Stat. 9.)

See notes to section 1 of this act, ante, § 4385.

§ 4413. (Act July 2, 1909, c. 2, § 27.) Expenditures to be authorized by Director of Census.

The Director of the Census may authorize the expenditure of necessary sums for the actual and necessary traveling expenses of the officers and employees of the Census Office, including an allowance in lieu of subsistence not exceeding four dollars per day during their necessary absence from the Census Office, or, instead of such an allowance, their actual subsistence expenses, not exceeding five dollars per day; and he may authorize the incidental, miscellaneous, and contingent expenses necessary for the carrying out of this Act, as herein provided, and not otherwise, including advertising in newspapers, the purchase of manuscripts, books of reference and periodicals, the rental of sufficient quarters in the District of Columbia or elsewhere and the furnishing thereof, and expenditures necessary for the compiling, printing, publishing, and distributing the results of the census, and purchase of necessary paper and other supplies, the purchase, rental, construction, and repair of mechanical appliances, the compensation of such permanent and temporary clerks as may be employed under the provisions of this Act and the Act establishing the permanent Census Office and Acts amendatory thereof or supplemental thereto, and

all other expenses incurred under authority conveyed in this Act. (36 Stat. 9.)

See notes to section 1 of this act, ante, § 4385, and also note to section 24 of this act, ante, § 4410.

§ 4414. (Act March 6, 1902, c. 139, § 11.) Census printing office abolished; bulletins and reports to be printed, etc., by Public Printer.

The printing office established in the Census Office is hereby abolished to take effect July first, nineteen hundred and two, and the outfit and equipment therein shall be turned over to the Public Printer; and the Director of the Census is hereby authorized and directed to have printed, published, and distributed, from time to time, bulletins and reports of the preliminary and other results of the various investigations authorized by law; and all of said printing and binding shall be done by the Public Printer at the Government Printing Office. (32 Stat. 53.)

See notes to section 7 of this act, ante, § 4389.

The Director of the Census was authorized to print and bind in the Census Office blanks, circulars, etc., and to print, publish, and distribute bulletins and reports, and the printing office outfit used in the Eleventh Census was transferred to the Census Office, by provisions of Act March 3, 1899, c. 419, §§ 25, 29, 30 Stat. 1020, 1021, and the appointment and employment of a Superintendent of Printing and of skilled mechanics and other persons in the census printing office were authorized by Act May 10, 1900, c. 389, § 1, 31 Stat. 174, which was repealed by the next following section of this act, 32 Stat. 53, which is omitted, as temporary merely.

Provisions for the printing necessary to carry out the act to provide for the Thirteenth and subsequent decennial censuses were made by section 28 of that act, Act July 2, 1909, c. 2, § 28, post, § 4415.

Provisions relating to the Public Printer and the Government Printing Office are contained in Title XLV, "Public Printing, Advertisements, and Public Documents."

§ 4415. (Act July 2, 1909, c. 2, § 28.) Printing of blanks, schedules, etc., and other miscellaneous printing, and printing of bulletins and reports and publishing and distributing thereof, by Public Printer.

The Director of the Census is hereby authorized to make requisition upon the Public Printer for such printing as may be necessary to carry out the provisions of this Act, to wit: Blanks, schedules, circulars, pamphlets, envelopes, work sheets, and other items of miscellaneous printing; that he is further authorized to have printed by the Public Printer, in such editions as the Director may deem necessary, preliminary and other Census bulletins, and final reports of the results of the several investigations authorized by this Act, or by the Act to establish a permanent Census Office and Acts amendatory thereof or supplemental thereto, and to publish and distribute said bulletins and reports. (36 Stat. 10.)

See notes to section 1 of this act, ante, § 4385, and also to section 24 of this act, ante, § 4410.

A general provision making punishable the use of any official envelope, label, or indorsement to avoid payment of postage or registry fee is contained in Crim. Code, § 227, post, § 10397.

§ 4416. (Act July 2, 1909, c. 2, § 30.) Information from other Departments or offices.

The Secretary of Commerce [and Labor], whenever he may deem it advisable, or on request of the Director of the Census, is hereby authorized to call upon any other department or office of the Government for information pertinent to the work herein provided for. (36 Stat. 10.)

See notes to section 1 of this act, ante, § 4385.

The words "and Labor," inclosed in brackets in this section, were superseded by the change of the name of the Department of Commerce and Labor to that

of the Department of Commerce, and of the Secretary of Commerce and Labor to that of Secretary of Commerce, by the act creating the Department of Labor, Act March 4, 1913, c. 141, § 1, ante, § 932.

§ 4417. (Repealed.)

This section, which was Act July 2, 1909, c. 2, § 31, 36 Stat. 10, provided for a census of agriculture and live stock in the year 1915, and every ten years thereafter. It was repealed by Act March 4, 1915, c. 41, § 1, 38 Stat. 1040.

§ 4418. (Act July 2, 1909, c. 2, § 32.) Certified copies from population or agricultural returns to be furnished to Governor of state or territory or to court of record; data for genealogical, etc., purposes to be furnished to individuals.

The Director of the Census is hereby authorized, at his discretion, upon the written request of the governor of any State or Territory, or of a court of record, to furnish such governor or court of record with certified copies of so much of the population or agricultural returns as may be requested, upon the payment of the actual cost of making such copies, and one dollar additional for certification; and that the Director of the Census is further authorized, in his discretion, to furnish to individuals such data from the population schedules as may be desired for genealogical or other proper purposes, upon payment of the actual cost of searching the records and one dollar for supplying a certificate; and the amounts so received shall be covered into the Treasury of the United States, to be placed to the credit of, and in addition to, the appropriations made for taking the census. (36 Stat. 10.)

See notes to section 1 of this act, ante, § 4385.

§ 4419. (Act July 2, 1909, c. 2, § 33.) Repeal.

The Act establishing the permanent Census Office, approved March sixth, nineteen hundred and two, and Acts amendatory thereof and supplemental thereto, except as are herein amended, shall remain in full force. That the Act entitled "An Act to provide for taking the Twelfth and subsequent censuses," approved March third, eighteen hundred and ninety-nine, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed. (36 Stat. 10.)

See notes to section 1 of this act, ante, § 4385.

Act March 6, 1902, c. 139, as amended, is set forth ante, §§ 909–911, and §§ 4389–4391.

Act March 3, 1899, c. 419, 30 Stat. 1014, repealed by this section, provided for the taking of the Twelfth Census.

§ 4420. (Act June 30, 1906, c. 3914, § 1.) Publication of names of heads of families returned in First Census; sale of publications; report.

Census Office: The Director of the Census is hereby authorized and directed to publish, in a permanent form, by counties and minor civil divisions, the names of the heads of families returned at the First Census of the United States in seventeen hundred and ninety; and the Director of the Census is authorized, in his discretion, to sell said publications, the proceeds thereof to be covered into the Treasury of the United States, to be deposited to the credit of miscellaneous receipts on account of "Proceeds of sales of Government property:" Provided, That no expense shall be incurred hereunder additional to appropriations for the Census Office for printing therefor made for the fiscal year nineteen hundred and seven; and the Director of the Census is hereby directed to report to Congress at its next session the cost incurred hereunder and the price fixed for said publication and the total received therefor. (34 Stat. 722.)

This was a provision of the sundry civil appropriation act for the fiscal year 1907, cited above.

A further provision for the expense of continuing and completing the publication of names authorized by this act, was made by Act Feb. 15, 1908, c. 27, § 1, 35 Stat. 19.

§ 4420a. (Act May 10, 1916, c. 117, § 1.) Division of cotton and tobacco statistics.

Hereafter there shall be in the official organization of the bureau a separate, distinct, and independent division called the division of cotton and tobacco statistics. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above.

§ 4421. (Act April 30, 1912, c. 102, § 1.) Collection of tobacco statistics; semi-annual reports of quantities in hands of dealers and manufacturers; manufacturers exempt.

The Director of the Census be, and he is hereby, authorized and directed to collect and publish, in addition to the tobacco reports now being made by him, statistics of the quantity of leaf tobacco in all forms in the United States in the possession of all persons who are dealers or manufacturers, other than the original growers of tobacco, to be summarized and returned by the holder to the Director of the Census as of the dates of October first and April first of each year, provided that the Director of the Census shall not be required to collect statistics of leaf tobacco from any manufacturer of tobacco who in the preceding calendar year, according to the returns to the Commissioner of Internal Revenue, manufactured less than fifty thousand pounds of tobacco, or from any manufacturer of cigars who during the preceding calendar year manufactured less than two hundred and fifty thousand cigars, or from any manufacturer of cigarettes who during the preceding calendar year manufactured less than one million cigarettes, or from any dealer in leaf tobacco who, on the average, had less than fifty thousand pounds in stock at the ends of the four quarters of the preceding calendar year, and every manufacturer of tobacco who, in the preceding calendar year, according to the return of the Commissioner of Internal Revenue manufactured more than fifty thousand pounds of tobacco, and every manufacturer of cigars who, during the preceding calendar year, manufactured more than two hundred and fifty thousand cigars, and every manufacturer of cigarettes who, during the preceding calendar year, manufactured more than one million cigarettes, and every dealer in or manufacturer of leaf tobacco who, on an average, during the preceding calendar year, had more than fifty thousand pounds in stock, at the ends of the four quarters of the preceding calendar year, shall, under oath, make written reports of the amounts held by them, as herein provided. (37 Stat. 106.)

This section and the seven sections next following were an act entitled "An act to authorize the Director of the Census to collect and publish additional statistics of tobacco."

The Director of the Census was authorized to collect the specified information by special agents and other employés, by Act May 10, 1916, c. 117, § 1, post, § 4428a.

§ 4422. (Act April 30, 1912, c. 102, § 2.) Types of tobacco to be specified; Director of Census to prepare blanks.

The Director of the Census shall specify the types of tobacco to be included in the reports of the holders thereof, and he shall specify the several types separately in making his reports. In securing reports by types, the Director of the Census shall follow substantially the classification of general types as recognized and adopted by the Department of Agriculture. That the Director of the Census shall prepare appropriate blanks upon which such reports shall be made and shall send a copy of same to any person subject to make reports under this Act, not more than fifteen nor less than ten days prior to the first days of October and April in each year, together

with a written or printed demand that such person make the report required. (37 Stat. 107.)

§ 4423. (Act April 30, 1912, c. 102, § 3.) Reports required; penalty for failure to report; demand for report; notice of demand; corporation officers subject to penalties.

All persons subject to the provisions of this Act shall, within ten days after the first day of October and first day of April in each year, make written report to the Director of the Census the number of pounds of each of the several types of leaf tobacco owned by him as of the said dates, respectively. If any such person shall fail to make said report within the time prescribed, he shall be guilty of a misdemeanor, and upon conviction shall be fined not less than three hundred dollars or more than one thousand dollars. If any such person so liable to make such reports shall fail to make the same within the dates above specified, and thereafter the Director of the Census shall demand such report in writing, which demand shall be forwarded by registered mail, then if such person shall fail to make such report within twenty days after such demand so made, he shall also be deemed guilty of a misdemeanor, and upon conviction shall be imprisoned for not more than six months, in the discretion of the court. The depositing of the notice by the Director of Census in any post office shall be held to be prima facie evidence of the delivery of the notice to the holder of tobacco, from which date the period of twenty days shall begin to run. The president, general manager, or other chief officer of any corporation failing to make such reports as required by this Act shall be subject to the same penalties as are herein prescribed. (37 Stat. 107.)

The refusal or willful neglect of a manufacturer to answer any question upon the census schedule was made punishable by Act July 2, 1909, c. 2, § 24, ante, § 4310.

§ 4424. (Act April 30, 1912, c. 102, § 4.) Punishment for false reports; corporation officers liable.

Any person who shall make a false report to the Director of the Census as to the types or amounts of tobacco held or owned by him shall be guilty of a misdemeanor, and upon conviction shall be punished by imprisonment for not more than six months, in the discretion of the court. The president, general manager, or other officer of any corporation making such false report shall be subject to the same penalty as prescribed in this section. (37 Stat. 107.)

§ 4425. (Act April 30, 1912, c. 102, § 5.) "Person" defined.

The word "person" as used in this Act shall be held to embrace also any partnership, corporation, or association. (37 Stat. 107.)

§ 4426. (Act April 30, 1912, c. 102, § 6.) Information as to quantity of tobacco on hand to be used only for statistical purposes.

The information furnished under the provisions of this Act shall be used only for the statistical purposes for which it is supplied. No publication shall be made by the Director of the Census whereby the data furnished by any particular establishment can be identified, nor shall the Director of the Census permit anyone other than the sworn employees of the Census Office to examine the individual reports. (37 Stat. 107.)

Similar provisions as to the information required of manufacturers in general were made by Act July 2, 1909, c. 2, § 25, ante, § 4311.

§ 4427. (Act April 30, 1912, c. 102, § 7.) Co-operation of Commissioner of Internal Revenue with Director of Census.

The Director of the Census shall have access to the records of the Commissioner of Internal Revenue for the purpose of obtaining the

information herein required, and the Commissioner of Internal Revenue shall cooperate with the Director of the Census in effectuating the purposes and provisions of this Act. (37 Stat. 107.)

§ 4428. (Act April 30, 1912, c. 102, § 8.) Publication of tobacco reports.

The Director of the Census shall make his first report under this Act as of the first day of October, nineteen hundred and twelve, and he shall publish the same and all subsequent reports at a date as early as practicable after the first day of October and the first of April in each year. (37 Stat. 108.)

§ 4428a. (Act May 10, 1916, c. 117, § 1.) Collection of tobacco statistics; information by mail or by special agents.

Hereafter the Director of the Census may procure the information for the tobacco reports required by this Act and the Act approved April thirtieth, nineteen hundred and twelve, by mail or by special agents or by other employees of the Bureau of the Census. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above.

Under Act April 30, 1912, c. 102, §§ 1–4, ante, §§ 4421–4424, the Director of the Census was not given express power to secure the specified information by special agents or other employés.

§ 4429. (Act July 22, 1912, c. 249, § 1.) Collection and publication of additional cotton statistics authorized.

The Director of the Census be, and he is hereby, authorized and directed to collect and publish statistics concerning the amount of cotton ginned; the quantity of raw cotton consumed in manufacturing establishments of every character; the quantity of baled cotton on hand; the number of active consuming cotton spindles; and the quantity of cotton imported and exported, with the country of origin and destination. (37 Stat. 198.)

This section and the five sections next following were an act entitled "An act authorizing the Director of the Census to collect and publish statistics of cotton."

The annual collection of statistics of cotton production and their publication weekly from September 1st of each year to February 1st following were required by Act March 6, 1902, c. 139, § 9, ante, § 4391.

Other previous provisions for the collection and publication of statistics of cotton consumption, surplus, and export summarized as of September 1st of each year and for semi-monthly reports of the amount of cotton ginned, were made by Res. Feb. 9, 1905, No. 16, 33 Stat. 1282, which was repealed by section 6 of this act, post, § 4434.

The Director of the Census was also authorized to collect and publish statistics of stocks of baled cotton in the United States, summarized as of November 1st, January 1st and March 1st of each year in addition to those previously required, by Res. March 2, 1909, No. 21, 35 Stat. 1168, also repealed by section 6 of this act, post, § 4434.

§ 4430. (Act July 22, 1912, c. 249, § 2.) Periods for quantity of cotton ginned; publication; monthly reports of other statistics; details of reports; distribution of publications; statistics furnished to Agricultural Department.

The statistics of the quantity of cotton ginned shall show the quantity ginned from each crop prior to September first, September twenty-fifth, October eighteenth, November first, November fourteenth, December first, December thirteenth, January first, January sixteenth, and March first, and shall be published as soon as possible after these respective dates. The quantity of cotton consumed in manufacturing establishments, the quantity of baled cotton on hand, the number of active consuming cotton spindles, and the statistics of cotton imported and exported shall relate to each calendar month, and shall be published as soon as possible after the close of the month. Each report published by the Bureau of the Census of the quantity of cotton ginned

shall carry with it the latest available statistics concerning the quantity of cotton consumed, stocks of baled cotton on hand, the number of cotton-consuming spindles, and the quantity of cotton imported and exported. All of these publications containing statistics of cotton shall be mailed by the Director of the Census to all cotton ginners, cotton manufacturers, and cotton warehousemen, and to all daily newspapers throughout the United States. The Director of the Census shall furnish to the Bureau of Statistics of the Department of Agriculture, immediately prior to the publication of each report of that bureau regarding the cotton crop, the latest available statistics hereinbefore mentioned, and the said Bureau of Statistics shall publish the same in connection with each of its reports concerning cotton. (37 Stat. 198.)

§ 4431. (Act July 22, 1912, c. 249, § 3.) Information concerning cotton confidential; penalty for divulging information by employé of Census Bureau.

The information furnished by any individual establishment under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Bureau of the Census who, without the written authority of the Director of the Census, shall publish or communicate any information given into his possession by reason of his employment under the provisions of this Act shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not less than three hundred dollars or more than one thousand dollars or imprisoned for a period of not exceeding one year, or both so fined and imprisoned, at the discretion of the court. (37 Stat. 198.)

The information secured for the census from any manufacturer was to be used only for statistical purposes, by Act July 2, 1909, c. 2, § 25, ante, § 4411.

The publishing or communication of any information received by an employé of the Census Office by reason of his employment under the provisions of Act July 2, 1909, c. 2, or the act for a permanent Census Office, or the acts amendatory thereof or supplemental thereto, was made punishable by Act July 2, 1909, c. 2, § 22, ante, § 4408.

§ 4432. (Act July 22, 1912, c. 249, § 4.) Owners and officers of cotton ginneries, factories, etc., to furnish information; demand; notice; penalty for willful refusal.

It shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cotton ginnery, manufacturing establishment, warehouse, or other place where cotton is ginned, manufactured, or stored, whether conducted as a corporation, firm, limited partnership, or by individuals, when requested by the Director of the Census or by any special agent or other employee of the Bureau of the Census acting under the instructions of said director, to furnish completely and correctly, to the best of his knowledge, all of the information concerning the quantity of cotton ginned, consumed, or on hand, and the number of cotton-consuming spindles. The request of the Director of the Census for information concerning the quantity of cotton ginned or consumed, stocks of cotton on hand, and number of spindles may be made in writing or by a visiting representative, and if made in writing shall be forwarded by registered mail, and the registry receipt of the Post Office Department shall be accepted as evidence of such demand. Any owner, president, treasurer, secretary, director, or other officer or agent of any cotton ginnery, manufacturing establishment, warehouse, or other place where cotton is ginned or stored, who, under the conditions hereinbefore stated, shall refuse or willfully neglect to furnish any of the information herein provided for or shall willfully give answers that are false shall be guilty of a misdemeanor and, upon conviction thereof, shall be fined not less than three hundred dollars or more than one

thousand dollars or imprisoned for a period of not exceeding one year, or both so fined and imprisoned, at the discretion of the court. (37 Stat. 198.)

The refusal or willful neglect of a manufacturer to answer any questions on the census schedule was made punishable by Act July 2, 1909, c. 2, § 24, ante, § 4410.

§ 4433. (Act July 22, 1912, c. 249, § 5.) Compilation of information concerning production, consumption and stocks of cotton in foreign countries; publication of abstract of information with reports.

In addition to the information regarding cotton in the United States hereinbefore provided for, the Director of the Census shall compile, by correspondence or the use of published reports and documents, any available information concerning the production, consumption, and stocks of cotton in foreign countries, and the number of cotton-consuming spindles in such countries. Each report published by the Bureau of the Census regarding cotton shall contain an abstract of the latest available information obtained under the provisions of this section, and the Director of the Census shall furnish the same to the Department of Agriculture for publication in connection with the reports of that department concerning cotton in the same manner as in the case of statistics relating to the United States. (37 Stat. 199.)

§ 4434. (Act July 22, 1912, c. 249, § 6.) Repeal.

The joint resolution authorizing the Director of the Census to collect and publish additional statistics, approved February ninth, nineteen hundred and five, and the joint resolution approved March second, nineteen hundred and nine, and all other laws and parts of laws inconsistent with the provisions of this Act are hereby repealed. (37 Stat. 199.)

Res. Feb. 9, 1905, No. 16, 33 Stat. 1282, repealed by this section, authorized the collection and publication of statistics of cotton consumption, surplus and export, summarized as of September 1st of each year, and for semi-monthly reports of the amount of cotton ginned. It also authorized and directed the Director of the Census to collect and publish the statistics of marriage and divorce in the several States and Territories and the District of Columbia since January 1, 1887.

Res. March 2, 1909, No. 21, 35 Stat. 1168, also repealed by this section, authorized and directed the Director of the Census to collect and publish statistics of the stocks of baled cotton on hand, summarized as of November 1st, January 1st and March 1st of each year, in addition to those previously required.

Certain statistics regarding cotton seed and the products thereof were required to be collected and published by Act Aug. 7, 1916, c. 274, post, §§ 4434a–4434d.

§ 4434a. (Act Aug. 7, 1916, c. 274, § 1.) Monthly statistics of cotton seed products thereof.

That the Director of the Census be, and he is hereby, authorized and directed to collect and publish monthly statistics concerning the quantity of cotton seed received at oil mills, the quantity of seed crushed in such mills, the quantity of crude cottonseed products and refined oil produced, the quantities of these products shipped out of the mills and the quantities of these products and of cotton seed on hand, the quantities of crude and refined cottonseed oil held by refiners, by manufacturers of compound lard, butterine, oleomargarine, and soap, and by brokers, exporters, and warehousemen, engaged in handling crude and refined cottonseed oil, and the quantity of cotton seed and cottonseed products imported and exported: Provided, That the cost of the collection and publication of the statistics herein provided for shall not exceed $10,000 per annum. (39 Stat.)

This section, and the three sections next following, were an act entitled "An act authorizing the Director of the Census to collect and publish statistics of cotton seed and cottonseed products, and for other purposes," cited above.

§ 4434b. (Act Aug. 7, 1916, c. 274, § 2.) Information furnished for cotton seed statistics confidential; divulgence; punishment.

The information furnished by any individual establishment under the provisions of this Act shall be considered as strictly confidential and shall be used only for the statistical purpose for which it is supplied. Any employee of the Bureau of the Census who, without the written authority of the Director of the Census, shall publish or communicate any information given into his possession by reason of his employment under the provisions of this Act shall be guilty of a misdemeanor and shall, upon conviction thereof, be fined not more than $1,000, or imprisoned not more than one year, or both. (39 Stat.)

§ 4434c. (Act Aug. 7, 1916, c. 274, § 3.) Information to be furnished by owners, etc., of cottonseed-oil mills, etc.; requests for; refusal to furnish and furnishing false information; punishment.

It shall be the duty of every owner, president, treasurer, secretary, director, or other officer or agent of any cottonseed-oil mill, manufacturing establishment, refinery, or warehouse, where cottonseed products are produced, manufactured, or stored, when requested by the Director of the Census or by any special agent or other employee of the Bureau of the Census acting under the instructions of said director, to furnish completely and correctly, to the best of his knowledge, all of the information concerning the quantity of cotton seed received, consumed, or on hand, and the quantity of crude and refined oil, cake and meal, hulls and linters produced, and the quantity of these products shipped and on hand. The request of the Director of the Census for information concerning the quantity of cotton seed received, consumed, and on hand, the quantity of crude oil shipped, and the quantity of crude oil consumed and stocks on hand may be made in writing or by a visiting representative, and if made in writing shall be forwarded by registered mail, and the registry receipt of the Post Office Department shall be accepted as prima facie evidence of such demand. Any owner, president, treasurer, secretary, director, or other officer or agent of any cottonseed oil or manufacturing establishment, refinery, or warehouse, where cotton seed and cottonseed products are manufactured or stored, who, under the conditions hereinbefore stated, shall refuse or willfully neglect to furnish any of the information herein provided for or shall willfully give answers that are false shall be guilty of a misdemeanor and upon conviction thereof shall be fined not more than $1,000. (39 Stat.)

§ 4434d. (Act Aug. 7, 1916, c. 274, § 4.) Statistics of raw and prepared cotton and linters, cotton waste, and hull fiber used in manufacture of explosives, and absorbent and medicated cotton.

That the Director of the Census be, and he is hereby, authorized and directed to collect and publish statistics of raw and prepared cotton and linters, cotton waste, and hull fiber consumed in the manufacture of guncotton and explosives of all kinds, and of absorbent and medicated cotton, during the calendar year nineteen hundred and fifteen, and quarterly thereafter, and the quantity held in such establishments at the end of each quarter. The statistics herein provided for are in addition to those now collected in compliance with the Act of Congress approved July twenty-second, nineteen hundred and twelve, the provisions of that Act being made applicable to and governing the collection and publication of the data. (39 Stat.)

TITLE XXXII

THE PUBLIC LANDS

Chap.		Sec.
1.	Surveyors and deputy surveyors	4435
2.	Registers and receivers	4469
3.	Land-districts—Provisions respecting particular districts	4504
3A.	Withdrawal from settlement, location, sale, or entry	4523
4.	Pre-emptions	
5.	Homesteads	4530
6.	Mineral lands and mining resources	4613
6A.	Timber and stone lands	4671
6B.	Desert and arid lands, and irrigation and reclamation	4674
7.	Sale and disposal of the public lands	4751
8.	Reservation and sale of town-sites on the public lands	4784
9.	Survey of the public lands	4803
10.	Bounty-lands	4826
10A.	Reservations and grants to states for public purposes	4860
10B.	Grants in aid of railroads and wagon roads	4882
10C.	Rights of way and other easements in public lands	4918
10D.	Grants of swamp and overflowed lands	4958
10E.	Drainage under state laws	4970
10F.	Protection of timber, and depredations	4977
10G.	Unlawful inclosures or occupancy; obstructing settlement or transit	4997
10H.	Abandoned military reservations	5003
10I.	Ceded Indian reservations	5013
10J.	Public lands in Oklahoma	5020
10K.	Public lands in Alaska	5045
11.	Miscellaneous provisions relating to the public lands	5097

CHAPTER ONE

Surveyors and Deputy Surveyors

Sec.

4435. Surveyors-general, how and where appointed.
4436. Office of surveyor-general for Kansas abolished.
4437. Offices of surveyor-general for North Dakota and South Dakota.
4438. Office of surveyor-general for Alaska.
4439. Salary of, in Oregon and Washington.
4440. Salary of, in Colorado, New Mexico, California, Idaho, Nevada, Montana, Utah, Wyoming, and Arizona.
4441. Salaries of, in Oregon and California, how and from what time payable.
4442. Salaries of surveyor-general for South Dakota.
4443. Salary of surveyor-general for Alaska.
4444. Consolidation of offices of surveyor-general; salary.
4445. Offices, number and location of.
4446. Office, location of, in Idaho.
4447. Residence of surveyor-general.
4448. Bond of surveyor-general.
4449. New bond of, and additional security.
4450. Duration of office.
4451. Completion of surveys, delivery of field-notes, etc.
4452. Devolution of surveyor-general's powers upon Commissioner of Land Office, when.
4453. Free access to field-notes, etc., delivered to States.
4454. Conditions of delivery of field-notes to the States.
4455. Transfer to Nebraska and Iowa of records of surveys; office of surveyor-general abolished; safe-keeping of and access to records.
4456. Continuation of duties after expiration of commission.
4457. General duties of surveyors-general.
4458. Seals of surveyors-general of California, Oregon, and Louisiana; transcripts from records of.
4459. Transcripts from records of Louisiana.

Sec.
4460. Clerk-hire, allowance of, to surveyors-general.
4460a. Detail of clerks from and to offices of surveyors general; traveling expenses, and statement thereof.
4461. Office-rent, allowance of, to surveyors-general.
4462. Stationery, etc., for mineral surveys to be paid for from special fund.
4463. Duties of register and receiver performed by surveyor-general.
4464. Official papers, etc., in office of surveyor-general of California; copies thereof.
4465. Bond of deputy-surveyor.
4466. Oath of deputy-surveyor.
4467. Suit on bond of deputy surveyor, lien of.
4468. Penalty for default of deputy.

§ 4435. (R. S. § 2207.) Surveyors-general, how and where appointed.

There shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor-general for the States and Territories herein named, embracing, respectively, one surveying district, namely: [Louisiana], [Florida], [Minnesota], [Kansas], California, Nevada, Oregon, [Nebraska and Iowa], [Dakota], Colorado, New Mexico, Idaho, Washington, Montana, Utah, Wyoming, Arizona.

Act March 3, 1823, c. 29, § 7, 3 Stat. 755. Act March 3, 1831, c. 116, § 1, 4 Stat. 492. Act Sept. 27, 1850, c. 76, § 1, 9 Stat. 496. Act March 3, 1853, c. 145, § 1, 10 Stat. 244. Act July 17, 1854, c. 84, § 7, 10 Stat. 306. Act July 22, 1854, c. 103, §§ 1, 10, 10 Stat. 308, 309. Act Feb. 21, 1855, c. 117, § 1, 10 Stat. 611. Act March 3, 1857, c. 107, § 1, 11 Stat. 212. Act Feb. 28, 1861, c. 59, § 17, 12 Stat. 176. Act March 2, 1861, c. 83, § 17, 12 Stat. 214. Act March 2, 1861, c. 86, § 17, 12 Stat. 244. Act June 29, 1866, c. 156, 14 Stat. 77. Act July 4, 1866, c. 166, § 4, 14 Stat. 85. Act July 28, 1866, c. 311, § 1, 14 Stat. 344. Act March 2, 1867, c. 179, § 1, 14 Stat. 542. Act July 16, 1868, c. 175, § 1, 15 Stat. 91. Act Feb. 5, 1870, c. 14, § 2, 16 Stat. 65. Act July 11, 1870, c. 246, 16 Stat. 230. Act May 8, 1872, c. 140, § 1, 17 Stat. 76.

The names of the States and Territories inclosed in brackets in this section were superseded by the abolition or discontinuance of the office of surveyor-general in those states, respectively, as follows:

The office of surveyor-general for the State of Kansas was abolished by a provision of Act July 31, 1876, c. 246, post, § 4436.

The office of surveyor-general for the States of Nebraska and Iowa was abolished by a provision of Act Oct. 2, 1888, c. 1069, post, § 4445.

The office of surveyor-general for the Territory of Dakota, provided for by this section, was not abolished by express enactment, but the provision of Act April 10, 1890, c. 77, § 1, post, § 4437, creating the office of surveyor-general for each of the States of North Dakota and South Dakota, had the effect of abolishing the office in the Territory of Dakota.

R. S. § 2218, post, § 4451, provided for the discontinuance of the office of surveyor-general in various districts on the completion of the surveys and records.

In pursuance of R. S. §§ 2218–2221, etc., post, §§ 4451–4454, the office has ceased in the States of Louisiana, Florida, Minnesota, and North Dakota.

The offices of surveyor-general for each of the States of North Dakota and South Dakota were created by Act April 10, 1890, c. 77, § 1, post, § 4437, but that office for North Dakota has since been discontinued.

The office of surveyor-general for the District, now Territory, of Alaska was created by Act July 24, 1897, c. 14, § 2, post, § 4438.

As the result of the changes mentioned, surveyors-general are established in the following States, etc., only: California, Nevada, Oregon, South Dakota, Colorado, New Mexico, Idaho, Washington, Montana, Utah, Wyoming, Arizona, Alaska.

In each of the other States containing public lands, the office of surveyor-general has been discontinued, and the records and papers appertaining to surveys, etc., have been delivered to officers of the respective States, under the provisions of Rev. St. §§ 2218–2221, post, §§ 4451–4456, or previous provisions incorporated therein, or of Act Oct. 2, 1888, c. 1069, post, § 4455. Those States are the following: Alabama, Arkansas, Florida, Illinois, Indiana, Iowa, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Missouri, Nebraska, North Dakota, Ohio, Wisconsin.

The Secretary of the Interior was authorized and directed, whenever practicable, to consolidate the offices of two or more surveyors-general into one office, by a provision of Act March 3, 1893, c. 211, § 1, post, § 4444.

Notes of Decisions

New Mexico and Arizona.—No change in the policy of the government as to lands in Arizona is to be inferred from the provision in the acts establishing

the office of surveyor general for New Mexico and Arizona. Cameron v. U. S. (1893) 13 Sup. Ct. 595, 599, 148 U. S. 301, 37 L. Ed. 459. And see Whitney v. Same (1901) 21 Sup. Ct. 565, 566, 181 U. S. 104, 45 L. Ed. 771; Lockhart v. Johnson (1901) 21 Sup. Ct. 665, 667, 181 U. S. 516, 45 L. Ed. 979.

A survey by a surveyor general, pursuant to the duties imposed on him is not subject to revision by the courts. Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966, reversing judgment (1887) 12 Pac. 736, 4 N. M. (Johns.) 59. And see Lane v. Watts (1914) 34 Sup. Ct. 965, 972, 234 U. S. 525, 58 L. Ed. 1440.

The function of the surveyor general, under Act July 22, 1854 (10 Stat. 308), was merely advisory. U. S. v. Ortiz (1900) 20 Sup. Ct. 466, 469, 176 U. S. 422, 44 L. Ed. 529.

§ 4436. (Act July 31, 1876, c. 246.) Office of surveyor-general for Kansas abolished.

The office of the surveyor-general of Kansas is hereby abolished from and after the thirtieth of September next. (19 Stat. 121.)

This was a provision of the sundry civil appropriation act for the fiscal year 1877, cited above.

§ 4437. (Act April 10, 1890, c. 77, § 1.) Offices of surveyor-general for North Dakota and South Dakota.

There shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor-general each for the States of North Dakota and South Dakota, embracing, respectively, one surveying district. (26 Stat. 53.)

This section was part of an act entitled "An act to create the offices of surveyor-general in the States of North Dakota and South Dakota," cited above.

Section 2 of the act, fixing the salaries of these surveyors-general, is set forth post, § 4442.

The offices created by this section superseded the office of surveyor-general for the Territory of Dakota, under R. S. § 2207, ante, § 4435.

§ 4438. (Act July 24, 1897, c. 14, § 2.) Office of surveyor-general for Alaska.

There shall be appointed by the President, by and with the advice and consent of the Senate, a surveyor-general for the [District] of Alaska, embracing one surveying district. (30 Stat. 215.)

This section was part of an act to amend section 8 of the Alaska Civil Government Act of May 17, 1884, and to create the office of surveyor-general for Alaska, etc.

The word "District," inclosed in brackets in this section, was superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

Section 1 of this act amended said Act May 17, 1884, c. 53, § 8, 23 Stat. 26, which act provided a civil government for Alaska, by striking out part of said section 8, including a provision that the marshal provided for by that act should be ex officio surveyor-general of the land-district of Alaska created by the same section. The act so amended was superseded by Act June 6, 1900, c. 786, 31 Stat. 321, which made further provision for a civil government for Alaska.

Section 3 of this act, fixing the salary of the surveyor-general, is set forth post, § 4443.

Section 4 of this act authorized the division of the Territory into two land-districts, and the appointment of a register and receiver for the additional land-office, and provided that the surveyor-general should serve in both districts; and further provisions for the establishment, discontinuance, etc., of land-districts, and offices therein, in Alaska, and the appointment, compensation, etc., of registers and receivers therefor, were made by Act May 14, 1898, c. 299, § 12, post, § 4517.

The surveyor-general of the district was made secretary thereof, by Act June 6, 1900, c. 786, § 3, 31 Stat. 322, which section—part of the act making further provision for a civil government for Alaska—was as follows:

"The surveyor-general of the district shall be ex officio secretary thereof, and as such shall be custodian of the district seal, which shall be provided by the Attorney-General. The surveyor-general, as ex officio secretary of the district, shall perform the official duties required by law to be performed by the secretary of a Territory of the United States, in so far as applicable to said district, and such other duties as may be required by law."

(R. S. § 2208. Superseded.)

This section fixed the salaries of the surveyors-general of Louisiana, Florida, Minnesota, Kansas, Nebraska and Iowa, and of Dakota Territory. It was

superseded by the abolition of that office in Kansas by Act July 31, 1876, c. 246, ante, § 4436, and in Nebraska and Iowa by Act Oct. 2, 1888, c. 1069, post, § 4455, and by its discontinuance in Louisiana, Florida, and Minnesota under the authority given the Secretary of the Interior by R. S. § 2218, post, § 4451, and in the Territory of Dakota by the creation of a similar office for each of the States of North Dakota and South Dakota, by Act April 10, 1890, c. 77, § 1, ante, § 4437. See, also, note to R. S. § 2207, ante, § 4435.

§ 4439. (R. S. § 2209.) Salary of, in Oregon and Washington.

The surveyors-general of Oregon and of Washington shall each receive a salary at the rate of two thousand five hundred dollars a year.

Act Sept. 27, 1850, c. 76, § 2, 9 Stat. 496. Act Feb. 14, 1853, c. 69, § 4, 10 Stat. 158. Act March 3, 1853, c. 145, § 11, 10 Stat. 248. Act July 17, 1854, c. 84, § 7, 10 Stat. 306. Act March 3, 1855, c. 175, § 26, 10 Stat. 674. Act May 30, 1862, c. 86, § 9, 12 Stat. 410. Act May 8, 1872, c. 140, § 1, 17 Stat. 76.

The amounts of the salaries actually paid to the respective surveyors-general depend on the sums annually appropriated therefor. The sums appropriated by the legislative, executive, and judicial appropriation act for the fiscal year 1917, Act May 10, 1916, c. 117, § 1, 39 Stat., were as follows: Alaska, $4,000 for surveyor-general and ex-officio secretary of the district; Arizona, $3,000; California, $3,000; Colorado, $3,000; Idaho, $3,000; Montana, $3,000; Nevada, $3,000; New Mexico, $3,000; Oregon, $3,000; South Dakota, $2,000; Utah, $3,000; Washington, $3,000; Wyoming, $3,000.

All laws or parts of laws inconsistent with rates of salaries or compensation appropriated by the legislative, executive, and judicial appropriation acts are repealed, and the rates of salaries or compensation of officers or employés appropriated for in said acts are to constitute the rate of salary or compensation of such officers or employés, respectively, until otherwise fixed by an annual rate of appropriation or other law, by Act July 16, 1914, c. 141, § 6, ante, § 3228a.

The officers and employés of the United States whose salaries are appropriated for in the legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, 38 Stat. 1049, are established and continued from year to year to the extent that they are appropriated for by Congress, by § 6 of said act, ante, § 3228b.

Unless otherwise specially authorized by law, no money appropriated by any act shall be available for payment to any person receiving more than one salary, when the combined amount of said salaries exceeds $2,000 per annum, with certain enumerated exceptions, by Act May 10, 1916, c. 117, § 6, as amended by Act Aug. 29, 1916, c. 417, ante, § 3230a.

§ 4440. (R. S. § 2210.) Salary of, in Colorado, New Mexico, California, Idaho, Nevada, Montana, Utah, Wyoming, and Arizona.

The surveyors-general of Colorado, New Mexico, California, Idaho, Nevada, Montana, Utah, Wyoming, and Arizona, shall each receive a salary at the rate of three thousand dollars a year.

Act March 3, 1853, c. 145, § 1, 10 Stat. 244. Act July 22, 1854, c. 103, § 1, 10 Stat. 308. Act Feb. 21, 1855, c. 117, § 1, 10 Stat. 611. Act Feb. 28, 1861, c. 59, § 17, 12 Stat. 176. Act March 2, 1861, c. 83, § 17, 12 Stat. 214. Act May 30, 1862, c. 86, § 9, 12 Stat. 410. Act June 29, 1866, c. 156, 14 Stat. 77. Act July 4, 1866, c. 166, § 4, 14 Stat. 85. Act March 2, 1867, c. 179, § 1, 14 Stat. 542. Act July 16, 1868, c. 175, § 1, 15 Stat. 91. Act Feb. 5, 1870, c. 14, § 2, 16 Stat. 65. Act July 11, 1870, c. 246, 16 Stat. 230. Act May 8, 1872, c. 140, § 1, 17 Stat. 76.

See note to R. S. § 2209, ante, § 4439, as to salaries of surveyors-general.

§ 4441. (R. S. § 2211.) Salaries of, in Oregon and California, how and from what time payable.

The salary of each surveyor-general of [Florida], Oregon, and California shall be paid quarter-yearly, and shall commence from the time he enters into bond, as provided by law.

Act March 3, 1823, c. 29, § 7, 3 Stat. 756. Act Sept. 27, 1850, c. 76, § 2, 9 Stat. 496. Act March 3, 1853, c. 145, § 1, 10 Stat. 244.

The word "Florida," inclosed in brackets in this section, was superseded by the discontinuance of the office of surveyor-general in that State. See note to R. S. § 2207, ante, § 4435.

See note to R. S. § 2209, ante, § 4439, as to salaries of surveyors-general.

§ 4442. (Act April 10, 1890, c. 77, § 2.) Salaries of surveyor-general for South Dakota.

The surveyors-general of [North Dakota and] South Dakota shall each receive a salary at the rate of two thousand dollars per annum. (26 Stat. 53.)

See note to section 1 of this act, ante, § 4437, and also note to R. S. § 2209, ante, § 4439, as to salaries of surveyors-general.

The words "North Dakota and," inclosed in brackets in this section, were superseded by the discontinuance of the office in that State. See note to R. S. §§ 2207, 2209, ante, §§ 4435, 4439.

§ 4443. (Act July 24, 1897, c. 14, § 3.) Salary of surveyor-general for Alaska.

The surveyor-general of Alaska shall receive a salary at the rate of two thousand dollars per annum. (30 Stat. 215.)

See note to section 2 of this act, ante, § 4438, and also note to R. S. § 2209, ante, § 4439, as to salaries of surveyors-general.

§ 4444. (Act March 3, 1893, c. 211, § 1.) Consolidation of offices of surveyor-general; salary.

That hereafter the Secretary of the Interior be, and he is hereby, authorized and directed, whenever practicable, to consolidate the offices of two or more surveyor-generals into one office, and in cases of such consolidation, in the discretion of the Secretary, the surveyor-general appointed in charge of a consolidated office may be paid a salary not exceeding two thousand five hundred dollars per annum, from the sums appropriated respectively for the salaries of the surveyors-general whose offices may be consolidated hereunder. (27 Stat. 709.)

This was a provision of section 1 of the legislative, executive, and judicial appropriation act for the fiscal year 1894, cited above.

See note to R. S. § 2209, ante, § 4439, as to salaries of surveyors-general.

§ 4445. (R. S. § 2212.) Offices, number and location of.

There shall be but one office of surveyor-general in each surveyor-general's district; and such office shall be located as the President, in view of the public convenience, may from time to time direct, except as provided in the following section.

Act July 2, 1864, c. 210, § 8, 13 Stat. 352.

§ 4446. (R. S. § 2213.) Office, location of, in Idaho.

The surveyor-general's office for [Minnesota district] shall continue to be located [at the city of Saint Paul]; that for Idaho [Territory], at Boise City; [and that for the district of Nebraska and Iowa, at Plattsmouth, in Nebraska.]

Act March 3, 1857, c. 107, § 1, 11 Stat. 212. Act June 29, 1866, c. 156, 14 Stat. 77. Act July 28, 1866, c. 311, § 1, 14 Stat. 344.

The word "Territory," inclosed in brackets in this section, was superseded by the admission of Idaho into the Union by Act July 3, 1890, c. 656, 26 Stat. 215.

The other words inclosed in brackets in this section were superseded by the discontinuance of the office of surveyor-general in Minnesota and its abolition in Iowa and Nebraska. See note to R. S. § 2207, ante, § 4435.

§ 4447. (R. S. § 2214.) Residence of surveyor-general.

Every surveyor-general, while in the discharge of the duties of his office, shall reside in the district for which he is appointed.

Act March 3, 1843, c. 100, § 1, 5 Stat. 637.

§ 4448. (R. S. § 2215.) Bond of surveyor-general.

Every surveyor-general shall, before entering on the duties of his office, execute and deliver to the Secretary of the Interior a bond, with good and sufficient security, for the penal sum of thirty thousand dollars, conditioned for the faithful disbursement, according to law,

of all public money placed in his hands, and for the faithful performance of the duties of his office.

Act May 7, 1822, c. 118, § 1, 3 Stat. 697.

Notes of Decisions

Bond.—See Farrar v. U. S. (1831) 5 Pet. 373, 386, 8 L. Ed. 159.

See, also (1885) 18 Op. Atty. Gen. 274, holding that where the form of the bond is not prescribed by statute, its form may be determined by the officer whose duty it is to approve the same.

—— **Surety's liability.**—Surety held entitled to credit for payments made by his principal. Bryan v. U. S. (1861) 1 Black, 140, 145, 17 L. Ed. 135.

Where the boundaries of a surveyor general's district depend on the construction of acts of congress, which have long been construed in a particular way, a surety cannot set up that the duties as performed were beyond the limits of district. U. S. v. Lytle (C. C. 1849) Fed. Cas. No. 15,652.

§ 4449. (R. S. § 2216.) New bond of, and additional security.

The President is authorized, whenever he may deem it expedient, to require any surveyor-general to give a new bond and additional security, under the direction of the Secretary of the Interior, for the faithful disbursement, according to law, of all money placed in his hands.

Act May 7, 1822, c. 118, § 3, 3 Stat. 697.

§ 4450. (R. S. § 2217.) Duration of office.

The commission of every surveyor-general now in office, and of every surveyor-general hereafter appointed, shall cease and expire, unless sooner vacated by death, resignation, or removal from office, in four years from the date of the commission.

Act May 7, 1822, c. 118, § 2, 3 Stat. 697.

§ 4451. (R. S. § 2218.) Completion of surveys, delivery of field-notes, etc.

The Secretary of the Interior shall take all the necessary measures for the completion of the surveys in the several surveying-districts for which surveyors-general have been, or may be, appointed, at the earliest periods compatible with the purposes contemplated by law; and whenever the surveys and records of any such district are completed, the surveyor-general thereof shall be required to deliver over to the secretary of state of the respective States, including such surveys, or to such other officer as may be authorized to receive them, all the field-notes, maps, records, and other papers appertaining to land titles within the same; and the office of surveyor-general in every such district shall thereafter cease and be discontinued.

Act June 12, 1840, c. 36, § 1, 5 Stat. 384.

See note to R. S. § 2207, ante, § 4435, as to the States in which the records, etc., appertaining to the surveys of public lands have been delivered to the officers of the respective States under the provisions of this section and the two sections next following.

All records, etc., belonging to the office of the recorder of land titles for Missouri were delivered to the State upon the discontinuance of the office, by provisions of Act June 6, 1874, c. 223, § 3, and Act July 31, 1876, c. 246, post, §§ 4514, 4515.

A survey, pursuant to this section, of unsurveyed lands in Louisiana, was provided for by Act May 25, 1906, c. 2554, 34 Stat. 199, which is omitted as temporary merely, and executed.

Resurveys or retracements of surveys, to mark the boundaries of the public lands remaining undisposed of, were authorized by Act March 3, 1909, c. 271, post, § 4824.

Notes of Decisions

Survey of lands generally.—See notes to § 4803 et seq., post.

Jurisdiction of courts over surveys.—See, also, notes to § 699, ante.

Surveys not subject to revision. Cragin v. Powell (1888) 9 Sup. Ct. 203, 128 U. S. 691, 32 L. Ed. 566; Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 142 U. S. 161, 35 L. Ed. 974; Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 158 U. S. 240, 39 L. Ed. 966; Russell v. Maxwell Land Grant Co. (1895) 15 Sup. Ct. 827, 158 U. S. 253, 39 L. Ed. 971; Kirwan v. Murphy (1903) 23 Sup. Ct. 599, 189 U. S. 35, 47 L. Ed. 698; Gauthier v. Morrison (1911) 114 Pac. 501, 62 Wash. 572, and federal cases cited.

§ 4452. (R. S. § 2219.) Devolution of surveyor-general's powers upon Commissioner of Land Office, when.

In all cases where, as provided in the preceding section, the field-notes, maps, records, and other papers appertaining to land-titles in any State are turned over to the authorities of such State, the same authority, powers, and duties in relation to the survey, resurvey, or subdivision of the lands therein, and all matters and things connected therewith, as previously exercised by the surveyor-general, whose district included such State, shall be vested in, and devolved upon, the Commissioner of the General Land-Office.

Act Jan. 22, 1853, c. 24, § 1, 10 Stat. 152.

Notes of Decisions

Jurisdiction of courts over surveys.—
See notes to § 4451, ante.

§ 4453. (R. S. § 2220.) Free access to field-notes, etc., delivered to States.

Under the authority and direction of the Commissioner of the General Land-Office, any deputy surveyor or other agent of the United States shall have free access to any such field-notes, maps, records, and other papers, for the purpose of taking extracts therefrom, or making copies thereof, without charge of any kind.

Act Jan. 22, 1853, c. 24, § 2, 10 Stat. 152.

§ 4454. (R. S. § 2221.) Conditions of delivery of field-notes to the States.

The field-notes, maps, records, and other papers mentioned in section twenty-two hundred and nineteen, shall in no case be turned over to the authorities of any State, until such State has provided by law for the reception and safe-keeping of the same as public records, and for the allowance of free access to the same by the authorities of the United States.

Act Jan. 22, 1853, c. 24, § 3, 10 Stat. 152.

§ 4455. (Act Oct. 2, 1888, c. 1069.) Transfer to Nebraska and Iowa of records of surveys; office of surveyor-general abolished; safe-keeping of and access to records.

That the Secretary of the Interior be, and is hereby, authorized to transfer to the Secretary of state of the States of Nebraska and Iowa, or to such officers as may be entitled to receive them, the field-notes, maps, records, and other papers appertaining to land surveys in said States which are now stored in the district land-office at Lincoln, Nebraska; and the office of surveyor-general for the district of Nebraska and Iowa is hereby abolished: Provided, That the aforesaid field-notes, maps, records, and other papers pertaining to the State of Nebraska shall not be delivered to the proper authorities until said State shall have provided by law for the safe keeping of the same as public records, and for the allowance of free access to field-notes, maps, records, and other papers by the authorities of the United States, as provided by section twenty-two hundred and twenty-one of the Revised Statutes of the United States, the State of Iowa having heretofore enacted the requisite legislation. (25 Stat. 525.)

This was a provision of the sundry civil appropriation act for the fiscal year ending June 30, 1889, cited above.

See note to R. S. § 2207, ante, § 4435.

R. S. § 2221, referred to in this section, is set forth ante, § 4454.

§ 4456. (R. S. § 2222.) Continuation of duties after expiration of commission.

Every surveyor-general, register, and receiver, except where the President sees cause otherwise to determine, is authorized to continue in the uninterrupted discharge of his regular official duties, after

the day of expiration of his commission, and until a new commission is issued to him for the same office, or until the day when a successor enters upon the duties of such office; and the existing official bond of any officer so acting shall be deemed good and sufficient, and in force, until the date of the approval of a new bond to be given by him, if re-commissioned, or otherwise, for the additional time he may so continue officially to act, pursuant to the authority of this section.

Act March 3, 1853, c. 145, § 10, 10 Stat. 247.

Notes of Decisions

Liability of sureties.—Where a surveyor general or receiver or register is in default in the discharge of his official duties after the expiration of his commission, and before his successor enters upon the duties of the office, the sureties on his bond are made liable for such default. U. S. v. Jameson (C. C. 1882) 16 Fed. 331.

§ 4457. (R. S. § 2223.) General duties of surveyors-general.

Every surveyor-general shall engage a sufficient number of skillful surveyors as his deputies, to whom he is authorized to administer the necessary oaths upon their appointments. He shall have authority to frame regulations for their direction, not inconsistent with law or the instructions of the General Land-Office, and to remove them for negligence or misconduct in office.

Second. He shall cause to be surveyed, measured, and marked, without delay, all base and meridian lines through such points and perpetuated by such monuments, and such other correction parallels and meridians as may be prescribed by law or by instructions from the General Land-Office, in respect to the public lands within his surveying-district, to which the Indian title has been or may be hereafter extinguished.

Third. He shall cause to be surveyed all private land-claims within his district after they have been confirmed by authority of Congress, so far as may be necessary to complete the survey of the public lands.

Fourth. He shall transmit to the register of the respective land-offices within his district general and particular plats of all lands surveyed by him for each land-district; and he shall forward copies of such plats to the Commissioner of the General Land-Office.

Fifth. He shall, so far as is compatible with the desk-duties of his office, occasionally inspect the surveying operations while in progress in the field, sufficiently to satisfy himself of the fidelity of the execution of the work according to contract, and the actual and necessary expenses incurred by him while so engaged shall be allowed; and where it is incompatible with his other duties for a surveyor-general to devote the time necessary to make a personal inspection of the work in progress, then he is authorized to depute a confidential agent to make such examination; and the actual and necessary expenses of such person shall be allowed and paid for that service, and five dollars a day during the examination in the field; but such examination shall not be protracted beyond thirty days; and in no case longer than is actually necessary; and when a surveyor-general, or any person employed in his office at a regular salary, is engaged in such special service, he shall receive only his necessary expenses in addition to his regular salary.

Act May 18, 1796, c. 29, § 1, 1 Stat. 464. Act April 29, 1816, c. 151, § 1, 3 Stat. 325. Act March 3, 1831, c. 116, § 1, 4 Stat. 492. Act March 3, 1853, c. 145, §§ 3, 10, 10 Stat. 245, 247.

Provisions different from those of the fifth paragraph of this section, for inspection of surveying operations, are made by the recent sundry civil appropriation acts, in connection with the appropriations for surveys and resurveys for the current year, and limited to the expenditure of the particular appropriation. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

The surveyors-general were required to keep accurate accounts of the cost

of surveying and platting private land claims, and to report the same to the General Land-Office, with the map of such claim, by Act July 31, 1876, c. 246, post, § 4809.

The duties of the surveyor-general of Alaska were prescribed by Act March 2, 1907, c. 2537, § 4, post, § 4522.

Notes of Decisions

Deputies.—A deputy surveyor is not an "officer of the United States." Scully v. U. S. (C. C. 1910) 193 Fed. 185. A survey by a deputy has no authoritative or official validity until it is approved by the surveyor general. Chouteau v. Gibson (1879) 7 Mo. App. 562.

Private land claims.—As to powers of commissioner of the land office and Secretary of the Interior, see City of St. Louis v. U. S. (1873) 9 Ct. Cl. 455; (1884) 18 Op. Atty. Gen. 31.

Contract for survey.—Surveys made under contract and approved by field examiner held to have been correctly executed in the field. Scully v. U. S. (D. C. 1912) 197 Fed. 327.

Removal of deputy surveyor.—The surveyor general will not be liable for removing a deputy, although under a contract with which his removal was an unwise and unlawful interference, provided he acted according to his best judgment, or from a desire to promote the public interests, and not from malice. Reed v. Conway (1857) 26 Mo. 13.

The removal of a deputy surveyor by the surveyor general, without cause, with a view to deprive him of the benefit of a subsisting contract, or to annul it after the right is secured to perform it, or during its execution, is illegal. Id.

A deputy surveyor appointed by the surveyor general is only paid by contract, and if wantonly removed when not under contract, he can have no action for the wrong against the surveyor general. Id.

Cited without definite application. West v. Cochran (1854) 17 How. 403, 414, 15 L. Ed. 110; Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 665, 190 U. S. 452, 47 L. Ed. 1134 (dissenting opinion); Germania Iron Co. v. James (1898) 89 Fed. 811, 815, 32 C. C. A. 348; James v. Germania Iron Co. (1901) 107 Fed. 597, 604, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Neff v. U. S. (1908) 165 Fed. 273, 277, 91 C. C. A. 241.

§ 4458. (R. S. § 2224.) Seals of surveyors-general of California, Oregon, and Louisiana; transcripts from records of.

The official seals heretofore authorized to be provided for the offices of the surveyors-general of Oregon, California, and Louisiana shall continue to be used; and any copy of or extract from the plats, field-notes, records, or other papers on file in those offices, respectively, when authenticated by the seal and signature of the proper surveyor-general, shall be evidence in all cases in which the original would be evidence.

Act March 3, 1853, c. 145, §§ 2, 11, 10 Stat. 245, 248.

The office of surveyor-general in Louisiana has been discontinued. See note to R. S. § 2207, ante, § 4435.

Notes of Decisions

Transcripts from records of register as evidence.—A certified copy of a map on file in his office is admissible. Goodwin v. McCabe (1888) 75 Cal. 584, 17 Pac. 705, distinguishing Murphy v. Sumner (1887) 74 Cal. 316, 16 Pac. 3.

§ 4459. (R. S. § 2225.) Transcripts from records of Louisiana.

Any copy of a plat of survey, or transcript from the records of the office of surveyor-general of Louisiana, duly certified by him, shall be admitted as evidence in all the courts of the United States and the Territories thereof.

Act March 3, 1831, c. 116, § 5, 4 Stat. 493.

The office of surveyor-general in Louisiana has been discontinued. See note to R. S. § 2207, ante, § 4435.

Notes of Decisions

Transcripts as evidence.—Copies of surveys in the register's office were placed there to enable him to perform his duties, but he had no authority to certify copies. That power was intrusted to another. Millaudon v. McDonough (1841) 18 La. 103. But see Boatner v. Scott (La. 1842) 1 Rob. 546.

§ 4460. (R. S. § 2226.) Clerk-hire, allowance of, to surveyors-general.

There shall be allowed for the offices of the several surveyors-general, for clerk-hire therein, such sums as may be appropriated for the purpose by Congress from year to year.

See appropriation acts.

Appropriations for clerk hire and other expenses in the offices of the surveyors-general are made in the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 4460a. (Act May 10, 1916, c. 117, § 1.) Detail of clerks from and to offices of surveyors general; traveling expenses, and statement thereof.

The Secretary of the Interior is authorized to detail temporarily clerks from the office of one surveyor general to another as the necessities of the service may require and to pay their actual necessary traveling expenses in going to and returning from such office out of the appropriation for surveying the public lands. A detailed statement of traveling expenses incurred hereunder shall be made to Congress at the beginning of each regular session thereof. (39 Stat.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1917, cited above.

The legislative, executive, and judicial appropriation act for the fiscal year 1916, Act March 4, 1915, c. 141, § 1, 38 Stat. 1035, contained a similar provision.

The legislative, executive, and judicial appropriation act for the fiscal year 1915, Act July 16, 1914, c. 141, § 1, 38 Stat. 494, provided only for the detail of clerks.

§ 4461. (R. S. § 2227.) Office-rent, allowance of, to surveyors-general.

There shall be allowed for office-rent, fuel, books, stationery, and other incidental expenses of the several offices of surveyors-general such sums as may be appropriated for the purpose by Congress, from year to year.

See appropriation acts.

Appropriations for office rent and other expenses for the offices of the surveyors-general are made in the annual legislative, executive, and judicial appropriation acts. The provisions for the fiscal year 1917 were by Act May 10, 1916, c. 117, § 1, 39 Stat.

Such appropriations for recent years are accompanied by a restriction on incurring expenses chargeable thereto, which in said Act May 10, 1916, c. 117, § 1, was as follows:

"Expenses chargeable to the foregoing appropriations for clerk hire and incidental expenses in the offices of the surveyors-general shall not be incurred by the respective surveyors-general in the conduct of said offices, except upon previous specific authorization by the Commissioner of the General Land Office."

A proviso contained in Act March 3, 1901, c. 830, § 1, relating to payment for stationery, etc., for use in making mineral surveys, is set forth post, § 4462.

Notes of Decisions

Expenses.—A surveyor general, compelled to retain custody of public property after his removal from office, is entitled to his actual expenses. Burr v. U. S. (1866) 2 Ct. Cl. 217.

§ 4462. (Act March 3, 1901, c. 830, § 1.) Stationery, etc., for mineral surveys to be paid for from special fund.

The stationery and drafting instruments hereafter purchased for exclusive use in the offices of the surveyors-general in the preparation of plats and field notes of mineral surveys, as also the rent of additional quarters that may be necessary for the execution of such work, shall be paid for out of the fund created by deposits made

by individuals to the credit of the United States to cover the cost of office work on such mineral surveys. (31 Stat. 1003.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1902, cited above.

Payment by individuals of expenses of surveys of mining claims was provided for by R. S. § 2334, post, § 4642.

§ 4463. (R. S. § 2228.) Duties of register and receiver performed by surveyor-general.

The President is authorized, in any case where he thinks the public interest may require it, to transfer the duties of register and receiver in any district to the surveyor-general of the surveying-district in which such land-district is located.

Act May 30, 1862, c. 86, § 8, 12 Stat. 410.

§ 4464. (R. S. § 2229.) Official papers, etc., in office of surveyor-general of California; copies thereof.

All official books, papers, instruments of writing, documents, archives, official seals, stamps, or dies, which have been heretofore authorized by law to be collected and deposited in the surveyor-general's office in California, shall be safely and securely kept by such surveyor-general in the archives of his office; and copies thereof, authenticated by the surveyor-general under his seal of office, shall be evidence in all cases where the originals would be evidence.

Act May 18. 1858. c. 39, § 1, 11 Stat. 289.

Notes of Decisions

Copies.—A certificate that the paper offered is a true and accurate copy of a document on file is sufficient. Natoma Water & Mining Co. v. Clarkin (1860) 14 Cal. 544; Young v. Emerson (1861) 18 Cal. 416.

§ 4465. (R. S. § 2230.) Bond of deputy-surveyor.

Every deputy-surveyor shall enter into bond, with sufficient security, for the faithful performance of all surveying contracts confided to him; and the penalty of the bond, in each case, shall be double the estimated amount of money accruing under such contracts, at the rate per mile stipulated to be paid therein. The sufficiency of the sureties to all such bonds shall be approved and certified by the proper surveyor-general.

Act March 3, 1831, c. 116, § 4, 4 Stat. 493. Act March 3, 1853, c. 145, § 10, 10 Stat. 247.

Notes of Decisions

Approval of bond.—The approval of the existing surveyor general, of sureties on bonds of deputies for the performance of their contracts, is sufficient until notice to the obligor of a requisition for other sureties. Reed v. Conway (1857) 26 Mo. 13.

§ 4466. (R. S. § 2231.) Oath of deputy-surveyor.

The surveyors-general, in addition to the oath now authorized by law to be administered to deputies on their appointment to office, shall require each of their deputies, on the return of his surveys, to take and subscribe an oath that those surveys have been faithfully and correctly executed, according to law and the instructions of the surveyor-general.

Act Aug. 8, 1846, c. 106, § 2, 9 Stat. 79.

Notes of Decisions

Authority to administer oath.—The oath cannot be taken before a notary public. U. S. v. Hall (1889) 9 Sup. Ct. 663, 664, 131 U. S. 50, 33 L. Ed. 97. Or a court commissioner. U. S. v. Reilly (1889) 9 Sup. Ct. 664, 665, 131 U. S. 58, 33 L. Ed. 75.

§ 4467. (R. S. § 2232.) Suit on bond of deputy surveyor, lien of.

The district attorney of the United States, in whose district any false, erroneous, or fraudulent surveys have been executed, shall, upon the application of the proper surveyor-general, immediately

institute suit upon the bond of such deputy; and the institution of such suit shall act as a lien upon any property owned or held by such deputy, or his sureties, at the time such suit was instituted.

Act Aug. 8, 1846, c. 106, § 2, 9 Stat. 79.

Notes of Decisions

Res judicata.—Judgment held not admissible to prove correctness of survey. Michigan Land & Lumber Co. v. Rust (1895) 68 Fed. 155, 15 C. C. A. 335, judgment affirmed (1897) 18 Sup. Ct. 208, 168 U. S. 589, 42 L. Ed. 591.

§ 4468. (R. S. § 2233.) Penalty for default of deputy.

In the event of the failure of a deputy in Louisiana to comply with the terms of his contract, unless such failure be satisfactorily shown by him to have arisen from causes beyond his control, he shall forfeit the penalty of his bond on due process of law, and ever afterward be debarred from receiving a contract for surveying public lands.

Act March 3, 1831, c. 116, § 4, 4 Stat. 493.

CHAPTER TWO

Registers and Receivers

Sec.
4469. Appointment of registers and receivers; duties; liabilities on bonds.
4470. Residence of register and receiver.
4471. Bond of register and receiver.
4472. Salaries of register and receiver.
4473. Fees and commissions of register and receiver.
4474. Fees for transcripts of records; transcripts as evidence.
4475. Fees of register and receiver for consolidated land-offices.
4476. Maximum compensation for registers and receivers.
4477. Excess of compensation to be paid in Treasury.
4478. Plats of townships and lists of lands sold to be furnished; compensation therefor.
4479. Excess of fees to be covered into Treasury.
4480. Fees for notices of cancellation of entries hereafter received to be accounted for.
4481. Reimbursement of sums disbursed by receivers as special disbursing agents.
4482. Illegal fees; penalty.
4483. Compensation of registers and receivers, when to commence.
4484. Duration of office of registers and receivers.
4485. Monthly and quarterly returns of receivers.
4486. Reports and returns by registers and receivers, not to be duplicated.
4487. Deposit in Treasury by receivers of unearned fees and unofficial moneys carried on their books for five years or more.
4488. Lists to be furnished with deposits.
4489. Deposit of moneys deposited by unknown parties.
4490. Repayment of moneys deposited in Treasury; limitation; payment by homestead entryman on making cash entry.
4491. Repayment of purchase moneys, etc., paid under applications, etc., afterward rejected.
4492. Repayment of excess payments.
4493. Certification of amount of excess moneys, purchase moneys, etc., and repayment.
4494. Oaths administered by registers and receivers.
4495. Penalty for false information by register.
4496. Vacancy in office of register or receiver; taking final proofs.
4497. Disqualification of register or receiver.
4498. Designation of officer to act in place of disqualified register or receiver.
4499. Subpœnas for attendance of witnesses before registers and receivers.
4500. Witnesses' fees.
4501. Disobedience to subpœna, punishable.
4502. Depositions of witnesses residing outside the county.
4503. Continuing taking of depositions in behalf of opposite party.

§ 4469. (R. S. § 2234, as amended, Act Jan. 27, 1898, c. 10.) Appointment of registers and receivers; duties; liabilities on bonds.

There shall be appointed by the President, by and with the advice and consent of the Senate, a register of the land office and a receiver

of public moneys for each land district established by law, who shall have charge of and attend to the sale of public and Indian lands within their respective districts, as provided by law and official regulations, and receivers shall be accountable under their official bonds for the proceeds of such sales, and for all fees, commissions, or other moneys received by them under any provision of law or official regulation.

See all acts establishing land-districts. Act Jan. 27, 1898, c. 10, 30 Stat. 234.

This section, as enacted in the Revised Statutes, contained only the provision at the beginning thereof, for appointment of registers and receivers. The further provisions, beginning with the words "who shall have charge," etc., to the end of the section as set forth here, were added by amendment by Act Jan. 27, 1898, c. 10, last cited above.

The various acts creating new land-districts usually contain provisions for the appointment of a register and receiver of public moneys therefor, fixing the salaries of said officers, and prescribing their duties. These acts are collated in the note to R. S. § 2256, post, under Chapter 3 of this Title, subchapter "Provisions Respecting Particular Districts."

The clerks of the district courts at Nome and Fairbanks, in Alaska, were made, respectively, ex-officio registers of the land-offices at Nome and Fairbanks, and the marshals of the said courts at Nome and Fairbanks ex-officio receivers of public moneys for the Nome and Fairbanks land districts, by Act March 2, 1907, c. 2537, § 2, post, § 4520.

Notes of Decisions

1. Appointment.
2. —— Judicial notice.
3. De facto officers.
4. Duties and powers.
5. —— Conclusiveness of decisions.
6. —— Deputies.
7. —— Injunction to control acts.
8. —— Presumptions.
9. Liabilities on bonds.
10. —— Deceased surety.

1. Appointment.—It cannot be made until there is sufficient land surveyed to authorize the opening of land offices. (1819) 1 Op. Atty. Gen. 291.

2. —— Judicial notice.—A receiver's appointment will be judicially recognized by the courts. Bullock v. Wilson (Ala. 1837) 5 Port. 338.

3. De facto officers.—A receiver, acting as register by authority of the land department, is a de facto officer, and his acts are valid. Jeffords v. Hine (Ariz. 1886) 11 Pac. 351.

4. Duties and powers.—The register and receiver need not sit at the same time. Potter v. U. S. (1883) 1 Sup. Ct. 524, 527, 107 U. S. 126, 27 L. Ed. 230. And need not act jointly in administering oaths and taking testimony. Peters v. U. S. (1894) 2 Okl. 116, 33 Pac. 1031. They had no authority to permit a party to vacate his entry. McDaniel v. Orton (1848) 12 Mo. 12.

An application to a register, and a deposit of money with him in the absence of the receiver, gives no right to the land applied for, either in law or equity. Groom v. Hill (1845) 9 Mo. 323.

An entry of land in a land office of the United States, made without warrant and authority of law, is a nullity. Carman v. Johnson (1859) 29 Mo. 84.

5. —— Conclusiveness of decisions.—Decision of register and receiver, in the absence of fraud, is conclusive as to the facts. Wilcox v. Jackson ex dem. McConnel (1839) 13 Pet. 498, 511, 10 L. Ed. 264; (1836) 3 Op. Atty. Gen. 93; Old Dominion Copper Mining & Smelting Co. v. Haverly (Ariz. 1907) 90 P. 333; Cragie v. Roberts (Cal. App. 1907) 92 Pac. 97.

The action of the register and receiver of a local land office in making or refusing a sale is not conclusive, and the proceedings or official action necessary for a completed sale must be regarded as in fieri and only in progress towards completion until finally consummated by the issuing of a patent. People v. Kidd (1871) 23 Mich. 440.

6. —— Deputies.—Mere ministerial or clerical acts of the register may be performed by a deputy, but judicial acts can only be performed by the register himself. Hunter v. Hemphill (1839) 6 Mo. 106.

7. —— Injunction to control acts.—The exercise of their official judgment will not be enjoined. Koehler v. Barin (C. C. 1885) 25 Fed. 161.

8. —— Presumptions.—Proceedings of United States land officers are presumed to be regular. Crawford County Bank v. Baker (Ark. 1910) 130 S. W. 556, and cases cited.

9. Liabilities on bonds.—The receiver's sureties are liable for money received after his appointment and before the execution of the bond, if he fails to pay over the money after the execution of the bond. U. S. v. Boyd (1841) 15 Pet. 187, 207, 10 L. Ed. 706. See, also, U. S. v. Boyd (1847) 5 How. 29, 48, 12 L. Ed. 36. But see U. S. v. Spencer (C. C. 1841) Fed. Cas. No. 16,368. They are not liable for money which came into his hands the day after the expiration of his term. U. S. v. Spencer (C. C. 1840) Fed. Cas. No. 16,367. They are only bound for the paying over of all moneys received aft-

er execution of the bond, and not for any previous shortage or defalcation. And as against the sureties the government has no right to apply payments made after execution of the bond to the discharge of a shortage existing prior thereto. Myers v. U. S. (C. C. 1839) Fed. Cas. No. 9,996; U. S. v. Linn (C. C. 1841) Fed. Cas. No. 15,606; They are liable only for a reasonable compensation for labor neglected by the officer. U. S. v. Wann (C. C. 1843) Fed. Cas. No. 16,638. A receiver neglecting to pay over money is liable for its loss when forcibly taken from him. Bevans v. U. S. (1871) 13 Wall. 56, 60, 20 L. Ed. 531. Money paid to a person in charge of the office is a good payment to the receiver, and the risk is with him and his sureties; and it is no defense to an action on his official bond to recover moneys paid that at the time they were received the register was absent from the land office. Potter v. U. S. (1882) 1 Sup. Ct. 524, 529, 107 U. S. 126, 27 L. Ed. 330. He is liable on his bond for money received from entrymen before it was payable under a rule of the interior department. Meads v. U. S. (1897) 81 Fed. 684, 686, 26 C. C. A. 229. See, also (1851) 5 Op. Atty. Gen. 291, 396. He is accountable under his bond for money paid for entry of public lands by applicants pending action on their proofs, such advance payments being required by the regulations of the land department, though he is removed from office, and though at the time of the giving of bond the land department had erroneously decided that money paid by entrymen in advance of action upon their proofs was held by such receivers as agents for the payees until final receipts were issued. Smith v. U. S. (1898) 18 Sup. Ct. 626, 629, 170 U. S. 372, 42 L. Ed. 1074.

Moneys paid by applicants, but for which no receipt has been issued, are public funds, for which the receiver is accountable. Id.

10. —— Deceased surety.—The surety's estate is liable. (1822) 1 Op. Atty. Gen. 573.

Cited without definite application, U. S. v. Brindle (1884) 4 Sup. Ct. 180, 182, 110 U. S. 688, 28 L. Ed. 286.

§ 4470. (R. S. § 2235.) Residence of register and receiver.

Every register and receiver shall reside at the place where the land-office for which he is appointed is directed by law to be kept.

See all acts establishing land-districts.

See notes to R. S. § 2234, ante, § 4469.

Cited without definite application, U. S. v. Brindle (1884) 4 Sup. Ct. 180, 182, 110 U. S. 688, 28 L. Ed. 286; Swigett v. U. S. (D. C. 1896) 78 Fed. 456, 458 (affirmed [1897] 83 Fed. 97, 27 C. C. A. 465); Delaney v. Same (1895) 31 Ct. Cl. 44.

§ 4471. (R. S. § 2236.) Bond of register and receiver.

Every register and receiver shall, before entering on the duties of his office, give bond in the penal sum of ten thousand dollars, with approved security, for the faithful discharge of his trust.

Act May 10, 1800, c. 55, §§ 1, 6, 2 Stat. 73, 75. Act March 3, 1853, c. 145, § 5, 10 Stat. 245.

The receivers are liable on their official bonds for the proceeds of sales of public and Indian lands, and for all fees, commissions, or other moneys received by them under any provision of law or official regulation, by R. S. § 2234, as amended by Act Jan. 27, 1898, c. 10, ante, § 4469.

Notes of Decisions

Validity of bond.—An instrument without a seal is not a bond within this section, but may be good at common law. U. S. v. Linn (1841) 15 Pet. 290, 311, 10 L. Ed. 742; Glavey v. U. S. (1901) 21 Sup. Ct. 891, 894, 182 U. S. 595, 45 L. Ed. 1247.

The condition of a receiver's bond is prospective, and fraud in respect to past transactions, not within the condition, cannot render it void. U. S. v. Boyd (1847) 5 How. 29, 48, 12 L. Ed. 36.

Liabilities on bonds.—See notes to § 4469, ante.

Cited without definite application, Meads v. U. S. (1897) 81 Fed. 684, 686, 26 C. C. A. 229.

§ 4472. (R. S. § 2237.) Salaries of register and receiver.

Every register and receiver shall be allowed an annual salary of five hundred dollars.

Act April 20, 1818, c. 123, 3 Stat. 466. Act May 30, 1862, c. 86, § 6, 12 Stat. 409.

The fees to which registers and receivers are entitled in addition to their annual salaries were prescribed by R. S. § 2238, post, § 4473.

The salaries of the registers and receivers for the districts in Alaska were

fixed, and they were allowed in addition fees and commissions, by provisions of Act May 14, 1898, c. 299, § 12, post, § 4517, Act Feb. 14, 1902, c. 17, § 1, post, § 4518, and Act March 2, 1907, c. 1232, §§ 2, 3, post, §§ 4520, 4521.

Notes of Decisions

Services required by land department.—Compensation held limited to legal maximum. Stewart v. U. S. (1907) 27 Sup. Ct. 631, 633, 206 U. S. 185, 51 L. Ed. 1017.

Allowance for office rent.—A register held entitled to allowance for office rent. Swigett v. U. S. (D. C. 1896) 78 Fed. 456, affirmed U. S. v. Swiggett (1897) 83 Fed. 97, 27 C. C. A. 465.

§ 4473. (R. S. § 2238, as amended, Act Dec. 17, 1880, c. 2, and Act May 29, 1908, c. 220, § 14.) Fees and commissions of register and receiver.

Registers and receivers, in addition to their salaries, shall be allowed each the following fees and commissions, namely:

First. A fee of one dollar for each declaratory statement filed [and for services in acting on pre-emption claims].

Act Sept. 4, 1841, c. 16, § 12, 5 Stat. 456. Act March 21, 1864, c. 38, § 4, 13 Stat. 35.

The words inclosed in brackets in this subsection became inoperative upon the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See note under Chapter 4 of this Title.

Second. A commission of one per centum on all moneys received at each receiver's office.

Act April 20, 1818, c. 123, 3 Stat. 466.

Third. A commission to be paid by the homestead applicant, at the time of entry, of one per centum on the cash price, as fixed by law, of the land applied for; and a like commission when the claim is finally established, and the certificate therefor issued as the basis of a patent.

Act May 20, 1862, c. 75, § 6, 12 Stat. 393. Act March 21, 1864, c. 38, § 2, 13 Stat. 35. Act July 15, 1870, c. 294, § 25, 16 Stat. 320.

Fourth. The same commission on lands entered under any law to encourage the growth of timber on western prairies, as allowed when the like quantity of land is entered with money.

Act March 3, 1873, c. 277, § 6, 17 Stat. 606.

The laws to encourage the growth of timber mentioned in this subsection were repealed, except as to rights accrued and claims already initiated, by Act March 3, 1891, c. 561, post, § 5116.

Fifth. For locating military bounty-land warrants, issued since the eleventh day of February, eighteen hundred and forty-seven, and for locating agricultural-college land-scrip, the same commission, to be paid by the holder or assignee of each warrant or scrip, as is allowed for sales of the public lands for cash, at the rate of one dollar and twenty-five cents per acre.

Act March 22, 1852, c. 19, § 2, 10 Stat. 4. Act July 2, 1862, c. 130, § 7, 12 Stat. 505.

Sixth. A fee in donation cases of two dollars and fifty cents for each final certificate for one hundred and sixty acres of land, five dollars for three hundred and twenty acres, and seven dollars and fifty cents for six hundred and forty acres.

Act May 30, 1862, c. 86, § 6, 12 Stat. 409. Act Dec. 17, 1880, c. 2, 21 Stat. 311.

This subsection was amended by Act Dec. 17, 1880, c. 2, cited above, by changing the amounts of the fees from five, ten, and fifteen dollars, respectively, to the amounts set forth here.

Seventh. In the location of lands by States and corporations under grants from Congress for railroads and other purposes, (except for agricultural colleges,) a fee of one dollar for each final location of one hundred and sixty acres; to be paid by the State or corporation making such location.

Act July 1, 1864, c. 196, § 1, 13 Stat. 335.

Eighth. A fee of five dollars per diem for superintending public-land sales at their respective offices; [and, to each receiver, mileage in going to and returning from depositing the public moneys received by him].

Act April 24, 1820, c. 51, § 5, 3 Stat. 567.

The words inclosed in brackets in this subsection were superseded by the provision that only actual traveling expenses should be allowed to any person holding employment or appointment under the United States, with certain exceptions, contained in Act March 3, 1875, c. 133, § 1, ante, § 3236.

Ninth. A fee of five dollars for filing and acting upon each application for patent or adverse claim filed for mineral lands, to be paid by the respective parties.

Act May 10, 1872, c. 152, § 12, 17 Stat. 95.

Tenth. Registers and receivers are allowed, jointly, at the rate of fifteen cents per hundred words for testimony reduced by them to writing for claimants, in establishing pre-emption, desert-land, and homestead rights.

Act March 21, 1864, c. 38, § 4, 13 Stat. 35. Act May 29, 1908, c. 220, § 14, 35 Stat. 468.

This subsection was amended by Act May 29, 1908, c. 220, § 14, cited above, by inserting the term "desert-land."

Eleventh. A like fee as provided in the preceding subdivision when such writing is done in the land-office, in establishing claims for mineral lands.

Act May 10, 1872, c. 152, § 12, 17 Stat. 95.

Twelfth. Registers and receivers in California, Oregon, Washington, Nevada, Colorado, Idaho, New Mexico, Arizona, Utah, Wyoming, and Montana, are each entitled to collect and receive fifty per centum on the fees and commissions provided for in the first, third, and tenth subdivisions of this section.

Act March 21, 1864, c. 38, § 6, 13 Stat. 36, and several acts establishing land-offices for Utah, Wyoming, and Montana.

Registers and receivers were to be entitled to such compensation for furnishing maps or plats of lands sold as might be prescribed by the Commissioner of the General Land Office, by Act March 3, 1883, c. 101, § 2, post, § 4478.

A fee of $1 to the register for giving to contestants, notice of cancellation of entries, was provided for by Act May 14, 1880, c. 89, § 2, as amended by Act July 26, 1892, c. 251, post, § 4537.

The usual commissions were allowed on all moneys paid for lands entered under the Reclamation Act of June 17, 1902, c. 1093, by a provision of section 5 of that act, post, § 4704.

Additional fees to registers and receivers for making transcripts of the records in their offices for individuals were authorized, and such transcripts, when duly certified, were made admissible as evidence, by Act March 22, 1904, c. 748, post, § 4474.

Notes of Decisions

Register's fees.—It was the register's duty to receive fees for locating military bounty land warrants. U. S. v. Babbitt (1877) 95 U. S. 334, 24 L. Ed. 480.

—— Services required by land department.—Compensation held limited to legal maximum. Stewart v. U. S. (1907) 27 Sup. Ct. 631, 633, 206 U. S. 185, 51 L. Ed. 1017.

Receiver's commissions.—A receiver is entitled to his commissions, though he resigns or is removed from office at the termination of the first six months of the last year covered by his appointment. U. S. v. Edwards (C. C. 1839) Fed. Cas. No. 15,026. He is entitled to 1 per cent. on moneys received until the allowance amounts to $2,500, though the same accrue within the first six months of the year. The commission should be paid quarterly as it arises, and payment cannot be refused because the whole amount accrues in the first two quarters. U. S. v. McCarty (C. C. 1838) Fed. Cas. No. 15,-657.

Clerk hire.—Clerk hire was a charge upon commissions. (1846) 4 Op. Atty. Gen. 467, 472.

Cited without definite application, Sturr v. Beck (1890) 10 Sup. Ct. 350, 352, 133 U. S. 541, 33 L. Ed. 761; U. S. v. Swiggett (1897) 83 Fed. 97, 99, 27 C. C. A. 465; Jewett v. U. S. (1892) 27 Ct. Cl. 519.

§ 4474. (Act March 22, 1904, c. 748.) Fees for transcripts of records; transcripts as evidence.

Registers and receivers of United States land offices shall, in addition to the fees now allowed by law, be entitled to charge and receive for making transcripts of the records in their offices for individuals, the sum of ten cents per hundred words for each transcript so furnished; and the transcripts thus furnished, when duly certified to by them, shall be admitted as evidence in all courts of the United States and the Territories thereof, and before all officials authorized to receive evidence, with the same force and effect as the original records. (33 Stat. 144.)

This was an act entitled "An act to authorize registers and receivers of United States land offices to furnish transcripts of their records to individuals."

Provisions for certifying copies of records, books, and papers in the General Land Office, and for transmission of original papers on file in the office, for use as evidence, were made by Rev. St. § 891, ante, § 1504, by R. S. § 2469, ante, § 709, and by Act April 19, 1904, c. 1398, ante, § 701.

§ 4475. (R. S. § 2239.) Fees of register and receiver for consolidated land-offices.

The register for any consolidated land-district, in addition to the fees now allowed by law, shall be entitled to charge and receive for making transcripts for individuals, or furnishing any other record information respecting public lands or land-titles in his consolidated land-district, such fees as are properly authorized by the tariff existing in the local courts of his district; and the receiver shall receive his equal share of such fees, and it shall be his duty to aid the register in the preparation of the transcripts, or giving the desired record information.

Act Feb. 18, 1861, c. 38, §§ 1, 3, 12 Stat. 131.

Provisions for consolidation, etc., of land-districts, are contained in Chapter 3 of this Title.

§ 4476. (R. S. § 2240.) Maximum compensation for registers and receivers.

The compensation of registers and receivers, including salary, fees, and commissions, shall in no case exceed in the aggregate three thousand dollars a year, each; and no register or receiver shall receive for any one quarter or fractional quarter more than a pro-rata allowance of such maximum.

Act April 20, 1818, c. 123, 3 Stat. 466. Act March 22, 1852, c. 19, § 3, 10 Stat. 4. Act Feb. 2, 1859, c. 19, 11 Stat. 378. Act Feb. 18, 1861, c. 38, §§ 1, 3, 12 Stat. 131. Act May 20, 1862, c. 75, § 6, 12 Stat. 393. Act May 30, 1862, c. 86, § 6, 12 Stat. 409. Act July 2, 1862, c. 130, § 7, 12 Stat. 505. Act March 21, 1864, c. 38, § 6, 13 Stat. 36. Act July 1, 1864, c. 196, § 1, 13 Stat. 335.

The fees allowed registers and receivers for testimony reduced by them to writing for claimants in establishing pre-emption and homestead rights and mineral entries in contested cases (see R. S. § 2238, ante, § 4473, subds. 10, 11) were to be excluded in determining the maximum compensation of said officers, by Act March 3, 1883, c. 101, § 1, 22 Stat. 484. This section was superseded by a provision of Act March 3, 1887, c. 362, post, § 4479. By section 2 of said act of 1883, post, § 4478, the registers and receivers were required, upon application, to furnish plats or diagrams of townships in their respective districts, showing what lands are vacant and what lands are taken, the fees for which are to be fixed by the Commissioner of the General Land Office. They were also required to furnish, upon application by the proper State or Territory or officers, for the purposes of taxation, a list of all lands sold in their respective districts, together with the names of the purchasers, for which they are allowed to receive not to exceed 10 cents per entry. The fees to which they are thus entitled were not to be considered in determining their maximum compensation. So much of this section as allowed the registers and receivers to retain said fees was also superseded by said provision of Act March 3, 1887, § 362, post, § 4479.

The register was also allowed a fee of one dollar for giving, to one who had contested and procured the cancellation of a pre-emption, homestead, or timber-culture entry, a notice of the cancellation of the entry, which fee was

not to be reported, by Act May 14, 1880, c. 89, § 2, as amended by Act July 26, 1892, c. 251, post, § 4537. The provision of that act that the fees were not to be reported was superseded by the requirement that such fees be reported and accounted for by Act March 4, 1911, c. 261, § 2, post, § 4480.

The clerks and marshals of the district courts at Nome and Fairbanks, in Alaska, respectively ex-officio registers and receivers of the land offices located at Nome and Fairbanks, were allowed, in addition to their compensation as clerks or marshals, to receive all the fees and commissions allowed by law for their services as registers and receivers, but required to pay all such fees in excess of $1,500 by either of such officials into the Treasury of the United States, by Act March 2, 1907, c. 2537, § 3, post, § 4521.

Notes of Decisions

Amount of compensation.—A receiver was entitled to calculate his yearly commission on the amount of money received during the year, commencing from his appointment, instead of calculating it by the fiscal year. U. S. v. Dickson (1841) 15 Pet. 141, 157, 10 L. Ed. 689. But now the fiscal year is the basis on which compensation must be estimated. Sweet v. U. S. (1899) 34 Ct. Cl. 377.

As to a register's compensation under Act March 22, 1852, § 3, see U. S. v. Babbit (1861) 1 Black, 55, 57, 17 L. Ed. 94. See, also, U. S. v. Babbitt (1877) 95 U. S. 334, 24 L. Ed. 480, followed in U. S. v. Brindle (1884) 4 Sup. Ct. 180, 110 U. S. 688, 28 L. Ed. 286.

Compensation held limited to legal maximum. Stewart v. U. S. (1907) 27 Sup. Ct. 631, 633, 206 U. S. 185, 51 L. Ed. 1017. affirming judgment (1904) 39 Ct. Cl. 321.

Allowance for office expenses.—Office rent must be refunded to the register. Swigett v. U. S. (D. C. 1896) 78 Fed. 456, judgment affirmed U. S. v. Swiggett (1897) 83 Fed. 97, 27 C. C. A. 465. His compensation should not be diminished by the expenses of his office. Luse v. U. S. (1900) 35 Ct. Cl. 164.

§ 4477. (R. S. § 2241.) Excess of compensation to be paid in Treasury.

Whenever the amount of compensation received at any land-office exceeds the maximum allowed by law to any register or receiver, the excess shall be paid into the Treasury, as other public moneys.

Act March 3, 1853, c. 97, § 1, 10 Stat. 204. Act Feb. 18, 1861, c. 38, §§ 1, 3, 12 Stat. 131.

See note to R. S. § 2240, ante, § 4476.

Notes of Decisions

Register's duty to pay over excess.—The register's refusal to pay over the excess was a breach of his official bond, and the government was not bound to proceed against him by an action for money had and received. U. S. v. Babbitt (1877) 95 U. S. 334, 24 L. Ed. 480. See, also, U. S. v. Babbit (1861) 1 Black, 55, 59, 17 L. Ed. 94.

Cited without definite application, Stewart v. U. S. (1907) 27 Sup. Ct. 631, 633, 206 U. S. 185, 51 L. Ed. 1017.

§ 4478. (Act March 3, 1883, c. 101, § 2.) Plats of townships and lists of lands sold to be furnished; compensation therefor.

Registers and receivers shall, upon application, furnish plats or diagrams of townships in their respective districts showing what lands are vacant and what lands are taken, and shall be allowed to receive compensation therefor from the party obtaining said plat or diagram at such rates as may be prescribed by the Commissioner of the General Land Office and said officers shall, upon application by the proper State or Territorial authorities, furnish, for the purpose of taxation, a list of all lands sold in their respective districts, together with the names of the purchasers, and shall be allowed to receive compensation for the same not to exceed ten cents per entry. (22 Stat. 484.)

These provisions were part of section 2 of an act entitled "An act in relation to certain fees allowed registers and receivers," cited above.

The remaining portion of this section, omitted here, provided that the sums received for plats and lists should not be considered in determining the maximum of compensation of registers and receivers. It was superseded by a provision of Act March 3, 1887, c. 362, post, § 4479. See note to R. S. § 2240, ante, § 4476.

Section 1 of this act provided that fees of registers and receivers for taking testimony should not be considered in determining the maximum of their compensation. It also was superseded by the provision of Act March 3, 1887, c. 362, post, § 4479. See, also, note to R. S. § 2240, ante, § 4476.

Notes of Decisions

Forest reservations—Lieu lands.—Local land-officers were given no power by this act to decide on the sufficiency of an application for vacant lands in lieu of lands relinquished in a forest reservation. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 23 Sup. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064 (affirming decree [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230); Pacific Land & Improvement Co. v. Elwood Oil Co. (1903) 23 Sup. Ct. 698, 190 U. S. 316, 47 L. Ed. 1073 (affirming decree [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230).

§ 4479. (Act March 3, 1887, c. 362.) Excess of fees to be covered into Treasury.

Hereafter all fees collected by registers or receivers, from any source whatever, which would increase their salaries beyond three thousand dollars each a year, shall be covered into the Treasury, except only so much as may be necessary to pay the actual cost of clerical services employed exclusively in contested cases; and they shall make report quarterly, under oath, of all expenditures for such clerical services, with vouchers therefor. (24 Stat. 526.)

This was a provision of the sundry civil appropriation act for the fiscal year 1888, cited above. It superseded Act March 3, 1883, c. 101, § 1, and part of section 2 of that act, ante, § 4478. See notes to R. S. § 2240, ante, § 4476, and said Act March 3, 1883, c. 101, § 2, ante, § 4478.

This section also superseded the provision of Act May 14, 1880, c. 89, § 2, 21 Stat. 141, that the register need not report fees for notices to contestants of the cancellation of entries, but that provision was re-enacted by Act July 26, 1892, c. 251, amending the former section 2 of Act May 24, 1880, cited above, so as to make it read as set forth post, § 4537. The provision was again superseded by Act March 4, 1911, c. 261, § 2, post, § 4480, which required those fees to be covered into the Treasury.

§ 4480. (Act March 4, 1911, c. 261, § 2.) Fees for notices of cancellation of entries hereafter received to be accounted for.

Hereafter all money or fees received or collected by registers of United States land offices for issuing notices of cancellation of entries shall be reported and accounted for by such registers in the same manner as other fees or moneys received or collected. (36 Stat. 1352.)

This section was part of an act entitled "An act for the relief of registers and former registers of the United States land offices," cited above.

The first section of the act authorized and directed the Secretary of the Treasury to refund to registers and former registers of United States land offices money earned by them for issuing notices of cancellation of entries subsequent to July 26, 1892, which money they were erroneously required to deposit in the United States Treasury, contrary to the provisions of the act approved July 26, 1892. The section is omitted, as temporary merely.

Act July 26, 1892, c. 251, amended Act May 24, 1880, c. 89, § 2, so as to make it read as set forth post, § 4537. Act May 24, 1880, c. 89, § 2, as originally enacted, provided, in the same terms as the amended section, that the register need not report the fees for giving to contestants notice of the cancellation of entries. This provision was superseded by Act March 3, 1887, c. 362, ante, § 4479, but was re-enacted by the amending act of July 26, 1892, c. 251, post, § 4537. It was again superseded by this section.

See, also, notes to R. S. § 2240, ante, § 4476, and to Act March 3, 1887, c. 362, ante, § 4479.

Appropriations for contingent expenses of land offices, including clerk hire, rent, and incidental expenses, are made in the annual sundry civil appropriation acts. The provisions for the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, 39 Stat.

Such appropriations for recent years are accompanied by a restriction on incurring expenses chargeable to the Government, which in said Act July 1, 1916, c. 209, § 1, 39 Stat., was as follows:

"No expenses chargeable to the Government shall be incurred by registers and receivers in the conduct of local land offices except upon previous specific authorization by the Commissioner of the General Land Office."

§ 4481. (Act March 2, 1907, c. 2563.) Reimbursement of sums disbursed by receivers as special disbursing agents.

The Secretary of the Treasury be, and he is hereby, authorized and directed to pay, out of any unexpended balances of appropriations for contingent expenses of land offices, for the expenses of hearings in land entries and the expenses of depositing public moneys, such sums as may have been or may hereafter be disbursed by receivers of public moneys, acting as special disbursing agents at United States land offices, before the receipt of Government funds: Provided, That no payment shall be made under this Act in excess of the amount appropriated by the Congress for the particular purpose in each instance and for the fiscal year in which such disbursements were made: Provided, That all such disbursements shall have been or shall hereafter be made in pursuance of law in carrying out departmental regulations or to meet authorizations by the Commissioner of the General Land Office: Provided further, That the accounts containing such items shall have been duly approved by the Commissioner of the General Land Office. (34 Stat. 1245.)

This was an act entitled "An act authorizing and directing the Secretary of the Treasury, in certain contingencies, to refund to receivers of public moneys acting as special disbursing agents amounts paid by them out of their private funds."

§ 4482. (R. S. § 2242.) Illegal fees; penalty.

No register or receiver shall receive any compensation out of the Treasury for past services who has charged or received illegal fees; and, on satisfactory proof that either of such officers has charged or received fees or other rewards not authorized by law, he shall be forthwith removed from office.

Act March 22, 1852, c. 19, § 3, 10 Stat. 4. Act July 17, 1854, c. 84, § 6, 10 Stat. 306.

Cited without definite application,
U. S. v. Babbit (1861) 1 Black, 55, 60, 17 L. Ed. 94.

§ 4483. (R. S. § 2243.) Compensation of registers and receivers, when to commence.

The compensation of registers and receivers, both for salary and commissions, shall commence and be calculated from the time they, respectively, enter on the discharge of their duties.

Act Feb. 24, 1855, c. 124, § 3, 10 Stat. 615.

Notes of Decisions

Entering on discharge of duties.—This includes doing work incidental to the opening of a new land office. U. S. v. Delaney (1896) 17 Sup. Ct. 84, 164 U. S. 282, 41 L. Ed. 435, affirming Delaney v. U. S. (1895) 31 Ct. Cl. 44.

§ 4484. (R. S. § 2244.) Duration of office of registers and receivers.

All registers and receivers shall be appointed for the term of four years, but shall be removable at pleasure.

Act May 15, 1820, c. 102, § 1, 3 Stat. 582.

§ 4485. (R. S. § 2245.) Monthly and quarterly returns of receivers.

The receivers shall make to the Secretary of the Treasury monthly returns of the moneys received in their several offices, and pay over such money pursuant to his instructions. And they shall also make to the Commissioner of the General Land-Office like monthly returns, and transmit to him quarterly accounts-current of the debits and credits of their several offices with the United States.

Act July 4, 1836, c. 352, § 9, 5 Stat. 111.

Receivers were authorized to deposit to the credit of the Treasurer of the United States unearned fees and unofficial moneys carried on the books of their offices for five years or more, and moneys deposited by unknown parties, and repayment of such moneys was provided for, by Act March 2, 1907, c. 2562, post, §§ 4487–4490.

The repayment of purchase moneys, etc., paid under the land laws on applications afterward rejected, and of excess payments under the land laws, was provided for by Act March 26, 1908, c. 102, post, §§ 4491–4493.

Notes of Decisions

Conclusiveness of returns.—The returns are not conclusive upon the receiver's sureties. U. S. v. Boyd (1847) 5 How. 29, 50, 12 L. Ed. 36.

§ 4486. (Act March 2, 1895, c. 177, § 3.) Reports and returns by registers and receivers, not to be duplicated.

The duplication of reports and returns of registers and receivers to the General Land Office shall be prevented by such regulations as the Commissioner of the General Land Office, with the approval of the Secretary of the Interior, may make. (28 Stat. 807.)

Other provisions of this section relating to the engrossing and recording of patents are set forth ante, § 707.

§ 4487. (Act March 2, 1907, c. 2562, § 1.) Deposit in Treasury by receivers of unearned fees and unofficial moneys carried on their books for five years or more.

The receivers of public moneys for land districts are hereby authorized, under the direction of the Commissioner of the General Land Office, to deposit to the credit of the Treasurer of the United States all unearned fees and unofficial moneys that have been carried upon the books of their respective offices for a period of five years or more, which sums shall be covered into the Treasury by warrant and carried to the credit of the parties from whom such fees or moneys were received, and into an appropriation account to be denominated "Outstanding liabilities." (34 Stat. 1245.)

This section and the three sections next following were an act entitled "An act to authorize the receivers of public moneys for land districts to deposit with the treasurer of the United States certain sums embraced in their accounts of unearned fees and unofficial moneys."

§ 4488. (Act March 2, 1907, c. 2562, § 2.) Lists to be furnished with deposits.

At the time of making such deposit the receiver shall furnish a list showing the date when the money was paid to him or to his predecessor; the names and residences of the parties; the purposes of the payments and the amounts thereof, which list shall bear the certificate of the register and receiver that the same is correct; that the amounts are due and payable; that diligence has been exercised to return the same, and that the sums specified have remained unclaimed for a period of five years or more. (34 Stat. 1245.)

§ 4489. (Act March 2, 1907, c. 2562, § 3.) Deposit of moneys deposited by unknown parties.

Amounts that appear in a receiver's accounts as "Moneys deposited by unknown parties" shall also be deposited to the credit of the Treasurer of the United States, accompanied by a list showing the amount and, if possible, the date of the receipt of each item; which list shall bear the certificate of the register and receiver that, after careful investigation, the ownership of said moneys could not be determined, and that they have been reported in the unearned fees and unofficial moneys accounts for five years or more. (34 Stat. 1245.)

§ 4490. (Act March 2, 1907, c. 2562, § 4.) Repayment of moneys deposited in Treasury; limitation; payment by homestead entryman on making cash entry.

Any person or persons who shall have made payment to a receiver, or to his predecessor, and the money shall have been covered into the Treasury pursuant to section one or section three hereof, shall, on presenting satisfactory evidence of such payment to the proper officer of the Treasury Department, be entitled to have the

same returned by the settlement of an account and the issuing of a warrant in his favor according to the practice in other cases of authorized and liquidated claims against the United States: Provided, That when such moneys shall remain unclaimed in the Treasury for more than five years the right to recover the same shall be barred: Provided, That no homestead entryman shall be required to make payment of the purchase money on any application to make a cash entry until the same shall have been approved by the register and receiver, but such payment shall be made within ten days after notice of such approval. (34 Stat. 1245.)

§ 4491. (Act March 26, 1908, c. 102, § 1.) Repayment of purchase moneys, etc., paid under applications, etc., afterward rejected.

Where purchase moneys and commissions paid under any public land law have been or shall hereafter be covered into the Treasury of the United States under any application to make any filing, location, selection, entry, or proof, such purchase moneys and commissions shall be repaid to the person who made such application, entry, or proof, or to his legal representatives, in all cases where such application, entry, or proof has been or shall hereafter be rejected, and neither such applicant nor his legal representatives shall have been guilty of any fraud or attempted fraud in connection with such application. (35 Stat. 48.)

This section and the two sections next following were an act entitled "An act to provide for the repayment of certain commissions, excess payments, and purchase moneys paid under the public laws."

§ 4492. (Act March 26, 1908, c. 102, § 2.) Repayment of excess payments.

In all cases where it shall appear to the satisfaction of the Secretary of the Interior that any person has heretofore or shall hereafter make any payments to the United States under the public land laws in excess of the amount he was lawfully required to pay under such laws, such excess shall be repaid to such person or to his legal representatives. (35 Stat. 48.)

A provision for repayment to homestead entrymen of excess payments was made by Act March 2, 1907, c. 2568, post, § 4542.

Notes of Decisions

Suit for excess payment.—The court cannot entertain jurisdiction unless it appears that the claim has been presented to the Secretary of the Interior and that his decision on the facts has been made. King v. U. S. (1913) 48 Ct. Cl. 371.

§ 4493. (Act March 26, 1908, c. 102, § 3.) Certification of amount of excess moneys, purchase moneys, etc., and repayment.

When the Commissioner of the General Land Office shall ascertain the amount of any excess moneys, purchase moneys, or commissions in any case where repayment is authorized by this statute, the Secretary of the Interior shall at once certify such amounts to the Secretary of the Treasury, who is hereby authorized and directed to make repayment of all amounts so certified out of any moneys not otherwise appropriated and issue his warrant in settlement thereof. (35 Stat. 48.)

§ 4494. (R. S. § 2246.) Oaths administered by registers and receivers.

The register or receiver is authorized, and it shall be their duty, to administer any oath required by law or the instructions of the General Land-Office, in connection with the entry or purchase of any tract of the public lands; but he shall not charge or receive, directly or indirectly, any compensation for administering such oath.

Act June 12, 1840, c. 35, 5 Stat. 384.

The compulsory attendance of witnesses before registers and receivers in

all matters requiring a hearing before them, and the taking of testimony and of depositions for such hearings, were provided for by Act Jan. 31, 1903, c. 344, post, §§ 4499–4503.

Notes of Decisions

Authority to administer oath.—The receiver or register may administer the oath required in connection with an entry under the Timber and Stone Act. U. S. v. Eddy (C. C. 1905) 134 Fed. 114; Same v. Brace (D. C. 1907) 149 Fed. 869.

Registers and receivers have power to administer oaths in contest cases tried before them. Peters v. U. S. (1894) 37 P. 1081, 2 Okl. 138.

—— **Judicial notice.**—The courts will take judicial notice of the qualification of the receiver to administer an oath. U. S. v. Eddy (C. C. 1905) 134 Fed. 114.

Perjury.—See, also, notes to § 10295, post.

In homestead entry, see Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415, 515; U. S. v. George (1913) 33 Sup. Ct. 412, 228 U. S. 14, 57 L. Ed. 712; Same v. Nelson (D. C. 1912) 199 Fed. 464.

In timber land purchase, see U. S. v. Brace (D. C. 1907) 149 Fed. 874.

§ 4495. (R. S. § 2247.) Penalty for false information by register.

If any person applies to any register to enter any land whatever, and the register knowingly and falsely informs the person so applying that the same has already been entered, and refuses to permit the person so applying to enter the same, such register shall be liable therefor to the person so applying, for five dollars for each acre of land which the person so applying offered to enter, to be recovered by action of debt in any court of record having jurisdiction of the amount.

Act July 4, 1836, c. 352, § 13, 5 Stat. 112.

Cited without definite application, Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415; Germania Iron Co. v. James (1898) 89 Fed. 811, 815, 32 C. C. A. 348; James v. Germania Iron Co. (1901) 107 Fed. 597, 604, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Neff v. U. S. (1908) 165 Fed. 273, 277, 91 C. C. A. 241.

§ 4496. (Act Oct. 1, 1890, c. 1269, § 2.) Vacancy in office of register or receiver; taking final proofs.

Hereafter, when a vacancy shall occur in any of the land offices of the United States by reason of the death, resignation, or removal of either the register or receiver, and the time set for taking final proof falls within the vacancy thus caused, the remaining officer may proceed to take said final proofs, in the absence of any contest or protest, reduce the same to writing, and place it on file in the office to be considered and passed upon when the vacancy is filled. (26 Stat. 657.)

This section was part of an act entitled "An act for the relief of certain settlers on the public lands of the United States and to authorize the taking and filing of final proofs in certain cases," cited above.

Section 1 of the act, relating to pending causes, is omitted, as temporary merely.

§ 4497. (Act Jan. 11, 1894, c. 10, § 1.) Disqualification of register or receiver.

No register or receiver shall receive evidence in, hear or determine any cause pending in any district land office in which cause he is interested directly or indirectly, or has been of counsel, or where he is related to any of the parties in interest by consanguinity or affinity within the fourth degree, computing by the rules adopted by the common law. (28 Stat. 26.)

This section and the section next following were an act entitled "An act relating to the disqualification of registers and receivers of United States land offices, and making provision in case of such disqualification."

§ 4498. (Act Jan. 11, 1894, c. 10, § 2.) Designation of officer to act in place of disqualified register or receiver.

It shall be the duty of every register or receiver so disqualified to report the fact of his disqualification to the Commissioner of

the General Land Office, as soon as he shall ascertain it, and before the hearing of such cause, who thereupon, with the approval of the Secretary of the Interior, shall designate some other register, receiver, or special agent of the Land Department to act in the place of the disqualified officer, and the same authority is conferred on the officer so designated which such register or receiver would otherwise have possessed to act in such case. (28 Stat. 26.)

§ 4499. (Act Jan. 31, 1903, c. 344, § 1.) Subpœnas for attendance of witnesses before registers and receivers.

Registers and receivers of the land office, or either of them, in all matters requiring a hearing before them, are authorized and empowered to issue subpœnas directing the attendance of witnesses, which subpœnas may be served by any person by delivering a true copy thereof to such witness, and when served, witnesses shall be required to attend in obedience thereto: Provided, That if any subpœna be served under the provisions of this Act by any person other than an officer authorized by the laws of the United States, or of the State or Territory in which the depositions are taken, the service thereof shall be proved by the affidavit of the person serving the same: Provided further, That said subpœnas shall be served within the county in which attendance is required, and at least five days before attendance is required. (32 Stat. 790.)

This section and the four sections next following were an act entitled "An act providing for the compulsory attendance of witnesses before registers and receivers of the land office."

Authority to administer oaths was given to registers and receivers by R. S. § 2246, ante, § 4494.

Subpœnas for taking depositions of witnesses residing outside the county were provided for by section 4 of this act, post, § 4502.

§ 4500. (Act Jan. 31, 1903, c. 344, § 2.) Witnesses' fees.

Witnesses shall have the right to receive their fee for one day's attendance and mileage in advance. The fees and mileage of witnesses shall be the same as that provided by law in the district courts of the United States in the district in which such land offices are situated; and the witness shall be entitled to receive his fee for attendance in advance from day to day during the hearing. (32 Stat. 790.)

Witnesses' fees in the courts of the United States were prescribed by R. S. § 848, and subsequent provisions, ante, §§ 1452–1456.

§ 4501. (Act Jan. 31, 1903, c. 344, § 3.) Disobedience to subpœna, punishable.

Any person willfully neglecting or refusing obedience to such subpœna, or neglecting or refusing to appear and testify when subpœnaed, his fees having been paid if demanded, shall be deemed guilty of a misdemeanor, for which he shall be punished by indictment in the district court of the United States or in the district courts of the Territories exercising the jurisdiction of circuit or district courts of the United States. The punishment for such offense, upon conviction, shall be a fine of not more than two hundred dollars, or imprisonment not to exceed ninety days, or both, at the discretion of the court: Provided, That if such witness has been prevented from obeying such subpœna without fault upon his part he shall not be punished under the provisions of this Act. (32 Stat. 790.)

Witnesses under subpœnas for taking depositions are subject to the same penalties, by the provisions of the next following section of this act post, § 4502.

§ 4502. (Act Jan. 31, 1903, c. 344, § 4.) Depositions of witnesses residing outside the county.

Whenever the witness resides outside the county in which the hearing occurs any party to the proceeding may take the testimony of such witness in the county of such witness's residence in

the form of depositions by giving ten days' written notice of the time and place of taking such depositions to the opposite party or parties. The depositions may be taken before any United States commissioner, notary public, judge or clerk of a court of record. Subpœnas for witnesses before the officer taking depositions may issue from the office of the register or receiver, or may be issued by the officer taking the depositions, and disobedience thereof, as defined in this Act, shall also be punished; and the witness shall receive the same fees and mileage and be subject to the same penalties in all respects as in case of violation of a subpœna to appear before the register or receiver, and subject to the same limitations. The fees of the officer taking the depositions shall be the same as those allowed in the State or Territorial courts, and shall be paid by the party taking the deposition, and an itemized account of the fees shall be made by the officer taking the depositions and attached to the depositions. (32 Stat. 790.)

Penalties in case of violation of a subpœna to appear before the register or receiver, mentioned in this section, were imposed by the preceding section of this act, ante, § 4501.

§ 4503. (Act Jan. 31, 1903, c. 344, § 5.) Continuing taking of depositions in behalf of opposite party.

Whenever the taking of any depositions taken in pursuance of the foregoing provisions of this Act is concluded the opposite party may proceed at once at his own expense to take depositions in his own behalf, at the same time and place and before the same officer: Provided, That he shall, before taking of the depositions in the first instance is entered upon, give notice to the opposing party, or any agent or attorney representing him in the taking of said depositions, of his intention to do so. (32 Stat. 791.)

CHAPTER THREE

Land-Districts—Provisions Respecting Particular Districts

Sec.
4504. When land-office may be discontinued by Secretary of the Interior.
4505. When land-office may be continued by Secretary of the Interior.
4506. When land-offices may be consolidated by Secretary of the Interior.
4507. When land-office may be annexed to adjacent district by the President.
4508. Change of location of land-office by the President.
4509. Discontinuance of land-office by the President.
4510. Change of boundaries of land-districts by the President.
4511. Business of original district in case of change of boundaries.
4512. Allowance of office-rent and clerk-hire for consolidated land-offices.
4513. Entry of public lands in States where no land-offices exist.

PROVISIONS RESPECTING PARTICULAR DISTRICTS

4514. Office of recorder of land titles in Missouri to be discontinued.
4515. Land-offices in Ohio, Indiana, and Illinois, and office of recorder of land titles in Missouri, abolished.
4515a. Office of receiver at Springfield, Mo., abolished, and duties imposed upon register; additional duties of register; fees, etc.
4515b. Books, records, etc., of land office at Springfield, Mo., to be delivered to register as custodian.
4516. Land-office at Des Moines, Iowa, abolished; disposition of records.
4517. Land-districts and offices in Alaska; registers and receivers.
4518. Land-districts and offices in Alaska.
4519. Additional land-districts in Alaska.
4520. Additional land-districts in Alaska; clerks of courts to be registers, and marshals to be receivers.
4521. Fees and commissions as compensation of officers in additional districts.
4522. Surveys in additional districts.

§ 4504. (R. S. § 2248.) When land-office may be discontinued by Secretary of the Interior.

Whenever the quantity of public land remaining unsold in any land-district is reduced to a number of acres less than one hundred thousand, it shall be the duty of the Secretary of the Interior to discontinue the land-office of such district; and if any land in any such district remains unsold at the time of the discontinuance of a land-office, the same shall be subject to sale at some one of the existing land-offices most convenient to the district in which the land-office has been discontinued, of which the Secretary of the Interior shall give notice.

Act June 12, 1840, c. 36, § 2, 5 Stat. 385.

§ 4505. (R. S. § 2249.) When land-office may be continued by Secretary of the Interior.

The Secretary of the Interior may continue any land-district in which is situated the seat of government of any one of the States, and may continue the land-office in such district, notwithstanding the quantity of land unsold in such district may not amount to one hundred thousand acres, when, in his opinion, such continuance is required by public convenience, or in order to close the land-system in such State.

Act Sept. 4, 1841, c. 16, § 7, 5 Stat. 455.

§ 4506. (Act Aug. 5, 1892, c. 380, § 1.) When land-offices may be consolidated by Secretary of the Interior.

It shall be the duty of the Secretary of the Interior to consolidate the district land offices where practicable and consistent with the public interests. (27 Stat. 368.)

This was a provision of the sundry civil appropriation act for the fiscal year 1893, cited above.

The Secretary of the Interior was required to consolidate the district land-offices so as to bring the total compensation of the registers and receivers for the fiscal year 1894, within the appropriation made therefor by the sundry civil appropriation act for that year, Act March 3, 1893, c. 208, 27 Stat. 591, which was fixed at $520,000.

§ 4507. (R. S. § 2250.) When land-office may be annexed to adjacent district by the President.

Whenever the cost of collecting the revenue from the sales of the public lands in any land-district is as much as one-third of the whole amount of revenue collected in such district, it may be lawful for the President, if, in his opinion, not incompatible with the public interest, to discontinue the land-office in such district, and to annex the same to some other adjoining land-district.

Act March 3, 1853, c. 97, § 1, 10 Stat. 189, 194.

§ 4508. (R. S. § 2251.) Change of location of land-office by the President.

The President is authorized to change the location of the land-offices in the several land-districts established by law, and to relocate the same from time to time at such point in the district as he deems expedient.

Act March 3, 1853, c. 97, § 1, 10 Stat. 204. Act March 3, 1853, c. 144, 10 Stat. 244.

§ 4509. (R. S. § 2252.) Discontinuance of land-office by the President.

Upon the recommendation of the Commissioner of the General Land-Office, approved by the Secretary of the Interior, the President may order the discontinuance of any land-office and the transfer of any of its business and archives to any other land-office within the same State or Territory.

Act May 30, 1862, c. 86, § 5, 12 Stat. 409.

§ 4510. (R. S. § 2253.) Change of boundaries of land-districts by the President.

The President is authorized to change and re-establish the boundaries of land-districts whenever, in his opinion, the public interests will be subserved thereby, without authority to increase the number of land-offices or land-districts.

Act June 29, 1870, c. 171, 16 Stat. 171.

The President was authorized to establish additional land-districts when necessary in executing the provisions of chapter 6 of this Title, which relate to mineral lands, etc., by R. S. § 2343, post, § 4651.

§ 4511. (R. S. § 2254.) Business of original district in case of change of boundaries.

In case of the division of existing land-districts by the erection of new ones, or by a change of boundaries by the President, all business in such original districts shall be entertained and transacted without prejudice or change, until the offices in the new districts are duly opened by public announcement under the direction of the Secretary of the Interior. All sales or disposals of the public lands heretofore regularly made at any land-office, after such lands have been made part of another district by any act of Congress, or by any act of the President, are confirmed, provided the same are free from conflict with prior valid rights.

Act May 31, 1872, c. 241, 17 Stat. 192.

Notes of Decisions

Disposal of lands in new district.—Under former acts it was held that lands included in a new district could not be sold by the register and receiver of the old district. Matthews v. Zane (1822) 7 Wheat. 164, 206, 5 L. Ed. 425.

§ 4512. (R. S. § 2255.) Allowance of office-rent and clerk-hire for consolidated land-offices.

The Secretary of the Interior is authorized to make a reasonable allowance for office-rent for each consolidated land-office; and when satisfied of the necessity therefor, to approve the employment by the register of one or more clerks, at a reasonable per-diem compensation, for such time as such clerical force is absolutely required to keep up the current public business, which clerical force shall be paid out of the surplus fees authorized to be charged by section twenty-two hundred and thirty-nine, if any, and if no surplus exists, then out of the appropriation for incidental expenses of district land-offices; but no clerk shall be so paid unless his employment has been first sanctioned by the Secretary of the Interior.

Act Feb. 18, 1861, c. 38, § 2, 12 Stat. 131.

Notes of Decisions

Allowance of office rent.—A receiver who rents an office without previous authority has no legal right to reimbursement. Bane v. U. S. (1884) 19 Ct. Cl. 644. But see U. S. v. Swiggett (1897) 83 Fed. 97, 99, 27 C. C. A. 465.

§ 4513. (Act June 19, 1878, c. 329, § 1.) Entry of public lands in States where no land-offices exist.

Public lands situated in States in which there are no land offices may be entered at the General Land Office, subject to the provisions of law touching the entry of public lands; and that the necessary proofs and affidavits required in such cases may be made before some officer competent to administer oaths, whose official character shall be duly certified by the clerk of a court of record. And moneys received by the Commissioner of the General Land Office for lands entered by cash entry shall be covered into the Treasury. (20 Stat. 201.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1879, cited above.

This provision was repeated from the similar appropriation act for the preceding year, Act March 3, 1877, c. 102, § 1, 19 Stat. 315.

PROVISIONS RESPECTING PARTICULAR DISTRICTS

(R. S. § 2256. Superseded.)

This section prescribed the boundaries of the 93 land-districts as they existed at the time of the enactment of the Revised Statutes. It also designated the places at which the land-offices were located at that time. By virtue of the provisions of R. S. §§ 2248–2255, ante, §§ 4504–4512, the President and the Secretary of the Interior were authorized, under certain circumstances, to discontinue, consolidate, annex, or change the boundaries of the various land-districts; and the President was further authorized to change the location of the land-offices in the several districts, and to relocate the same from time to time at places in the districts deemed by him expedient. In pursuance of these sections and the provisions of various subsequent acts, the boundaries of the land-districts and the locations of the land-offices have been changed from time to time. In some states land-districts and land-offices have been abolished or discontinued altogether; in others the number of districts has been reduced by consolidation, annexation, or discontinuance; in others the number has been increased by the creation of new districts. Where this has occurred the boundaries as established by this section have necessarily been changed. In a few states only no changes have been made. The provisions of this section being no longer applicable to the present status, it is accordingly omitted. The Acts of Congress establishing new districts subject to change in the same manner are also omitted, for the same reason. They are, however, noted below. The districts as they now exist are merely enumerated, and the location of the land-offices therein given, without attempting to set forth their boundaries.

The land-districts in Ohio, Indiana, and Illinois, established by this section, were abolished by a provision of Act July 31, 1876, c. 246, § 1, post, § 4515. The office of recorder of land titles of the state of Missouri was also abolished by the same provision.

The land-office at Des Moines, Iowa, was abolished, after February 28, 1910, by Act Feb. 15, 1910, c. 28, post, § 4516.

The office of receiver at Springfield, Mo., was abolished by Act May 2, 1914, c. 74, § 1, post, § 4515a.

The acts creating, or authorizing the creation of, new land-districts were as follows:

Alaska: Act May 17, 1884, c. 53, § 8, 23 Stat. 26; Act July 24, 1897, c. 14, § 4, 30 Stat. 215; Act May 14, 1898, c. 299, § 12, 30 Stat. 414.

California: Act June 15, 1916, c. 147, 39 Stat.

Colorado: Act June 20, 1874, c. 341, 18 Stat. 122; Act Aug. 4, 1886, c. 895, § 1, 24 Stat. 218; Act Feb. 6, 1890, c. 7, 26 Stat. 5.

Idaho: Act Feb. 4, 1879, c. 48, 20 Stat. 282.

Kansas: Act June 20, 1874, c. 340, 18 Stat. 121; Act May 24, 1880, c. 100, 21 Stat. 141; Act March 3, 1881, c. 146, 21 Stat. 508.

Montana: Act June 20, 1874, c. 342, 18 Stat. 123; Act April 30, 1880, c. 71, 21 Stat. 81; Act April 1, 1890, c. 60, 26 Stat. 33; Joint Res. Aug. 8, 1890, No. 36, 26 Stat. 677; Act March 2, 1897, c. 355, 29 Stat. 602; Act April 28, 1902, c. 595, 32 Stat. 171; Act Feb. 5, 1906, c. 83, 34 Stat. 11; Act Feb. 25, 1907, c. 1191, 34 Stat. 929; Act Feb. 15, 1910, c. 27, 36 Stat. 192.

Nebraska: Act June 19, 1882, c. 230, 22 Stat. 206; Act May 3, 1886, c. 81, 24 Stat. 20; Act April 16, 1890, c. 83, 26 Stat. 55.

Nevada: Act Oct. 3, 1913, c. 19, 38 Stat. 203.

New Mexico: Act March 3, 1874, c. 43, 18 Stat. 18; Act Dec. 18, 1888, c. 6, 25 Stat. 637; Act March 1, 1889, c. 327, 25 Stat. 772; Act March 16, 1908, c. 93, 35 Stat. 45; Act June 22, 1910, c. 320, 36 Stat. 585.

Oklahoma: Act May 2, 1890, c. 182, § 19, 26 Stat. 91; Act Jan. 18, 1897, c. 62, § 6, 29 Stat. 490; Act March 3, 1901, c. 846, § 3, 31 Stat. 1093.

Oregon: Act Jan. 11, 1875, c. 13, 18 Stat. 294; Act May 21, 1888, c. 297, 25 Stat. 152; Act March 15, 1910, c. 97, 36 Stat. 238.

South Dakota: Act May 29, 1908, c. 220, § 13, 35 Stat. 468; Act Feb. 6, 1909, c. 77, 35 Stat. 597.

Utah: Act April 25, 1876, c. 78, 19 Stat. 36; Act March 3, 1905, c. 1450, 33 Stat. 1014.

Washington: Act Aug. 15, 1876, c. 307, 19 Stat. 207; Act June 16, 1880, c. 242, 21 Stat. 283; Act May 16, 1890, c. 215, 26 Stat. 113.

Wyoming: Act Aug. 9, 1876, c. 256, 19 Stat. 126; Act March 3, 1887, c. 362, § 1, 24 Stat. 509; Act April 23, 1890, c. 153, 26 Stat. 61.

Dakota: Act April 24, 1874, c. 127, 18 Stat. 34; Act Jan. 21, 1880, c. 8, 21 Stat. 60; Act March 23, 1882, c. 49, 22 Stat. 33; Act March 3, 1883, c. 140, 22 Stat. 582; Act Sept. 26, 1890, c. 946, 26 Stat. 485.

The President was authorized to create not to exceed two land-districts in the Indian Territory whenever he deemed it necessary, by Act March 2, 1889, c. 412, § 15, 25 Stat. 1006.

Nearly all of the acts creating, or authorizing the creation of, new districts contained provisions authorizing the appointment of a register and receiver for each of the districts so created, designating the location of the land-offices, and relating to the transfer of records, etc., from the old offices to the new. They also in many instances contained repetitions of one or more of sections 2248–2255 of the Revised Statutes, ante, §§ 4504–4512.

The President was authorized and empowered to establish or discontinue land-districts in Alaska by Act May 14, 1898, c. 299, § 12, post, § 4517.

The number of land-offices in Alaska was reduced to one by Act Feb. 14, 1902, c. 17, § 1, post, § 4518, but that section was superseded by the creation of the Nome and Fairbanks land-districts by Act March 2, 1907, c. 2537, § 1, post, § 4519.

The Government of the Philippine Islands was authorized to establish land-districts and to provide for the appointment of the necessary officers wherever they deem the same necessary for the public convenience, by Act July 1, 1902, c. 1369, § 52, ante, § 3862.

The existing land districts are as follows:

Alabama: Montgomery.

Alaska: Fairbanks, Juneau, Nome.

Arizona: Phœnix.

Arkansas: Camden, Harrison, Little Rock.

California: Eureka, Imperial, Independence, Los Angeles, Sacramento, San Francisco, Susanville, Visalia.

Colorado: Del Norte, Denver, Durango, Glenwood Springs, Hugo, Lamar, Leadville, Montrose, Pueblo, Sterling.

Florida: Gainesville.

Idaho: Blackfoot, Boise, Coeur d'Alene, Hailey, Lewiston.

Kansas: Dodge City, Topeka.

Louisiana: Baton Rouge.

Michigan: Marquette.

Minnesota: Cass Lake, Crookston, Duluth.

Mississippi: Jackson.

Missouri: Springfield.

Montana: Billings, Bozeman, Glasgow, Great Falls, Havre, Helena, Kalispell, Lewistown, Miles City, Missoula.

Nebraska: Alliance, Broken Bow, Lincoln, North Platte, O'Neill, Valentine.

Nevada: Carson City, Elko.

New Mexico: Clayton, Fort Sumner, Las Cruces, Roswell, Santa Fé, Tucumcari.

North Dakota: Bismarck, Devils Lake, Dickinson, Minot, Williston.

Oklahoma: Guthrie, Woodward.

Oregon: Burns, La Grande, Lakeview, Portland, Roseburg, The Dalles, Vale.

South Dakota: Bellefourche, Gregory, Lemmon, Pierre, Rapid City, Timber Lake.

Utah: Salt Lake City, Vernal.

Washington: North Yakima, Olympia, Seattle, Spokane, Vancouver, Walla Walla, Waterville.

Wisconsin: Wausau.

Wyoming: Buffalo, Cheyenne, Douglas, Evanston, Lander, Sundance.

§ 4514. (Act June 6, 1874, c. 223, § 3.) Office of recorder of land titles in Missouri to be discontinued.

Whenever the Secretary of the Interior shall be of the opinion that the public interest no longer requires the continuance of the office of recorder of land titles in Missouri, he may close and discontinue the same; and all of the records, maps, plats, field-notes, books, papers, and everything else concerning, pertaining, or belonging to said office of recorder, shall be delivered to the State of Missouri: Provided, however, That said State shall provide by law for the reception and safe-keeping of said records, maps, plats, field-notes, books, papers, and everything else belonging to said office of recorder, as public records, and for the allowance of free access to the same by the authorities of the United States, for the purpose of taking extracts therefrom, or making copies thereof, without charge of any kind: And provided further, That when said office of recorder shall be closed and discontinued as aforesaid, the Commissioner of the General Land-Office shall forever thereafter possess

and exercise all of the powers and authority and perform all the duties of said recorder. (18 Stat. 62.)

This section was part of act obviating the necessity of issuing patents for certain private land claims in the State of Missouri, etc., cited above.

Sections 1 and 2 of the act are set forth post, §§ 5099, 5100.

The office of recorder of land titles was abolished by a provision of Act July 31, 1876, c. 246, post, § 4515.

§ 4515. (Act July 31, 1876, c. 246.) Land-offices in Ohio, Indiana, and Illinois, and office of recorder of land titles in Missouri, abolished.

The land offices at Chillicothe, Ohio, Indianapolis, Indiana, Springfield, Illinois, and the office of recorder of land-titles of the State of Missouri, are hereby abolished, from and after the thirtieth day of September next and the Secretary of the Interior is hereby authorized to transfer to the States respectively aforesaid such of the transcripts, documents, and records of the offices aforesaid as may not be required for the use of the United States, and as the States respectively in which said offices are situated may desire to preserve. (19 Stat. 121.)

These were provisions of the sundry civil appropriation act for the fiscal year 1877, cited above.

See notes to R. S. § 2256, ante, under this subchapter, as to the land-offices abolished by this provision.

§ 4515a. (Act May 2, 1914, c. 74, § 1.) Office of receiver at Springfield, Mo., abolished, and duties imposed upon register; additional duties of register; fees, etc.

The office of receiver of public moneys at Springfield, Missouri, shall, ten days from and after the passage and approval of this Act, be abolished and cease to exist; and that all the powers, duties, obligations, and penalties at that time lawfully imposed upon such receiver, and upon the register of the land office at Springfield, Missouri, shall, from and after that date, be exercised by and imposed upon such register; and such register shall, in addition to the duties thus imposed, have charge of and attend to the sale of public lands within the State of Missouri, as provided by law and official regulation, and shall be accountable under his official bond for the proceeds of such sales, and for all fees, commissions, and other moneys received by him under any provision of law or official regulation: Provided, That all the fees and commissions now allowed by law to both such register and such receiver shall, ten days after the passage and approval of this Act, be paid to and accounted for by such register in the same manner and in like amounts in which they are now required to be paid to and accounted for by such receiver, but the salary, fees, and commissions of such register shall not exceed $3,000 per annum. (38 Stat. 371.)

This and the following section were an act entitled "An act to abolish the office of receiver of public moneys at Springfield, Missouri, and for other purposes," cited above.

§ 4515b. (Act May 2, 1914, c. 74, § 2.) Books, records, etc., of land office at Springfield, Mo., to be delivered to register as custodian.

All official and public books, papers, plats, records, and property of every description found and remaining in the said land office ten days from and after the approval of this Act shall be delivered to the register of the said office, who shall become the custodian of the same, under the direction of the Commissioner of the General Land Office. (38 Stat. 372.)

§ 4516. (Act Feb. 15, 1910, c. 28.) Land-office at Des Moines, Iowa, abolished; disposition of records.

The land office at Des Moines, Iowa, shall be, and is hereby, abol-

ished from and after the twenty-eighth day of February, nineteen hundred and ten; and the Secretary of the Interior is hereby authorized to transfer to the State of Iowa such of the transcripts, documents, and records of the office as are not required for the use of the United States and as the State may desire to preserve. (36 Stat. 193.)

This was an act entitled "An act to abolish the United States land office at Des Moines, Iowa."

See note to R. S. § 2256, ante, under this subchapter, as to the land-office abolished by this act.

§ 4517. (Act May 14, 1898, c. 299, § 12.) Land-districts and offices in Alaska; registers and receivers.

The President is authorized and empowered, in his discretion, by Executive order from time to time to establish or discontinue land districts in [the District of] Alaska, and to define, modify, or change the boundaries thereof, and designate or change the location of any land office therein; and he is also authorized and empowered to appoint, by and with the advice and consent of the Senate, a register for each land district he may establish and a receiver of public moneys therefor; and the register and receiver appointed for such district shall, during their respective terms of office, reside at the place designated for the land office. The registers and receivers of public moneys in the land districts of Alaska shall each receive an annual salary of one thousand five hundred dollars and the fees provided by law for like officers in the State of Oregon, not to exceed, including such salary and fees, a total annual compensation of three thousand dollars for each of said officers. (30 Stat. 414.)

This section was part of an act extending the homestead laws and providing for right of way for railroads in Alaska, cited above.

This section superseded the previous provisions of Act May 17, 1884, c. 53, § 8, 23 Stat. 26, which created Alaska a land-district, and located a land-office therefor at Sitka, and of Act July 24, 1897, c. 14, § 4, 30 Stat. 215, which authorized the President to divide the Territory into two land-districts, and also authorized the appointment of a register and receiver for the additional district; the surveyor-general to serve in both districts.

The number of land-offices and land-districts in Alaska was reduced to one, the location to be fixed by the President, by a provision of Act Feb. 14, 1902, c. 17, § 1, post, § 4518; but two additional land-districts were established by Act March 2, 1907, c. 2537, post, §§ 4519–4522.

The words "the district of," inclosed in brackets in this section, were superseded by the organization of Alaska as a territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

§ 4518. (Act Feb. 14, 1902, c. 17, § 1.) Land-districts and offices in Alaska.

On and after June first, nineteen hundred and two, the number of land offices and land districts in the district of Alaska is hereby reduced to one, the location of which shall be fixed by the President. (32 Stat. 20.)

This was a provision of the urgent deficiency appropriation act for the fiscal year 1902, cited above.

Two additional land districts in Alaska were established by Act March 2, 1907, c. 2537, post, §§ 4519–4522.

§ 4519. (Act March 2, 1907, c. 2537, § 1.) Additional land-districts in Alaska.

There are hereby created two additional land districts, the boundaries of which shall be designated by the President, in the [district] of Alaska, to be known as the Nome land district and the Fairbanks land district, with the land offices located, respectively, at Nome, Alaska, and Fairbanks, Alaska. (34 Stat. 1232.)

This section and the three sections next following were parts of an act entitled "An act to provide for the creation of additional land-districts in the District of Alaska."

Section 5 of the act provided that the act should be in force from and after July 1, 1907.

The word "district," inclosed in brackets in this section, was superseded by the organization of Alaska as a Territory, by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

§ 4520. (Act March 2, 1907, c. 2537, § 2.) Additional land-districts in Alaska; clerks of courts to be registers, and marshals to be receivers.

The clerks of the district courts at Nome and Fairbanks shall respectively be ex-officio registers of the land offices at Nome and Fairbanks and the marshals of the said courts at Nome and Fairbanks shall be ex-officio receivers of public moneys for the Nome and Fairbanks land districts. Said officers shall perform the several duties of register of the land office and receiver of public moneys for the land districts with all the powers incident to such offices to the same extent as now performed by the register of the land office and the receiver of public moneys at Juneau, Alaska. (34 Stat. 1232.)

§ 4521. (Act March 2, 1907, c. 2537, § 3.) Fees and commissions as compensation of officers in additional districts.

The said officers shall, in addition to their present compensation as clerk or marshal as provided by law, receive all the fees and commissions allowed by law for their services as registers of land offices and receivers of public moneys for land districts under the land laws: Provided, That any fees or commissions in excess of one thousand five hundred dollars per annum received by either such officials shall be paid into the Treasury of the United States: Provided, That no other salary than aforesaid shall be paid such registers and receivers. (34 Stat. 1232.)

The fees and commissions of registers and receivers were prescribed by R. S. § 2238, ante, § 4473, and other provisions referred to in the notes to that section.

§ 4522. (Act March 2, 1907, c. 2537, § 4.) Surveys in additional districts.

The surveyor-general of the district of Alaska, under the direction of the Secretary of the Interior, shall furnish the receivers of said land offices a sufficient quantity of numbers to be used in the different classes of official surveys that may be made in said Nome and Fairbanks land districts to meet the requirements thereof, and upon application by any person desiring to have an official survey made the receivers shall furnish a number or numbers for such survey or surveys, together with an order directing a qualified deputy surveyor to make the same, and such application, order, and the fee required to be paid to the surveyor-general in the district of Alaska shall be transmitted to the surveyor-general: Provided, That all surveys thus made shall be approved by the surveyor-general as at present. (34 Stat. 1232.)

CHAPTER THREE A

Withdrawal from Settlement, Location, Sale, or Entry

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes the provisions of Act June 25, 1910, c. 421, authorizing the President to make withdrawals of public lands in certain cases, and subsequent amendatory and additional acts relating to the subject.

Sec.
4523. Withdrawal by President from settlement, location, etc., and reservation of lands for water-power sites; irrigation, etc.
4524. Lands withdrawn open to exploration, discovery, etc., under mining laws applying to metalliferous minerals; rights of oc-

Sec.
cupants or claimants of oil or gas bearing lands; previous homestead, etc., entries, etc., excepted; no forest reserves to be created, etc., within certain States except by act of Congress.
4525. Reports of withdrawals to Congress.
4526. Withdrawal from location, entry, etc., and reservation of lands within Indian reservations, for power or reservoir sites, irrigation, etc.; reports of reservations to Congress.
4527. Exchange of private lands, over which Indian reservation is extended, for other lands.
4528. Opening of lands restored by the President to entry after withdrawals.
4529. Opening of lands restored by the Secretary of the Interior to entry after withdrawal.
4529a. Exchange of lands with state of North Dakota; reservation of lands exchanged for experiments in dry-land agriculture.

§ 4523. (Act June 25, 1910, c. 421, § 1.) Withdrawal by President from settlement, location, etc., and reservation of lands for water-power sites; irrigation, etc.

The President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands of the United States including [the District of] Alaska and reserve the same for water-power sites, irrigation, classification of lands, or other public purposes to be specified in the orders of withdrawals, and such withdrawals or reservations shall remain in force until revoked by him or by an Act of Congress. (36 Stat. 847.)

The words "the District of," inclosed in brackets in this section, were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

Provisions somewhat similar to those of this section, for reservation from location, etc., of lands within any Indian reservation, by the Secretary of the Interior, were made by Act June 25, 1910, c. 431, § 13, post, § 4526.

Provisions for withdrawal from entry of lands required for irrigation works and lands believed to be susceptible of irrigation from such works, and provisions for entry of lands to be irrigated, were made by Act June 17, 1902, c. 1093, §§ 3–5, post, §§ 4702–4704.

All lands which were occupied by settlers or persons entitled to make entries, etc., under the general homestead laws included in a tract of land west of the Navajo and Moqu reservations in Arizona, and withdrawn from settlement by executive order of January 8, 1900, are exempted from the operation of such withdrawal, and such settlers are authorized, within a prescribed period, to make homestead entries of not to exceed 160 acres of such land, and submit final proof of the existence of their rights at the date of the issue of the order of withdrawal, and patents are to issue therefor upon the payment of the legal fees and purchase price, by Act Aug. 11, 1916, c. 315, 39 Stat.

Notes of Decisions

Withdrawals or reservations.—The President's power to make temporary withdrawals of lands from entry is not negatived by this act. U. S. v. Midwest Oil Co. (1915) 35 Sup. Ct. 309, 316, 236 U. S. 459, 59 L. Ed. 641, overruling (D. C. 1913) 206 Fed. 141. And see Wood v. Beach (1895) 15 Sup. Ct. 410, 156 U. S. 548, 39 L. Ed. 528; Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co. (C. C. 1881) 13 Fed. 106; U. S. v. Payne (D. C. 1881) 8 Fed. 883; (1882) 17 Op. Atty. Gen. 258; (1889) 19 Op. Atty. Gen. 370.

—— **Validity of withdrawal.**—Although a withdrawal of public land from sale by the Secretary of the Interior for public use in connection with a forest reservation was unauthorized at the time, it is validated by the continued recognition of the withdrawal and use of the land since this act. U. S. v. Hodges (D. C. 1914) 218 Fed. 87.

—— **Effect of withdrawal.**—A withdrawal of lands from sale by competent authority for a lawful purpose operates to sever such lands from the public domain. Kansas Pac. Ry. Co. v. Atchison, T. & S. F. R. Co. (C. C. 1881) 13 Fed. 106. See, also, Wilcox v. Jackson ex dem. McConnel (1839) 13 Pet. 498, 513, 10 L. Ed. 264; U. S. v. Chicago (1849) 7 How. 185, 193, 12 L. Ed. 660. But is ineffectual as against a title previously acquired. Northern Pac. Ry. Co. v. Mitchell (D. C. 1913) 208 Fed. 469; Knudsen v. Omanson (1894) 10 Utah, 124, 37 Pac. 250.

—— **Effect on oil location.**—Where a grantee of an oil location was actually on the land, had expended large sums of money, and discovered oil before the passage of this act, such grantee's rights in the land were not affected by the withdrawal. U. S. v. McCutchen (D. C. 1914) 217 Fed. 650.

Protection of government land from trespass and waste.—The United States may maintain a suit in equity for an interlocutory mandatory injunction and a final decree of abatement to restrain continuous trespass and waste upon public land which has been withdrawn from sale and devoted to governmental use in connection with a forest reservation. U. S. v. Hodges (D. C. 1914) 218 Fed. 87.

§ 4524. (Act June 25, 1910, c. 421, § 2, as amended, Act Aug. 24, 1912, c. 369.) Lands withdrawn open to exploration, discovery, etc., under mining laws applying to metalliferous minerals; rights of occupants or claimants of oil or gas bearing lands; previous homestead, etc., entries, etc., excepted; no forest reserves to be created, etc., within certain States except by act of Congress.

All lands withdrawn under the provisions of this Act shall at all times be open to exploration, discovery, occupation, and purchase under the mining laws of the United States, so far as the same apply to metalliferous minerals: Provided, That the rights of any person who, at the date of any order of withdrawal heretofore or hereafter made, is a bona fide occupant or claimant of oil or gas bearing lands and who, at such date, is in the diligent prosecution of work leading to the discovery of oil or gas, shall not be affected or impaired by such order so long as such occupant or claimant shall continue in diligent prosecution of said work: Provided further, That this Act shall not be construed as a recognition, abridgment, or enlargement of any asserted rights or claims initiated upon any oil or gas bearing lands after any withdrawal of such lands made prior to June twenty-fifth, nineteen hundred and ten: And provided further, That there shall be excepted from the force and effect of any withdrawal made under the provisions of this Act all lands which are, on the date of such withdrawal, embraced in any lawful homestead or desert-land entry theretofore made, or upon which any valid settlement has been made and is at said date being maintained and perfected pursuant to law; but the terms of this proviso shall not continue to apply to any particular tract of land unless the entryman or settler shall continue to comply with the law under which the entry or settlement was made: And provided further, That hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created, within the limits of the States of California, Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (36 Stat. 847. 37 Stat. 497.)

The amendment of this section by Act Aug. 24, 1912, c. 369, cited above, consisted in the substitution of the words "metalliferous minerals," where they occur in the first clause as it reads here, for the words "minerals other than coal, oil, gas, and phosphates," of the section as originally enacted.

Provisions for entries under the homestead and desert land laws upon coal lands, and for their selection under the Carey Act, or their withdrawal under the Reclamation Act, reserving the coal to the United States, were made by Act June 22, 1910, c. 318, post, §§ 4666–4668, which was supplemented so as to allow the selection of such lands by the States, and their sale in isolated and disconnected tracts, by Act April 30, 1912, c. 99, post, § 4669.

Provisions for entries under the homestead and desert land laws of oil lands in the State of Utah, for their selection by the State under the Carey Act or grants by Congress, and for their withdrawal under the Reclamation Act, reserving the oil or gas to the United States, were contained in Act Aug. 24, 1912, c. 367, post, §§ 4638–4640.

Provisions for the appropriation, location, entry, etc., under the non-mineral land laws of the United States, of lands withdrawn or classified as containing phosphate, nitrate, etc., were made by Act July 17, 1914, c. 142, post, §§ 4640a–4640c.

Provisions for the selection of phosphate lands by the State of Idaho under indemnity and other land grants, reserving the phosphate and oil to the United States, were contained in Act Feb. 27, 1913, c. 85, post, §§ 4863–4865.

§ 4525. (Act June 25, 1910, c. 421, § 3.) Reports of withdrawals to Congress.

The Secretary of the Interior shall report all such withdrawals to Congress at the beginning of its next regular session after the date of the withdrawals. (36 Stat. 848.)

§ 4526. (Act June 25, 1910, c. 431, § 13.) Withdrawal from location, entry, etc., and reservation of lands within Indian reservations, for power or reservoir sites, irrigation, etc.; reports of reservations to Congress.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to reserve from location, entry, sale, allotment, or other appropriation any lands within any Indian reservation, valuable for power or reservoir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress: Provided, That if no irrigation project shall be authorized prior to the opening of any Indian reservation containing such power or reservoir sites the Secretary of the Interior may, in his discretion, reserve such sites pending future legislation by Congress for their disposition, and he shall report to Congress all reservations made in conformity with this Act. (36 Stat. 858.)

This section was part of an act for determining the heirs of deceased Indians, for the disposition and sale of allotments of deceased Indians, etc., cited above.

§ 4527. (Act April 21, 1904, c. 1402, § 1.) Exchange of private lands, over which Indian reservation is extended, for other lands.

Any private land over which an Indian reservation has been extended by Executive order, may be exchanged at the discretion of the Secretary of the Interior and at the expense of the owner thereof and under such rules and regulations as may be prescribed by the Secretary of the Interior, for vacant, nonmineral, nontimbered, surveyed public lands of equal area and value and situated in the same State or Territory. (33 Stat. 211.)

This was a provision of the Indian appropriation act for the fiscal year 1905, cited above.

A previous similar provision for exchange of "any private lands occupied by actual settlers over which an Indian reservation has been or may be extended by Executive order," was contained in the similar act for the preceding year, Act March 3, 1903, c. 994, § 1, 32 Stat. 1000.

§ 4528. (Act Sept. 30, 1913, c. 15, § 1.) Opening of lands restored by the President to entry after withdrawals.

Hereafter when public lands are excluded from national forests or released from withdrawals the President may, whenever in his judgment it is proper or necessary, provide for the opening of the lands by settlement in advance of entry, by drawing, or by such other method as he may deem advisable in the interest of equal opportunity and good administration, and in doing so may provide that lands so opened shall be subject only to homestead entry by actual settlers only or to entry under the desert-land laws for a period not exceeding ninety days, the unentered lands to be thereafter subject to disposition under the public-land laws applicable thereto. (38 Stat. 113.)

This section and the section next following were an act entitled "An act to authorize the President to provide a method for opening lands restored from reservation or withdrawal, and for other purposes."

§ 4529. (Act Sept. 30, 1913, c. 15, § 2.) Opening of lands restored by the Secretary of the Interior to entry after withdrawal.

Where under the law the Secretary of the Interior is authorized or directed to make restoration of lands previously withdrawn he may

also restrict the restoration as prescribed in section one of this Act. (38 Stat. 114.)

§ 4529a. (Act July 3, 1916, c. 219.) Exchange of lands with state of North Dakota; reservation of lands exchanged for experiments in dry-land agriculture.

Upon receipt of a proper deed from the State of North Dakota, executed under authority of the Act of its legislative assembly, approved February fifth, nineteen hundred and fifteen, reconveying to the United States title to section sixteen, township one hundred and thirty-eight north, range eighty-one west, fifth principal meridian, the Secretary of the Interior is authorized to issue patents to said State for such vacant, surveyed, unreserved, unoccupied, nonmineral public lands as may be selected by said State within its boundaries, not exceeding one thousand two hundred and eighty acres in aggregate area, and said section when so reconveyed shall not be subject to settlement, location, entry, or selection under the public-land laws, but shall be reserved for the use of the Department of Agriculture in carrying on experiments in dry-land agriculture at the Northern Great Plains Field Station, Mandan, North Dakota.

This was an act entitled "An act to authorize an exchange of lands with the state of North Dakota for promotion of experiments in dry-land agriculture, and for other purposes," cited above.

CHAPTER FOUR

Pre-emptions

(R. S. §§ 2257–2274. Repealed.)

Sections 2257–2274, 2277–2285, and 2287 were expressly repealed by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097, together with all other acts or parts of acts relating to the pre-emption of the public lands. Sections 2275, 2276, and 2286 were expressly excepted from the repeal. Section 2288 was not so excepted, but it was expressly amended by section 3 of said Act March 3, 1891, c. 561. All bona fide claims or rights under the pre-emption laws were saved and might be perfected under their provisions.

Section 2257 designated the lands of the United States subject to the right of pre-emption. Section 2258 enumerated the classes of lands not subject to the right of pre-emption. Section 2259 enumerated the persons entitled to pre-emption rights, and prescribed the number of acres to which each person was entitled upon payment to the United States of the minimum price. Section 2260 enumerated the classes of persons not entitled to pre-emption rights. Section 2261 provided that no person should be entitled to more than one pre-emptive right by virtue of section 2259, and that no person should, after having filed a declaration of intention to claim the benefits under said section, at any future time file a second declaration for another tract. Section 2262, as amended by Act June 9, 1880, c. 164, 21 Stat. 169, prescribed the oath to be taken by pre-emptionists, and made it the duty of the officer administering the oath to file a certificate thereof in the public land-office of the proper district, and to transmit a duplicate copy to the General Land-Office. Section 2263 required satisfactory proof of the settlement and improvement of the tract sought to be pre-empted, before any entries could be made under section 2259, and declared all assignments or transfers of any rights prior to the issuing of a patent null and void. Section 2264 provided that any person settling or improving a tract of land, subject at the time of settlement to private entry, with intent to purchase the same, should file with the register of the proper district a written statement describing the lands settled, and declaring an intention to claim the same; that pre-emptionists should, within twelve months from the date of settlement, make the proof, affidavit, and payment required by section 2262; and that a failure to make said proof, affidavit, and payment within the prescribed time should subject the land to entry by other purchasers. Section 2265 required all pre-emptionists for land not yet proclaimed for sale to make known their claims in writing within three months from the time of settlement, or forfeit their claims. Section 2266 required all pre-emptionists upon unsurveyed lands, open to settlement, to file

a declaratory statement within three months from the date of the receipt at the proper district land-office of the approved plat of the township embracing the settlement. Section 2267 provided that all claimants of pre-emption rights under sections 2265 and 2266 should make the proper proofs and payments within thirty months after the dates prescribed by said sections, respectively, for filing the declaratory notices had expired. Act July 26, 1894, c. 164, § 2, 28 Stat. 123, extended the time one year in certain cases. Section 2268 provided that pre-emptors who had taken the initiatory steps required by law for actual settlement, and who were called away by reason of being engaged in the military or naval services of the United States, were to be granted an extension of time, within which the performance of the various acts required to perfect their claims might be made. Section 2269 provided that upon the death of any person entitled to claim benefits of the pre-emption laws, before consummating his claim, his executor or administrator might file the papers necessary, and that the entry should be in favor of the heirs of said deceased pre-emptor, and that the patent thereon should cause the title to inure to such heirs in the same manner as if their names had been specifically mentioned. Section 2270 provided that non-compliance with any requisition of the pre-emption laws within the appointed time, due to a vacancy in the office either of the register or receiver, or both, should not work to the detriment of any claimant, but that the requisition might be complied with within the same period after the vacancies had been filled. Section 2271 provided that the chapter should be construed so as not to confer on any one a right of pre-emption by reason of a settlement made on a tract already disposed of, when such disposal had not been confirmed by the General Land-Office. Section 2272 provided that no person who had filed a notice of intention to claim any tract of land by pre-emption should be barred from the right to purchase such tract by private entry after the expiration of his right to pre-emption. Section 2273 provided for the determination of conflicting claims of two or more persons settling on the same tract of land. Section 2274 provided that if, whenever two or more persons settled upon unsurveyed lands, it should be found after survey thereof that they had settled upon the same legal subdivision, such settlers might make a joint entry of their lands, or that one settler might perform the statutory requirements for all, after having contracted with the other settlers to convey to them their proper shares. Sections 2275 and 2276, as amended by Act Feb. 28, 1891, c. 384 remained in force. Section 2277 provided for the payment for pre-emption lands with military bounty land warrants. Section 2278 provided for the payment for pre-emption lands with agricultural college scrip. Section 2279 limited the number of acres along the line of railroads subject to pre-emption to 160 to each person. Section 2280 provided that settlers on land reserved on account of claims under French, Spanish, or other grants should be entitled to all previously granted pre-emption rights, upon said claims being declared invalid by the Supreme Court. Section 2281 provided that all persons settling on lands prior to their withdrawal for railroad grants should be entitled to pre-empt said lands on the payment of the ordinary minimum, provided they filed the notice and made the proof and payment required in other cases. Section 2282 provided that nothing in the chapter should delay the sale of any of the public lands beyond the time appointed by the proclamation of the President. Section 2283 provided the manner of the sale of the Osage Indian trust and diminished-reserve lands in Kansas. Section 2284 provided that the transfer by any settler of his claim prior to April 26, 1871, should not preclude him from the right to pre-empt another tract under the provisions of the chapter. Section 2285 provided that the restrictions contained in sections 2260 and 2261 should not apply to settlers on the Osage Indian trust and diminished-reserve lands in Kansas. Section 2286 remained in force. Section 2287 provided that any bona fide settler under the homestead or pre-emption laws, who had filed a proper application to enter lands, should not be deprived of his right to perfect his title thereto by reason of the fact that he had subsequent to the filing of his application, been appointed a register or receiver. Section 2288 remained in force.

Numerous acts relating to both pre-emption and homestead rights subsequent to the enactment of the Revised Statutes, and prior to the passage of Act March 3, 1891, c. 561, are omitted from this chapter, as repealed in so far as applicable to pre-emption entries. Such as remain in force and applicable to homestead rights are set forth under Chapter 5 of this Title.

All bona fide claims lawfully initiated before the passage of the repealing act, under any of the provisions of law so repealed, might be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests, as if the act had not been passed, by a provision of section 4 of the act, Act March 3, 1891, c. 561, § 4, 26 Stat. 1097.

(R. S. § 2257. Repealed.)

Notes of Decisions

Statute construed and applied.—See Shepley v. Cowan (1875) 91 U. S. 330, 337, 23 L. Ed. 424; Buttz v. Northern Pac. R. Co. (1886) 7 Sup. Ct. 100, 106, 119 U. S. 55, 30 L. Ed. 330. And see Russell v. Beebe (C. C. 1855) Fed. Cas. No. 12,153; U. S. v. Garretson (C. C. 1890) 42 Fed. 22, 24; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Van Horn (D. C. 1912) 197 Fed. 611, 616; Morrow v. Warner Valley Stock Co. (Or. 1909) 101 Pac. 171; Dixon v. Same, Id. 189; Greene v. Same, Id.; Harrington v. Same, Id.; Foskett v. Same, Id. 190.

(R. S. § 2258. Repealed.)

Notes of Decisions

Statute construed and applied.—See Wilcox v. Jackson ex dem. McConnel (1839) 13 Pet. 498, 511, 10 L. Ed. 264; Hot Springs Cases (1875) 92 U. S. 698, 705, 23 L. Ed. 690; Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423; Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182 (reversing decree U. S. v. Southern Colorado Coal & Town Co. [C. C. 1883] 18 Fed. 273); Wood v. Beach (1895) 15 Sup. Ct. 410, 156 U. S. 548, 39 L. Ed. 528; Burfenning v. Chicago, St. P., M. & O. R. Co. (1896) 16 Sup. Ct. 1018, 1019, 163 U. S. 321, 41 L. Ed. 175; Northern Pac. R. Co. v. De Lacey (1899) 19 S. Ct. 791, 793, 174 U. S. 622, 43 L. Ed. 1111; Scott v. Carew (1905) 25 Sup. Ct. 193, 196, 196 U. S. 100, 49 L. Ed. 403 (affirming decree [1903] 121 Fed. 1021, 56 C. C. A. 684); Southern Pac. R. Co. v. Groeck (1898) 87 Fed. 970, 31 C. C. A. 334; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 13, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Root v. Shields (C. C. 1868) Fed. Cas. No. 12,038; U. S. v. Mullan (C. C. 1882) 10 Fed. 785, 787; Same v. Reed (C. C. 1886) 28 Fed. 482, 485; Same v. Garretson (C. C. 1890) 42 Fed. 22, 24; Ex parte Davidson (C. C. 1893) 57 Fed. 883, 884; U. S. v. La Chappelle (C. C. 1897) 81 Fed. 152; Same v. Payne (D. C. 1881) 8 Fed. 883, 886; (1881) 17 Op. Atty. Gen. 160; Kansas City Min. & Mill. Co. v. Clay (Ariz. 1892) 29 Pac. 9; U. S. v. Blackburn (1897) 48 Pac. 904, 5 Ariz. 162; Low v. Hutchings (1871) 41 Cal. 634; Jackson v. Wilcox (1837) 2 Ill. (1 Scam.) 344; Ballance v. Underhill (1844) 6 Ill. (1 Gilman) 113; Bellows v. Todd (1872) 34 Iowa, 18; Burfenning v. Chicago, St. P., M. & O. Ry. Co. (1891) 46 Minn. 20, 48 N. W. 444; Springer v. Clopath (1901) 65 Pac. 804, 26 Nev. 183; Salt Lake Inv. Co. v. Oregon Short Line R. Co. (Utah, 1914) 148 Pac. 439; Houlton v. Chicago, St. P., M. & O. Ry. Co. (1893) 86 Wis. 59, 56 N. W. 336.

Cited without definite application, U. S. v. Williams (C. C. 1886) 30 Fed. 309, 314, affirmed (1891) 11 Sup. Ct. 457, 138 U. S. 514, 34 L. Ed. 1026.

(R. S. § 2259. Repealed.)

Notes of Decisions

Statute construed and applied.—See U. S. v. Fitzgerald (1841) 15 Pet. 407, 10 L. Ed. 785; Lytle v. Arkansas (1850) 9 How. 314, 333, 13 L. Ed. 153; Barnard v. Ashley (1855) 18 How. 43, 46, 15 L. Ed. 285; Garland v. Wynn (1857) 20 How. 6, 7, 15 L. Ed. 801; Harkness v. Underhill (1861) 1 Black, 316, 323, 17 L. Ed. 208; Frisbie v. Whitney (1869) 9 Wall. 187, 194, 19 L. Ed. 668; Atherton v. Fowler (1877) 96 U. S. 513, 518, 24 L. Ed. 732; Bohall v. Dilla (1885) 5 Sup. Ct. 782, 784, 114 U. S. 47, 29 L. Ed. 61; Northern Pac. R. Co. v. De Lacey (1899) 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Bogan v. Edinburgh American Land Mortg. Co. (1894) 63 Fed. 192, 11 C. C. A. 128; U. S. v. Central Pac. R. Co. (1899) 94 Fed. 906, 36 C. C. A. 546; Northern Pac. Ry. Co. v. McCormick (1899) 94 Fed. 932, 36 C. C. A. 560; Gimmy v. Culverson (C. C. 1866) Fed. Cas. No. 5,454; Aiken v. Ferry (C. C. 1879) Fed. Cas. No. 112; Cahalan v. McTague (C. C. 1891) 46 Fed. 251; Northern Pac. R. Co. v. Amacker (C. C. 1892) 53 Fed. 48 (judgment reversed Amacker v. Northern Pac. R. Co. [1893] 58 Fed. 850, 7 C. C. A. 518); U. S. v. La Chappelle (C. C. 1897) 81 Fed. 157; Same v. Central Pac. R. Co. (C. C. 1897) 84 Fed. 88; Same v. Bedgood (D. C. 1891) 49 Fed. 54, 55; (1843) 4 Op. Atty. Gen. 147; (1855) 7 Op. Atty. Gen. 351; Rector v. Gaines (1857) 19 Ark. 70; People v. Folsom (1855) 5 Cal. 373; Garrison v. Sampson (1860) 15 Cal. 93; Page v. Hobbs (1865) 27 Cal. 483; Kile v. Tubbs (1865) 28 Cal. 402; Hutton v. Frisbie (1869) 37 Cal. 475; Iburg v. Suanet (1874) 47 Cal. 265; Burrell v. Haw (1874) 48 Cal. 222; Davis v. Scott (1880) 56 Cal. 165; Smer v. Duggan, Id. 257; McBrown v. Morris (1881) 59 Cal. 64; Haven v. Haws (1883) 63

Cal. 514; Kendall v. Waters (1885) 68 Cal. 26, 8 Pac. 510; Cothrin v. Faber (1885) 68 Cal. 39, 4 Pac. 940, 8 Pac. 599; Hambleton v. Duhain (1886) 71 Cal. 136, 11 Pac. 865; Merriam v. Bachioni (1896) 112 Cal. 191, 44 Pac. 481; St. Onge v. Day (1888) 11 Colo. 368, 18 Pac. 278; Forbes v. Driscoll (1887) 4 Dak. 336, 31 N. W. 633; Brown v. Throckmorton (1850) 11 Ill. (1 Peck) 529; Tatro v. French (1885) 5 Pac. 426, 33 Kan. 49; Ard v. Pratt (1890) 43 Kan. 419, 23 Pac. 646; Boyce v. Danz (1874) 29 Mich. 146; Busch v. Donohue (1875) 31 Mich. 481; Camp v. Smith (1858) 2 Minn. 155 (Gil. 131); Kelley v. Wallace (1869) 14 Minn. 236 (Gil. 173); McAfee's Heirs v. Keirn (1846) 15 Miss. (7 Smedes & M.) 780, 45 Am. Dec. 331; Ely v. Ellington (1842) 7 Mo. 302; Groves' Heirs v. Fulsome (1852) 16 Mo. 543, 57 Am. Dec. 247; Coleman v. Allen (1878) 5 Mo. App. 127 (affirmed [1882] 75 Mo. 332); Towsley v. Johnson (1871) 1 Neb. 95.

Cited without definite application, Clements v. Warner (1860) 24 How. 394, 16 L. Ed. 695; Minor v. Happersett (1874) 21 Wall. 162, 170, 22 L. Ed. 627; Lansdale v. Daniels (1879) 100 U. S. 113, 118, 25 L. Ed. 587; Potter v. U. S. (1883) 1 Sup. Ct. 524, 527, 107 U. S. 126, 27 L. Ed. 230; Orchard v. Alexander (1895) 15 Sup. Ct. 635, 157 U. S. 372, 39 L. Ed. 737; Minneapolis v. Reum (1893) 56 Fed. 576, 580, 6 C. C. A. 31; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 969, 972, 15 C. C. A. 96 (affirmed [1897] 17 Sup. Ct. 368, 165 U. S. 463, 41 L. Ed. 789); Grubbs v. U. S. (1900) 105 Fed. 314, 317, 44 C. C. A. 513; U. S. v. Williams (C. C. 1886) 30 Fed. 309, 314 (affirmed [1891] 11 Sup. Ct. 457, 138 U. S. 514, 34 L. Ed. 1026); Northern Pac. R. R. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145; Stimson Land Co. v. Rawson (C. C. 1894) 62 Fed. 426, 427; U. S. v. Payne (D. C. 1881) 8 Fed. 883, 886; Same v. Howard (D. C. 1889) 37 Fed. 666, 667; Same v. Blendauer (D. C. 1903) 122 Fed. 703, 708 (reversed [1904] 128 Fed. 910, 63 C. C. A. 636); Johnson v. U. S. (1866) 2 Ct. Cl. 391; Megerle v. Ashe (1867) 33 Cal. 74; Parsons v. Venzke (1894) 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669; Brown v. Corson (1888) 16 Or. 388, 19 Pac. 66, 21 Pac. 47.

(R. S. § 2260. Repealed.)

Notes of Decisions

Statute construed and applied.—See Aiken v. Ferry (C. C. 1879) Fed. Cas. No. 112.

Cited without definite application, Lansdale v. Daniels (1879) 100 U. S. 113, 118, 25 L. Ed. 587; Northern Pac. Ry. Co. v. De Lacey (1899) 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111; St. Paul, M. & M. R. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. R. R. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2261. Repealed.)

Notes of Decisions

Statute construed and applied.—See Johnson v. Towsley (1871) 13 Wall. 72, 89, 20 L. Ed. 485; Baldwin v. Starks (1883) 2 Sup. Ct. 473, 107 U. S. 463, 27 L. Ed. 526; Nix v. Allen (1884) 5 Sup. Ct. 70, 74, 112 U. S. 129, 28 L. Ed. 675; Sanford v. Sanford (1891) 11 Sup. Ct. 666, 139 U. S. 642, 35 L. Ed. 290; Montgomery v. Whiting (1870) 40 Cal. 294; Cumens v. Cyphers (1880) 56 Cal. 383; Smiley v. Sampson (1871) 1 Neb. 56; Sanborn v. Knight (1898) 75 N. W. 1009, 100 Wis. 216.

Cited without definite application, St. Paul, M. & M. R. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Durango Land & Coal Co. v. Evans (1897) 80 Fed. 425, 432, 25 C. C. A. 523; Smith v. Ewing (C. C. 1885) 23 Fed. 741, 746; Northern Pac. R. R. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2262. Repealed.).

Notes of Decisions

Statute construed and applied.—See U. S. v. Minor (1885) 5 Sup. Ct. 836, 838, 114 U. S. 233, 29 L. Ed. 110; Hyde v. Bishop Iron Co. (1900) 20 Sup. Ct. 592, 594, 177 U. S. 281, 44 L. Ed. 771; Hafemann v. Gross (1905) 26 Sup. Ct. 80, 81, 199 U. S. 342, 50 L. Ed. 220; American Mortg. Co. of Scotland v. Hopper (C. C. 1893) 56 Fed. 67 (judgment affirmed [1894] 64 Fed. 553, 12 C. C. A. 293); Same v. Crow (C. C. 1893) 56 Fed. 76 (following U. S. v. Steenerson [1892] 50 Fed. 504, 1 C. C. A. 552, disapproving Smith v. Ewing [C. C. 1885] 23 Fed. 741, and Wilson v. Fine [C. C. 1889] 40 Fed. 52, 5 L. R. A. 141, and distinguishing U. S. v. California & O. Land Co. [1893] 13 Sup. Ct. 458, 148 U. S. 31, 37 L. Ed. 354); California Redwood Co. v. Litle (C. C.

1897) 79 Fed. 854; U. S. v. Redgwood (D. C. 1891) 49 Fed. 54; Rogers v. Rawlings (Ala. 1838) 8 Port. 325; Cothran v. McCoy's Heirs (1858) 33 Ala. 65; Marshall v. Cowles (Ark. 1886) 48 Ark. 362, 3 S. W. 188; Farish v. Coon (1870) 40 Cal. 33; Damrell v. Meyer, Id. 166; Snow v. Kimmer (1878) 52 Cal. 624; Douglas v. Gould, Id. 656; Stewart v. Powers (1893) 98 Cal. 514, 33 Pac. 486; Id., 33 Pac. 489, 98 Cal. xviii; Wilcox v. John (1895) 21 Colo. 367, 40 Pac. 880, 52 Am. St. Rep. 246; Kneen v. Halin (1899) 59 Pac. 14, 6 Idaho, 621; McKean v. Crawford (1870) 6 Kan. 112; Same v. Massey, Id., 122; Watterson v. Kirkwood (1871) 8 Kan. 463; Ogden v. Walters (1873) 12 Kan. 282; Ainsworth v. Miller (1878) 20 Kan. 220; St. Peter Co. v. Bunker (1861) 5 Minn. 192 (Gil. 153); Evans v. Folsom (1861) 5 Minn. 422 (Gil. 342); Bruggerman v. Hoerr (1862) 7 Minn. 337 (Gil. 264), 82 Am. Dec. 97; Randall v. Edert (1862) 7 Minn. 450 (Gil. 359); Gray v. Stockton (1863) 8 Minn. 529 (Gil. 472); McCue v. Smith (1864) 9 Minn. 252 (Gil. 237), 86 Am. Dec. 100; Ferguson v. Kumler (1866) 11 Minn. 104 (Gil. 62); Warren v. Van Brunt (1867) 12 Minn. 70 (Gil. 36); Woodbury v. Dorman (1870) 15 Minn. 338 (Gil. 272); Jones v. Tainter (1870) 15 Minn. 512 (Gil. 423); Sharon v. Wooldrick (1872) 18 Minn. 354 (Gil. 325); Gross v. Hafeman (1903) 97 N. W. 430, 91 Minn. 1, 103 Am. St. Rep. 471; Bass v. Buker (1887) 6 Mont. 442, 12 Pac. 922; Norris v. Heald (1892) 12 Mont. 282, 29 Pac. 1121, 33 Am. St. Rep. 581; Rose v. Treadway (1868) 4 Nev. 455, 97 Am. Dec. 546; Treadway v. Wilder (1872) 8 Nev. 91; Larison v. Wilbur (1890) 1 N. D. 284, 47 N. W. 381; Ford v. Ford (S. D. 1910) 124 N. W. 1108; Carson v. Railsback (1887) 3 Wash. T. 168, 13 Pac. 618; Spaulding v. Wood (1858) 8 Wis. 195.

Cited without definite application, Potter v. U. S. (1883) 1 Sup. Ct. 524, 527, 107 U. S. 126, 27 L. Ed. 230; Orchard v. Alexander (1895) 15 Sup. Ct. 635, 636, 157 U. S. 372, 39 L. Ed. 737; Northern Pac. Ry. Co. v. De Lacey (1899) 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111; Hawley v. Diller (1900) 20 Sup. Ct. 986, 989, 178 U. S. 476, 44 L. Ed. 1157; Hill v. McCord (1904) 25 Sup. Ct. 96, 101, 195 U. S. 395, 49 L. Ed. 251; St. Paul, M. & M. R. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Swigett v. U. S. (D. C. 1896) 78 Fed. 456 (affirmed [1897] 83 Fed. 97, 27 C. C. A. 465).

(R. S. § 2263. Repealed.)

Notes of Decisions

Statute construed and applied.—See Lytle v. Arkansas (1850) 9 How. 314, 331, 13 L. Ed. 153; Barnard v. Ashley (1855) 18 How. 43, 45, 15 L. Ed. 285; Lytle v. Arkansas (1859) 22 How. 193, 16 L. Ed. 306; Harkness v. Underhill (1861) 1 Black, 316, 323, 17 L. Ed. 208; Lindsey v. Hawes (1862) 2 Black, 554, 17 L. Ed. 265; Myers v. Croft (1871) 13 Wall. 291, 295, 20 L. Ed. 562; Quinby v. Conlan (1881) 104 U. S. 420, 26 L. Ed. 800; Potter v. U. S. (1883) 1 Sup. Ct. 524, 527, 107 U. S. 126, 27 L. Ed. 230; Orchard v. Alexander (1895) 15 Sup. Ct. 635, 637, 157 U. S. 372, 39 L. Ed. 737; Gonzales v. French (1896) 17 Sup. Ct. 102, 105, 164 U. S. 338, 41 L. Ed. 458; Kellom v. Easley (C. C. 1870) Fed. Cas. No. 7,668; Hudson v. Milner (1847) 12 Ala. 667; Tenison v. Martin (1848) 13 Ala. 21; Cothran v. McCoy's Heirs (1858) 33 Ala. 65; Marston v. Rowe (1869) 43 Ala. 271; Wynn v. Morris (1855) 16 Ark. 414; Whitney v. Buckman (1859) 13 Cal. 536; Thurston v. Alva (1872) 45 Cal. 16; Thompson v. Doaksum (1886) 68 Cal. 593, 10 Pac. 199; Turner v. Donnelly (1886) 70 Cal. 597, 12 Pac. 469; Simpson v. Applegate (1888) 75 Cal. 342, 17 Pac. 237; Stewart v. Powers (1893) 98 Cal. 514, 33 Pac. 486; Merrill v. Clark (1894) 103 Cal. 367, 37 Pac. 238; Rupert v. Jones (1897) 51 Pac. 26, 119 Cal. 111; McMillen v. Gerstle (1893) 19 Colo. 98, 34 Pac. 681; Cooper v. Hunter (1896) 8 Colo. App. 101, 44 Pac. 944; Taylor v. Baker (1847) 1 Fla. (Branch) 245; Robbins v. Bunn (1870) 54 Ill. 48, 5 Am. Rep. 75; Stephens v. Hays (Ind. 1848) Smith, 177; Pierson v. David (1855) 1 Iowa (1 Clarke) 23; Snow v. Flannery (1860) 10 Iowa, 318, 77 Am. Dec. 120; De Land v. Day (1876) 45 Iowa, 37; McKean v. Crawford (1870) 6 Kan. 112; Same v. Massey, Id. 122; Lapham v. Head (1878) 21 Kan. 332; Kellam v. Rippey (La. 1842) 3 Rob. 138; Seaton v. Sharkey (1848) 3 La. Ann. 332; Arbour v. Nettles (1857) 12 La. Ann. 217; Penn v. Ott, Id. 233; Camp v. Smith (1858) 2 Minn. 155 (Gil. 131); Woodbury v. Dorman (1870) 15 Minn. 338 (Gil. 272); Sharon v. Wooldrick (1872) 18 Minn. 354 (Gil. 325); Olson v. Orton (1886) 28 Minn. 36, 8 N. W. 878; Fulton v. McAfee (1841) 6 Miss. (5 How.) 751; Glenn v. Thistle (1851) 23 Miss. (1 Cushm.) 42; Wilkerson v. Mayfield (1854) 27 Miss. (5 Cushm.) 542; Bower v. Higbee (1845) 9 Mo. 259; Coleman v. Allen (1882) 75 Mo. 332 (affirming [1878] 5 Mo. App. 127); Franklin v. Kelley (1872) 2 Neb. 79; Robinson v. Jones (1890) 31 Neb. 20, 47 N. W. 480; Pierce v. Frace (1891) 2 Wash. St. 81, 26 Pac. 807; Spaulding v. Wood (1858) 8 Wis. 195.

Cited without definite application, Northern Pac. Ry. Co. v. De Lacey

(1899) 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 210 U. S. 21, 52 L. Ed. 941; Hallock v. U. S. (1911) 185 Fed. 417, 107 C. C. A. 487 (certiorari denied [1911] 31 Sup. Ct. 717, 220 U. S. 613, 55 L. Ed. 610); Smith v. Ewing (C. C. 1885) 23 Fed. 741, 744; Northern Pac. R. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Bedgood (D. C. 1891) 49 Fed. 54, 58.

(R. S. § 2264. Repealed.)

Notes of Decisions

Statute construed and applied.—See Johnson v. Towsley (1871) 13 Wall. 72, 74, 20 L. Ed. 485; Northern Pac. Ry. Co. v. De Lacey (1899) 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111; Tarpey v. Madsen (1900) 20 Sup. Ct. 849, 851, 178 U. S. 215, 44 L. Ed. 1042; Amacker v. Northern Pac. R. Co. (1893) 58 Fed. 850, 7 C. C. A. 518 (reversing judgment [C. C. 1892] 53 Fed. 48, judgment affirmed Northern Pac. R. Co. v. Amacker [1898] 92 Fed. 1021, 34 C. C. A. 687, and [1900] 20 Sup. Ct. 236, 175 U. S. 564, 44 L. Ed. 274); Chicago, St. P., M. & O. Ry. Co. v. U. S. (1901) 108 Fed. 311, 47 C. C. A. 343; Union Pac. R. Co. v. City of Greeley (1911) 189 Fed. 1, 110 C. C. A. 571; U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143 (disapproving Whitney v. Taylor [C. C. 1891] 45 Fed. 616); Page v. Hobbs (1865) 27 Cal. 483; Hemphill v. Davies (1869) 38 Cal. 577; Collins v. Bartlett (1872) 44 Cal. 371; Hamilton v. Spokane & P. Ry. Co. (1891) 2 Idaho, 898, 28 Pac. 408; Baty v. Sale (1867) 43 Ill. 351, 92 Am. Dec. 128; Jackson v. Jackson (1888) 17 Or. 110, 19 Pac. 847.

Cited without definite application, Morrison v. Stalnaker (1881) 104 U. S. 213, 26 L. Ed. 741; Nelson v. Northern Pac. R. Co. (1903) 23 Sup. Ct. 302, 319, 188 U. S. 108, 47 L. Ed. 406 (dissenting opinion); St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 602, 210 U. S. 21, 52 L. Ed. 941; U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2265. Repealed.)

Notes of Decisions

Statute construed and applied.—See Johnson v. Towsley (1871) 13 Wall. 72, 90, 20 L. Ed. 485. And see Whitney v. Taylor (1895) 15 Sup. Ct. 796, 158 U. S. 85, 39 L. Ed. 906 (affirming judgment [C. C. 1891] 45 Fed. 616); Gonzales v. French (1896) 17 Sup. Ct. 102, 105, 164 U. S. 338, 41 L. Ed. 458; Northern Pac. Ry. Co. v. De Lacey (1899) 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111; Rio Grande Western Ry. Co. v. Stringham (Utah, 1910) 110 P. 868.

Cited without definite application, Morrison v. Stalnaker (1881) 104 U. S. 213, 215, 26 L. Ed. 741; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 602, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145.

(R. S. § 2266. Repealed.)

Notes of Decisions

Statutes construed and applied.—See Lansdale v. Daniels (1879) 100 U. S. 113, 115, 25 L. Ed. 587; Gonzales v. French (1896) 17 Sup. Ct. 102, 105, 164 U. S. 338, 41 L. Ed. 458; Northern Pac. R. Co. v. De Lacy (C. C. 1894) 66 Fed. 450 (judgment reversed De Lacey v. Northern Pac. R. Co. [1896] 72 Fed. 726, 19 C. C. A. 157, and Northern Pac. R. Co. v. De Lacey [1899] 19 Sup. Ct. 791, 174 U. S. 622, 43 L. Ed. 1111); Osborne v. Altschul (C. C. 1900) 101 Fed. 739; Damrell v. Meyer (1870) 40 Cal. 166; Daniels v. Lansdale (1872) 43 Cal. 41; Megerle v. Ashe (1874) 47 Cal. 632.

Cited without definite application, Morrison v. Stalnaker (1881) 104 U. S. 213, 26 L. Ed. 741; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 602, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. R. Co. v. McCormick (1899) 94 Fed. 932, 939, 36 C. C. A. 560; Same v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145.

(R. S. § 2267. Repealed.)

Notes of Decisions

Statute construed and applied.—See Gonzales v. French (1896) 17 Sup. Ct. 102, 105, 164 U. S. 338, 41 L. Ed. 458; Northern Pac. Ry. Co. v. De Lacey (1899) 19 Sup. Ct. 791, 795, 174 U. S. 622, 43 L. Ed. 1111 (reversing judgments De Lacey v. Northern Pac. R. Co. [1896] 72 Fed. 726, 19 C. C. A. 157, and Northern Pac. R. Co. v. De Lacy [C. C. 1894] 66 Fed. 450).

Cited without definite application, Morrison v. Stalnaker (1881) 104 U. S. 213, 215, 26 L. Ed. 741; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 210 U. S. 21, 52 L. Ed. 941; Smith v. Ewing (C. C. 1885) 23 Fed. 741, 744; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 7 C. C. A. 192).

(R. S. § 2268. Repealed.)

Cited without definite application, St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604, 607 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145.

(R. S. § 2269. Repealed.)

Notes of Decisions

Statute construed and applied.—See Quinn v. Chapman (1884) 4 Sup. Ct. 508, 111 U. S. 445, 28 L. Ed. 476; Buxton v. Traver (1889) 9 Sup. Ct. 509, 130 U. S. 232, 32 L. Ed. 920; Hutchinson v. Investment Co. v. Caldwell (1894) 14 Sup. Ct. 504, 505, 152 U. S. 65, 38 L. Ed. 356; Johnson v. Collins (1847) 12 Ala. 322; Elliott v. Figg (1881) 59 Cal. 117; Buxton v. Traver (1885) 67 Cal. 171, 7 Pac. 450; Wittenbrock v. Wheadon (1900) 60 P. 664, 128 Cal. 150, 79 Am. St. Rep. 32; Cady v. Eighmey (1880) 54 Iowa, 615, 7 N. W. 102; Wood v. Murray (1892) 85 Iowa, 505, 52 N. W. 356; Andrews v. Same (1892) 85 Iowa, 736, 52 N. W. 357; Rogers v. Clemmans (1881) 26 Kan. 522; Caldwell v. Miller (1890) 44 Kan. 12, 23 Pac. 946.

Cited without definite application, St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604, 607 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2270. Repealed.)

Cited without definite application, St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604, 607 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2271. Repealed.)

Cited without definite application, St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145.

(R. S. § 2272. Repealed.)

Notes of Decisions

Statute construed and applied.—See Allison v. Hunter (1846) 9 Mo. 749.

Cited without definite application, St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604, 607 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2273. Repealed.)

Notes of Decisions

Statute construed and applied.—See Barnard v. Ashley (1855) 18 How. 43, 45, 15 L. Ed. 285; Garland v. Wynn (1857) 20 How. 6, 7, 15 L. Ed. 801; Lindsey v. Hawes (1862) 2 Black, 554, 17 L. Ed. 265; Minnesota v. Batchelder (1863) 1 Wall. 109, 115, 17 L. Ed. 551; Johnson v. Towsley (1871) 13 Wall. 72, 81, 20 L. Ed. 485; Butterworth v. U. S. (1884) 5 Sup. Ct. 25, 28, 112 U. S. 50, 28 L. Ed. 656; In re Emblen (1896) 16 Sup. Ct. 487, 488, 161 U. S. 52, 40 L. Ed. 613; Smith v. Ewing (C. C. 1885) 23 Fed. 741; Glidden v. Union Pac. Ry. Co. (C. C. 1887) 30 Fed. 660; Wilson v. Fine (C. C. 1889) 40 Fed. 52; Ashley v. Cunningham (1855) 16 Ark. 168; Burrell v. Haw

(1870) 40 Cal. 373; Hess v. Bolinger (1874) 48 Cal. 349; Conlan v. Quinby (1876) 51 Cal. 412; McHarry v. Stewart (Cal. 1893) 35 Pac. 141; Godding v. Decker (1893) 3 Colo. App. 198, 32 Pac. 832; Gray v. McCance (1853) 14 Ill. (4 Peck.) 343; Bishop Iron Co. v. Hyde (1896) 66 Minn. 24, 68 N. W. 95.

Cited without definite application, Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415; Orchard v. Alexander (1895) 15 Sup. Ct. 635, 637, 157 U. S. 372, 39 L. Ed. 737; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Potter v. Tibbetts (C. C. 1890) 43 Fed. 505, 508; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192); U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145.

(R. S. § 2274. Repealed.)

Notes of Decisions

Statute construed and applied.—See Miles v. Johnson (1899) 56 Pac. 299, 18 Utah, 428.

Cited without definite application, Warren v. Van Brunt (1873) 19 Wall. 646, 652, 22 L. Ed. 219; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 145.

(R. S. §§ 2275, 2276. Transferred to Chapter 10A.)

R. S. §§ 2275, 2276, provided for the selection by the States or Territories of other sections for school purposes, where sections 6 or 16 in any township in which those sections were granted for school purposes had been settled on with a view to pre-emption or homestead, or where they were mineral land, or within an Indian reservation, or where sections 6 and 16 in any township were fractional or entirely wanting from any natural cause. They are set forth, as amended by Act Feb. 28, 1891, c. 384, under Chapter 10A of this Title, "Reservations and Grants to States for Public Purposes," post, §§ 4860, 4861.

(R. S. §§ 2277–2285. Repealed.)

See notes to R. S. §§ 2257–2274, ante, at the beginning of this Chapter.

(R. S. § 2279. Repealed)

Cited without definite application, Clements v. Warner (1860) 24 How. 394, 16 L. Ed. 695.

(R. S. § 2281. Repealed.)

Notes of Decisions

Statute construed and applied.—See Northern Pac. Ry. Co. v. McCormick (C. C. 1898) 89 Fed. 659; (1887) 18 Op. Atty. Gen. 571; Northern Pac. R. Co. v. Peronto (1882) 3 Dak. 217, 14 N. W. 103.

Cited without definite application, St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2282. Repealed.)

Cited without definite application, Moore v. Robbins (1877) 96 U. S. 530, 537, 24 L. Ed. 848; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Northern Pac. Ry. Co. v. Sanders (C. C. 1891) 47 Fed. 604 (affirmed [1892] 49 Fed. 129, 1 C. C. A. 192).

(R. S. § 2283. Repealed.)

Notes of Decisions

Statute construed and applied.—See Freese v. Scouten (1894) 53 Kan. 347, 36 Pac. 741; Ware v. Hitchcock (1902) 69 Pac. 355, 65 Kan. 328; Cooke v. Blakely (1897) 50 Pac. 981, 6 Kan. App. 707.

Cited without definite application, Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30.

(R. S. § 2286. Transferred to Chapter 10A.)

R. S. § 2286, granted to the several counties or parishes of the States and Territories in which there were public lands the right to pre-empt one quar-

ter-section of land for the establishment of seats of justice therein. It is set forth, under Chapter 10A of this Title, "Reservations and Grants to States for Public Purposes," post, § 4869.

(R. S. § 2287. Repealed.)

See notes to R. S. §§ 2257–2274, ante, at the beginning of this Chapter.

(R. S. § 2288. Transferred to Chapter 5.)

R. S. § 2288, as amended by Act March 3, 1891, c. 561, § 3, gave to any bona fide settler, under the pre-emption, homestead, or other settlement law, the right to transfer any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, canals, reservoirs, or ditches. It is set forth, as further amended by Act March 3, 1905, c. 1424, under Chapter 5 of this Title, "Homesteads," post, § 4535.

See notes to R. S. §§ 2257–2274, ante, at the beginning of this Chapter.

CHAPTER FIVE

Homesteads

Sec.
4530. Who may enter certain unappropriated public lands.
4531. Mode of procedure.
4532. Certificate and patent, when given and issued; leaves of absence; proof upon commutation; proof required where entryman dies; area of cultivation; enlarged homesteads; Nebraska arid land entries; entries under reclamation act; election as to mode of making proof.
4532a. Leaves of absence to entryman in one or two periods; proof on commutation.
4532b. Leaves of absence; persons entitled.
4533. Failure to give notice of election as to mode of final proof not to prejudice right of entryman to proceed under former law.
4534. Right of settler on unsurveyed land to elect as to law under which to make final proof.
4535. Right of transfer of settlers under homestead or pre-emption laws for certain public purposes.
4536. Relinquishment of claim; land open to entry.
4537. Cancellation of claim; notice to contestant; death of contestant.
4538. Time for settler to file homestead application and perfect entry; marriage of homestead entrywoman; preference rights to settlers on enlarged homesteads on non-irrigable lands; time for entry on enlarged homesteads.
4538a. Marriage of entryman to entrywoman not to impair right of either to patent.
4538b. Female citizen, having initiated claim to public land under any laws, marrying alien, to be entitled to certificate or patent as though unmarried.
4538c. Wife of settler or entryman, abandoned by husband, entitled to submit proof upon claim and obtain patent therefor.
4539. Notice of intention to make final proof.
4540. Taking testimony for final proof in case of unavoidable delay.
4541. Notice of contest; publication.
4542. Repayment of excess required to be paid on final proof or commutation.
4543. When rights inure to the benefit of infant children.
4544. Insanity of settlers; proof and payment by persons authorized to act for them.
4545. Persons in military or naval service, when and before whom to make affidavit.
4546. Officers before whom affidavits, proofs, etc., may be made; false swearing deemed perjury and punishable; fees.
4547. United States court commissioners; appointment.
4548. Administration of oaths in preliminary affidavits and final proofs under land laws.
4549. Place of residence of court commissioner.
4550. Record of applications.
4551. Homestead lands not to be subject to prior debts.
4552. When lands entered for homestead revert to Government.
4553. Leave of absence where crops destroyed or seriously injured by grasshoppers.
4554. Leave of absence on destruction or failure of crops, sickness, or other unavoidable casualty.
4555. Time for payment extended.
4556. Homestead entry or desert-land entry after former entry lost, forfeited, or abandoned, without fault.
4557. Limitation of amount entered for homestead.

Sec.
4558. Limitation of aggregate amount entered under any land laws.
4559. Lands entered under mineral land laws not included in amount limited.
4560. Additional entry after final proof on former entry of less than one quarter-section.
4561. Additional entry of land contiguous to former entry of less than one quarter section.
4562. Commutation of entries under this act not allowed.
4563. Enlarged homestead entries of nonmineral, nonirrigable, etc., lands, not containing merchantable timber, in certain States; lands to be designated as not irrigable.
4564. Applications for entry; affidavits; fees.
4565. Additional entry of land contiguous to former entry, not to exceed limitation.
4566. Proof of cultivation upon making final proofs; final proofs upon additional entries; extension of time for final proofs upon additional entries.
4567. Right to make homestead entries under Rev. St. § 2289, not affected by act; entries under act not to be commuted.
4568. Lands in Utah without supply of water for domestic use to be designated; requirements of residence and cultivation as to such lands.
4568a. Additional entry of land not contiguous to former entry; limitation of amounts; patents.
4568b. Enlarged homestead entries; applications for entry of lands not designated as subject to such entry; applications for additional entry of land adjoining original entry.
4568c. Enlarged homestead entries; provisions therefor extended to South Dakota.
4568d. Enlarged homestead entries; provisions therefor extended to Kansas.
4569. Enlarged homestead entries of non-mineral, non-irrigable lands, not containing merchantable timber in Idaho; lands to be designated as not irrigable.
4570. Applications for entry; affidavits; fees.
4571. Additional entry of land contiguous to former entry, not to exceed limitation.
4572. Proof of cultivation upon making final proofs; final proofs upon additional entries; extension of time for final proofs upon additional entries.
4573. Right to make homestead entries under Rev. St. § 2289, not affected by act; entries under act not to be commuted.
4574. Lands without supply of water for domestic use to be designated; requirements of residence and cultivation as to such lands; leaves of absence.
4574a. Enlarged homestead entries; noncontiguous lands; occupancy and improvements; soldiers' additional homesteads.
4575. Validation of certain entries, made in good faith upon enlarged homesteads, by persons who had theretofore acquired title under the homestead laws.
4576. Limitation of entries within certain boundaries in Nebraska extended; exclusion of irrigable lands from provisions of act.
4577. Additional entry of land contiguous to former entry, not to exceed in the aggregate the limitation as extended.
4578. Fees and commissions on entries; commutation of entries not allowed; improvements to be shown on final proof; entries under this act by former homestead entrymen.
4579. Benefits of Kinkaid Act extended to entries made within tract affected between April 28, 1904, and June 28, 1904.
4580. Benefits of military service extended to entries under the Kinkaid Act.
4581. Isolated tracts within limits affected by the Kinkaid Act to be sold; limitation of amount.
4582. Determination of qualifications of entrymen making additional entries upon Nebraska arid lands.
4583. Additional entry after commutation of former entry.
4584. Additional entry after loss or forfeiture of former entry; purchasers of Flathead Indian lands.
4585. Entries within limits of railroad grants; extent; additional entries.
4586. Entries within the limits of railroad grants; extent; additional entries.
4587. Entries within limits of railroad grants; patents for additional entries.
4588. What minors may have the privileges of this chapter.
4589. Payment before expiration of five years; rights of applicant.
4590. Commutation allowable after fourteen months.
4591. No distinction on account of race or color; mineral lands not subject to entry as homestead.
4592. Soldiers' and sailors' homestead.
4593. Deduction of military and naval service from time, etc.
4594. Persons who have entered less than 160 acres, rights of.

Sec.
4595. Soldiers' and sailors' entries canceled; repayment of fees.
4596. Homestead or other entries canceled or not confirmed; repayment of fees and purchase-money.
4597. Appropriation.
4598. Rules by Commissioner of General Land Office; warrants for payments.
4599. Amendment of Act June 16, 1880, c. 244; proof of loyalty not to be required.
4600. Soldiers' additional entries invalid; commutation.
4601. Soldiers' additional homestead certificates; sale.
4602. Widows and minor children of persons entitled to homestead, etc.
4603. Actual service in the Army or Navy equivalent to residence, etc.
4604. Service of homestead settlers in Army or Navy in time of war equivalent to actual residence, etc.
4604a. Act June 16, 1898, c. 458, applicable to military service rendered in connection with operations in Mexico.
4605. Who may enter by agent.
4606. Chiefs, etc., of Stockbridge Munsees, homestead rights of.
4607. Exemption of homestead of Stockbridge Munsees.
4608. Homestead laws extended over former Ute Indian Reservation in Colorado; certain entries prohibited.
4609. Reimbursement of Ute Indian fund.
4610. Lands on which the Government has improvements excepted from act.
4611. Indians abandoning tribal relations entitled to benefit of homestead laws.
4612. Indians located on public lands entitled to benefit of homestead laws; patents.

§ 4530. (R. S. § 2289, as amended, Act March 3, 1891, c. 561, § 5.) Who may enter certain unappropriated public lands.

Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one-quarter section, or a less quantity, of unappropriated public lands, to be located in a body in conformity to the legal subdivisions of the public lands; but no person who is the proprietor of more than one hundred and sixty acres of land in any State or Territory, shall acquire any right under the homestead law. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres.

Act May 20, 1862, c. 75, § 1, 12 Stat. 392. Act March 3, 1891, c. 561, § 5, 26 Stat. 1097.

This section, as originally enacted, was as follows:

"Every person who is the head of a family, or who has arrived at the age of twenty-one years, and is a citizen of the United States, or who has filed his declaration of intention to become such, as required by the naturalization laws, shall be entitled to enter one quarter-section or a less quantity of unappropriated public lands, upon which such person may have filed a pre-emption claim, or which may, at the time the application is made, be subject to pre-emption at one dollar and twenty-five cents per acre; or eighty acres or less of such unappropriated lands, at two dollars and fifty cents per acre, to be located in a body, in conformity to the legal subdivisions of the public lands, and after the same have been surveyed. And every person owning and residing on land may, under the provisions of this section, enter other land lying contiguous to his land, which shall not, with the land so already owned and occupied, exceed in the aggregate one hundred and sixty acres."

It was amended by Act March 3, 1891, c. 561, § 5, cited above, to read as set forth here; the part of the original section omitted in the amendment depending on the pre-emption laws, which were also repealed by section 4 of the same act, 26 Stat. 1097.

Homestead settlers who have entered less than 160 acres were allowed to enter additional lands by various provisions set forth post, §§ 4560–4567.

The amount of public land which any person may acquire by entry or settlement under any of the land laws was limited to 320 acres in the aggregate by a provision of Act Aug. 30, 1890, c. 837, § 1, post, § 4558.

Certain Indians are entitled to the benefits of the homestead laws, by R. S. §§ 2310, 2311, and subsequent provisions, post, §§ 4606–4612.

Chapter 4 of this Title, entitled "Pre-emptions," except sections 2275, 2276,

2286, and 2289, and all other laws allowing pre-emptions, were repealed by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes under said chapter, ante. Various acts, subsequent to the Revised Statutes and prior to Act March 3, 1891, c. 561, were in terms applicable to both pre-emption and homestead entries. These acts are inoperative as to pre-emptions, but so far as they remain in force and applicable to homesteads, are included under this chapter.

The provisions of the homestead laws were extended to Alaska, by Act May 14, 1898, c. 299, § 1, 30 Stat. 409, which was amended by Act March 3, 1903, c. 1002, post, § 5046.

Lands may be withdrawn from settlement, location, sale, or entry, and reserved for water-power sites, irrigation, classification, or other public purposes, by the President, by Act June 25, 1910, c. 421, ante, §§ 4523–4525.

Provisions somewhat similar, for reservation from location, etc., of lands within any Indian reservation, by the Secretary of the Interior, were made by Act June 25, 1910, c. 431, § 13, ante, § 4526.

Provisions for opening to homestead entry agricultural lands within forest reserves were made by Act June 11, 1906, c. 3074, § 1, post, § 5162.

Provisions for the reclassification of lands in Alabama to determine which are agricultural lands and which mineral lands, those designated as agricultural to be subject to homestead entry, were made by Act March 27, 1906, c. 1347, post, §§ 4656, 4657.

The right to make homestead entries under the provisions of this section was not affected by Act Feb. 19, 1909, c. 160, providing for enlarged homestead entries of lands, in certain states and territories named, designated as not irrigable, but no person making entry under that act is entitled to make homestead entry under this section, by section 5 of that act, post, § 4567.

The provision of the Naturalization Act of June 29, 1906, c. 3592, § 8, that no alien shall be naturalized or admitted to citizenship who can not speak the English language, does not apply to aliens who declare their intention to become citizens and make homestead entries on the public lands, by a proviso annexed to said section 8, ante, § 4364.

Where an alien, after declaration of intention to become a citizen becomes insane before he is actually naturalized, and his wife thereafter makes a homestead entry under the land laws, she and their minor children may be naturalized without making declaration of intention, by Act Feb. 24, 1911, c. 151, ante, § 4365.

The President was authorized to open by proclamation for settlement under the homestead laws the arid lands of the United States reserved for sites for irrigation purposes, and all lands made susceptible of irrigation by such reservoirs, etc., by Act Oct. 2, 1888, c. 1069, § 1, post, § 4696. So much of said act as reserved said sites and lands was repealed by Act Aug. 30, 1890, c. 837, § 1, post, § 4697.

Provisions relating to homestead entries, as well as to the sale, of lands in military reservations, which have been abandoned or have become useless for military purposes, or have been restored to the public domain, are collected or referred to in chapter 10H of this Title, "Abandoned Military Reservations."

Provisions relating to homestead entries on lands granted for railroads, after forfeiture, etc., of such grants, and for the relief of settlers on and purchasers of such lands, and which were of general application and remain in force, are set forth in chapter 10B of this Title, "Grants for Railroads and Wagon Roads." Other acts, making similar provisions for relief of settlers on lands granted to particular railroads, including grants and indemnity grants to the Northern Pacific Railroad, and lands in the States of North Dakota and South Dakota, within the limits of the projected extension of the grants of land to aid in construction of the several lines of railroad owned by the St. Paul, Minneapolis & Manitoba Railroad Company, being merely local in their nature, are omitted, but reference thereto is made in a note, to § 4917, post.

Provisions relating to homestead entries on lands acquired from the Indians and opened for settlement or other disposition, which are general in their nature, and remain in force, are set forth post, in chapter 10I of this Title, under subchapter "Ceded Indian Reservations and Lands." Other acts making similar provisions relating to homestead entries on lands acquired from particular Indian tribes, etc., usually providing that the particular tracts ceded shall be opened to settlement to actual settlers only, under the homestead laws, that R. S. § 2301, post, § 4589, shall not apply, and that settlers shall pay for the lands entered by them a fixed price per acre, being merely special and local in their nature, are omitted.

Provisions relating to homestead entries on lands in Greer county, Okl., are collected or referred to in chapter 10J of this Title, "Public Lands in Oklahoma."

Provisions for withdrawal from entry of lands required for irrigation works, and provisions for entries under the homestead laws of lands susceptible of irrigation from such works were made by the Reclamation Act of June 17,

1902, c. 1093, §§ 3–5, post, §§ 4702–4704; but, by a proviso annexed to said section 3, the commutation provisions of the homestead laws are not to apply to entries made under that act.

Provisions for exclusion from entry of irrigable lands within certain boundaries in Nebraska were made by the Kinkaid Act of April 28, 1904, c. 1801, § 1, post, § 4576.

Notes of Decisions

1. Who may enter public lands—Head of family.
2. —— Aliens.
3. —— Proprietor of other land.
4. Unappropriated public lands defined.
5. Lands open to homestead entry.
6. Lands not open to homestead entry.
7. Amount entered.
8. —— Departmental regulations.
9. Possessory rights in public lands.
10. Rights of settlers on unsurveyed land.
11. Removal of improvements.

1. Who may enter public lands—Head of family.—The law neither permits nor contemplates that both husband and wife shall take advantage thereof. Anderson v. U. S. (1913) 202 Fed. 200, 123 C. C. A. 118.

2. —— Aliens.—An alien, who has not declared his intention of becoming a citizen, cannot acquire a homestead. Call v. Los Angeles-Pacific Co. (C. C. 1908) 162 Fed. 926. But in the absence of an adverse claim one is not deprived of his right to enter by the fact that he made an application for and occupied the land as a homestead before he declared his intention to become a citizen. Bogan v. Edinburgh American Land Mortg. Co. (1894) 63 Fed. 192, 11 C. C. A. 128.

The use of different names by one in declaring his intention and in entering lands is immaterial, where the question is one of identity merely, and the identity is clearly established. Boyce v. Danz (1874) 29 Mich. 146.

An alien will be protected in the possession of public lands the same as a citizen, against any one whose title is not acquired from the government. Courtney v. Turner (1877) 12 Nev. 345.

3. —— Proprietor of other land.—If a settler is qualified when he takes up his residence and files on the land, he is not disqualified from making final proof because he afterward acquires more than 160 acres of other land. West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189.

One holding land by virtue of a receiver's final certificate prior to patent is not seized in fee simple of the land described, and is not on account thereof prohibited from entering public land. Gourley v. Countryman (1907) 90 Pac. 427, 18 Okl. 220.

4. Unappropriated public lands defined.—The words "public lands," if nothing be said to the contrary, relate to lands subject to disposition under the public land laws, and not to those set apart and used for some special public purpose. Stearns v. U. S. (1907) 152 Fed. 900, 82 C. C. A. 48, and cases cited. See, also, U. S. v. Williams (C. C. 1886) 30 Fed. 309, affirmed (1891) 11 Sup. Ct. 457, 138 U. S. 514, 34 L. Ed. 1026, and cases cited.

The fact that the title to land may be in the United States does not necessarily make it subject to settlement. U. S. v. Payne (D. C. 1881) 8 Fed. 883.

5. Lands open to homestead entry.—Residence and occupancy by a homestead claimant between the rejection, because not accompanied by a designation of the loss in the place limits, of a selection within the indemnity limits of a railroad land grant and a second approved indemnity selection of the same tract, initiated a homestead right superior to the indemnity selection. Svor v. Morris (1913) 33 Sup. Ct. 385, 227 U. S. 524, 57 L. Ed. 623, reversing judgment Morris v. Svor (1912) 136 N. W. 852, 118 Minn. 344.

Land left unsurveyed and designated as a lake. Gauthier v. Morrison (1914) 34 Sup. Ct. 384, 386, 232 U. S. 452, 58 L. Ed. 680.

Lands within the exterior limits of a private Mexican grant. Grant v. Oliver (1891) 91 Cal. 158, 27 Pac. 596.

Indemnity lands, not segregated from the public domain. Sjoli v. Dreschel (1905) 26 Sup. Ct. 154, 155, 199 U. S. 564, 50 L. Ed. 311; Northern Pac. Ry. Co. v. Wass (1908) 116 N. W. 937, 104 Minn. 411; Osborn v. Froyseth (Minn. 1908) 116 N. W. 1113; Northern Pac. Ry. Co. v. Wass (1908) 117 N. W. 1126; Houston v. Northern Pac. Ry. Co. (1909) 123 N. W. 922, 109 Minn. 273.

The unauthorized withdrawal from settlement of lands within the indemnity limits of a railway land grant does not prevent a homestead claim from attaching to such land, and such right will be protected as against the subsequent selection of the land by the railway company. Brandon v. Ard (1908) 29 Sup. Ct. 1, 4, 211 U. S. 11, 53 L. Ed. 68, affirming judgment (1906) 87 P. 366, 74 Kan. 424, 118 Am. St. Rep. 321.

Land relinquished by one who has mortgaged it; but his subsequent entry does not inure to the benefit of the mortgagee. Hebert v. Brown (C. C. 1895) 65 Fed. 2.

Only unoccupied and unimproved lands are subject to homestead settlement, though the possession of the prior occupant is wrongful as against the government. Harvey v. Holles (C. C. 1908) 160 Fed. 531.

But a competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable, adverse entry upon it while it is in the

possession of those who have no superior right to acquire the title or to hold the possession. Pacific Live Stock Co. v. Isaacs (Or. 1908) 96 P. 460; Morrow v. Warner Valley Stock Co. (Or. 1909) 101 P. 171; Dixon v. Same, Id. 189; Foskett v. Same, Id. 190.

Swamp lands before they have been identified as land belonging to the state. Morrow v. Warner Valley Stock Co. (1909) 101 P. 171, 56 Or. 312; Dixon v. Same, 101 P. 189, 56 Or. 364; Foskett v. Same, 101 P. 190, 56 Or. 366.

6. Lands not open to homestead entry.—Land in the possession of another. Lyle v. Patterson (1913) 33 Sup. Ct. 480, 228 U. S. 211, 57 L. Ed. 804 (affirming decree [1910] 176 Fed. 909, 100 C. C. A. 379); Id. (1910) 176 Fed. 909, 100 C. C. A. 379 (affirming decree [C. C. 1908] 160 Fed. 545, and decree affirmed [1913] 33 Sup. Ct. 480, 228 U. S. 211, 57 L. Ed. —); Dockendorf v. Bassett (1910) 176 Fed. 917, 100 C. C. A. 387 (affirming decree [C. C. 1908] 160 Fed. 543); Tustin v. Adams (C. C. 1898) 87 Fed. 377; Harvey v. Holles (C. C. 1908) 160 Fed. 531; Linebeck v. Vos (C. C. 1908) 160 Fed. 540; Dockendorf v. Bassett (C. C. 1908) 160 Fed. 543 (decree affirmed [1910] 176 Fed. 917, 100 C. C. A. 387); Lyle v. Patterson (C. C. 1908) 160 Fed. 545 (decree affirmed [1910] 176 Fed. 909, 100 C. C. A. 379, which is affirmed [1913] 33 Sup. Ct. 480, 228 U. S. 211, 57 L. Ed. —); Bishop v. Glassen (Cal. 1886) 12 Pac. 258; Bullock v. Rouse (1889) 81 Cal. 590, 22 Pac. 919; Rourke v. McNally (1893) 98 Cal. 291, 33 Pac. 62; Gragg v. Cooper (Cal. 1907) 89 Pac. 346; Carmichael v. Campodonico (Cal. App. 1908) 95 Pac. 164; Bisson v. Curry (1872) 35 Iowa, 72; Logan v. Davis (Iowa, 1910) 124 N. W. 808; Nickals v. Winn (1882) 17 Nev. 188, 30 Pac. 435; Same v. Bird (1882) 17 Nev. 195, 30 Pac. 436; Short v. Read (Nev. 1908) 96 P. 1060; Caldwell v. Bush (1895) 6 Wyo. 342, 45 Pac. 488. And see Caldwell v. Bush (Wyo. 1896) 46 Pac. 1092; Weeks v. White (1889) 41 Kan. 569, 21 Pac. 600.

Lands embraced in a prior entry, whether legal or illegal. Emblen v. Lincoln Land Co. (1902) 22 Sup. Ct. 523, 184 U. S. 660, 46 L. Ed. 736; Hodges v. Colcord (1904) 24 Sup. Ct. 433, 193 U. S. 192, 48 L. Ed. 677 (affirming [1902] 70 P. 383, 12 Okl. 313); McMichael v. Murphy (1905) 25 Sup. Ct. 460, 461, 197 U. S. 304, 49 L. Ed. 766 (affirming judgment [1902] 70 Pac. 189, 12 Okl. 155); James v. Germania Iron Co. (1901) 107 Fed. 597, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243; Jameson v. James (Cal. 1909) 100 Pac. 700; King v. Great Northern Ry. Co. (1911) 119 Pac. 709, 20 Idaho, 687; Sproat v. Durland (1894) 2 Okl. 24, 35 Pac. 682, 886; Holt v. Classen (Okl. 1907) 91 Pac. 866.

But when there is a mistake in entry, see Le Marchel v. Teagarden (C. C. 1907) 152 Fed. 662, decree reversed (1909) 175 Fed. 682, 99 C. C. A. 236.

A settler on land covered by a valid entry is a mere trespasser, and acquires no rights against a contestant who secures the cancellation of the first entry and is awarded the preference right to enter the land. Gourley v. Countryman (1907) 90 Pac. 427, 18 Okl. 220.

The almost uniform practice of the land department has been to regard land upon which an entry of record valid upon its face has been made as appropriated and withdrawn from subsequent homestead entry until the original entry be canceled or declared forfeited. Hastings & D. R. Co. v. Whitney (1889) 10 Sup. Ct. 112, 114, 132 U. S. 357, 33 L. Ed. 363.

Lands surrounding Seattle harbor. Ex parte Davidson (C. C. 1893) 57 Fed. 883.

The doctrine that one has the right to enter peaceably and make settlement on unoccupied public lands, which are subject to settlement, is inapplicable to lands which had been settled on and improved, and continuously remained in the possession of the original settlers and their grantees, for several successive years. Tidwell v. Chiricahua Cattle Co. (1898) 53 Pac. 192, 5 Ariz. 352. See, also, Neal v. Kayser (1909) 100 Pac. 439, 12 Ariz. 118.

Lands patented to prior entrymen. Lyle v. Patterson (1910) 176 Fed. 909, 100 C. C. A. 379 (affirming decree [C. C. 1908] 160 Fed. 545, and decree affirmed [1913] 33 Sup. Ct. 480, 228 U. S. 211, 57 L. Ed. 804); Linebeck v. Vos (C. C. 1908) 160 Fed. 540; Ard v. Pratt (1890) 43 Kan. 419, 23 Pac. 646.

Land withdrawn from sale. Wood v. Beach (1895) 15 Sup. Ct. 410, 411, 156 U. S. 548, 39 L. Ed. 528; (1887) 18 Op. Atty. Gen. 571; Mower v. Kemp (1890) 42 La. Ann. 1007, 8 South. 830; Sage v. Swenson (1896) 64 Minn. 517, 67 N. W. 544.

Land withdrawn to satisfy a railroad land grant. Hamblin v. Western Land Co. (1893) 13 Sup. Ct. 353, 356, 147 U. S. 531, 37 L. Ed. 267, following Wolcott v. Des Moines Nav. & R. Co. (1866) 5 Wall. 681, 18 L. Ed. 689; Wolsey v. Chapman (1879) 101 U. S. 755, 25 L. Ed. 915; Bullard v. Des Moines & Ft. D. R. Co. (1887) 7 Sup. Ct. 1149, 122 U. S. 167, 30 L. Ed. 1123, and U. S. v. Des Moines Nav. & Ry. Co. (1892) 12 Sup. Ct. 308, 142 U. S. 510, 35 L. Ed. 1099.

Land patented under adjustment act. Sullivan v. Damon (D. C. 1913) 202 Fed. 285.

Lands lying within the limits of a military reservation. Gavigan v. Crary (1905) 2 Alaska, 370.

Land granted by a confirmatory act of congress. Dudley v. Gallups (1901) 29 South. 616, 128 Ala. 236.

Land passed to a railroad company by a grant in aid of a railroad. Sousa v. Pereira (1901) 64 Pac. 90, 132 Cal. 77.

Lands certified to the state. Deweese v. Reinhard (1894) 61 Fed. 777, 10 C. C. A. 55, decree affirmed (1897) 17 Sup. Ct. 340, 165 U. S. 386, 41 L. Ed. 757.

Lands within the limits of an incorporated city or town. Burfenning v. Chicago, St. P., M. & O. R. Co. (1896) 16 Sup. Ct. 1018, 1019, 163 U. S. 321, 41 L. Ed. 175. See, also, King v. McAndrews (C. C. 1900) 104 Fed. 430, judgment reversed (1901) 111 Fed. 860, 50 C. C. A. 29.

Lands settled upon, occupied, and used for townsite purposes. White v. Whitcomb (1907) 90 Pac. 1080, 13 Idaho, 490.

Lands occupied by Indians. U. S. v. La Chappelle (C. C. 1897) 81 Fed. 152, 156.

Lands containing valuable coal or mineral deposits. Stearns v. U. S. (1907) 152 Fed. 900, 82 C. C. A. 48.

7. Amount entered.—"Additional farm homestead" allowed. Stewart v. McHarry (1895) 16 Sup. Ct. 117, 159 U. S. 643, 40 L. Ed. 290; McHarry v. Stewart (Cal. 1893) 35 Pac. 141.

A homesteader may embrace in his claim land in contiguous quarter sections, if he does not exceed the quantity allowed by law, and provided that his improvements are upon some portion of the tract, and that he does such acts as put the public upon notice of the extent of his claim. St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 210 U. S. 21, 52 L. Ed. 941.

8. —— Departmental regulations.—A regulation requiring affidavit by the entryman stating whether he has made other entries is properly addressed to the enforcement of the homestead laws. U. S. v. Smull (1915) 35 Sup. Ct. 349, 236 U. S. 405, 59 L. Ed. 641.

9. Possessory rights in public lands.—A possessory right, to enable the settler to segregate and hold land, can only be acquired by actual, as distinguished from constructive, possession. Hinchman v. Ripinsky (1908) 3 Alaska, 543.

Though not qualified to enter public land, a partnership can hold unsurveyed public land under a claim of possessory right and transfer it; one's capacity to initiate such right being subject to question only by the government. Neal v. Kayser (Ariz. 1909) 100 P. 439.

An alien will be protected in his possession, the same as a citizen, against mere naked trespassers who do not connect themselves with the government title. Courtney v. Turner (1877) 12 Nev. 345.

Where two parties are claiming the right to reside on a homestead—one by settlement, the other by filing in the land office—each party has a right to reside on and occupy the land until the land department has determined to whom the land belongs. Peckham v. Faught (1894) 2 Okl. 173, 37 Pac. 1085.

A mere trespasser cannot defend his possession by showing that the settler was the owner of 160 acres of land and therefore not capable of taking the land in question for a homestead. Switzler v. Earnheart (Or. 1911) 117 P. 296.

10. Rights of settlers on unsurveyed land.—Occupancy and improvement of unsurveyed land, in good faith, by a settler who makes it his home, with the intention of making entry of the same when it shall have been surveyed has always been recognized as lawful. Holmes v. U. S. (1902) 118 Fed. 995, 55 C. C. A. 489.

11. Removal of improvements.—A defeated entryman may remove the improvements or crops within a reasonable time. Richardson v. Bohney (Idaho, 1911) 114 Pac. 42.

Cited without definite application, U. S. v. Waddell (1884) 5 Sup. Ct. 35, 36, 112 U. S. 76, 28 L. Ed. 673; Baldwin v. Franks (1887) 7 Sup. Ct. 656, 665, 120 U. S. 678, 30 L. Ed. 766; Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231; Webster v. Luther (1896) 16 Sup. Ct. 963, 964, 163 U. S. 331, 41 L. Ed. 179; Payne v. Robertson (1898) 18 Sup. Ct. 337, 339, 169 U. S. 323, 42 L. Ed. 764; U. S. v. Ingram (1899) 19 Sup. Ct. 177, 178, 172 U. S. 327, 43 L. Ed. 465; Yerke v. U. S. (1899) 19 Sup. Ct. 441, 442, 173 U. S. 439, 43 L. Ed. 760; Jones v. Meehan (1899) 20 Sup. Ct. 1, 9, 175 U. S. 1, 44 L. Ed. 49; Messinger v. Eastern Oregon Land Co. (1900) 20 Sup. Ct. 271, 272, 176 U. S. 58, 44 L. Ed. 370; Hewitt v. Schultz (1901) 21 Sup. Ct. 309, 313, 180 U. S. 139, 45 L. Ed. 463; Powers v. Slaght (1901) 21 Sup. Ct. 319, 320, 180 U. S. 173, 45 L. Ed. 479; Nelson v. Northern Pac. R. Co. (1903) 23 Sup. Ct. 302, 303, 188 U. S. 108, 47 L. Ed. 406; Whitcomb v. White (1909) 29 Sup. Ct. 599, 600, 214 U. S. 15, 53 L. Ed. 889; Osborn v. Froyseth (1910) 30 Sup. Ct. 420, 422, 216 U. S. 571, 54 L. Ed. 619; Northern P. R. Co. v. Wass (1911) 31 Sup. Ct. 321, 324, 219 U. S. 426, 55 L. Ed. 280; Johannessen v. U. S. (1912) 32 Sup. Ct. 613, 615, 225 U. S. 227, 56 L. Ed. 1066; Bailey v. Sanders (1913) 33 Sup. Ct. 602, 228 U. S. 603, 57 L. Ed. 985; U. S. v. Buchanan (1914) 34 Sup. Ct. 237, 238, 232 U. S. 72, 58 L. Ed. 511; Minneapolis v. Reum (1893) 56 Fed. 576, 580, 6 C. C. A. 31; Barnes v. Poirier (1894) 64 Fed. 14, 18, 12 C. C. A. 9; Norton v. Evans (1897) 82 Fed. 804, 806, 27 C. C. A. 168; Grubbs v. U. S. (1900) 105 Fed. 314, 318, 44 C. C. A. 513; Ware v. Same (1907) 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann.

Cas. 233 (certiorari denied [1907] 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353); Gilson v. Same (1911) 185 Fed. 484, 107 C. C. A. 584; U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345 (reversing decree [C. C. 1909] 169 Fed. 686); Wright, Blodgett & Co. v. U. S. (1913) 203 Fed. 262, 121 C. C. A. 460; Hemmer v. Same (1912) 204 Fed. 898, 900, 123 C. C. A. 194; U. S. v. Hearing (C. C. 1886) 26 Fed. 744, 745; Same v. Reed (C. C. 1886) 28 Fed. 482, 485; Same v. Garretson (C. C. 1890) 42 Fed. 22, 24; Carr v. Fife (C. C. 1891) 44 Fed. 713; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 46; Kerns v. Lee (C. C. 1906) 142 Fed. 985; U. S. v. Laam (C. C. 1906) 149 Fed. 581, 582; Same v. Smith (C. C. 1910) 181 Fed. 545 (decree affirmed Linn & Lane Timber Co. v. U. S. [1912] 196 Fed. 593, 116 C. C. A. 267, amended on rehearing [1913] 203 Fed. 394, 121 C. C. A. 498); Daniels v. Wagner (D. C. 1912) 194 Fed. 973 (affirmed [1913] 205 Fed. 235, 125 C. C. A. 93); U. S. v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212; McCorkell v. Herron (1905) 103 N. W. 988, 128 Iowa, 324, 111 Am. St. Rep. 201; St. Paul & S. C. R. Co. v. Ward (1891) 47 Minn. 40, 49 N. W. 401; Sage v. Maxwell (1904) 99 N. W. 42, 91 Minn. 527; Kinyon v. Christianson (1913) 139 N. W. 597, 120 Minn. 335; Slocum v. Same (1913) 139 N. W. 599, 120 Minn. 528; Watt v. Amos (1904) 79 Pac. 109, 14 Okl. 178; Stewart v. Altstock (1892) 22 Or. 182, 29 Pac. 553.

§ 4531. (R. S. § 2290, as amended, Act March 3, 1891, c. 561, § 5.) Mode of procedure.

Any person applying to enter land under the preceding section shall first make and subscribe before the proper officer and file in the proper land office an affidavit that he or she is the head of a family, or is over twenty-one years of age, and that such application is honestly and in good faith made for the purpose of actual settlement and cultivation, and not for the benefit of any other person, persons or corporation, and that he or she will faithfully and honestly endeavor to comply with all the requirements of law as to settlement, residence, and cultivation necessary to acquire title to the land applied for; that he or she is not acting as agent of any person, corporation, or syndicate in making such entry, nor in collusion with any person, corporation or syndicate to give them the benefit of the land entered, or any part thereof, or the timber thereon; that he or she does not apply to enter the same for the purpose of speculation, but in good faith to obtain a home for himself, or herself, and that he or she has not directly or indirectly made, and will not make, any agreement or contract in any way or manner, with any person or persons, corporation or syndicate whatsoever, by which the title which he or she might acquire from the Government of the United States should inure, in whole or in part, to the benefit of any person, except himself, or herself, and upon filing such affidavit with the register or receiver on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he or she shall thereupon be permitted to enter the amount of land specified.

Act May 20, 1862, c. 75, § 2, 12 Stat. 392. Act March 21, 1864, c. 38, § 2, 13 Stat. 35. Act June 21, 1866, c. 127, § 2, 14 Stat. 67. Act March 3, 1891, c. 561, § 5, 26 Stat. 1097.

This section, as originally enacted, was as follows:

"The person applying for the benefit of the preceding section shall, upon application to the register of the land office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, or is twenty-one years or more of age, or has performed service in the Army or Navy of the United States, and that such application is made for his exclusive use and benefit, and that his entry is made for the purpose of actual settlement and cultivation, and not either directly or indirectly for the use or benefit of any other person; and upon filing such affidavit with the register or receiver, on payment of five dollars when the entry is of not more than eighty acres, and on payment of ten dollars when the entry is for more than eighty acres, he shall thereupon be permitted to enter the amount of land specified."

It was amended, to read as set forth here, by Act March 3, 1891, c. 561, § 5, cited above.

Notes of Decisions

1. Mode of acquiring title in general.
2. Departmental regulations.
3. Entry defined.
4. Entry in land office as initial step.

5. Occupancy without entry.
6. Place for making entry.
7. Filing application for entry.
8. Completion of entry.
9. Denial of application for entry.
10. Mistake in entry.
11. Bona fides of entryman.
12. Fraud in entry.
13. Entry for use of another.
14. Agreements or contracts forbidden.
15. Validity of conveyance pursuant to contract as against one claiming under patentee.
16. Agreements or contracts permitted.
17. Relinquishment by entryman.
18. Sale by entryman as relinquishment.
19. Payment by entrymen.
20. Recovery of payment.
21. Right acquired by entry.
22. Receipt issued to applicant as contract.
23. Entry as appropriation of land.
24. Possessory rights of entrymen.
25. Criminal conspiracy to defraud United States.

1. Mode of acquiring title in general.—The purpose of the law was to grant land to actual bona fide settlers. U. S. v. Richards (D. C. 1906) 149 Fed. 443, 450.

The law deals tenderly with one who, in good faith, goes upon the public lands with a view of making a home thereon. Northern Pac. R. Co. v. Amacker (1900) 20 Sup. Ct. 236, 237, 175 U. S. 564, 44 L. Ed. 274; Tarpey v. Madsen (1900) 20 Sup. Ct. 849, 850, 178 U. S. 215, 44 L. Ed. 1042. But he must initiate his right in the way prescribed by law. U. S. v. Union Pacific R. Co. (C. C. 1894) 61 Fed. 143, 145.

No rights adverse to the government can be acquired by an entry not authorized by law, though sanctioned in advance by the commissioner of the general land office. Puget Mill Co. v. Brown (C. C. 1893) 54 Fed. 987, judgment and decree affirmed (1893) 59 Fed. 35, 7 C. C. A. 643.

No right of property as against the government vests in a settler until he has complied with all the prerequisites for acquiring title. Oregon Short Line R. Co. v. Quigley (1905) 80 Pac. 401, 10 Idaho, 770; City of Guthrie v. Beamer (1895) 41 Pac. 647, 3 Okl. 652.

A settler who in good faith complies with the law is entitled, as against subsequent settlers, to pre-empt the land, but would derive no right thereto by purchasing the claim of a prior settler, unless by actual entry at the proper office he had acquired some right thereto. Rio Grande W. Ry. Co. v. Telluride Power Transmission Co. (1900) 63 P. 995, 23 Utah, 22, citing Quimby v. Conlan (1881) 104 U. S. 420, 26 L. Ed. 800.

2. Departmental regulations.—A department regulation that a homestead entryman must make affidavit whether he had made other entries is not repugnant to this section. U. S. v. Smull (1915) 35 Sup. Ct. 349, 236 U. S. 405, 59 L. Ed. 641. But the statute cannot be added to for criminal purposes by a regulation requiring an affidavit of the mineral character of the land. U. S. v. Maid (D. C. 1902) 116 Fed. 650.

3. Entry defined.—The word "entry" may be used and construed as applying to any or all of the steps necessary to acquire title. Bradford v. U. S. (1907) 152 Fed. 617, 81 C. C. A. 607; Stearns v. Same (1907) 152 Fed. 900, 82 C. C. A. 48; U. S. v. Northern Pac. Ry. Co. (C. C. 1911) 204 Fed. 485.

A homestead entry is not a simple entering into possession of the land, but three things must concur to constitute an entry on public lands: First, the applicant must make affidavit setting forth the facts which entitle him to make such an entry; second, he must make a formal application; and, third, he must make payment of the money required. When these three requisites are complied with, and the certificate of entry is executed and delivered to him, the entry is made. Hastings & D. R. Co. v. Whitney (1889) 10 Sup. Ct. 112, 114, 132 U. S. 357, 33 L. Ed. 363; U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861.

4. Entry in land office as initial step.—The entry in the local land office is the initial step towards acquiring title. The settler acquires no vested interest as against the government until such entry is made. Kansas Pac. R. Co. v. Dunmeyer (1885) 5 Sup. Ct. 566, 573, 113 U. S. 629, 28 L. Ed. 1122; Maddox v. Burnham (1895) 15 Sup. Ct. 448, 449, 156 U. S. 544, 39 L. Ed. 524; Whitney v. Taylor (1895) 15 Sup. Ct. 796, 800, 801, 158 U. S. 85, 39 L. Ed. 906 (affirming decree [C. C. 1891] 45 Fed. 616); Northern Pac. R. Co. v. Colburn (1896) 17 Sup. Ct. 98, 99, 164 U. S. 383, 41 L. Ed. 479, reviewing authorities; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243; (1881) 17 Op. Atty. Gen. 160; Jameson v. James (1909) 100 Pac. 700, 155 Cal. 275; Indian Cove Irr. Dist. v. Prideaux (Idaho, 1913) 136 Pac. 618; City of Guthrie v. Beamer (1895) 41 Pac. 647, 3 Okl. 652. See, also, Savage v. Worsham (C. C. 1895) 66 Fed. 852.

The entry may be made at any time after settlement and before another party commences a settlement. U. S. v. Blendauer (D. C. 1903) 122 Fed. 703, reversed (1904) 128 Fed. 910, 63 C. C. A. 636.

5. Occupancy without entry.—Mere occupancy of public lands and making improvements gives the settler no vested rights therein as against the United States, or a purchaser from it. Northern Pac. R. Co. v. Colburn (1896) 17 Sup. Ct. 98, 99, 164 U. S. 383, 41 L. Ed. 479; Russian-American Packing Co. v. U. S. (1905) 26 Sup. Ct. 157, 158, 199 U. S. 579, 50 L. Ed. 316;

Holmes v. U. S. (1902) 118 Fed. 995, 55 C. C. A. 489 (reversing judgment U. S. v. Holmes [C. C. 1900] 105 Fed. 41); U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371; Cahalan v. McTague (C. C. 1891) 46 Fed. 251; Northern Pac. Ry. Co. v. McCormick (C. C. 1898) 89 Fed. 659, 662; U. S. v. Holmes (C. C. 1900) 105 Fed. 41 (judgment reversed Holmes v. U. S. [1902] 118 Fed. 995, 55 C. C. A. 489); Le Fevre v. Amonson (1905) 81 Pac. 71, 11 Idaho, 45; McHenry v. Nygaard (1898) 74 N. W. 1106, 72 Minn. 2; Helstrom v. Rodes (1906) 83 Pac. 730, 30 Utah, 122.

Mere settlement on public lands creates only such rights in the entryman as are given by statute or recognized by rule of the land department. Delacey v. Commercial Trust Co. (1909) 99 Pac. 574, 51 Wash. 542.

6. Place for making entry.—The right of one who has actually occupied lands, with an intent to make a homestead entry, cannot be defeated by the mere lack of a place in which to make a record of his intent, if he makes his entry as soon as an office is opened. Tarpey v. Madsen (1900) 20 Sup. Ct. 849, 850, 178 U. S. 215, 44 L. Ed. 1042.

7. Filing application for entry.—The application is regarded as filed as of the date it is delivered for filing. Hasty v. Bonness (1901) 86 N. W. 896, 84 Minn. 120.

8. Completion of entry.—The entry is complete, so as to protect whatever preferential rights the homesteader has, without his actually going on the land, for which he is allowed six months from the date of the entry. McLemore v. Express Oil Co. (Cal. 1910) 112 Pac. 59.

9. Denial of application for entry.—The homesteader's application having been wrongfully rejected, he did not lose his rights by failure to take an appeal from the register, or by making a preemption filing, when his homestead application was rejected. Ard v. Brandon (1895) 15 Sup. Ct. 406, 408, 156 U. S. 537, 39 L. Ed. 524, reversing (1890) 23 Pac. 646, 43 Kan. 419. Compare Burnham v. Starkey (1889) 41 Kan. 604, 21 Pac. 624.

No vested right is obtained in a piece of government land, by reason of an application for a homestead entry thereon, when such application is denied. Baldwin v. Keith (1904) 75 P. 1124, 13 Okl. 624.

10. Mistake in entry.—See, also, notes to §§ 4777–4780, post.

A settler claiming the right to enter land as a homestead, who omits to insert in his application one 40-acre tract, acquires no right thereto. Kitteringham v. Blair Town Lot & Land Co. (1887) 73 Iowa, 421, 35 N. W. 502.

A settler, who has made lasting and valuable improvements and has attempted to make a homestead entry, but failed to include the exact tract, acquires an equitable title, not to be divested by the subsequent definite location of a railroad. Fearns v. Atchison, T. & S. F. R. Co. (1885) 33 Kan. 275, 6 Pac. 237.

11. Bona fides of entryman.—It is not a compliance with the law for a man to file on land with no intention of making it his home, but there must be a combination of act and intent to make the property entered his actual place of abode. U. S. v. Richards (D. C. 1906) 149 Fed. 443. See, also, Paine v. Foster (1896) 53 P. 109, 9 Okl. 213 (affirmed [1899] 59 Pac. 252, 9 Okl. 257); Pacific Live Stock Co. v. Gentry (1900) 61 Pac. 422, 38 Or. 275; Id. (1901) 65 Pac. 597, 38 Or. 275.

On a contest of an entry for abandonment, the secretary of the interior may cancel the entry on the ground that the contestee was not a bona fide homestead claimant, though that objection to the entry was not raised by the contestant. Carr v. Fife (C. C. 1891) 44 Fed. 713.

That land sought to be entered as a homestead by a settler thereon was covered with valuable timber and that its value for agricultural purposes may be questionable held not to warrant the inference that the entry was not made in good faith for legitimate homestead purposes. West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189.

12. Fraud in entry.—What constitutes such fraud as will invalidate an entry is a matter to be determined from the facts and circumstances of each particular case. Brandt v. U. S. (1912) 198 Fed. 449, 117 C. C. A. 208.

Fraud not inferred from the fact that a large number of entries may have been solicited and located by one person, if the entries themselves are legal. U. S. v. Richards (D. C. 1906) 149 Fed. 443. And further as to facts showing fraud, see Gilson v. U. S. (1911) 185 Fed. 484, 107 C. C. A. 584; Wright, Blodgett & Co. v. Same (1913) 203 Fed. 263, 121 C. C. A. 461; U. S. v. Belts (C. C. 1911) 192 Fed. 708.

13. Entry for use of another.—But the fact that the applicant has promised to concede a right of way over the premises for a neighborhood road does not render his affidavit false. U. S. v. Reed (C. C. 1886) 28 Fed. 482.

Title cannot inure to the benefit or in trust for any one other than the entryman. Carroll v. Draughon (Ala. 1911) 56 So. 207; Clark v. Bayley (1874) 5 Or. 343. Compare Barlow v. Barlow (1892) 47 Kan. 676, 28 Pac. 607.

A tenant in common cannot acquire a right of homestead to government land of which he is in possession for himself and his cotenants. Reinhart v. Bradshaw (1886) 19 Nev. 255, 9 Pac. 245, 3 Am. St. Rep. 886.

14. Agreements or contracts forbidden.—An agreement by one to enter lands for the benefit of another and to convey the same after acquiring title is a violation of the statute, and is void. Hardy v. Samuels, 122 S. W. 654, 92 Ark. 289; Anderson v. Carkins (1890) 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272; Bailey v. Sanders (1913) 33 Sup. Ct. 602, 228 U. S. 603, 57 L. Ed. 985 (affirming decree [1910] 177 Fed. 667, 101 C. C. A. 293); U. S. v. Richards (D. C. 1906) 149 Fed. 443, 450; Cox v. Donnelly (1879) 34 Ark. 762; Hardy v. Samuels (1909) 122 S. W. 654, 92 Ark. 289; In re Groome's Estate (1892) 94 Cal. 69, 29 Pac. 487; Moffatt v. Bulson (1892) 96 Cal. 106, 30 Pac. 1022, 31 Am. St. Rep. 192; Moore v. Moore (1900) 62 Pac. 294, 130 Cal. 110, 80 Am. St. Rep. 78; McCrillis v. Copp (1893) 31 Fla. 100, 12 South. 643; Harris v. McCrary (Idaho, 1909) 105 Pac. 558; Oaks v. Heaton (1876) 44 Iowa, 116; Mellison v. Allen (1883) 30 Kan. 382, 2 Pac. 97; Weeks v. White (1889) 41 Kan. 569, 21 Pac. 600; Carley v. Gitchell (1895) 105 Mich. 38, 62 N. W. 1003, 55 Am. St. Rep. 428; Collins v. Bounds (Miss. 1904) 36 South. 689; Dawson v. Merrille (1872) 2 Neb. 119; Carkins v. Anderson (1887) 21 Neb. 364, 32 N. W. 155; Higgins v. Butler (1900) 62 Pac. 810, 10 Okl. 345; Pacific Live-Stock Co. v. Gentry (1900) 61 Pac. 422, 38 Or. 275; Id. (1901) 65 Pac. 597, 38 Or. 275; Horseman v. Horseman (1903) 72 Pac. 698, 43 Or. 83; Jackson v. Baker (1906) 85 Pac. 512, 48 Or. 155; McMillan v. Wright (1909) 105 Pac. 176, 56 Wash. 114.

A contract by trespassers that they will make homestead entries when the lands are opened, and, after acquiring title, will make conveyances so as to adjust their title, is void as in violation of this act. Armstrong v. Henderson (1909) 102 Pac. 361, 16 Idaho, 566.

Even before the acquiring of even an equitable title to land as against the government, contracts made by actual settlers concerning their possessory rights and title hoped to be acquired from the United States may be valid as between the parties thereto and enforced in the courts. Clark v. Herington (1902) 22 Sup. Ct. 872, 874, 186 U. S. 206, 46 L. Ed. 1128.

Agreement to sell the land made by the entryman in advance of commuting his entry. Bailey v. Sanders (1913) 33 Sup. Ct. 602, 228 U. S. 603, 57 L. Ed. 985, affirming decree (1910) 177 Fed. 667, 101 C. C. A. 293.

The forbidden agreement need not be in writing, nor of sufficient form or of a nature to be enforced; but it is sufficient that the minds of the parties have met definitely, so that there was a mutual consent that, when the applicant acquired title, it should inure to the benefit of the other for a consideration. U. S. v. Richards (D. C. 1906) 149 Fed. 443.

A conveyance of a homestead under a power of attorney, executed before application for entry. Nichols v. Council (1888) 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20.

Any agreement by a homesteader to transfer his claim or any interest therein, before final proof, except as expressly authorized by the homestead law, is void. Cascade Public Service Corporation v. Railsback (Wash. 1910) 109 P. 1062.

15. Validity of conveyance pursuant to contract as against one claiming under patentee. — One claiming under a trust deed from the patentee, with knowledge of a prior conveyance of the timber and a right of way, cannot challenge the validity of such conveyance because it was made pursuant to an agreement entered into prior to the patent, in consideration of an advance of money to enable entryman to perfect his entry to obtain the patent. Hartman v. Butterfield Lumber Co. (1905) 26 Sup. Ct. 63, 64, 199 U. S. 335, 50 L. Ed. 217.

16. Agreements or contracts permitted. — A homestead entryman may acquire a valid title, though his entry was made with a view of disposing of the land after he had completed his purchase, provided that at the time and before the completion thereof he had not entered into any agreement whereby such other should receive any of the benefit of such purchase. The entryman may agree with any person at any time that when he has proved up on his land, if he desires to sell, he will give that person the first option to buy; such option in itself not being a violation of the law. U. S. v. Richards (D. C. 1906) 149 Fed. 443.

That parties desired and did lease homestead lands could not make them responsible for any failure of the entrymen to comply with the law relating to settlement or residence. Id.

One who has fully complied with all of the requirements of the law, and received the receiver's certificate, may dispose of the lands before the issuance of a patent. Doll v. Stewart (1902) 70 P. 326, 30 Colo. 320; Newkirk v. Marshall (1886) 10 Pac. 571, 35 Kan. 77; Gregory v. Kenyon (1892) 34 Neb. 640, 52 N. W. 685; Hyde v. Holland (1890) 18 Or. 331, 22 Pac. 1104; Knight v. Leary (1882) 54 Wis. 459, 11 N. W. 600.

When a portion of certain lands conveyed belongs to the United States, and the vendor agrees with the vendee that the latter shall enter it, and be reimbursed by the vendor for all expenses in perfecting his title, the entry in pursuance of such agreement does not infringe this section. Purcell v. Lay (1887) 84 Ala. 287, 4 South. 196. See, also, Frink v. Hoke (1899) 56 Pac. 1093, 35 Or. 17.

Neither is the statute violated by

uniting with another as a partner, in building a mill on the land, giving to such partner an interest therein and in its profits for his advances. Hot Springs R. Co. v. Tyler (1880) 36 Ark. 205. Or by a conveyance of a water right. Mt. Carmel Fruit Co. v. Webster (1903) 73 Pac. 826, 140 Cal. 183. Or by a contract to sell made by a homesteader who thereafter perfects his title and executes a deed to the purchaser without further stipulation as to terms of payment. Sutphen v. Sutphen (1883) 30 Kan. 510, 2 Pac. 100. Or by an agreement by an applicant, after his application, and before issue of the patent thereon, that he will convey the land as soon as he shall make final proof of his claim thereto, upon a consideration to be paid to him at that time. Townsend v. Fenton (1883) 30 Minn. 528, 16 N. W. 421. Or by a contract settling rights of persons jointly occupying lands. Waring v. Loomis (1904) 76 Pac. 510, 35 Wash. 85. See, also, Waring v. Loomis (Wash. 1908) 93 Pac. 1088, and Sweesey v. Sparling (1890) 81 Iowa, 433, 46 N. W. 1068, 25 Am. St. Rep. 506, 9 L. R. A. 777.

Unless forbidden by positive law, contracts made by actual settlers, concerning their possessory rights, and concerning title to be acquired in the future from the United States, are valid, as between the parties, though there be at the time no act of congress by which title may be acquired. McKennon v. Winn (1893) 1 Okl. 327, 33 Pac. 582, 22 L. R. A. 501, following Lamb v. Davenport (1873) 85 U. S. (18 Wall.) 307, 21 L. Ed. 759.

17. Relinquishment by entryman.—See, also, notes to § 4536, post.

The sale and relinquishment of homestead rights was not prohibited. Lindersmith v. Schwiso (1871) 17 Minn. 26 (Gil. 10).

18. Sale by entryman as relinquishment.—A sale of a homestead claim before patent has issued, although void, may be treated by the land department as a relinquishment or abandonment by the seller of his homestead application and entry. Love v. Flahive (1907) 27 Sup. Ct. 486, 488, 205 U. S. 195, 51 L. Ed. 768, affirming judgment (1905) 83 Pac. 882, 33 Mont. 348, and rehearing denied (1907) 27 Sup. Ct. 729, 206 U. S. 356, 51 L. Ed. 1092. And in such case the seller cannot, by merely continuing in possession, create a new right of entry as against the party in whose favor he has relinquished his right. Love v. Flahive (1907) 27 Sup. Ct. 729, 206 U. S. 356, 51 L. Ed. 1092, denying rehearing (1907) 27 Sup. Ct. 486, 205 U. S. 195, 51 L. Ed. 768.

19. Payment by entrymen.—The custom in allowing an entry for only 160 acres and making entrymen pay for an excess in a subdivision platted as a quarter section, but in fact containing more, is not an erroneous practice. Tictin v. U. S. (1900) 36 Ct. Cl. 1.

20. Recovery of payment.—One who voluntarily abandons his entry cannot recover back the money which he paid. Tictin v. U. S. (1900) 36 Ct. Cl. 1.

21. Right acquired by entry.—A qualified entryman, who enters public lands with intent to acquire title, has a vested right, of which he can only be deprived by failure to comply with the law. Daniels v. Wagner (D. C. 1912) 194 Fed. 973, affirmed (1913) 205 Fed. 235, 125 C. C. A. 93.

The party who first commences his proceedings to acquire the title has the better right. Young v. Shinn (1874) 48 Cal. 26.

22. Receipt issued to applicant as contract.—Issuing a filing receipt does not constitute a contract between the applicant and the United States, and the former obtains no vested right to the land filed on. Forman v. Healey (N. D. 1909) 121 N. W. 1122, and cases cited.

23. Entry as appropriation of land.—The entry operates as an appropriation of the land covered by it, and segregates this tract from the mass of the public domain. Hastings & D. R. Co. v. Whitney (1889) 10 Sup. Ct. 112, 132 U. S. 357, 33 L. Ed. 363; Sturr v. Beck (1890) 10 Sup. Ct. 350, 352, 133 U. S. 541, 33 L. Ed. 761; U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243; Same v. Turner (C. C. 1892) 54 Fed. 228, and cases cited; (1881) 17 Op. Atty. Gen. 160; Heine v. Roth (1905) 2 Alaska, 416; King v. Great Northern Ry. Co. (1911) 119 Pac. 709, 20 Idaho, 687.

Public land ceases to be such after it has been surveyed and filed on by a qualified entryman. Cheney v. Minidoka County (1914) 144 Pac. 343, 26 Idaho, 471.

24. Possessory rights of entrymen.—The homesteader from his entry has a title sufficient against third parties to support suits in equity or at law. Knapp v. Alexander-Edgar Lumber Co. (1915) 35 Sup. Ct. 515, 237 U. S. 162, 59 L. Ed. 894, reversing judgment (1911) 130 N. W. 504, 145 Wis. 528, 140 Am. St. Rep. 1091.

The entryman acquires the inchoate right to the land and its possession, which may be perfected by residence and improvements. U. S. v. Waddell (1884) 5 Sup. Ct. 35, 36, 112 U. S. 76, 28 L. Ed. 673; Flint & P. M. Ry. Co. v. Gordon (1879) 2 N. W. 648, 41 Mich. 420.

A homesteader has not the legal title before final proof, but has an immediate equitable interest and the exclusive right of possession until forfeited by failure to carry out the terms of entry. U. S. v. Turner (C. C. 1892) 54 Fed. 228. He is entitled to exclusive possession against all adverse claimants, except one having a valid, prior,

equal, or superior right. Thompson v. Basler (1906) 84 P. 161, 148 Cal. 646, 113 Am. St. Rep. 321; Hasty v. Bonness (1901) 86 N. W. 896, 84 Minn. 120; Culbertson Irrigating & Water Power Co. v. Olander (1897) 71 N. W. 298, 51 Neb. 539; Tiernan v. Miller & Leith (1903) 96 N. W. 661, 69 Neb. 764; Brown v. Donnelly (1899) 59 Pac. 975, 9 Okl. 32; Cope v. Braden (1901) 67 Pac. 475, 11 Okl. 291; McQuiston v. Walton (1902) 69 Pac. 1048, 12 Okl. 130; Brown v. Hartshorn (1902) 69 Pac. 1049, 12 Okl. 121; Burns v. Noell (1902) 69 Pac. 1076, 12 Okl. 133; Steele v. Noell (1902) 69 Pac. 1077, 12 Okl. 137; Bay v. Oklahoma Southern Gas, Oil & Mining Co. (1903) 73 Pac. 936, 13 Okl. 425; Hackney v. McKee (1903) 75 Pac. 535, 12 Okl. 401; Reservation State Bank v. Holst (1903) 95 N. W. 931, 17 S. D. 240, 70 L. R. A. 799; Stofferan v. Okanogan County (Wash. 1913) 136 Pac. 484.

The receiver's receipt will support an action by the entryman to recover damages to the land inflicted by a wrongdoer who does not connect himself with any claim or interest in the land. Gulf, C. & S. F. Ry. Co. v. Clark (1900) 101 Fed. 678, 41 C. C. A. 597. And see Hiwannee Lumber Co. v. McPhearson (Miss. 1909) 47 South. 741.

Where a settler who has attempted to make a homestead entry is in open and exclusive possession, such possession is sufficient to put all persons upon inquiry, and all persons are bound to take notice of his rights in the property. Fearns v. Atchison, T. & S. F. R. Co. (1885) 6 Pac. 237, 33 Kan. 275.

25. **Criminal conspiracy to defraud United States.**—See notes to § 10201, post.

Cited without definite application, Baldwin v. Franks (1887) 7 Sup. Ct. 656, 665, 763, 120 U. S. 678, 30 L. Ed. 766; Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231; Stewart v. McHarry (1895) 16 Sup. Ct. 117, 118, 159 U. S. 643, 40 L. Ed. 290; Black v. Jackson (1900) 20 Sup. Ct. 648, 651, 177 U. S. 349, 44 L. Ed. 801; Nelson v. Northern Pac. R. Co. (1903) 23 Sup. Ct. 302, 319, 188 U. S. 108, 47 L. Ed. 406 (dissenting opinion); Hill v. McCord (1904) 25 Sup. Ct. 96, 101, 195 U. S. 395, 49 L. Ed. 251; Buchser v. Buchser (1913) 34 Sup. Ct. 46, 47, 231 U. S. 157, 58 L. Ed. 166; Norton v. Evans (1897) 82 Fed. 804, 806, 27 C. C. A. 168; Grubbs v. U. S. (1900) 105 Fed. 314, 319, 44 C. C. A. 513; Stearns v. Same (1907) 152 Fed. 900, 82 C. C. A. 48; Ware v. Same (1907) 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233 (certiorari denied [1907] 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353); Nurnberger v. Same (1907) 156 Fed. 721, 725, 84 C. C. A. 377; Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296; U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345 (reversing decree [C. C. 1909] 169 Fed. 686); Hemmer v. U. S. (1912) 204 Fed. 898, 900, 123 C. C. A. 194; U. S. v. Hearing (C. C. 1886) 26 Fed. 744, 746; Same v. Howard (D. C. 1889) 37 Fed. 666; Same v. Nelson (D. C. 1912) 199 Fed. 464; Shorman v. Eakin (1886) 47 Ark. 351, 1 S. W. 559; Stewart v. Altstock (1892) 22 Or. 182, 29 Pac. 553.

§ 4532. (R. S. § 2291, as amended, Act June 6, 1912, c. 153.) Certificate and patent, when given and issued; leaves of absence; proof upon commutation; proof required where entryman dies; area of cultivation; enlarged homesteads; Nebraska arid land entries; entries under reclamation act; election as to mode of making proof.

No certificate, however, shall be given or patent issued therefor until the expiration of three years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry, or if he be dead his widow, or in case of her death his heirs or devisee, or in case of a widow making such entry her heirs or devisee, in case of her death, proves by himself and by two credible witnesses that he, she, or they have a habitable house upon the land and have actually resided upon and cultivated the same for the term of three years succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States, then in such case he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law: Provided, That upon filing in the local land office notice of the beginning of such absence, the entryman shall be entitled to a continuous leave of absence from the land for a period not exceeding five months in each year after

establishing residence, and upon the termination of such absence the entryman shall file a notice of such termination in the local land office, but in case of commutation the fourteen months' actual residence as now required by law must be shown, and the person commuting must be at the time a citizen of the United States: Provided, That when the person making entry dies before the offer of final proof those succeeding to the entry must show that the entryman had complied with the law in all respects to the date of his death and that they have since complied with the law in all respects, as would have been required of the entryman had he lived, excepting that they are relieved from any requirement of residence upon the land: Provided further, That the entryman shall, in order to comply with the requirements of cultivation herein provided for, cultivate not less than one-sixteenth of the area of his entry, beginning with the second year of the entry, and not less than one-eighth, beginning with the third year of the entry, and until final proof, except that in the case of entries under section six of the enlarged-homestead law double the area of cultivation herein provided shall be required, but the Secretary of the Interior may, upon a satisfactory showing, under rules and regulations prescribed by him, reduce the required area of cultivation: Provided, That the above provision as to cultivation shall not apply to entries under the Act of April twenty-eighth, nineteen hundred and four, commonly known as the Kinkaid Act, or entries under the Act of June seventeenth, nineteen hundred and two, commonly known as the reclamation Act, and that the provisions of this section relative to the homestead period shall apply to all unperfected entries as well as entries hereafter made upon which residence is required: Provided, That the Secretary of the Interior shall, within sixty days after the passage of this Act, send a copy of the same to each homestead entryman of record who may be affected thereby, by ordinary mail to his last known address, and any such entryman may, by giving notice within one hundred and twenty days after the passage of this Act, by registered letter to the register and receiver of the local land office, elect to make proof upon his entry under the law under which the same was made without regard to the provisions of this Act.

Act June 21, 1866, c. 127, § 2, 14 Stat. 67. Act June 6, 1912, c. 153, 37 Stat. 123.

This section, as originally enacted, was as follows:

"No certificate, however, shall be given, or patent issued therefor, until the expiration of five years from the date of such entry; and if at the expiration of such time, or at any time within two years thereafter, the person making such entry; or if he be dead, his widow; or in case of her death, his heirs or devisee; or in case of a widow making such entry, her heirs or devisee, in case of her death, proves by two credible witnesses that he, she, or they have resided upon or cultivated the same for a term of five years immediately succeeding the time of filing the affidavit, and makes affidavit that no part of such land has been alienated, except as provided in section twenty-two hundred and eighty-eight, and that he, she, or they will bear true allegiance to the Government of the United States; then, in such case, he, she, or they, if at that time citizens of the United States, shall be entitled to a patent, as in other cases provided by law."

It was amended by Act June 6, 1912, c. 153, cited above, to read as set forth here; the principal changes being the reduction of the time from five years to three, the requirement of proof by the entryman, as well as by witnesses, and the addition of the numerous provisos.

R. S. § 2288, mentioned in this section, is set forth post, § 4525.

The Kinkaid Act of April 28, 1904, c. 1801, mentioned in this section, is set forth post, §§ 4576–4578, and the Reclamation Act of June 17, 1902, c. 1093, is set forth post, §§ 4700–4708.

Provisions that the proof and oath required by this section might be made before the judge, or in his absence before the clerk, of any court of record in the county and State, or district and Territory, in which the lands were situated, by an act entitled "An act to amend section twenty-two hundred and ninety-one of the Revised Statutes of the United States, in relation to proof required in homestead entries," Act March 3, 1877, c. 122, § 1, 19 Stat. 403, and false swearing before such officer was to be punished the same as if before

the register, by section 4 of that act, 19 Stat. 404. These sections were superseded by somewhat similar provisions applying to all affidavits and proof under the various land laws in R. S. § 2294, as amended by acts subsequent to said provisions, post, § 4546.

A provision that the failure of a homestead entryman to give notice of election of making his proof, as required by this section, should not prejudice his rights to proceed in accordance with the law under which such entry was made by Act Aug. 24, 1912, c. 355, post, § 4533.

A provision that any person entitled to enter lands under the homestead laws, who might have established residence upon unsurveyed lands prior to the enactment of this section, as amended in 1912, might perfect his proof for such lands under this section, as amended in 1912, or under the law existing at the time of such residence, as he might elect, signifying his election to the Department of the Interior in accordance with rules and regulations to be prescribed by the Secretary, was made by Act March 4, 1913, c. 149, post, § 4534.

Rights of infant children, in case of the death of both father and mother, were provided for by Rev. St. § 2292, post, § 4543.

Notice of intention to make final proof must be given, and publication thereof made, by Act March 3, 1879, c. 192, post, § 4539.

Whenever a vacancy occurs in the office of either the register or receiver, the remaining officer may take the final proof, by Act Oct. 1, 1890, c. 1269, § 2, ante, § 4496.

The time for making final proof, where such proof and payment had not been made, was extended one year from the time when such proof was required, by Act July 26, 1894, c. 164, 28 Stat. 123.

Publication of notices of contest was provided for by Act June 3, 1878, c. 152, § 1, post, § 4541.

Provisions for relinquishment of claims, for cancellation of entries and notice thereof to contestants, and for allowance to settlers of time to file applications, were made by Act May 14, 1880, c. 89, § 1, post, § 4536.

Provisions relating to suspended entries and claims and invalid and defective claims, and the disposition thereof, were made by R. S. §§ 2450–2457, and subsequent statutes, post, §§ 5106–5115.

The procedure in applications, entries, contests, and adjudications in the Territory of Oklahoma are to be in form and manner prescribed under the homestead laws by Act May 2, 1890, c. 182, § 20, post, § 5021, except as modified by said act, and Act March 1, 1889, c. 317, 25 Stat. 759, and Act March 2, 1889, c. 412, §§ 12–14, 25 Stat. 1004.

Where more than the lawful purchase money is required to be paid by homestead settlers on final proof or commutation, the excess is to be repaid, by Act March 2, 1907, c. 2568, post, § 4542.

The provision of this section as to leaves of absence was superseded by a provision of Act Aug. 22, 1914, c. 270, post, § 4532a.

Further provision as to leaves of absence were made by Act July 3, 1916, c. 214, post, § 4532b.

Leaves of absence for not to exceed one year because of crop failures, etc., were authorized by §§ 4553, 4554, post.

Notes of Decisions

1. Alienations by entryman.
2. —— Mortgage as alienation.
3. —— Grant of right of way.
4. —— Transfer of equitable title.
5. —— Transfer of timber.
6. Devise by entryman.
7. Timber—Rights of entrymen to cut and remove.
8. Possessory rights and improvements as subjects of transfer by settler.
9. Title acquired by entryman on compliance with law.
10. —— Final certificate as conveyance of equitable title.
11. —— Final receipt and certificate as evidence.
12. —— Government as trustee for entryman.
13. Patent—Essentials of right to patent in general.
14. —— Residence and cultivation by entryman.
15. —— Findings of land department as to residence and cultivation.
16. —— Proof and patent where entryman dies.
17. —— Proof and patent where entryman deserts wife.
18. —— Recitals in patent.
19. —— Validity of patent.
20. —— Conclusiveness of patent.
21. —— Application of doctrine of relation to patents.
22. —— Cancellation of patent.
23. —— Cancellation as against bona fide purchasers.
24. State laws as fixing status of entryman's property.

1. Alienations by entryman.—"Alienation" involves the complete transfer of the property, to another. Stark v. Duvall (1898) 54 Pac. 453, 7 Okl. 213.

The entryman, on making final proof, must file an affidavit that he has not directly or indirectly alienated, or agreed to alienate, the land. Such agreements cannot be enforced. Anderson v. Carkins (1890) 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272; Harris v. McCrary (1909) 105 Pac. 558, 17 Idaho, 300; Sutphen v. Sutphen (1883) 2 Pac. 100, 30 Kan. 510; Wood v. Noel (1906) 40 South. 857, 116 La. 516.

See, also, St. Louis Min. & Mill. Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 64, 171 U. S. 650, 43 L. Ed. 320; Barnes v. Poirier (1894) 64 Fed. 14, 18, 12 C. C. A. 9; In re Cohn (D. C. 1909) 171 Fed. 568, 570. And see Frink v. Hoke (1899) 56 Pac. 1093, 35 Or. 17; Nichols v. Council (1888) 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20.

One claiming under a trust deed from the patentee, with knowledge of a prior conveyance of the timber and a right of way, cannot challenge the validity of such conveyance because it was made pursuant to an agreement entered into prior to the patent, in consideration of an advance of money to enable the entryman to perfect his entry and obtain the patent. Hartman v. Butterfield Lumber Co. (1905) 26 Sup. Ct. 63, 64, 199 U. S. 335, 50 L. Ed. 217.

That the purchaser of a homestead bought before final certificate or patent issued did not charge him with notice of the entryman's failure to comply with the homestead law. U. S. v. Murphy (C. C. 1909) 193 Fed. 802.

The statute applies only to alienations made after the filing of the homestead claim. Hays v. Steiger (1888) 76 Cal. 555, 18 Pac. 670.

A conveyance of a water right is not conveyance of "land." Mt. Carmel Fruit Co. v. Webster (1903) 73 Pac. 826, 140 Cal. 183.

A lease of the land by a homesteader gives the lessee a right of possession similar to that of his lessor. Tiernan v. Miller & Leith (1903) 96 N. W. 661, 69 Neb. 764.

2. —— **Mortgage as alienation.**—See, also, notes to § 4551, post.

A mortgage is not an alienation within the statute. Hubbard v. Mulligan (1899) 57 Pac. 738, 13 Colo. App. 116; Runyan v. Snyder (1909) 45 Colo. 156, 100 Pac. 420; Fuller v. Hunt (1878) 48 Iowa, 163; McFall v. Murray (Kan. 1896) 45 Pac. 1100, 4 Kan. App. 554; Stark v. Morgan (1906) 85 Pac. 567, 73 Kan. 453, 6 L. R. A. (N. S.) 934; Dickerson v. Bridges (1898) 147 Mo. 235, 48 S. W. 825; Stark v. Duvall (1898) 54 Pac. 453, 7 Okl. 213; Weber v. Laidler (1901) 66 Pac. 400, 26 Wash. 144, 90 Am. St. Rep. 726.

A mortgage given prior to the making of final proof is void. Biddle v. Adams (1896) 46 Pac. 986, 5 Kan. App. 734 (following Brewster v. Madden [1875] 15 Kan. 249, and Mellison v. Allen [1883] 2 Pac. 97, 30 Kan. 382). See, also, Marley v. Sturkert (1901) 86 N. W. 1056, 62 Neb. 163, 89 Am. St. Rep. 749.

But where the mortgagor afterwards procures the title from the government, his after-acquired title inures to the benefit of the mortgagee. Stark v. Morgan (1906) 85 Pac. 567, 73 Kan. 453, 6 L. R. A. (N. S.) 934; Stark v. Duvall (1898) 54 Pac. 453, 7 Okl. 213. See, also, Kirkaldie v. Larrabee (1866) 31 Cal. 455, 89 Am. Dec. 205.

A mortgage executed by an entryman after he has made final proof and received final certificate is valid. Fariss v. Deming Inv. Co. (1897) 49 Pac. 926, 5 Okl. 496.

A mortgage executed before expiration of the five years' residence is void. Stark v. Fallis (Okl. 1910) 109 Pac. 66.

3. —— **Grant of right of way.**—See, also, notes to § 4535, post.

A homesteader may, even before final proof, grant a right of way to a railroad, provided no damage is done under it to the freehold. U. S. v. Turner (C. C. 1892) 54 Fed. 228, 230.

4. —— **Transfer of equitable title.**—A homestead entryman has, after making final proof, an equitable title, which may be transferred by him. S. S. Dale & Sons v. Griffith (Miss. 1908) 46 South. 543; Laughlin v. Fariss (1897) 50 Pac. 254, 7 Okl. 1; Peterson v. Sloss (1905) 81 Pac. 744, 39 Wash. 207; Kent Lumber Co. v. Clarke (1914) 140 Pac. 556, 79 Wash. 523. See, also, Walker v. Johnson (Fla. 1907) 43 South. 771; Nicholson v. Congdon (1905) 103 N. W. 1034, 95 Minn. 188.

This rule is not applicable where the entry was not in good faith, but in fraud of the law. U. S. v. Lonabaugh (D. C. 1907) 158 Fed. 314, judgment reversed Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56. The purchaser takes only the equity of his vendor, subject to the authority of the Land Department to cancel the entry, while the legal title remains in the United States, if it is found that the entry is based upon an error of law or a clear misapprehension of the facts, which, if not corrected, will lead to the transfer of the government's title to one not entitled to it. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651.

5. —— **Transfer of timber.**—A transfer of standing timber by the entryman prior to the grant of a patent is against public policy and void. K. C. Lumber Co. v. Moores (1914) 212 Fed. 153, 129 C. C. A. 1. But see Anderson v. Wilder (1904) 35 South. 875, 83 Miss. 606; Orrell v. Bay Mfg. Co. (1904) 36 South. 561, 83 Miss. 800, 70 L. R. A. 881.

The purchaser of standing timber from an entryman holding only a final receipt is chargeable with notice that the legal title is in the government, and that the certificate is subject to cancellation by the land department for cause, and, where it is so canceled, cannot claim, as a bona fide purchaser, better title than his vendor had. Moses v. Long-Bell Lumber Co. (1913) 206 Fed. 51, 124 C. C. A. 185. See, also, Potter v. U. S. (1903) 122 Fed. 49, 58 C. C. A. 231; U. S. v. Kennedy (1913) 206 Fed. 47, 124 C. C. A. 181; Same v. Union Naval Stores Co. (1913) 206 Fed. 57, 124 C. C. A. 191.

A lease of trees by an entryman is

void. Millikin v. Carmichael (1902) 33 South. 9, 134 Ala. 623, 92 Am. St. Rep. 45. But see Orrell v. Bay Mfg. Co. (1904) 36 South. 561, 83 Miss. 800, 70 L. R. A. 881; Id. (1906) 40 South. 429, 87 Miss. 632.

6. Devise by entryman.—An entryman has a right to devise his homestead entry to some one other than his adult heirs. Hays v. Wyatt (Idaho, 1911) 115 Pac. 13.

7. Timber—Rights of entrymen to cut and remove.—See, also, notes to §§ 4980, 10216, post.

The homesteader can cut only such timber as is reasonably incidental to the cultivation of the land, and cannot under color of right denude the soil of its timber for the purpose of selling and disposing of the same. See Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231; Stone v. Same (1897) 17 Sup. Ct. 778, 784, 167 U. S. 178, 42 L. Ed. 127; Bunker Hill & Sullivan Min. & Concentrating Co. v. Same (1913) 33 Sup. Ct. 138, 226 U. S. 548, 57 L. Ed. 345; Conway v. Same (1899) 95 Fed. 615, 617, 37 C. C. A. 200; Grubbs v. Same (1900) 105 Fed. 314, 44 C. C. A. 513; Cunningham v. Metropolitan Lumber Co. (1901) 110 Fed. 332, 49 C. C. A. 72 (writ of certiorari denied [1902] 23 Sup. Ct. 846, 187 U. S. 647, 47 L. Ed. 347); Teller v. U. S. (1901)113 Fed. 273, 283, 51 C. C. A. 230; U. S. v. Lane (C. C. 1883) 19 Fed. 910; Same v. Freyberg (C. C. 1886) 32 Fed. 195, 196; Same v. Ball (C. C. 1887) 31 Fed. 667, 668; Id., 670 (writ of error dismissed [1891] 11 Sup. Ct. 1029, 140 U. S. 701, 35 L. Ed. 602); Same v. Murphy (C. C. 1887) 32 Fed. 376, 379; Same v. McEntee (D. C. 1877) Fed. Cas. No. 15,673; The Timber Cases (D. C. 1881) 11 Fed. 81; U. S. v. Yoder (D. C. 1883) 18 Fed. 372; Same v. Niemeyer (D. C. 1899) 94 Fed. 147; King-Ryder Lumber Co. v. Scott (1904) 84 S. W. 487, 73 Ark. 329; Orrell v. Bay Mfg. Co. (1904) 36 South. 561, 83 Miss. 800, 70 L. R. A. 881. See, also, Stone v. U. S. (1894) 64 Fed. 667, 12 C. C. A. 451; Grubbs v. Same (1900) 105 Fed. 314, 44 C. C. A. 513; H. D. Williams Cooperage Co. v. U. S. (1915) 221 Fed. 234, 137 C. C. A. 90; Shea v. Cloquet Lumber Co. (1906) 105 N. W. 552, 97 Minn. 41; Babcock v. Canadian Northern Ry. Co. (Minn. 1912) 136 N. W. 275; Nilson v. Same, Id. 280; Nickelson v. Cameron Lumber Co. (1905) 81 Pac. 1059, 39 Wash. 569. But after the settler has acquired the right to a patent the United States cannot sue for the conversion of timber cut during his occupancy. U. S. v. Ball (C. C. 1887) 31 Fed. 667; Id. 670 (writ of error dismissed [1891] 11 Sup. Ct. 1029, 140 U. S. 701, 35 L. Ed. 602); Same v. Ellis (C. C. 1903) 122 Fed. 1016. He has this right, although he has not filed his entry, and he cannot be held liable for trespass, and for the value of the timber so cut and used, although the local land office had previously been ordered by the land department not to accept any filing on such land. U. S. v. Blendauer (D. C. 1903) 122 Fed. 703, judgment reversed Same v. Blendaur (1904) 128 Fed. 910, 63 C. C. A. 636.

Where he has received a patent, he may recover for timber wrongfully cut from his land by a trespasser after homestead entry, but before taking possession; and this right is not defeated by settlement between the United States and the trespasser. Knapp v. Alexander-Edgar Lumber Co. (1915) 35 Sup. Ct. 515, 237 U. S. 162, 59 L. Ed. 894, reversing judgment (1911) 130 N. W. 504, 145 Wis. 528, 140 Am. St. Rep. 1091.

The boxing of trees on land covered by an unperfected homestead entry is a willful trespass, although the settler may have acted in good faith. Parish v. U. S. (1911) 184 Fed. 590, 106 C. C. A. 570.

8. Possessory rights and improvements as subjects of transfer by settler.—The fact that a settler, who is actually residing on land with the bona fide intention of acquiring title, purchased his improvements from a prior settler, does not affect his right to so acquire the land. Trodick v. Northern Pac. Ry. Co. (1908) 164 Fed. 913, 90 C. C. A. 653, judgment affirmed Northern Pac. Ry. Co. v. Trodick (1911) 31 Sup. Ct. 607, 221 U. S. 208, 55 L. Ed. 704.

The entryman's possession and improvements are valuable rights, which he may legally convey. Tarrance v. Hatfield (1881) 71 Ala. 234; O'Hanlon v. Denvir (1889) 81 Cal. 60, 22 Pac. 407, 15 Am. St. Rep. 19; Caldwell v. Ruddy (1881) 2 Idaho, 5, 1 Pac. 339; Holloway v. Miller (1904) 36 South. 531, 84 Miss. 776; Brown v. Killabrew (1893) 21 Nev. 437, 33 Pac. 865.

But the purchase confers no settlement right on the purchaser. Sproat v. Durland (1894) 2 Okl. 24, 35 Pac. 682, 886. See, also, Porter v. Bishop (1889) 25 Fla. 749, 6 South. 863.

One who has entered land under the homestead act, and continues to reside thereon, is entitled to use water as other riparian proprietors may. Union Mill & Mining Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370.

A settler who makes a valid homestead entry, and continues to reside on and improve the land entered, in compliance with the land laws, has the exclusive right to its possession and use, and to the improvements, and also acquires equities in the land itself which increase from the time the entry is made until the complete title is earned. Burlington, K. & S. W. R. Co. v. Johnson (1887) 38 Kan. 142, 16 Pac. 125.

One who has a homestead entry upon public lands of the United States, on compliance with the laws and regulations of the Land Department, is enti-

tled to possession thereof. Pool v. Baker (Wyo. 1916) 154 Pac. 328.

9. Title acquired by entryman on compliance with law.—The settler's right to a patent as to the government is equivalent to one issued. Comos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); U. S. v. Ball (C. C. 1887) 31 Fed. 667; Id. 670 (writ of error dismissed [1891] 11 Sup. Ct. 1029, 140 U. S. 701, 35 L. Ed. 602); Hays v. Wyatt (1911) 19 Idaho, 544, 115 P. 13, 34 L. R. A. (N. S.) 397; Doran v. Kennedy (1913) 122 Minn. 1, 141 N. W. 851 (citing Stark v. Starr [1867] 6 Wall. 402, 18 L. Ed. 925; Barney v. Dolph [1878] 97 U. S. 652, 24 L. Ed. 1063; Simmons v. Wagner [1879] 101 U. S. 260, 25 L. Ed. 910); Fearnow v. Jones (1912) 34 Okl. 694, 126 Pac. 1015, L. R. A. 1916C, 720.

The entryman secures no title until he has complied with the law and earned his patent. Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231; Stone v. U. S. (1897) 17 Sup. Ct. 778, 784, 167 U. S. 178, 42 L. Ed. 127; Wadkins v. Producers' Oil Co. (1913) 33 Sup. Ct. 380, 227 U. S. 368, 57 L. Ed. 551; Knapp v. Alexander-Edgar Lumber Co. (1911) 130 N. W. 504, 145 Wis. 528, 140 Am. St. Rep. 1091; and other cases cited.

Individuals who purchase land from the government, pursuant to the federal land laws, acquire vested rights, which cannot be arbitrarily devested by the officers of the land department. Cornelius v. Kessel (1888) 9 Sup. Ct. 122, 124, 128 U. S. 456, 32 L. Ed. 482; George v. Riddle (C. C. 1899) 94 Fed. 689.

A homestead settler on public lands acquires no vested rights therein, as against the United States, prior to the time when, under the law, he becomes entitled to a patent, which deprives congress of the power to vest title to such lands in another. Wagstaff v. Collins (1899) 97 Fed. 3, 8, 38 C. C. A. 19.

An entryman who has performed all the conditions requisite to entitle him to a patent is vested with the equitable title; and his right to a patent cannot be affected by a subsequent discovery of mineral, or of any other fact which would take the land out of the class in which it stood when the entry was made. Olive Land & Development Co. v. Olmstead (C. C. 1900) 103 Fed. 568.

Congress had power to dispose of lands claimed by settlers at any time before the proof and payment required by law. (1866) 11 Op. Atty. Gen. 490.

Between the entry on land by a homesteader and the issuance of a patent, the title remains in the United States, though the entryman has the right of possession and cultivation. Wadkins v. Producers' Oil Co. (1912) 57 So. 937, 130 La. 308.

One who has commuted and complied with all the requirements necessary to entitle him to a patent for public land is the equitable owner thereof, and in the event of his death the land will form part of his estate. Doran v. Kennedy (Minn. 1913) 141 N. W. 851. See this case for a collation of authorities.

10. —— Final certificate as conveyance of equitable title.—A receiver's final certificate conveys the equitable title to the person named in the certificate, subject to be defeated by cancellation for fraud, but the legal title remains in the United States until patent is issued. U. S. v. Detroit Timber & Lumber Co. (1904) 131 Fed. 668, 67 C. C. A. 1 (decree affirmed [1906] 26 Sup. Ct. 282, 200 U. S. 321, 50 L. Ed. 499); McClung v. Steen (C. C. 1887) 32 Fed. 373; Gourley v. Countryman (1907) 90 Pac. 427, 18 Okl. 220 (see this case for a collation of authorities on this point); Brake v. Blain (Okl. 1915) 153 P. 158.

A homestead entryman who has made final proof is the equitable owner of the land, which, on his death, is subject to the probate jurisdiction of the state. Doran v. Kennedy (1915) 35 Sup. Ct. 615, 237 U. S. 362, 59 L. Ed. 996, affirming decree (1913) 141 N. W. 851, 122 Minn. 1.

A final receipt issued to a homestead entryman does not divest the title of the United States, but confers only an equity. Moses v. Long-Bell Lumber Co. (1913) 206 Fed. 51, 124 C. C. A. 185.

One who has entered and paid for land and received a certificate of purchase has the equitable title, and is entitled to riparian rights, although he has not received his patent. Union Mill & Mining Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370.

A certificate of entry vests in the holder a sufficient title to support a petitory action. Broussard v. Broussard (1891) 43 La. Ann. 921, 9 South. 910.

Where a homestead entry has been made, final proof submitted, and final certificate issued, the land immediately becomes liable to taxation. Cannon v. Hood River Irr. Dist. (Or. 1916) 154 P. 397.

11. —— Final receipt and certificate as evidence.—The final receipt and the certificate do not conclude the land department from investigating the truth of the facts on which they were issued, and the bona fides of the homestead claim. Holmes v. State (1893) 100 Ala. 291, 14 South. 51; Haumesser v. Chehalis County (1913) 136 P. 1141, 76 Wash. 570.

The final certificate is at least prima facie evidence of the facts and conclusions stated therein. U. S. v. Ball (C. C. 1887) 31 Fed. 667; Id. 670, writ of error dismissed (1891) 11 Sup. Ct. 1029, 140 U. S. 701, 35 L. Ed. 602.

One who pays the price acquires the

equitable title, and the government holds the legal title in trust, and the state may make the certificate of final payment evidence of title in the holder sufficient to maintain or defeat an action for possession unless an adversary title is shown by patent issued to another. Birmingham Coal & Iron Co. v. Doe ex dem. Arnett (Ala. 1913) 62 So. 26.

The receipt of the land office for entry fees is prima facie evidence of a homestead entry. Whittaker v. Pendola (1889) 78 Cal. 296, 20 Pac. 680.

The certificate of final entry of land, issued by the United States land office, is evidence of the facts recited therein, including the date on which settlement was made. Davis v. Chamberlain (Or. 1908) 98 P. 154.

12. —— Government as trustee for entryman.—After final proof and payment, the government holds the legal title in trust for the entryman. U. S. v. Steenerson (1892) 50 Fed. 504, 1 C. C. A. 552; Union Mill & Mining Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370; U. S. v. Freyberg (C. C. 1886) 32 Fed. 195; Morse v. Pickler (1912) 28 S. D. 612, 134 N. W. 809, and cases cited.

13. Patent—Essentials of right to patent in general.—To entitle one to a patent it is necessary that he comply with all the requirements of the statute and the authoritative regulations of the Land Department. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296; McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

14. —— Residence and cultivation by entryman.—The entryman is required to show both actual residence on the land in good faith and cultivation for the required length of time. Great Northern Ry. Co. v. Hower (1915) 35 Sup. Ct. 465, 236 U. S. 702, 59 L. Ed. 798 (reversing decree [1912] 125 P. 159, 69 Wash. 380); Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651; Nurnberger v. U. S. (1907) 156 Fed. 721, 84 C. C. A. 377; U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752 (reversing decree [C. C. 1909] 169 Fed. 686); Cooper v. U. S. (1915) 220 Fed. 867, 136 C. C. A. 497 (affirming decree U. S. v. Cooper [D. C. 1914] 217 Fed. 846); McGoldrick v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377; U. S. v. Waddell (C. C. 1883) 16 Fed. 221, 222; Same v. Perry (C. C. 1891) 45 Fed. 759; Same v. Murphy (C. C. 1909) 193 Fed. 802; Same v. Tillman (D. C. 1913) 205 Fed. 392; Jameson v. James (1909) 155 Cal. 275, 100 Pac. 700; Ard v. Brandon (1890) 43 Kan. 425, 23 Pac. 648; Sutherland v. Richardson (Or. 1910) 106 P. 1017. See, also, Kansas Pac. R. Co. v. Dunmeyer (1885) 5 Sup. Ct. 566, 113 U. S. 629, 28 L. Ed. 1122; Moss v. Dowman (1900) 20 Sup. Ct. 429, 431, 176 U. S. 413, 44 L. Ed. 526; Small v. Rakestraw (1905) 25 Sup. Ct. 285, 286, 196 U. S. 403, 49 L. Ed. 527 (affirming judgment [1903] 72 Pac. 746, 28 Mont. 413, 104 Am. St. Rep. 691); U. S. v. George (1913) 33 Sup. Ct. 412, 228 U. S. 14, 57 L. Ed. 712; U. S. v. Collett (1908) 159 Fed. 932, 87 C. C. A. 460.

A charge of perjury cannot be based upon false statements as to residence and cultivation in an affidavit of a homestead claimant under a regulation of the Land Department, because this addition to the requirement that cultivation and residence be proved by two credible witnesses is unauthorized. U. S. v. George (1913) 33 Sup. Ct. 412, 228 U. S. 14, 57 L. Ed. 712. See, also, Hallock v. U. S. (1911) 185 Fed. 417, 107 C. C. A. 487 (certiorari denied [1911] 31 Sup. Ct. 717, 220 U. S. 613, 55 L. Ed. 610); U. S. v. Howard (D. C. 1889) 37 Fed. 666, 667.

To establish a residence, act and intent must combine, the act of occupying and living on the claim, and intent to make the place a home to exclusion of a home elsewhere. Whaley v. Northern Pac. Ry. Co. (C. C. 1908) 167 Fed. 664; U. S. v. Richards (D. C. 1906) 149 Fed. 443, 450.

A residence for voting purposes in another precinct from that in which a homestead entry lies precludes the entryman from claiming residence at the same time on the land for homestead purposes. Small v. Rakestraw (1905) 25 Sup. Ct. 285, 286, 196 U. S. 403, 49 L. Ed. 527, affirming judgment (1903) 72 P. 746, 28 Mont. 413, 104 Am. St. Rep. 691.

Where a female homestead claimant, immediately after entry, married her adjoining claimant, and resided with him on his claim until the date of the final proof, her proof of residence was false, and her claim subject to forfeiture. Anderson v. U. S. (1913) 202 Fed. 200, 123 C. C. A. 118.

Title to land entered for a homestead cannot vest until final certificate, after proof of occupation for the prescribed period and nonalienation during that time. One who merely entered lands and paid entrance fees for a homestead, without residing thereon or cultivating it for the period prescribed, and during that time alienated it, could not acquire any title. Lindsey v. Veasy (1878) 62 Ala. 421.

A homestead entry is valid though the house in which the person making the entry is at the time living is a short distance outside the land entered, he having believed that it was on the land entered, and having moved onto it as soon as the true boundaries were discovered. Wormouth v. Gardner (1894) 105 Cal. 149, 38 Pac. 646.

The entryman obtains an inchoate title, which is only completed when he has resided upon the land the period of time mentioned in the statute, and prov-

ed his right to the title, and paid for the same. Schoolfield v. Houle (1889) 13 Colo. 394, 22 Pac. 781.

The entryman acquires a vested right therein at the expiration of the time mentioned in the law, but no estate in the lands vests in him until he has complied with the required conditions. Lovell v. Wall (1893) 31 Fla. 73, 12 South. 659.

The legal title to the homestead does not pass to the applicant until proof of the required residence and cultivation is made. Bolton v. La Camas Water-Power Co. (1894) 10 Wash. 246, 38 Pac. 1043.

A constructive residence may be sufficient. Great Northern Ry. Co. v. Hower (1912) 125 P. 159, 69 Wash. 380.

15. —— Findings of land department as to residence and cultivation.—See, also, notes to § 699, ante.

A finding by the land department that the entryman has complied with the law as to settlement and improvements is conclusive upon the courts. Northern Pac. Ry. Co. v. McCormick (C. C. 1898) 89 Fed. 659, 663; Thompson v. Basler (1906) 84 P. 161, 148 Cal. 646, 113 Am. St. Rep. 321; Kerr v. Snowden (1914) 140 P. 704, 24 Cal. App. 152.

16. —— Proof and patent where entryman dies.—A settler has no devisable or descendible interest in the land until he has completed the term of residence required to entitle him to make final proof and in case of his death before that time the patent to his widow, who completes the residence and makes the final proof, conveys the land to her absolutely, and no interest therein passes to his children. McCune v. Essig (1905) 26 Sup. Ct. 78, 80, 199 U. S. 382, 50 L. Ed. 237; McCune v. Essig (1903) 122 Fed. 588, 589, 59 C. C. A. 429 (affirming judgment [C. C. 1902] 118 Fed. 273, and decree affirmed [1905] 26 Sup. Ct. 78, 199 U. S. 382, 50 L. Ed. 237); McCune v. Essig (C. C. 1902) 118 Fed. 273, 280 (affirmed [1903] 122 Fed. 588, 59 C. C. A. 429).

A patent issued to minor heirs when there are also adult heirs will inure to the benefit of all alike. Bernier v. Bernier (1893) 13 Sup. Ct. 244, 245, 147 U. S. 242, 37 L. Ed. 152.

The death of the entryman before perfecting his right is essential to give his widow the right of residence, cultivation, and patent. Wadkins v. Producer Oil Co. (1913) 33 Sup. Ct. 380, 227 U. S. 368, 57 L. Ed. 551, affirming judgment Same v. Producers' Oil Co. (1912) 57 So. 937, 130 La. 308.

The heirs of a homestead entryman who made final proof before death could take as heirs where a patent issued in his name only, and not as beneficiaries under the statute. Doran v. Kennedy (1915) 35 Sup. Ct. 615, 237 U. S. 362, 59 L. Ed. 996, affirming decree (1913) 141 N. W. 851, 122 Minn. 1.

Where homesteader died after final proof, and patent was issued to her husband, held, that he took as her heir, and not directly as a purchaser from the government. Parmeter v. Butler (1915) 228 Fed. 668, 143 C. C. A. 190.

Where a widow who had made a homestead entry on public land died before she was entitled to a patent, the land did not belong to her estate, and a decree distributing it was void; the heirs of the widow having only a preferential right to perfect the homestead entry. Harris v. Lyon (Ariz. 1914) 140 P. 985.

Where a widow made a homestead entry on public land, remarried, and died before she became entitled to a patent, leaving her second husband and a minor child, the second husband is entitled to a life estate in one-third of the homestead after patent was issued. Id.

Upon the death of the homesteader the widow, upon performing the remaining conditions, is entitled to a patent and acquires a title in fee free from all trust in favor of the children. Jarvis v. Hoffman (1872) 43 Cal. 314.

It is the practice of the land department to issue patents to the "heirs or devisees," and to leave it to the courts to determine who are the devisees or heirs. Hays v. Wyatt (Idaho, 1911) 115 P. 13. See, also, Anderson v. Muhr (Okl. 1912) 128 P. 296.

An entryman who dies before the expiration of the time for the issuance of the patent has no interest in the land which he can convey by will to his executors. Chapman v. Price (1884) 32 Kan. 446, 4 Pac. 807.

The entryman's widow, on completing the entry, becomes entitled to absolute ownership, though the patent is issued in his name. Nelson v. Oberg (1912) 127 P. 767, 88 Kan. 14.

Where by mistake the patent is issued to the deceased entryman's heirs instead of his widow, who has complied with the law, she becomes the equitable owner of the land, and the patentees hold the legal title in trust for her. Hayes v. Carroll (1898) 76 N. W. 1017, 74 Minn. 134.

Children and heirs of full age at the time of the death of the applicant before issue of patent acquire no interest as against the minor children. Bernier v. Bernier (1888) 40 N. W. 50, 72 Mich. 43.

The widow of a settler who dies before completing the required residence may complete it, and entitle herself to a patent. Perry v. Ashby (1877) 5 Neb. 291.

Where a homesteader dies before his right to a patent accrues, his heirs succeed to his rights, not as heirs, but because the law gives them preference as new homesteaders, allowing to them the benefit of the residence of their ancestor upon the land. Gjerstadengen v. Van Duzen (1898) 76 N. W. 233, 7 N. D. 612, 66 Am. St. Rep. 679.

A deceased entryman's mother, being an alien, is incapable of making final proof, and the title passes to the heir capable of making such proof. Bergstrom v. Svenson (N. D. 1910) 126 N. W. 497.

Neither an entryman on government land nor his estate after his decease has any complete legal or equitable title until the patent has been issued or he has done all things prerequisite thereto. Martyn v. Olson (N. D. 1914) 148 N. W. 834.

A mortgage executed by a deceased entryman, who dies before making proof or doing the things prerequisite thereto, is not a lien on the land, or assumed by his heirs who take under the statute. Id.

In availing themselves of the preferred rights, conferred on the heirs of a deceased entryman, such heirs take directly from the government by donation or purchase rather than by inheritance. Id.

Where a homestead entryman during his life complied with all requirements of law, including final proof required by this section, the title, on issuance of receiver's certificate and patent after his death, relates back to the date of final proof. Gaylord v. Carroll (Or. 1914) 142 P. 357.

Where a husband and wife applied for a homestead, and, after the required residence thereon, the wife died, and the husband subsequently made final proof, received his patent, and afterwards sold the land to a purchaser for value, without notice of any beneficial interest therein belonging to the estate of the wife, the heirs of the wife cannot recover her interest in the homestead. Bolton v. La Camas Water-Power Co. (1894) 10 Wash. 246, 38 Pac. 1043.

The estate of a deceased has no interest in the homestead, and the administrator no right to make final proof or perfect entry. Demars v. Hickey (1905) 80 P. 521, 13 Wyo. 371, rehearing denied (1905) 81 P. 705, 13 Wyo. 371. See, also, Gjerstadengen v. Van Duzen (1898) 76 N. W. 233, 7 N. D. 612, 66 Am. St. Rep. 679.

The devisee of a homestead entryman succeeds to his rights, and on fulfillment of the requirements of the homestead act becomes the owner of the land and entitled to the patent. Cole v. Cole (Neb. 1915) 154 N. W. 248.

17. —— Proof and patent where entryman deserts wife.—Where one deserts his wife, and makes a homestead entry, and a patent is issued to the guardian of the entryman's illegitimate children after his death, the widow has no equity to have a trust declared in the homestead in her favor, where she did nothing to aid in acquiring the rights under the statute. Douglass v. Stephens (Fla. 1911) 54 So. 455.

One who has complied with the statutory requirements, so that his equitable right to have the title vested in him is complete, cannot be deprived of it by his wife, whom he had deserted, making the final proof for him. Egbert v. Bond (1899) 148 Mo. 19, 49 S. W. 873.

18. —— Recitals in patent.—Erroneous recitals in a patent, the presence of which is not required by law, are not binding on the grantee. McCorkell v. Herron (1905) 103 N. W. 988, 128 Iowa, 324, 111 Am. St. Rep. 201.

19. —— Validity of patent.—A patent for land not subject to entry, because previously appropriated, is void. King v. McAndrews (C. C. 1900) 104 Fed. 430, 431 (judgment reversed [1901] 111 Fed. 860, 50 C. C. A. 29); Anderson v. Woodward (1914) 57 Colo. 53, 140 Pac. 198.

The government may recover damages for fraud in procuring title through fraudulent entry. U. S. v. Jones (D. C. 1914) 218 Fed. 973.

20. —— Conclusiveness of patent.—The action of the Land Department of the United States in accepting the final proofs of a homestead settler, and in issuing a patent to him thereon, in the regular course of procedure, and after the usual notice required in such cases, is conclusive that the land was not swamp or overflowed at the time of the swamp land grant so as to pass to the state thereunder, and a claimant, under such grant through the state, is bound by such decision whether or not he appeared and contested such question of fact. Kerns v. Lee (C. C. 1906) 142 Fed. 985.

The patent constitutes a judgment establishing the character of the land, which cannot thereafter be collaterally attacked. Paterson v. Ogden (1903) 74 P. 443, 141 Cal. 43, 99 Am. St. Rep. 31. See, also, Standard Quicksilver Co. v. Habishaw (1901) 64 P. 113, 132 Cal. 115. It is evidence of due performance of every prerequisite, and cannot be questioned except for fraud or mistake. The issuing of a patent involves a finding that the patentee is the same person who applied to enter the land, which finding is conclusive in collateral proceedings. Redwater Land & Canal Co. v. Reed (S. D. 1910) 128 N. W. 702.

21. —— Application of doctrine of relation to patents.—The patent relates back to the time of the entry. Knapp v. Alexander-Edgar Lumber Co. (1915) 35 Sup. Ct. 515, 516, 237 U. S. 162, 59 L. Ed. 894; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243; Union Mill & Mining Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370; Jimmerson v.

Fordyce Lumber Co. (Ark. 1915) 178 S. W. 381; Manitou & P. P. Ry. Co. v. Harris (Colo. 1909) 101 P. 61; Hamilton v. Spokane & P. Ry. Co. (1891) 3 Idaho, 164, 28 Pac. 408; Flint & P. M. Ry. Co. v. Gordon (1879) 2 N. W. 648, 41 Mich. 420; Knapp v. Alexander & Edgar Lumber Co. (1911) 130 N. W. 504, 145 Wis. 528.

A patent relates back to the initiation of the claim, and gives the patentee the right to recover for a trespass after the initiation of his claim, as established by the patent proceedings, and prior to the issuance of the patent. Peyton v. Desmond (1904) 129 Fed. 1, 63 C. C. A. 651; Manitou & P. P. Ry. Co. v. Harris (1909) 45 Colo. 185, 101 P. 61, 132 Am. St. Rep. 140. Compare Knapp v. Alexander-Edgar Lumber Co. (1911) 130 N. W. 504, 145 Wis. 528, 140 Am. St. Rep. 1091.

The doctrine cannot successfully be invoked to confer any right or interest by inheritance in the land under the operation of the state laws on the daughter of a deceased settler as against his widow to whom the patent has issued. McCune v. Essig (1905) 26 Sup. Ct. 78, 80, 199 U. S. 382, 50 L. Ed. 237, affirming decree (1903) 122 Fed. 588, 59 C. C. A. 429.

The doctrine may not be invoked to validate a conveyance of timber before patent. But after issuance of patent, the entryman is invested with full legal title, and may transfer timber to another, who is entitled to recover for the cutting and conversion of the timber by one to whom the entryman had illegally conveyed the same before patent. K. C. Lumber Co. v. Moores (1914) 212 Fed. 153, 129 C. C. A. 1.

A patent relates back to the date of the entry, not only for the benefit of the settler, but also for the benefit of those with whom he has dealt, and it validates and renders enforceable by the doctrine of estoppel all contracts not expressly forbidden. Orrell v. Bay Mfg. Co. (1904) 36 So. 561, 83 Miss. 800, 70 L. R. A. 881.

22. —— **Cancellation of patent.**—A suit to cancel a patent should be sustained only by proof which produces conviction. Wright-Blodgett Co. v. U. S. (1915) 35 Sup. Ct. 339, 341, 236 U. S. 397, 59 L. Ed. 637; Webb v. U. S. (1913) 204 Fed. 78, 122 C. C. A. 392; U. S. v. Peterson (C. C. A. 1915) 220 Fed. 605; Same v. Laam (C. C. 1906) 149 Fed. 581; Same v. Cowart (D. C. 1913) 205 Fed. 316; Same v. Tillman (D. C. 1913) 205 Fed. 392.

Where, because of intervening rights, government could not recover patented land, recovery of minimum government price from the patentee held the utmost to which it was entitled. U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552.

On the cancellation as invalid of patents to public lands, the claimant under such patents cannot recover from the United States the cost of improvements made on the land or taxes paid thereon under the laws of the state. Bradford v. U. S. (1915) 222 Fed. 258, 138 C. C. A. 69.

The United States, in a suit for cancellation of patents to lands, which was barred by limitations as against the latest purchaser, held entitled to recover the unpaid purchase money due from him to his grantor by way of damages. U. S. v. Cooper (D. C. 1914) 217 Fed. 846, decree affirmed Cooper v. U. S. (1915) 220 Fed. 867, 136 C. C. A. 497.

Where the entryman has made final proof, and obtained a patent, and there is no adverse claimant who has complied with the land laws, so as to give him an equitable claim to the land, the United States has no such interest as would warrant a court in annulling the patent, though the patentee committed perjury and bribery in obtaining title. Lynch v. U. S. (1903) 73 P. 1095, 13 Okl. 142.

23. —— **Cancellation as against bona fide purchasers.**—A bona fide purchase from a homestead entryman is a valid defense which grantee must establish to defeat right of government to cancel a patent as obtained by fraud. Wright-Blodgett Co. v. U. S. (1915) 35 Sup. Ct. 339, 236 U. S. 397, 59 L. Ed. 637, affirming decree Wright-Blodgett & Co. v. Same (1913) 203 Fed. 263, 121 C. C. A. 461. See, also, U. S. v. Brannan (1914) 217 Fed. 849, 133 C. C. A. 559 (reversing decree Same v. Cowart [D. C. 1913] 205 Fed. 316); Stonebraker-Zea Cattle Co. v. U. S. (1915) 220 Fed. 99, 135 C. C. A. 96; Cooper v. U. S. (1915) 220 Fed. 871, 136 C. C. A. 501 (affirming judgment U. S. v. Cooper [D. C. 1914] 217 Fed. 846); U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552; U. S. v. Krueger (C. C. A. 1915) 228 Fed. 97; U. S. v. Cooper (D. C. 1914) 217 Fed. 846 (decree affirmed Cooper v. U. S. [C. C. A. 1915] 220 Fed. 867); U. S. v. Grover (D. C. 1915) 227 Fed. 181.

Patents issued to fictitious persons on forged and fraudulent homestead applications and proofs convey no title, and the United States is entitled to their cancellation, even as against a bona fide purchaser. McClure v. U. S. (1911) 187 Fed. 265, 111 C. C. A. 1 (affirming decree U. S. v. McClure [C. C. 1909] 174 Fed. 510); U. S. v. McLeod (C. C. 1909) 174 Fed. 508 (decree affirmed McLeod v. U. S. [1911] 187 Fed. 261, 109 C. C. A. 207).

Where the government has by patent conveyed the legal title to land, and a purchaser from its grantee is vested with the legal title, though he purchased from the entryman before patent, but after final proof, and the purchase was made in good faith and for a valuable consideration without knowledge

of any fraud of the entryman, the government may not sue to cancel the patent for the entryman's fraud. U. S. v. Gridley (C. C. 1911) 186 Fed. 544.

24. State laws as fixing status of entryman's property.—There is nothing in the federal laws which prevents the application, where a patent has been issued to a homestead entryman, of the rule of the local law that land in the state acquired by a husband under the homestead laws is the community property of the entryman and his wife. Buchser v. Buchser (1913) 34 Sup. Ct. 46, 231 U. S. 157, 58 L. Ed. 166; Same v. Morss (D. C. 1912) 196 Fed. 577, affirmed (1913) 202 Fed. 854, 121 C. C. A. 212.

The local state laws regulating property apply only after title has vested in the entryman by the issuance of a patent. Delacey v. Commercial Trust Co. (1909) 99 Pac. 574, 51 Wash. 542.

After final proof on public land its status is fixed by state laws, though legal title does not pass until issuance of the patent. Eckert v. Schmitt (Wash. 1910) 110 Pac. 635.

Cited without definite application, Baldwin v. Franks (1887) 7 Sup. Ct. 656, 665, 763, 120 U. S. 678, 30 L. Ed. 766; Sturr v. Beck (1890) 10 Sup. Ct. 350, 352, 133 U. S. 541, 32 L. Ed. 761; Galliher v. Cadwell (1892) 12 Sup. Ct. 873, 874, 145 U. S. 368, 36 L. Ed. 738; Webster v. Luther (1896) 16 Sup. Ct. 963, 965, 163 U. S. 331, 41 L. Ed. 179; Jones v. Meehan (1899) 20 Sup. Ct. 1, 9, 175 U. S. 1, 44 L. Ed. 49; Black v. Jackson (1899) 20 Sup. Ct. 648, 651, 177 U. S. 349, 44 L. Ed. 801; Adams v. Church (1904) 24 S. Ct. 512, 514, 193 U. S. 510, 48 L. Ed. 769; Hafeman v. Gross (1905) 26 Sup. Ct. 80, 82, 199 U. S. 342, 50 L. Ed. 220; Stearns v. U. S. (1907) 152 Fed. 900, 82 C. C. A. 48; Gilson v. Same (1911) 185 Fed. 484, 107 C. C. A. 584; Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466; Nelson v. Brownell (1912) 193 Fed. 641, 113 C. C. A. 509; Hemmer v. U. S. (1912) 204 Fed. 898, 900, 123 C. C. A. 194; Northern Pac. Ry. Co. v. Amacker (C. C. 1892) 53 Fed. 48, 57 (reversed [1893] 58 Fed. 850, 7 C. C. A. 518); In re Parmeter's Estate (D. C. 1914) 211 Fed. 757, 760; Shorman v. Eakin (1886) 47 Ark. 351, 1 S. W. 559; Chant v. Reynolds (1874) 49 Cal. 213; Stewart v. Sutherland (1892) 93 Cal. 270, 28 Pac. 947; Holloman v. Bullock (1903) 34 South. 355, 82 Miss. 405; Brygger v. Schweitzer (1893) 5 Wash. 564, 32 Pac. 462; Hall v. Hall (1905) 83 P. 108, 41 Wash. 186, 111 Am. St. Rep. 1016; Cunningham v. Krutz (1905) 83 Pac. 109, 41 Wash. 190, 7 L. R. A. (N. S.) 967.

§ 4532a. (Act Aug. 22, 1914, c. 270). Leaves of absence to entryman in one or two periods; proof on commutation.

The entryman mentioned in section twenty-two hundred and ninety-one, Revised Statutes of the United States, as amended by the Act of June sixth, nineteen hundred and twelve, thirty-seventh Statutes, one hundred and twenty-three, upon filing in the local land office notice of the beginning of such absence at his option shall be entitled to a leave of absence in one or two continuous periods not exceeding in the aggregate five months in each year after establishing residence; and upon the termination of such absence, in each period, the entryman shall file a notice of such termination in the local land office; but in case of commutation, the fourteen months actual residence, as now required by law, must be shown, and the person commuting be at the time a citizen of the United States. (38 Stat. 704.)

This was an act entitled "An act to provide for leave of absence for homestead entrymen in one or two periods," cited above.

See ante, § 4532, and notes thereunder.

§ 4532b. (Act July 3, 1916, c. 214.) Leaves of absence; persons entitled.

Any qualified person who has heretofore or shall hereafter in good faith make settlement upon and improve unsurveyed unreserved unappropriated public lands of the United States with intention, upon survey, of entering same under the homestead laws shall be entitled to a leave of absence in one or two periods not exceeding in the aggregate five months in each year after establishment of residence: Provided, That he shall have plainly marked on the ground the exterior boundaries of the lands claimed and have filed in the local land office notice of the approximate location of the lands settled upon and claimed, of the period of intended ab-

sence, and that he shall upon the termination of the absence and his return to the land file notice thereof in the local land office. (39 Stat.)

This was an act entitled "An act authorizing leave of absence to homestead settlers upon unsurveyed lands," cited above.

See ante, § 4532, and notes thereunder.

§ 4533. (Act Aug. 24, 1912, c. 355.) Failure to give notice of election as to mode of final proof not to prejudice right of entryman to proceed under former law.

The failure of a homestead entryman to give notice of election of making his proof as required by the Act of June sixth, nineteen hundred and twelve, being an Act to amend sections two hundred and ninety-one and two hundred and ninety-seven of the Revised Statutes of the United States, relating to homesteads, shall not in anywise prejudice his rights to proceed in accordance with the law under which such entry was made. (37 Stat. 455.)

Act June 6, 1912, c. 153, mentioned in this section, amended R. S. § 2291, to read as set forth ante, § 4532, and R. S. § 2297, to read as set forth post, § 4552.

The description of that act as an act to amend R. S. §§ 291 and 297, in this section, is apparently an error.

§ 4534. (Act March 4, 1913, c. 149.) Right of settler on unsurveyed land to elect as to law under which to make final proof.

Any person entitled to enter lands under the homestead laws, who may have established residence upon unsurveyed lands (which were subject to homestead entry) prior to the passage and approval of the Act of June sixth, nineteen hundred and twelve, entitled "An Act to amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven, of the Revised Statutes relating to homesteads," may perfect his proof for such lands under said Act of June sixth, nineteen hundred and twelve, or under the law existing at the time of the establishment of such residence, as he may elect, such election to be signified to the Department of the Interior in accordance with rules and regulations to be prescribed by the Secretary. (37 Stat. 925.)

Act June 6, 1912, c. 149, mentioned in this section, amended R. S. § 2291, to read as set forth ante, § 4532, and R. S. § 2297, to read as set forth post, § 4552.

Provisions for the election, by one who had entered a homestead prior to the passage of that act, as to the law under which he would make final proof, were contained in R. S. § 2291, as amended in 1912, ante, § 4532.

§ 4535. (R. S. § 2288, as amended, Act March 3, 1891, c. 561, § 3, and Act March 3, 1905, c. 1424.) Right of transfer of settlers under homestead or pre-emption laws for certain public purposes.

Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches, for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim.

Act March 3, 1873, c. 266, 17 Stat. 602. Act March 3, 1891, c. 561, § 3, 26 Stat. 1097. Act March 3, 1905, c. 1424, 33 Stat. 991.

This section, as originally enacted was as follows:

"Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the Homestead Law, or any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead, and the transfer for such public purposes shall in no way

vitiate the right to complete and perfect the title to their pre-emptions or homesteads."

It was included in chapter 4 of this Title of the Revised Statutes, and was not expressly excepted from the repeal of that chapter by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097, but was amended by section 4 of that act to read as set forth here, except for the words "telegraph, telephones," which were inserted in the section by Act March 3, 1905, c. 1424, also cited above.

The right of any homestead settler in Alaska to transfer any portion of the land settled upon, as provided by this section, was restricted by a provision of Act March 3, 1903, c. 1002, post, § 5046.

Notes of Decisions

Right of way for railroad.—A homesteader may, even before final proof, grant a right of way to a railroad, provided no damage is done under it to the freehold. U. S. v. Turner (C. C. 1892) 54 Fed. 228. See, also, U. S. v. Murphy (C. C. 1887) 32 Fed. 376, 379.

Where a homesteader contracted to convey five acres, for railroad purposes, when he obtained his patent, so much of the grant as was necessary for railroad purposes was valid. St. Louis & S. F. Ry. Co. v. Tapp (1897) 42 S. W. 667, 64 Ark. 357.

Title acquired by virtue of the issuance of a patent after relinquishing to a railroad company a right of way inures to the benefit of the railroad company. Indianapolis, P. & C. Ry. Co. v. Rayl (1880) 69 Ind. 424.

A settler may transfer a portion of his homestead for a right of way for a railroad, or his interest may be condemned. Burlington, K. & S. W. R. Co. v. Johnson (1887) 38 Kan. 142, 16 Pac. 125.

This section has no application to the case of a homesteader who was not an occupant at the time of the location of the road, but who became such before the approval of the railroad company's profile of the location of its line by the secretary of the interior. Kinion v. Kansas City, Ft. S. & M. R. Co. (1893) 118 Mo. 577, 24 S. W. 636.

Title to railroad right of way held valid, so far as the United States and all grantees therefrom with notice of the location and possession of the road were concerned. Alexander v. Kansas City, Ft. S. & M. R. Co. (1897) 138 Mo. 464, 40 S. W. 104.

—— Land within reclamation district.—The right to transfer land for a railroad right of way applies to homestead land within a reclamation district, and hence the United States, after such transfer is only entitled to have the railroad so constructed as not to interfere with the irrigation, reservoirs, ditches, and canals. The fact that the entryman might forfeit or abandon his entry does not constitute such an interest in the land as to entitle the government to an injunction restraining the railroad company from constructing its railroad across the lands and canals embraced in the reclamation project. U. S. v. Minidoka & S. W. R. Co. (C. C. 1910) 176 Fed. 762. See, also, Id. (1911) 190 Fed. 491, 111 C. C. A. 323.

Homesteaders without patents but lawfully in possession of irrigable lands in a reclamation area could grant a right of way over their settlements to a railway company. Minidoka & S. W. R. Co. v. U. S. (1914) 35 Sup. Ct. 46, 235 U. S. 211, 59 L. Ed. 200, reversing decree U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

Right of way for irrigation ditch.—Permission to cross a homesteader's land with an irrigation ditch, in consideration of the use of water therefrom is not an alienation of the land. Methow Cattle Co. v. Williams (1911) 64 Wash. 457, 117 Pac. 239.

Acknowledgment of transfer.—The acknowledgment of the wife, separate and apart from her husband, as required by the state law, is essential. Griffin v. Chattanooga S. R. Co. (1900) 30 South. 523, 127 Ala. 570, 85 Am. St. Rep. 143.

Cited without definite application, Anderson v. Carkins (1890) 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272; Bernier v. Bernier (1893) 13 Sup. Ct. 244, 245, 147 U. S. 242, 37 L. Ed. 152; Black v. Jackson (1900) 20 Sup. Ct. 648, 651, 177 U. S. 349, 44 L. Ed. 801; Adams v. Church (1904) 24 Sup. Ct. 512, 514, 193 U. S. 510, 48 L. Ed. 769; Hafeman v. Gross (1905) 26 Sup. Ct. 80, 82, 199 U. S. 342, 50 L. Ed. 220.

§ 4536. (Act May 14, 1880, c. 89, § 1.) Relinquishment of claim; land open to entry.

When a [pre-emption,] homestead, [or timber culture] claimant shall file a written relinquishment of his claim in the local land-office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. (21 Stat. 140.)

This section and the two sections next following were an act entitled "An act for the relief of settlers on public lands," cited above.

The word "pre-emption," inclosed in brackets in this section, was superseded

sence, and that he shall upon the termination of the absence and his return to the land file notice thereof in the local land office. (39 Stat.)

This was an act entitled "An act authorizing leave of absence to homestead settlers upon unsurveyed lands," cited above.

See ante, § 4532, and notes thereunder.

§ 4533. (Act Aug. 24, 1912, c. 355.) Failure to give notice of election as to mode of final proof not to prejudice right of entryman to proceed under former law.

The failure of a homestead entryman to give notice of election of making his proof as required by the Act of June sixth, nineteen hundred and twelve, being an Act to amend sections two hundred and ninety-one and two hundred and ninety-seven of the Revised Statutes of the United States, relating to homesteads, shall not in anywise prejudice his rights to proceed in accordance with the law under which such entry was made. (37 Stat. 455.)

Act June 6, 1912, c. 153, mentioned in this section, amended R. S. § 2291, to read as set forth ante, § 4532, and R. S. § 2297, to read as set forth post, § 4552.

The description of that act as an act to amend R. S. §§ 291 and 297, in this section, is apparently an error.

§ 4534. (Act March 4, 1913, c. 149.) Right of settler on unsurveyed land to elect as to law under which to make final proof.

Any person entitled to enter lands under the homestead laws, who may have established residence upon unsurveyed lands (which were subject to homestead entry) prior to the passage and approval of the Act of June sixth, nineteen hundred and twelve, entitled "An Act to amend section twenty-two hundred and ninety-one and section twenty-two hundred and ninety-seven, of the Revised Statutes relating to homesteads," may perfect his proof for such lands under said Act of June sixth, nineteen hundred and twelve, or under the law existing at the time of the establishment of such residence, as he may elect, such election to be signified to the Department of the Interior in accordance with rules and regulations to be prescribed by the Secretary. (37 Stat. 925.)

Act June 6, 1912, c. 149, mentioned in this section, amended R. S. § 2291, to read as set forth ante, § 4532, and R. S. § 2297, to read as set forth post, § 4552.

Provisions for the election, by one who had entered a homestead prior to the passage of that act, as to the law under which he would make final proof, were contained in R. S. § 2291, as amended in 1912, ante, § 4532.

§ 4535. (R. S. § 2288, as amended, Act March 3, 1891, c. 561, § 3, and Act March 3, 1905, c. 1424.) Right of transfer of settlers under homestead or pre-emption laws for certain public purposes.

Any bona fide settler under the preemption, homestead, or other settlement law shall have the right to transfer, by warranty against his own acts, any portion of his claim for church, cemetery, or school purposes, or for the right of way of railroads, telegraph, telephones, canals, reservoirs, or ditches, for irrigation or drainage across it; and the transfer for such public purposes shall in no way vitiate the right to complete and perfect the title to his claim.

Act March 3, 1873, c. 266, 17 Stat. 602. Act March 3, 1891, c. 561, § 3, 26 Stat. 1097. Act March 3, 1905, c. 1424, 33 Stat. 991.

This section, as originally enacted was as follows:

"Any person who has already settled or hereafter may settle on the public lands, either by pre-emption, or by virtue of the Homestead Law, or any amendments thereto, shall have the right to transfer, by warranty against his own acts, any portion of his pre-emption or homestead for church, cemetery, or school purposes, or for the right of way of railroads across such pre-emption or homestead, and the transfer for such public purposes shall in no way

vitiate the right to complete and perfect the title to their pre-emptions or homesteads."

It was included in chapter 4 of this Title of the Revised Statutes, and was not expressly excepted from the repeal of that chapter by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097, but was amended by section 4 of that act to read as set forth here, except for the words "telegraph, telephones," which were inserted in the section by Act March 3, 1905, c. 1424, also cited above.

The right of any homestead settler in Alaska to transfer any portion of the land settled upon, as provided by this section, was restricted by a provision of Act March 3, 1903, c. 1002, post, § 5046.

Notes of Decisions

Right of way for railroad.—A homesteader may, even before final proof, grant a right of way to a railroad, provided no damage is done under it to the freehold. U. S. v. Turner (C. C. 1892) 54 Fed. 228. See, also, U. S. v. Murphy (C. C. 1887) 32 Fed. 376, 379.

Where a homesteader contracted to convey five acres, for railroad purposes, when he obtained his patent, so much of the grant as was necessary for railroad purposes was valid. St. Louis & S. F. Ry. Co. v. Tapp (1897) 42 S. W. 667, 64 Ark. 357.

Title acquired by virtue of the issuance of a patent after relinquishing to a railroad company a right of way inures to the benefit of the railroad company. Indianapolis, P. & C. Ry. Co. v. Rayl (1880) 69 Ind. 424.

A settler may transfer a portion of his homestead for a right of way for a railroad, or his interest may be condemned. Burlington, K. & S. W. R. Co. v. Johnson (1887) 38 Kan. 142, 16 Pac. 125.

This section has no application to the case of a homesteader who was not an occupant at the time of the location of the road, but who became such before the approval of the railroad company's profile of the location of its line by the secretary of the interior. Kinion v. Kansas City, Ft. S. & M. R. Co. (1893) 118 Mo. 577, 24 S. W. 636.

Title to railroad right of way held valid, so far as the United States and all grantees therefrom with notice of the location and possession of the road were concerned. Alexander v. Kansas City, Ft. S. & M. R. Co. (1897) 138 Mo. 464, 40 S. W. 104.

—— Land within reclamation district.—The right to transfer land for a railroad right of way applies to homestead land within a reclamation district, and hence the United States, after such transfer is only entitled to have the railroad so constructed as not to interfere with the irrigation, reservoirs, ditches, and canals. The fact that the entryman might forfeit or abandon his entry does not constitute such an interest in the land as to entitle the government to an injunction restraining the railroad company from constructing its railroad across the lands and canals embraced in the reclamation project. U. S. v. Minidoka & S. W. R. Co. (C. C. 1910) 176 Fed. 762. See, also, Id. (1911) 190 Fed. 491, 111 C. C. A. 323.

Homesteaders without patents but lawfully in possession of irrigable lands in a reclamation area could grant a right of way over their settlements to a railway company. Minidoka & S. W. R. Co. v. U. S. (1914) 35 Sup. Ct. 46, 235 U. S. 211, 59 L. Ed. 200, reversing decree U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

Right of way for irrigation ditch.—Permission to cross a homesteader's land with an irrigation ditch, in consideration of the use of water therefrom is not an alienation of the land. Methow Cattle Co. v. Williams (1911) 64 Wash. 457, 117 Pac. 239.

Acknowledgment of transfer.—The acknowledgment of the wife, separate and apart from her husband, as required by the state law, is essential. Griffin v. Chattanooga S. R. Co. (1900) 30 South. 523, 127 Ala. 570, 85 Am. St. Rep. 143.

Cited without definite application, Anderson v. Carkins (1890) 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272; Bernier v. Bernier (1893) 13 Sup. Ct. 244, 245, 147 U. S. 242, 37 L. Ed. 152; Black v. Jackson (1900) 20 Sup. Ct. 648, 651, 177 U. S. 349, 44 L. Ed. 801; Adams v. Church (1904) 24 Sup. Ct. 512, 514, 193 U. S. 510, 48 L. Ed. 769; Hafeman v. Gross (1905) 26 Sup. Ct. 80, 82, 199 U. S. 342, 50 L. Ed. 220.

§ 4536. (Act May 14, 1880, c. 89, § 1.) Relinquishment of claim; land open to entry.

When a [pre-emption,] homestead, [or timber culture] claimant shall file a written relinquishment of his claim in the local land-office, the land covered by such claim shall be held as open to settlement and entry without further action on the part of the Commissioner of the General Land Office. (21 Stat. 140.)

This section and the two sections next following were an act entitled "An act for the relief of settlers on public lands," cited above.

The word "pre-emption," inclosed in brackets in this section, was superseded

2. Notice of charge and of hearing.—Where the equitable title to land based on an adjudicated homestead entry of their ancestor and five years occupation and improvement rests in heirs of the entryman, it is indispensable to a divesting thereof by the Land Department that legal notice of the charge against them and of its hearing be given them. Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466.

3. Adverse adjudication of contest as bar to second contest on same charge.—In the absence of fraud and of collusion between the parties, an adjudication that an informer's charge against a homesteader was unfounded was a bar to a contest against him by another informer on the same charge. Howe v. Parker (1911) 190 Fed. 738, 111 C. C. A. 466.

4. Revival of contest dismissed.—Where a contestant did not appeal from an order dismissing the contest because not sufficiently regular to constitute a valid contest, he could not revive the contest by mere suggestion on the hearing of his protest against a third person's entry under the timber and stone act on the relinquishment of the homestead entry. Kendall v. Long (Wash. 1911) 119 Pac. 9.

5. Madamus to control contest.—Contest cannot be controlled by mandamus. In re Emblen (1896) 16 Sup. Ct. 487, 488, 161 U. S. 52, 40 L. Ed. 613.

6. Lands open to entry on cancellation of claim.—On the cancellation of a homestead entry the land is restored to the public domain, as free for occupation or purchase as if the entry had never attached thereto. Galliher v. Cadwell (1892) 12 Sup. Ct. 873, 875, 145 U. S. 368, 36 L. Ed. 138; Northern Pac. R. Co. v. Amacker (C. C. 1892) 53 Fed. 48, judgment reversed Amacker v. Northern Pac. R. Co. (1893) 58 Fed. 850, 7 C. C. A. 518.

7. —— Presumptions as to cancellation of entry.—A homestead entry will be presumed to have been properly canceled unless the contrary is shown where subsequent entries appear. Crawford County Bank v. Baker (1910) 95 Ark. 438, 130 S. W. 556.

8. Preferential right of entry on cancellation of claim.—The preferential right of entry inures to the benefit of one who, by his contest, induced the relinquishment of a homestead entry prima facie valid, but made by one in fact disqualified to make the entry, although a settlement was made intermediate the homestead entry and the initiation of the contest, since such entry, though ineffectual to vest any rights in the entryman, was sufficient to prevent the acquisition of homestead rights by another until it had been set aside. Hodges v. Colcord (1904) 24 Sup. Ct. 433, 434, 193 U. S. 192, 48 L. Ed. 677, affirming (1902) 70 Pac. 383, 12 Okl. 313.

If an appeal is taken from the decision of the Commissioner of the General Land Office holding a land entry for cancellation on contest, the cancellation does not take effect unless and until the decision is affirmed, or the time to appeal passes without appeal taken. Edwards v. U. S. (1915) 223 Fed. 309, 138 C. C. A. 551.

To acquire this right one must have been a contestant who has paid the fees, and procured the cancellation of the entry. Savage v. Worsham (C. C. 1896) 72 Fed. 601. See, also, Kendall v. Long (Wash. 1911) 119 Pac. 9; King v. Great Northern Ry. Co. (1911) 119 Pac. 709, 20 Idaho, 687.

The preferential right is not a property or vested right, nor a right which could be enforced against the government, but a mere privilege of becoming the first entryman. Graham v. Great Falls Water Power & Town-Site Co. (1904) 76 Pac. 808, 30 Mont. 393.

The preferential right to enter given by this section was cut off by Act March 3, 1891 (26 Stat. 1098), set forth in section 5113, post. Id.

The allowance of 30 days to enter the lands, is a mere privilege to enter, and not an entry, so as to preclude the confirmation of a homestead entry prematurely commuted. McCord v. Hill (1901) 87 N. W. 481, 111 Wis. 499, affirming judgment (1900) 84 N. W. 27, 85 N. W. 145, 111 Wis. 499.

9. —— Entry by stranger to contest resulting in erroneous cancellation.—Where a decision canceling an entry for alleged abandonment was erroneous, and the successful contestant did not exercise his preference rights, a stranger to the contest whose application to enter the land had been accepted while the entry appeared canceled of record acquired no equitable right to the land by such entry. Martinson v. Marzolf (1906) 108 N. W. 801, 15 N. D. 471.

10. —— Entry pending appeal in violation of rules.—An application to enter filed during the time allowed for an appeal, from a decision against the validity of a prior entry confer no rights on the applicant. Holt v. Murphy (1908) 28 Sup. Ct. 212, 214, 207 U. S. 407, 52 L. Ed. 271.

11. —— Waiver of preferential right of entry.—Such waiver filed before the patent was finally issued, coupled with a delay of four years in attempting to enforce such preferential right, defeats any right to charge the patentee and his grantees with a resulting trust. Holt v. Murphy (1908) 28 Sup. Ct. 212, 214, 207 U. S. 407, 52 L. Ed. 271, affirming decree (1904) 79 Pac. 265, 15 Okl. 12.

12. —— Timber and stone lands.—The statute has no application to land

sought to be purchased as a stone and timber claim. Howell v. Sappington (C. C. 1908) 165 Fed. 944.

13. — Validity of contract to relinquish preferential right.—The preferential right of entry is personal, and a contract to relinquish the right to another is so clearly against public policy that equity will not decree specific performance thereof. Dameron v. Dingee (1892) 1 Colo. App. 436, 29 Pac. 305.

14. Contestant's interest in land dependent on cancellation of entry.—No vested right is obtained in public land by reason of the filing of a contest when the contest does not result in the cancellation of the entry. Baldwin v. Keith (1904) 75 Pac. 1124, 13 Okl. 624. See, also, Graham v. Great Falls Water Power & Town-Site Co. (1904) 76 Pac. 808, 30 Mont. 393.

15. Contestant's interest in land pending contest.—The contestant has no vested rights in the land until the cancellation of the entry; and hence, where the decision of the land officers, so far as a contest had progressed, was adverse to the contestant, and during the pendency of the proceedings congress passed a special act confirming the title of the entryman, the contestant acquired no vested rights in the land which a court can recognize or enforce. Emblen v. Lincoln Land Co. (1900) 102 Fed. 559, 42 C. C. A. 499, decree affirmed (1902) 22 Sup. Ct. 523, 184 U. S. 660, 46 L. Ed. 736.

Act May 14, 1880, c. 89, § 2, 21 Stat. 141, giving a contestant who has paid the land office fees, and procured the cancellation of a prior entry of public lands, a preferred right to enter the same, gives such contestant no vested rights in the land until the cancellation of the existing entry; and hence, where the decision of the land officers, so far as a contest had progressed, was adverse to the contestant, and during the pendency of the proceedings congress deprived the land department of further jurisdiction by the passage of a special act confirming the title of the entryman, the contestant acquired no vested rights in the land which a court can recognize or enforce. Id.

The contestant has no vested rights in the land until the cancellation of the entry. Emblen v. Lincoln Land Co. (C. C. 1899) 94 Fed. 710.

Section 2 of the act of May 14, 1880 (21 Stat. 140), giving a contestant who has paid the land-office fees and procured the cancellation of a prior entry of public lands a preferred right to enter the same, gives such contestant no vested rights in the land until the cancellation of the existing entry; and hence, where the decisions of the land officers, so far as a contest had progressed, were adverse to the contestant, and during the pendency of the proceedings congress deprived the land department of further jurisdiction by the passage of a special act confirming the title of the entryman, the contestant acquired no vested rights in the land which a court can recognize or enforce. Id.

The payment of contest fees and costs by a contestant of an entry of public land gives him no right in the land, unless the contest results in the cancellation of the prior entry. Emblen v. Lincoln Land Co. (1900) 102 F. 559, 42 C. C. A. 499 (affirmed [1902] 22 Sup. Ct. 523, 184 U. S. 660, 46 L. Ed. 736); Emblen v. Lincoln Land Co. (C. C. 1899) 94 Fed. 710.

A contestant who has neither made an entry on the land nor perfected a right to do so has no vested right or interest therein of which he is deprived without due process of law by a special act enacted during the pendency of the contest, confirming the title of the original entryman. Emblen v. Lincoln Land Co. (1902) 22 Sup. Ct. 523, 525, 184 U. S. 660, 46 L. Ed. 736, affirming decree (1900) 102 Fed. 559, 42 C. C. A. 499.

The party filing a contest has the right to have the contest heard, but he has no right or interest in the land itself. Parker v. Lynch (1898) 56 Pac. 1082, 7 Okl. 631.

16. — Timber.—A successful contestant who makes a homestead entry is not entitled to sue for value of timber destroyed pending the contest. King v. Great Northern Ry. Co. (1911) 119 Pac. 709, 20 Idaho, 687.

17. — Possessory rights of adverse claimants.—One contesting for a preference right and for cancellation of a homestead entry has no right of possession of the land pending the litigation. Reaves v. Oliver (1895) 3 Okl. 62, 41 Pac. 353; Bilyen v. Pilcher (1905) 83 Pac. 546, 16 Okl. 228. See, also, Glover v. Swartz (1899) 58 Pac. 943, 8 Okl. 642.

A settlement on land covered by an existing entry, which is relinquished as the result of a contest begun before such settlement, confers no settlement right, as the contestant, by virtue of his contest, is entitled to a preference right of entry. Sproat v. Durland (1894) 2 Okl. 24, 35 Pac. 682, 886.

Where adverse claimants are residing upon a tract of land, and each claiming the same as a homestead by virtue of priority of settlement, and the land department makes a final award thereof, the losing party cannot properly claim the right to continue his residence upon the land for the purpose of bringing a suit in equity to declare a trust against his successful adversary, when he has already resided upon the land a sufficient length of time, under the law, to enable him to make final proof for the land. Black v. Jackson (1898) 52 Pac. 406, 6 Okl. 751 (decree reversed [1900] 20 Sup. Ct. 648, 177

U. S. 349, 44 L. Ed. 801); Endicott v. Ellis (1900) 60 Pac. 501, 9 Okl. 666; Mendenhall v. Cagle (1900) 60 Pac. 505, 9 Okl. 668; Lee v. Ellis (1900) 60 Pac. 509, 9 Okl. 664. Where the entry of the contestee is canceled, and the contestant allowed to make homestead entry, the latter entryman is entitled to the full and undisturbed possession as against the contestee. McDonald v. Brady (1900) 60 Pac. 509, 9 Okl. 660.

18. Improvements by settler whose entry is canceled.—A bona fide settler is entitled, upon his entry being defeated, to remove his improvements. Bingham County Agricultural Ass'n v. Rogers (1900) 59 Pac. 931, 7 Idaho, 63; Winans v. Beidler (1898) 52 Pac. 405, 6 Okl. 603.

But one whose entry has been canceled for fraud cannot claim the rights of an occupying claimant, in order to enforce payment for improvements. Calhoun v. McCornack (1898) 54 Pac. 493, 7 Okl. 347.

One who makes improvements after being notified that the entry would be returned for cancellation cannot claim an allowance for such improvements on final decision against him. Smith v. Arthur (1893) 7 Wash. 60, 34 Pac. 433.

19. Desert land entry.—This statute does not embrace the case of one who has procured the cancellation of a desert land entry; and the fact that defendant procured the cancellation of such an entry made by another, and at the same time filed his own application under another act, gives him no preference over the right of plaintiff, who also filed an application for entry; and plaintiff, having made the first settlement, is entitled to recover the land. Gray v. Dixon (1890) 83 Cal. 33, 23 Pac. 60.

Cited without definite application, Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415; Nelson v. Northern Pac. R. Co. (1903) 23 Sup. Ct. 302, 308, 188 U. S. 108, 47 L. Ed. 406; Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30; Robinson v. Lundrigan (1910) 178 Fed. 230, 101 C. C. A. 590, affirmed (1913) 33 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468.

§ 4538. (Act May 14, 1880, c. 89, § 3, as amended, Act June 6, 1900, c. 821, and Act Aug. 9, 1912, c. 280.) Time for settler to file homestead application and perfect entry; marriage of homestead entrywoman; preference rights to settlers on enlarged homesteads on non-irrigable lands; time for entry on enlarged homesteads.

Any settler who has settled, or who shall hereafter settle, on any of the public lands of the United States, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall be allowed the same time to file his homestead application and perfect his original entry in the United States land-office as is now allowed to settlers under the pre-emption laws to put their claims on record, and his right shall relate back to the date of settlement, the same as if he settled under the pre-emption laws.

Where an unmarried woman who has heretofore settled, or may hereafter settle, upon a tract of public land, improved, established, and maintained a bona fide residence thereon, with the intention of appropriating the same for a home, subject to the homestead law, and has married, or shall hereafter marry, before making entry of said land, or before making application to enter said land, she shall not on account of her marriage forfeit her right to make entry and receive patent for the land: Provided, That she does not abandon her residence on said land, and is otherwise qualified to make homestead entry: Provided further, That the man whom she marries is not, at the time of their marriage, claiming a separate tract of land under the homestead law. That this Act shall be applicable to all unpatented lands claimed by such entrywoman at the date of passage. Provided, That any settler upon lands designated by the Secretary of the Interior as subject to the provisions of sections one to five of the enlarged homestead Acts of February nineteenth, nineteen hundred and nine (Thirty-fifth Statutes at Large, page six hundred and thirty-nine), and June seventeenth, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and thirty-one), shall be entitled to the preference right of entry accorded by

this section, provided he shall have plainly marked the exterior boundaries of the lands claimed as his homestead: And provided further, That after the designation by the Secretary of the Interior of public lands for entry under the nonresidence provisions of the enlarged homestead Acts of February nineteenth, nineteen hundred and nine, and June seventeenth, nineteen hundred and ten, any person who shall have plainly marked the exterior boundaries of the lands claimed under said provisions of law and made valuable improvements thereon shall have a preference right to enter the lands so claimed and improved at any time within three months after the date on which such lands become subject to entry; but such right shall forfeit unless the settler or claimant under the provisions of the enlarged homestead Acts shall annually cultivate and improve the lands in the form and manner and to the extent therein required following date of initiation of his claim hereunder. (21 Stat. 141. 31 Stat. 683. 37 Stat. 267.)

This section, as originally enacted, contained only the first paragraph thereof as set forth here, ending with the words, "the same as if he settled under the pre-emption laws."

It was amended by Act June 6, 1900, c. 821, cited above, by adding the provisions beginning with the words, "Where an unmarried woman who has heretofore settled," etc., and ending with the words, "claimed by such entry-woman at the date of passage."

It was further amended by Act Aug. 9, 1912, c. 280, last cited above, by adding at the end of the section as theretofore amended, the provisos beginning with the words, "Provided, that any settler upon lands designated by the Secretary of the Interior as subject to the provisions of sections one to five," etc., to the end of the section as set forth here.

The enlarged homestead acts, Act Feb. 19, 1909, c. 160, and Act June 17, 1910, c. 298, mentioned in the provisos added to the section by said last amendment, are set forth post, §§ 4563–4574.

For later provisions affecting married women, see §§ 4538a–4538c, post.

Notes of Decisions

1. Initiation and perfection of settler's rights in surveyed or unsurveyed lands.
2. —— Effect of settler's delay in filing.
3. —— Railroad land grants.
4. —— Railroad indemnity selection.
5. —— Railroad indemnity selection of lands claimed by settler on contiguous quarter sections.
6. —— Effect of settler's delay in filing on land claimed by land grant railroad.
7. —— Settlement on lands granted to state.
8. Possessory rights of settler.
9. —— Federal jurisdiction.
10. Riparian rights of settlers.
11. Timber depredations—Application of doctrine of relation back.

1. Initiation and perfection of settler's rights in surveyed or unsurveyed lands.—Land acquired on a settlement made before the settler's marriage does not fall into the community, where his wife dies before final proof, upon the theory that his inchoate right vested in him by his preliminary entry, but under this section his rights were initiated by the settlement, and though, as between him and any intervening claimant, his perfected right evidenced by the patent related back to the time of settlement, he did not acquire any vested interest until final proof, prior to which his rights were essentially inchoate and exclusively within the operation of the section, designating the beneficiaries, which confers no rights upon the wife, unless the entryman dies before perfecting his entry, when the widow has the right of residence, cultivation, and patent. Wadkins v. Producers' Oil Co. (1913) 33 Sup. Ct. 380, 227 U. S. 368, 57 L. Ed. 551, affirming judgment Same v. Producers' Oil Co. (1912) 57 So. 937, 130 La. 308. And as to homesteader's right relating back to settlement, see also, Maddox v. Burnham (1895) 15 Sup. Ct. 448, 156 U. S. 544, 39 L. Ed. 527; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 602, 210 U. S. 21, 52 L. Ed. 941; Osborn v. Froyseth (1910) 30 Sup. Ct. 420, 422, 216 U. S. 571, 54 L. Ed. 619; Northern Pac. Ry. Co. v. McCormick (C. C. 1898) 89 Fed. 659, 662.

2. —— Effect of settler's delay in filing.—The failure to file within the time allowed does not affect the settler's right, except as against another claimant who has acquired or initiated some right before the application is in fact made. Trodick v. Northern Pac. Ry. Co. (1908) 164 Fed. 913, 90 C. C. A. 653, judgment affirmed Northern Pac. Ry. Co. v. Trodick (1911) 31 Sup. Ct. 607, 221 U. S. 208, 55 L. Ed. 704.

One who takes possession of a tract of public land with a view to becoming an entryman under the homestead law, except as to the limited statutory time

allowed him preceding actual entry at the land office, is a mere "squatter" having no rights in the land as against the government or others. U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243.

3. —— **Railroad land grants.**—One who in good faith occupies unsurveyed public land within the exterior limits of a railroad land grant, after an order of withdrawal based on the map of general route, but before the definite location of the road, is entitled to perfect his title under the homestead laws as soon as the land is surveyed. Nelson v. Northern Pac. R. Co. (1903) 23 Sup. Ct. 302, 308, 188 U. S. 108, 47 L. Ed. 406. See, also, Oregon & C. R. Co. v. U. S. (1903) 23 Sup. Ct. 615, 620, 189 U. S. 103, 47 L. Ed. 726, affirming decree in part (1901) 109 Fed. 514, 48 C. C. A. 520, which is reversed in part (1903) 23 Sup. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012.

4. —— **Railroad indemnity selection.**—Residence and occupancy by a homesteader during the interim between the rejection of a selection within the indemnity limits of a railroad land grant and a second approved indemnity selection of the same tract initiated a homestead right superior to the indemnity selection. Svor v. Morris (1913) 33 Sup. Ct. 385, 227 U. S. 524, 57 L. Ed. 623, reversing Morris v. Svor (1911) 131 N. W. 324, 114 Minn. 303. See, also, Moss v. Dowman (1900) 20 Sup. Ct. 429, 431, 176 U. S. 413, 44 L. Ed. 526; Oregon & C. R. Co. v. U. S. (1903) 23 Sup. Ct. 615, 620, 189 U. S. 103, 47 L. Ed. 726 (affirming decree in part [1901] 109 Fed. 514, 48 C. C. A. 520, which is reversed in part [1903] 23 Sup. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012); Sjoli v. Dreschel (1905) 26 Sup. Ct. 154, 199 U. S. 564, 50 L. Ed. 311; Osborn v. Froyseth (1909) 30 Sup. Ct. 420, 422, 216 U. S. 571, 54 L. Ed. 619.

5. —— **Railroad indemnity selection of lands claimed by settler on contiguous quarter sections.**—Rights acquired by settlement upon and improvement of unsurveyed land, timely asserted upon filing of the plat of survey, will, as against an intervening indemnity railroad selection, be protected in their entirety, though the lands claimed lie in different quarter sections, and the improvements are confined to a single quarter section. St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 602, 210 U. S. 21, 52 L. Ed. 941, affirming Donohue v. St. Paul, M. & M. Ry. Co. (1907) 112 N. W. 413, 101 Minn. 239.

6. —— **Effect of settler's delay in filing on land claimed by land grant railroad.**—The settler's failure to assert his claim at the local land office within three months from settlement is not a matter of which advantage can be taken by a railroad company, in connection with an indemnity railroad selection. Svor v. Morris (1913) 33 Sup. Ct. 385, 227 U. S. 524, 57 L. Ed. 623, reversing judgment Morris v. Svor (1912) 136 N. W. 852, 118 Minn. 344.

The failure of a homestead settler to assert his claim at the local land office within three months from the date of settlement, as required by Act May 14, 1880, c. 89, § 3, 21 Stat. 140, and R. S. § 2265, failing which, the land shall be awarded to the next settler in order of time, is not a matter of which advantage can be taken by a railway company, or one standing in its shoes, in connection with an indemnity railroad selection. Id.

Occupation of land with the intention some time to enter it for a homestead, but without any offer to make entry till after it was withdrawn from sale and entry, gave no equitable rights as against a railroad to which the land was granted. Maddox v. Burnham (1895) 15 Sup. Ct. 448, 156 U. S. 544, 39 L. Ed. 527.

The mere occupancy of an entryman is insufficient to protect his claim against a land grant. Tarpey v. Madsen (1900) 20 Sup. Ct. 849, 851, 178 U. S. 215, 44 L. Ed. 1042.

The settler's delay beyond the time allowed cannot inure to the benefit of a railway company claiming the land on the theory that it had acquired an interest therein by the mere definite location of its land at a time when the land was in the actual occupancy of the settler. Northern Pac. Ry. Co. v. Trodick (1911) 31 Sup. Ct. 607, 221 U. S. 208, 55 L. Ed. 704, affirming judgment Trodick v. Northern Pac. Ry. Co. (1908) 164 Fed. 913, 90 C. C. A. 653.

7. —— **Settlement on lands granted to state.**—No rights can be acquired by settlement on land which is not at the time public land, but the title to which is vested in a state by a prior grant, although such grant is subsequently declared forfeited. Edwards v. Begole (1903) 121 Fed. 1, 57 C. C. A. 245.

Swamp land held subject to entry before identification. Morrow v. Warner Valley. Stock Co. (1909) 56 Or. 312, 101 Pac. 171; Dixon v. Same (1909) 56 Or. 364, 101 Pac. 189; Foskett v. Same (1909) 56 Or. 366, 101 Pac. 190.

8. **Possessory rights of settler.**—Possessory rights of mere occupants of public lands have been recognized as of value and made the subjects of sale. Tarpey v. Madsen (1900) 20 Sup. Ct. 849, 851, 178 U. S. 215, 44 L. Ed. 1042.

A right to occupy land as a settler must be based either upon a homestead filing or a settlement made within three months prior to an adverse filing. Sproat v. Durland (1894) 35 P. 682, 886, 2 Okl. 24.

A bona fide settler on unsurveyed land acquires a prior right to file there-

on which carries with it the right to possession and to be protected in his right of possession. Huffman v. Smyth (1906) 84 P. 80, 47 Or. 573, 114 Am. St. Rep. 938.

9. —— Federal jurisdiction.—A suit by a settler on unsurveyed land to protect his possessory right as against an adverse claimant does not involve a construction of the laws of the United States so as to sustain federal jurisdiction on that ground. Earnhart v. Switzler (1910) 179 Fed. 832, 105 C. C. A. 260.

10. Riparian rights of settlers.—See, also, notes to §§ 4647, 4648, post.

Upon the filing of the homestead entry upon land for which a patent is subsequently issued, riparian rights in a stream flowing over the land become vested, and the waters thereof are no longer subject to the right of appropriation. Sturr v. Beck (1890) 10 Sup. Ct. 350, 133 U. S. 541, 33 L. Ed. 761; Faull v. Cooke (1890) 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836, following Sturr v. Beck (1890) 133 U. S. 541, 10 Sup. Ct. 350, 33 L. Ed. 761. See, also, Jordan v. Ward (1894) 64 Fed. 904, 12 C. C. A. 447.

11. Timber depredations—Application of doctrine of relation back.—In an action by the United States to recover for timber taken from public land at the time covered by a homestead entry which had in fact been abandoned and was afterward relinquished, it is not a defense that the land was at the time of the trespass occupied by another, who after the relinquishment filed and perfected a homestead entry thereon. U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243.

Cited without definite application, Scott v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Gauthier v. Morrison (1914) 34 Sup. Ct. 384, 386, 232 U. S. 452, 58 L. Ed. 680; Cloquet Lumber Co. v. Burns (1913) 207 Fed. 40, 45, 124 C. C. A. 600.

§ 4538a. (Act April 6, 1914, c. 51.) Marriage of entryman to entrywoman not to impair right of either to patent.

The marriage of a homestead entryman to a homestead entrywoman after each shall have fulfilled the requirements of the homestead law for one year next preceding such marriage shall not impair the right of either to a patent, but the husband shall elect, under rules and regulations prescribed by the Secretary of the Interior, on which of the two entries the home shall thereafter be made, and residence thereon by the husband and wife shall constitute a compliance with the residence requirements upon each entry: Provided, That the provisions hereof shall apply to existing entries. (38 Stat. 312.)

This was an act entitled "An act providing that the marriage of a homestead entryman to a homestead entrywoman shall not impair the right of either to a patent after compliance with the law a year, to apply to existing entries," cited above.

§ 4538b. (Act Oct. 17, 1914, c. 325.) Female citizen, having initiated claim to public land under any laws, marrying alien, to be entitled to certificate or patent as though unmarried.

Any female citizen of the United States who has initiated a claim to a tract of public land under any of the laws applicable thereto, and who thereafter has complied with all the conditions as to the acquisition of title to such land prescribed by the public-land laws of the United States, shall, notwithstanding her intermarriage with an alien, who is entitled to become a citizen of the United States, be entitled to a certificate or patent to such entry equally as though she had remained unmarried or had married an American citizen. (38 Stat. 740.)

This was an act entitled "An act to provide for certificate of title to homestead entry by a female citizen who has intermarried with an alien," cited above.

§ 4538c. (Act Oct. 22, 1914, c. 335.) Wife of settler or entryman, abandoned by husband, entitled to submit proof upon claim and obtain patent therefor.

In any case in which persons have regularly initiated claims to public lands as settlers thereon under the provisions of the homestead laws and the wife of such homestead settler or entryman, while residing upon the homestead claim and prior to submission

of final proof of residence, cultivation, and improvement as prescribed by law, has been abandoned and deserted by her husband for a period of more than one year, the deserted wife shall, upon establishing the fact of such abandonment or desertion to the satisfaction of the Secretary of the Interior, be entitled to submit proof upon such claim and obtain patent therefor in her name in the form, manner, and subject to the conditions prescribed in section twenty-two hundred and ninety-one of the Revised Statutes of the United States and Acts supplemental thereto and amendatory thereof: Provided, That in such cases the wife shall be required to show residence upon, cultivation, and improvement of the homestead by herself for such time as when, added to the time during which her husband prior to desertion had complied with the law, would aggregate the full amount of residence, improvement, and cultivation required by law: And provided further, That the published and posted notices of intention to submit final proof in such cases shall recite the fact that the proof is to be offered and patent sought by applicant as a deserted wife, and, prior to its submission, notice thereof shall be served upon the husband of the applicant in such a manner and under such rules and regulations as the Secretary of the Interior shall prescribe. (38 Stat. 766.)

This was an act entitled "An act to provide for issuing of patents for public lands claimed under the homestead laws by deserted wives," cited above.

§ 4539. (Act March 3, 1879, c. 192.) Notice of intention to make final proof.

Before final proof shall be submitted by any person claiming to enter agricultural lands under the laws providing for [pre-emption or] homestead entries, such person shall file with the register of the proper land-office a notice of his or her intention to make such proof, stating therein the description of lands to be entered, and the names of the witnesses by whom the necessary facts will be established. Upon the filing of such notice, the register shall publish a notice, that such application has been made once a week for the period of thirty days, in a newspaper to be by him designated as published nearest to such land, and he shall also post such notice in some conspicuous place in his office for the same period. Such notice shall contain the names of the witnesses as stated in the application. At the expiration of said period of thirty days, the claimant shall be entitled to make proof in the manner heretofore provided by law. The Secretary of the Interior shall make all necessary rules for giving effect to the foregoing provisions. (20 Stat. 472.)

This was an act entitled "An act to provide additional regulations for homestead and pre-emption entries of public lands."

The words "pre-emption or," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

This act is not to be construed as forbidding the taking of testimony for final proofs within ten days following the day advertised as upon which such final proof shall be made, in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified, by Act March 2, 1889, c. 381, § 7, post, § 4549.

Cited without definite application, Barnard v. U. S. (1908) 162 Fed. 618, 89 C. C. A. 376; Neff v. Same (1908) 165 Fed. 273, 91 C. C. A. 241; U. S. v. Minor (C. C. 1884) 26 Fed. 672, 674, reversed (1885) 5 Sup. Ct. 836, 114 U. S. 233, 29 L. Ed. 110.

§ 4540. (Act March 2, 1889, c. 381, § 7.) Taking testimony for final proof in case of unavoidable delay.

The "act to provide additional regulations for homestead and pre-emption entries of public lands," approved March third, eighteen hundred and seventy-nine, shall not be construed to forbid

the taking of testimony for final proof within ten days following the day advertised as upon which such final proof shall be made, in cases where accident or unavoidable delays have prevented the applicant or witnesses from making such proof on the date specified. (25 Stat. 855.)

This section was part of an act to withdraw certain public lands from private entry, etc., cited above.

Act March 3, 1879, c. 192, mentioned in this section, is set forth ante, § 4539.

§ 4541. (Act June 3, 1878, c. 152, § 1.) Notice of contest; publication.

The notices of contest now provided by law under the homestead, [pre-emption and tree-culture] laws of the United States shall, after the passage of this act, be printed in some newspaper printed in the county where the land in contest lies; and if no newspaper be printed in such county, then in the newspaper printed in the county nearest to such land. (20 Stat. 91.)

This was an act entitled "An act to provide for the publication of Notices of contest under the homestead, pre-emption, and tree-culture laws of the United States."

The words "pre-emption and tree-culture," inclosed in brackets in this section, were superseded by the repeal of the pre-emption and tree-culture laws by Act March 3, 1891, c. 561, § 1, post, § 5116, and section 4 of said act, 26 Stat. 1097. See notes to chapter 4 of this Title.

Contests under the pre-emption laws were provided for by R. S. § 2273.

Notes of Decisions

Notice and contest affidavit.—Proceedings to contest a homestead entry, without any notice to a mortgagee of the entryman's interest, though commenced by a subsequent grantee of such interest, do not amount in law to a fraud on the mortgagee's rights. Guaranty Sav. Bank v. Bladow (1900) 20 Sup. Ct. 425, 428, 176 U. S. 448, 44 L. Ed. 540, affirming and modifying judgment (1896) 69 N. W. 41, 6 N. D. 108.

It is not error to refuse to dismiss a contest because the affidavit on which it is based is insufficient, and because of insufficient notice, where both parties appeared and took part in the proceedings. Forman v. Healey (N. D. 1909) 121 N. W. 1122.

Corroboration of a contest affidavit as required by the rules is not necessary to confer jurisdiction to hear the cause. Bertwell v. Haines (1900) 63 Pac. 702, 10 Okl. 469.

§ 4542. (Act March 2, 1907, c. 2568.) Repayment of excess required to be paid on final proof or commutation.

In all cases in which homestead entrymen upon final proof or commutation shall have been required to pay more than the lawful purchase money for their lands, the Secretary of the Interior shall cause the excess to be repaid to the entryman or to his heirs or assigns. (34 Stat. 1248.)

This was an act entitled "An act for the relief of homestead entrymen who have paid more than the lawful purchase money."

Subsequent provisions for repayment of excess moneys paid under the public land laws, and of purchase moneys, etc., paid under applications, etc., afterwards rejected, were made by Act March 26, 1908, c. 102, ante, §§ 4491–4493.

§ 4543. (R. S. § 2292.) When rights inure to the benefit of infant children.

In case of the death of both father and mother, leaving an infant child or children under twenty-one years of age, the right and fee shall inure to the benefit of such infant child or children; and the executor, administrator, or guardian may, at any time within two years after the death of the surviving parent, and in accordance with the laws of the State in which such children, for the time being, have their domicile, sell the land for the benefit of such infants, but for no other purpose, and the purchaser shall acquire the absolute title by

the purchase, and be entitled to a patent from the United States on the payment of the office-fees and sum of money above specified.

Act June 21, 1866, c. 127, § 2, 14 Stat. 67.

The provisions of R. S. § 2291, ante, § 4532, and of this section were made applicable to the cases of settlers who had actually established residence and made improvements on land in Greer county, Okl., prior to March 16, 1896, and their entry on such lands was to be treated as having accrued at the time the residence was established, by Act Jan. 18, 1897, c. 62, § 1, post, § 5040.

Provisions for issuing patents in cases where the claimants have become insane were made by Act June 8, 1880, c. 136, post, § 4544.

Provisions relating to the rights of widows and children of persons entitled to soldiers' or sailors' homesteads were made by R. S. § 2307, post, § 4602.

Notes of Decisions

Patent to "heirs or devisees."—See, also, notes to § 5098, post.

It is the practice to issue patent to "heirs or devisees." Hays v. Wyatt (1911) 19 Idaho, 544, 115 Pac. 13, 34 L. R. A. (N. S.) 397.

Where both parents die before perfecting a homestead entry, their heirs are entitled to a patent on proving the facts required, and take as tenants in common. Crumb v. Hambleton (1885) 86 Mo. 501.

Where a widow who had made a homestead entry on public land died before she was entitled to a patent, the land did not belong to her estate, and a decree distributing it was void; the heirs of the widow having only a preferential right, to perfect the homestead entry. Harris v. Lyon (Ariz. 1914) 140 Pac. 985.

A mortgage executed by a deceased entryman, who dies before making proof or doing the things prerequisite thereto, is not a lien on the land, or assumed by his heirs. Martyn v. Olson (N. D. 1914) 148 N. W. 834.

In availing themselves of the preferred rights conferred on the heirs of a deceased entryman, such heirs take directly from the government by donation or purchase rather than by inheritance. Id.

—— Minor heirs.—A patent issued to minor heirs when there are also adult heirs will inure to the benefit of all alike. Bernier v. Bernier (1893) 13 Sup. Ct. 244, 245, 147 U. S. 242, 37 L. Ed. 152, reversing Bernier v. Bernier (1888) 72 Mich. 43, 40 N. W. 50. See, also, Stadin v. Garfield (1908) 32 App. D. C. 49.

A patent granting land entered to "the minor heirs" passes the title to the children under 21 years of age, though by the law of that state some of them are not minors. Anderson v. Peterson (1887) 36 Minn. 547, 32 N. W. 861, 1 Am. St. Rep. 698.

This section is only intended to give to the minors exclusively when there are no other heirs. Holloman v. Bullock (1903) 34 South. 355, 82 Miss. 405.

—— Widow perfecting entry.—A patent issued to the settler's widow who completes the residence and makes final proof conveys the land to her absolutely, and no interest therein passes to his children. McCune v. Essig (1903) 122 Fed. 588, 589, 59 C. C. A. 429, affirmed (1905) 26 Sup. Ct. 78, 199 U. S. 382, 50 L. Ed. 237. See note under section 4532, ante.

A patent issuing to the widow of a homestead settler upon her making final proof conveys the land to her absolutely, and no interest therein passes by inheritance to the children of her husband. McCune v. Essig (C. C. 1902) 118 Fed. 273, 276, affirmed (1903) 122 Fed. 588, 59 C. C. A. 429.

Children of former marriage.—Where a widow made a homestead entry on public land, remarried, and died before she became entitled to a patent, leaving her second husband and a minor child, the second husband is entitled to a life estate in one-third of the homestead after patent was issued. Harris v. Lyon (1914) 16 Ariz. 35, 140 Pac. 985.

The statute does not give the children of a former marriage the fee of a homestead entry by their mother, as against her second husband. Anderson v. Muhr (1912) 36 Okl. 184, 128 P. 296.

Devise by entryman.—It is left to the option of the homesteader, either to leave his homestead to his adult heirs where he has no widow or minor children without making a will, or to devise it to some one other than his heirs, and thereby cut off the adult children. Hays v. Wyatt (1911) 19 Idaho, 544, 115 Pac. 13, 34 L. R. A. (N. S.) 397.

Minor children of a deceased settler will not be required to make any election, but can claim the land as theirs, and also share in the estate under his will. Lewis v. Lichty (1891) 3 Wash. St. 213, 28 Pac. 356, 28 Am. St. Rep. 25.

Cited without definite application, Galliher v. Cadwell (1892) 12 Sup. Ct. 873, 874, 145 U. S. 368, 36 L. Ed. 738; Wadkins v. Producers' Oil Co. (1913) 33 Sup. Ct. 380, 227 U. S. 368, 57 L. Ed. 551.

§ 4544. (Act June 8, 1880, c. 136.) Insanity of settlers; proof and payment by persons authorized to act for them.

In all cases in which parties who regularly initiated claims to public lands as settlers thereon according to the provisions of the [pre-emption or] homestead laws, have become insane or shall hereafter become insane before the expiration of the time during which their residence, cultivation, or improvement of the land claimed by them is required by law to be continued in order to entitle them to make the proper proof and perfect their claims, it shall be lawful for the required proof and payment to be made for their benefit by any person who may be legally authorized to act for them during their disability, and thereupon their claims shall be confirmed and patented, provided it shall be shown by proof satisfactory to the Commissioner of the General Land Office that the parties complied in good faith with the legal requirements up to the time of their becoming insane, and the requirement in homestead entries of an affidavit of allegiance by the applicant in certain cases as a prerequisite to the issuing of the patents shall be dispensed with so far as regards such insane parties. (21 Stat. 166.)

This was an act entitled "An act to provide for issuing patents for public lands claimed under the pre-emption and homestead laws in cases where the claimants have become insane."

The words "pre-emption or," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

Notes of Decisions

Insane settler's abandonment of claim.—There is no presumption of law from the absence of an insane settler that he intended to abandon his claims. White's Guardian v. Martin (1905) 2 Alaska, 495.

§ 4545. (R. S. § 2293.) Persons in military or naval service, when and before whom to make affidavit.

In case of any person desirous of availing himself of the benefits of this chapter; but who, by reason of actual service in the military or naval service of the United States, is unable to do the personal preliminary acts at the district land-office which the preceding sections require; and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a bona-fide improvement and settlement have been made, such person may make the affidavit required by law before the officer commanding in the branch of the service in which the party is engaged, which affidavit shall be as binding in law, and with like penalties, as if taken before the register or receiver; and upon such affidavit being filed with the register by the wife or other representative of the party, the same shall become effective from the date of such filing, provided the application and affidavit are accompanied by the fee and commissions as required by law.

Act March 21, 1864, c. 38, § 4, 13 Stat. 35.

Notes of Decisions

Affidavit.—The failure of the entryman's affidavit to state that his family or any member there was residing on the land does not invalidate the entry. Hastings & D. R. Co. v. Whitney (1889) 10 Sup. Ct. 112, 113, 132 U. S. 357, 33 L. Ed. 363.

Cited without definite application, Sturr v. Beck (1890) 10 Sup. Ct. 350, 353, 133 U. S. 541, 33 L. Ed. 761; Whitney v. Taylor (1895) 15 Sup. Ct. 796, 798, 158 U. S. 85, 39 L. Ed. 906.

§ 4546. (R. S. § 2294, as amended, Act May 26, 1890, c. 355, Act March 11, 1902, c. 182, and Act March 4, 1904, c. 394.) Officers before whom affidavits, proofs, etc., may be made; false swearing deemed perjury and punishable; fees.

Hereafter all proofs, affidavits, and oaths of any kind whatso-

ever required to be made by applicants and entrymen under the homestead, [pre-emption, timber-culture,] desert-land, and timber and stone Acts, may, in addition to those now authorized to take such affidavits, proofs, and oaths, be made before any United States commissioner or commissioner of the court exercising Federal jurisdiction in the Territory or before the judge or clerk of any court of record in the county, parish, or land district in which the lands are situated: Provided, That in case the affidavits, proofs, and oaths hereinbefore mentioned be taken out of the county in which the land is located the applicant must show by affidavit, satisfactory to the Commissioner of the General Land Office, that it was taken before the nearest or most accessible officer qualified to take said affidavits, proofs, and oaths in the land districts in which the lands applied for are located; but such showing by affidavit need not be made in making final proof if the proof be taken in the town or city where the newspaper is published in which the final proof notice is printed. The proof, affidavit, and oath, when so made and duly subscribed, or which may have heretofore been so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them with the fees and commissions allowed and required by law. If any witness making such proof, or any applicant making such affidavit or oath, shall knowingly, willfully, or corruptly swear falsely to any material matter contained in said proofs, affidavits, or oaths he shall be deemed guilty of perjury, and shall be liable to the same pains and penalties as if he had sworn falsely before the register. The fees for entries and for final proofs, when made before any other officer than the register and receiver, shall be as follows:

For each affidavit, twenty-five cents.

For each deposition of claimant or witness, when not prepared by the officer, twenty-five cents.

For each deposition of claimant or witness, prepared by the officer, one dollar.

Any officer demanding or receiving a greater sum for such service shall be guilty of a misdemeanor, and upon conviction shall be punished for each offense by a fine not exceeding one hundred dollars.

Act March 21, 1864, c. 38, § 3, 13 Stat. 35. Act May 26, 1890, c. 355, 26 Stat. 121. Act March 11, 1902, c. 182, 32 Stat. 63. Act March 4, 1904, c. 394, 33 Stat. 59.

This section, as originally enacted, was as follows:

"In any case in which the applicant for the benefit of the homestead, and whose family or some member thereof, is residing on the land which he desires to enter, and upon which a bona-fide improvement and settlement have been made, is prevented by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, it may be lawful for him to make the affidavit required by law before the clerk of the court for the county in which the applicant is an actual resident, and to transmit the same, with the fees and commissions to the register and receiver."

It was amended by Act May 26, 1890, c. 355, cited above, to read as follows:

"In any case in which the applicant for the benefit of the homestead, pre-emption, timber culture, or desert land law is prevented, by reason of distance, bodily infirmity, or other good cause, from personal attendance at the district land office, he or she may make the affidavit required by law before any commissioner of the United States circuit court or the clerk of a court of record for the county in which the land is situated, and transmit the same, with the fee and commissions to the register and receiver. That the proof of settlement, residence, occupation, cultivation, irrigation, or reclamation, the affidavit of non-alienation, the oath of allegiance, and all other affidavits required to be made under the homestead, pre-emption, timber culture, and desert land laws, may be made before the judge or clerk of any court of record of the county or parish in which the lands are situated; and the proof, affidavit, and oath, when so made and duly subscribed, shall have the same force and effect as if made before the register and receiver, when transmitted to them, with the fee and commissions allowed and required by law;" the balance of the section being the same as set forth here.

It was further amended by Act March 11, 1902, c. 182, also cited above, to read as set forth here, except that the words "county, parish," before the words "or land district," in the first sentence of the section, and the words "or which may have heretofore been so made and duly subscribed" in the second sentence, were not contained in that act, but were added by the amendment by Act March 4, 1904, c. 394, last cited above.

The words "pre-emption, timber-culture," inclosed in brackets in this section, became inoperative on the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097, and of the timber-culture laws by Act March 3, 1891, c. 561, § 1, post, § 5116.

The appointment of United States commissioners, empowered to administer the oaths in preliminary affidavits and final proofs, in like manner as provided in this section, was authorized by Act March 2, 1895, c. 174, post, §§ 4547-4549.

This section, as amended, superseded somewhat similar provisions contained in Act March 3, 1877, c. 122, §§ 1, 2, 19 Stat. 403, which was entitled "An act to amend section twenty-two hundred and ninety-one of the Revised Statutes of the United States, in relation to proof required in homestead entries." See note to R. S. § 2291, ante, § 4532.

This section, as amended, also superseded somewhat similar provisions concerning the affidavits required under the pre-emption laws, R. S. § 2262, and the laws concerning the commutation of homesteads, R. S. § 2301, post, § 4589, made by Act June 9, 1880, c. 164, 21 Stat. 169.

Notes of Decisions

Officer before whom proof may be made.—The clerk of the court who takes proofs must do so in his official capacity. Rhea v. Board of County Com'rs (Idaho, 1907) 88 P. 89.

Fees and compensation of officer.—The provision for the fees of a United States commissioner for an affidavit and final proof "made before him," contemplates fees allowable for administering an oath and attaching the jurat, but does not prevent him from charging additional compensation, where he draws an affidavit or fills out an application. In re James (D. C. 1912) 195 Fed. 981.

Perjury.—See, also, notes to § 10295, post.

If the applicant's oath is willfully and knowingly false, he is guilty of perjury. U. S. v. Hearing (C. C. 1886) 26 Fed. 744, 746. See, also, Barnard v. U. S. (1908) 162 Fed. 618, 89 C. C. A. 376; U. S. v. Howard (D. C. 1889) 37 Fed. 666; State v. Kirkpatrick (1877) 32 Ark. 117; People v. Kelly (1869) 38 Cal. 145, 99 Am. Dec. 360.

—— Acquittal not conclusive.—An acquittal for perjury is not conclusive upon the United States in the land department. (1841) 3 Op. Atty. Gen. 664.

Cited without definite application, Neff v. U. S. (1908) 165 Fed. 273, 91 C. C. A. 241.

§ 4547. (Act March 2, 1895, c. 174, § 1.) United States court commissioners; appointment.

The chief justice of the court exercising Federal jurisdiction in the Territories shall have power to appoint commissioners in the several judicial districts, to be known when appointed as United States court commissioners. (28 Stat. 744.)

This section and the two sections next following were part of an act entitled "An act granting chief justice of United States courts in Territories power to appoint commissioners to take proof in land cases, and so forth."

Section 4 of the Act provided that the act should be in force from and after its passage, and is omitted as temporary.

§ 4548. (Act March 2, 1895, c. 174, § 2.) Administration of oaths in preliminary affidavits and final proofs under land laws.

Said commissioners shall have power, and it shall be their duty on application by proper person, to administer the oaths in preliminary affidavits and final proofs required under the homestead, pre-emption, timber culture, and desert-land laws in their respective districts, in like manner as provided for in reference to United States circuit court commissioners, in the Act of May twenty-sixth, eighteen hundred and ninety. Twenty-sixth Statutes at Large, page one hundred and twenty-one. (28 Stat. 744.)

Act May 26, 1890, c. 355, mentioned in this section, amended R. S. § 2294, ante, § 4546. See note to that section for the provisions of said act.

§ 4549. (Act March 2, 1895, c. 174, § 3.) Place of residence of court commissioner.

No commissioner shall be appointed who resides within thirty miles of any local land office, nor shall any commissioner be appointed who resides within thirty miles of any other commissioner. (28 Stat. 744.)

§ 4550. (R. S. § 2295.) Record of applications.

The register of the land-office shall note all applications under the provisions of this chapter, on the tract-books and plats of his office, and keep a register of all such entries, and make return thereof to the General Land Office, together with the proof upon which they have been founded.

Act May 20, 1862, c. 75, § 3, 12 Stat. 393.

Notes of Decisions

Tract book as evidence.—The tract book is admissible to show that lands applied for were subject to entry, and the register may explain the meaning of abbreviations used therein. Nurnberger v. U. S. (1907) 156 Fed. 721, 727, 84 C. C. A. 377.

The tract book is prima facie evidence that the lands therein shown to be public lands are such. Jesse D. Carr Land & Live Stock Co. v. U. S. (1902) 118 Fed. 821, 55 C. C. A. 433.

Powers and duties of commissioner of General Land Office.—See notes to § 699.

Cited without definite application, Hafemann v. Gross (1905) 26 Sup. Ct. 80, 82, 199 U. S. 342, 50 L. Ed. 220; Germania Iron Co. v. James (1898) 89 Fed. 811, 815, 32 C. C. A. 348; James v. Germania Iron Co. (1901) 107 Fed. 597, 610, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); Neff v. U. S. (1908) 165 Fed. 273, 277, 91 C. C. A. 241; Wilson v. Fine (C. C. 1889) 40 Fed. 52, 54, 5 L. R. A. 141.

§ 4551. (R. S. § 2296.) Homestead lands not to be subject to prior debts.

No lands required under the provisions of this chapter shall in any event become liable to the satisfaction of any debt contracted prior to the issuing of the patent therefor.

Act May 20, 1862, c. 75, § 4, 12 Stat. 393.

The word "required," in this section was evidently intended for "acquired."

Notes of Decisions

1. Validity of statute.
2. Exemption from prior debts.
3. —— Debts due government.
4. —— Bankruptcy of homesteader.
5. —— Debts of decedent.
6. —— Debts of devisor.
7. —— Time from which land becomes liable for debts.
8. —— Lien of judgment for prior debts.
9. —— Torts of entrymen.
10. Exemption as restriction on power to mortgage land.
11. —— Effect of void mortgage.
12. Exemption of buildings from mechanic's lien.
13. Exemption of irrigation ditches.
14. Exemption of proceeds of sale.
15. Exemption in favor of patentee's heirs and assigns.
16. Waiver or loss of exemption.
17. —— Effect of abandonment of land as homestead.
18. —— Effect of conveyance by patentee.
19. —— Effect of reconveyance to patentee.

1. Validity of statute.—This section is valid and binding on the states. Seymour v. Sanders (C. C. 1874) Fed. Cas. No. 12690; Miller v. Little (1874) 47 Cal. 348; Russell v. Lowth (1874) 21 Minn. 167, 18 Am. Rep. 389; Gile v. Hallock (1873) 33 Wis. 523. See, also, Fink v. O'Neil (1882) 1 Sup. Ct. 325, 333, 106 U. S. 272, 27 L. Ed. 196.

2. Exemption from prior debts.—The land is not liable to seizure and sale for debts contracted prior to the issuing of the patent. Buchser v. Morss (D. C. 1912) 196 Fed. 577 (affirmed [1913] 202 Fed. 854, 121 C. C. A. 212); Grames v. Consolidated Timber Co. (D. C. 1914) 215 Fed. 785; Shorman v. Eakin (1886) 47 Ark. 351, 1 S. W. 559; Brown v. Kennedy (1888) 12 Colo. 235, 20 Pac. 696; Scott v. Stutheit (Colo. 1915) 146 P. 766; Patton v. Richmond (1876) 28 La. Ann. 795; Dickerson v. Bridges (1898) 147 Mo. 235, 48 S. W. 825; Messick v. McCarty (1884) 16 Neb. 704, 21 N. W. 439; Baldwin v. Boyd (1885) 18 Neb. 444, 25 N. W. 580; Jackett v. Bower (1901) 86 N. W. 1075, 62 Neb. 232; Clark v. Bayley (1874) 5 Or. 343; Adams v. Church (1902) 70 Pac. 1037, 42 Or. 270, 59 L. R. A. 782, 95 Am. St. Rep. 740.

3. —— Debts due government.—Such exemptions apply to executions or judgments in favor of the United States.

Fink v. O'Neil (1882) 1 Sup. Ct. 325, 333, 106 U. S. 272, 27 L. Ed. 196.

4. —— Bankruptcy of homesteader.—Homestead lands of a bankrupt are exempt. In re Daubner (D. C. 1899) 96 Fed. 805.

An unpatented homestead does not pass to the entryman's trustee in bankruptcy. In re Cohn (D. C. 1909) 171 Fed. 568.

5. —— Debts of decedent.—The probate court has no jurisdiction to order land acquired by decedent under the homestead laws sold to pay debts contracted prior to the issuance of the patent. J. B. Watkins Land Mortg. Co. v. Mullen (1898) 54 Pac. 921, 8 Kan. App. 705, reversed (1900) 61 Pac. 385, 62 Kan. 1, 84 Am. St. Rep. 372. But the statute does not take the land, after it has once become the property of the homesteader, out of the probate court's jurisdiction. Doran v. Kennedy (1913) 122 Minn. 1, 141 N. W. 851.

Where decedent at the time of his death had an equitable title to public land to which he had not yet received a patent, the probate court has jurisdiction to order such land sold to pay certain demands. Id.

6. —— Debts of devisor.—When a settler dies before acquiring title, having devised the homestead, the devisee perfecting his title, acquires the land exempt from liability for prior debts. Coleman v. McCormick (1887) 37 Minn. 179, 33 N. W. 556.

7. —— Time from which land becomes liable for debts.—The exemption no longer applies after final proof has been made, and final or patent certificates issued therefor. Ruddy v. Rossi (Idaho, 1916) 154 Pac. 977; Flanagan v. Forsythe (1897) 50 Pac. 152, 6 Okl. 225; Hobb v. J. I. Case Threshing Mach. Co. (Okl. 1913) 135 P. 395.

The issuance of the patent, and not the issuance of a final receipt, fixes the time from which the property may become liable for subsequent debts of the homesteader. In re Cohn (D. C. 1909) 171 Fed. 568. See, also, Cooper v. Miller (1913) 165 Cal. 31, 130 Pac. 1048.

Where a debt is contracted after the issuance of a final certificate of entry, but prior to the patent, the land may lawfully be taken in satisfaction of the debt. Struby-Estabrook Mercantile Co. v. Davis (1892) 18 Colo. 93, 31 Pac. 495, 36 Am. St. Rep. 266.

Such lands are liable for debts contracted after the day on which the owner becomes entitled to a patent which may not be issued until later. Leonard v. Ross (1880) 23 Kan. 292.

The time when a debt was contracted is the time when the consideration was received and the obligation to pay was assumed. Ash v. Eriksson (1911) 132 N. W. 997, 115 Minn. 478.

Land is not liable for a debt contracted after final proofs, and before the issuance of the patent. Wallowa Nat. Bank v. Riley (1896) 29 Or. 289, 45 Pac. 766, 54 Am. St. Rep. 794, following Barnard v. Boller (1894) 105 Cal. 214, 38 Pac. 728.

8. —— Lien of judgment for prior debts.—A judgment is not a lien on the land, if the debt was contracted prior to the issuing of the patent. Ash v. Eriksson (1911) 132 N. W. 997, 115 Minn. 478.

When a homesteader contracts a debt before his title is perfected, and judgment is rendered against him after he obtains his patent, the judgment is not a lien on the land. Kruger v. Adams & French Harvester Co. (1882) 13 Neb. 97, 13 N. W. 3.

Land is not subject to a judgment obtained on a note given between the making of final proof and the issuance of patent. Sprinkle v. West (Wash. 1911) 114 Pac. 430.

A homestead does not become subject to the lien of a judgment against the entryman's wife, rendered upon a joint indebtedness of husband and wife contracted prior to final proof, where the entryman, after final proof, but before patent issues, conveys to his wife. Blair v. Mayer (S. D. 1910) 124 N. W. 721.

9. —— Torts of entryman.—The homestead is not exempt from liabilities for prior torts of the entrymen. Brun v. Mann (1906) 151 Fed. 145, 80 C. C. A. 513, 12 L. R. A. (N. S.) 154.

The statute includes a liability for a tort growing out of a breach of a contract warranting the title to certain personal property. Flanagan v. Forsythe (1897) 50 P. 152, 6 Okl. 225.

10. Exemption as restriction on power to mortgage land.—Mortgage as alienation, see notes to § 4532, ante.

A mortgage executed before the right to a patent had been perfected is void. Webster v. Bowman (C. C. 1885) 25 Fed. 889. But this section does not prevent the settler from mortgaging or otherwise conveying his interest in the land before the issuing of the patent. A mortgage given after the issuance of a final certificate is valid. Smart v. Kennedy (1899) 26 So. 198, 123 Ala. 627; Gilkerson-Sloss Co. v. Forbes (1891) 54 Ark. 148, 15 S. W. 191, 26 Am. St. Rep. 29; Orr v. Stewart (1885) 67 Cal. 275, 7 Pac. 693; Klempp v. Northrop (1902) 70 Pac. 284, 137 Cal. 414; Nycum v. McAllister (1872) 33 Iowa, 374; Watson v. Voorhees (1875) 14 Kan. 328; Cheney v. White (1876) 5 Neb. 261, 25 Am. Rep. 487; Jones v. Yoakam (1876) 5 Neb. 265; Orr v. Ulyatt (1896) 23 Nev. 134, 43 Pac. 916; Adam v. McClintock (N. D. 1911) 131 N. W. 394; Englert v. Dale (N. D. 1913) 142 N. W. 169; Dickerson v. Cuthburth (1894) 56 Mo. App. 647; Dickerson v. Bridges (1898) 48 S. W. 825, 147 Mo. 235; Fariss v. Deming Inv. Co. (1897) 49 P. 926,

5 Okl. 496; Stark v. Duvall (1898) 54 Pac. 453, 7 Okl. 213; Howard v. Reckling (1897) 49 Pac. 961, 31 Or. 161; Boggan v. Reid (1889) 1 Wash. St. 514, 20 P. 425; Weber v. Laidler (1901) 66 Pac. 400, 26 Wash. 144, 90 Am. St. Rep. 726; Rogers v. Minneapolis Threshing Mach. Co. (Wash. 1907) 92 P. 774; Meinhold v. Walters (1899) 78 N. W. 574, 102 Wis. 389, 72 Am. St. Rep. 888.

It has been held that the entryman may execute a valid mortgage prior to submitting final proof and receiving the final certificate. Runyan v. Snyder (Colo. 1909) 100 P. 420; Fuller v. Hunt (1878) 48 Iowa, 163; Lewis v. Wetherell (1887) 36 Minn. 386, 31 N. W. 356, 1 Am. St. Rep. 674; Lang v. Morey (1889) 40 Minn. 396, 42 N. W. 88, 12 Am. St. Rep. 748.

A deposit of the final certificate issued on a homestead entry as security for a debt is not effective to create an equitable mortgage on the land. Grames v. Consolidated Timber Co. (D. C. 1914) 215 Fed. 785.

11. —— Effect of void mortgage.—No title, legal or equitable, is acquired by a mortgage void because of this provision. Hall v. Slaughter (Ala. 1908) 47 So. 103.

12. Exemption of buildings from mechanic's lien.—The sale and removal on foreclosure of mechanic's lien of a house erected on land on which a homestead filing had been made, but not final proof thereon, in no way conflict with this section. Mahon v. Surerus (1899) 81 N. W. 64, 9 N. D. 57.

13. Exemption of irrigation ditches.—Irrigation ditches are not liable to be sold for debts contracted before the issue of the patent. Faull v. Cooke (1890) 19 Or. 455, 26 Pac. 662, 20 Am. St. Rep. 836.

14. Exemption of proceeds of sale.—The exemption is in the nature of a condition attached to the grant, and does not extend to the proceeds of a sale. Ritzville Hardware Co. v. Bennington (1908) 96 P. 826, 50 Wash. 111.

15. Exemption in favor of patentee's heirs and assigns.—The debts referred to are those of the patentee, and the exemption does not run with the land and inure to the benefit of the patentee's heirs and assigns, so as to render the lands exempt from execution for debts of the patentee's husband contracted prior to patent on his acquiring the land on her death. In re Parmeter's Estate (D. C. 1914) 211 Fed. 757.

16. Waiver or loss of exemption.—The exemption may be waived by voluntary act, or by acquiescing in a sale of the land to pay debts. Doran v. Kennedy (1913) 122 Minn. 1, 141 N. W. 851. And see Cooper v. Miller (1913) 165 Cal. 31, 130 Pac. 1048.

It is not abandoned by a commutation. McCorkell v. Herron (1905) 103 N. W. 988, 128 Iowa, 324, 111 Am. St. Rep. 201.

17. —— Effect of abandonment of land as homestead.—The exemption continues though the land ceases to be occupied as a homestead after the issuance of the patent. Adams v. White (1887) 23 Fla. 352, 2 South. 774; Jean v. Dee (1893) 5 Wash. 580, 32 Pac. 460.

Lands, after they have been abandoned as a homestead, are liable to seizure and sale for debts contracted between the date of final proof and certificate and the issue of the patent. Johnson v. Borin (1898) 54 P. 804, 7 Kan. App. 369.

18. —— Effect of conveyance by patentee.—The exemption is not a privilege personal to the patentee, but attaches to the land, and inures to the benefit of his grantee. Miller v. Little (1874) 47 Cal. 348; Russell v. Lowth (1874) 21 Minn. 167, 18 Am. Rep. 389; Dickerson v. Cuthburth (1894) 56 Mo. App. 647; Smith v. Steele (1882) 13 Neb. 1, 12 N. W. 830; Baldwin v. Boyd (1885) 18 Neb. 444, 25 N. W. 580; Stark Bros. v. Glaser (Okl. 1907) 91 P. 1040; Gile v. Hallock (1873) 33 Wis. 523. And see Bouscher v. Smith (1887) 73 Iowa, 610, 35 N. W. 681.

But lands are not exempt from the payment of debts of one to whom the patentee conveyed the property, though incurred prior to the issuance of the patent. Duell v. Potter (1897) 70 N. W. 932, 51 Neb. 241; Hannah v. Perkins (1902) 89 N. W. 599, 2 Neb. (Unof.) 614.

The exemption is available to the entryman after his conveyance is set aside as fraudulent. McCorkell v. Herron (1905) 103 N. W. 988, 128 Iowa, 324, 111 Am. St. Rep. 201.

19. —— Effect of reconveyance to patentee.—The exemption does not protect one who has parted with title to the land and subsequently acquired title. De Lany v. Knapp (1896) 111 Cal. 165, 43 Pac. 598, 52 Am. St. Rep. 160; Cooper v. Miller (1913) 165 Cal. 31, 130 Pac. 1048. But see Brandhoefer v. Bain (1895) 45 Neb. 781, 64 N. W. 213.

The person making the entry having conveyed his interest in the land to his wife, and it having subsequently come to him through succession to her estate, on her death, all before issuance of the patent, it is not liable for his debts contracted while she owned it. Van Doren v. Miller (1901) 85 N. W. 187, 14 S. D. 264.

Cited without definite application, Shea v. Lewis (1913) 206 Fed. 877, 124 C. C. A. 537; Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 662, 190 U. S. 452, 47 L.

Ed. 1134 (dissenting opinion); Hartman v. Butterfield Lumber Co. (1905) 26 Sup. Ct. 63, 199 U. S. 335, 50 L. Ed. 217; Hafeman v. Gross (1905) 26 Sup. Ct. 80, 82, 199 U. S. 342, 50 L. Ed. 220.

§ 4552. (R. S. § 2297, as amended, Act March 3, 1881, c. 153, and Act June 6, 1912, c. 153.) When lands entered for homestead revert to Government.

If, at any time after the filing of the affidavit as required in section twenty-two hundred and ninety and before the expiration of the three years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land office that the person having filed such affidavit has failed to establish residence within six months after the date of entry, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government: Provided, That the three years' period of residence herein fixed shall date from the time of establishing actual permanent residence upon the land: And provided further, That where there may be climatic reasons, sickness, or other unavoidable cause, the Commissioner of the General Land Office may, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence on said land under such rules and regulations as he may prescribe.

Act May 20, 1862, c. 75, § 5, 12 Stat. 393. Act March 3, 1881, c. 153, 21 Stat. 511. Act June 6, 1912, c. 153, 37 Stat. 123.

This section, as originally enacted, was as follows:

"If, at any time after the filing of the affidavit, as required in section twenty-two hundred and ninety, and before the expiration of the five years mentioned in section twenty-two hundred and ninety-one, it is proved, after due notice to the settler, to the satisfaction of the register of the land-office, that the person having filed such affidavit has actually changed his residence, or abandoned the land for more than six months at any time, then and in that event the land so entered shall revert to the Government."

It was amended by Act March 3, 1881, c. 153, cited above, by adding a proviso that for climatic reasons the Commissioner of the General Land Office might, in his discretion, allow the settler twelve months from the date of filing in which to commence his residence, and was further amended, to read as set forth here, by Act June 6, 1912, c. 153, last cited above.

Leaves of absence and extensions of time for final proofs and payment for cause were granted to settlers by Act July 1, 1879, c. 63, § 1, Act March 2, 1889, c. 381, § 3, as amended by Act Dec. 29, 1894, c. 14, and Res. Sept. 30, 1890, No. 59, post, §§ 4553–4555.

Leaves of absence not exceeding five months yearly were granted by R. S. § 2291, as amended, Act June 6, 1912, c. 153, ante, § 4532; Act Aug. 22, 1914, c. 270, ante, § 4532a; and Act July 3, 1916, c. 214, ante, § 4532b.

Notes of Decisions

Effect of entry.—A homestead entry operates as an appropriation of the land covered by it, and segregates that tract from the mass of the public domain. Sturr v. Beck (1890) 10 Sup. Ct. 350, 352, 133 U. S. 541, 33 L. Ed. 761; U. S. v. Turner (C. C. 1892) 54 Fed. 228, 230; (1881) 17 Op. Atty. Gen. 160; King v. Great Northern Ry. Co. (1911) 119 P. 709, 20 Idaho, 687.

Abandonment of claim.—On the abandonment of a homestead claim the land reverts to the government. Kansas Pac. R. Co. v. Dunmeyer (1885) 5 Sup. Ct. 566, 567, 113 U. S. 629, 28 L. Ed. 1122. See, also, Bardon v. Northern Pac. R. Co. (1892) 12 Sup. Ct. 856, 857, 145 U. S. 535, 36 L. Ed. 806.

A homestead claim is abandoned by filing a new application to enter the same land. Edwards v. Begole (1903) 121 Fed. 1, 57 C. C. A. 245.

The settler loses all his title by abandonment. Gluckauf v. Reed (1863) 22 Cal. 468.

Enforced absence by reason of conviction for crime will not work an abandonment. Huffman v. Smyth (1906) 84 P. 80, 47 Or. 573, 114 Am. St. Rep. 938.

This section does not prevent the settler from restoring the land to the public domain without a contest by means of a voluntary relinquishment. Keane v. Brygger (1891) 3 Wash. St. 338, 28 Pac. 653.

Jurisdiction to hear and decide contests—Register and receiver.—Whether the receiver may validly take part in the inquiry will not for the first time be considered on appeal in a suit to set aside the patent for the land in dispute before the land office. Carr v. Fife (1895) 15 Sup. Ct. 427, 156 U. S.

494, 39 L. Ed. 508, affirming decree (C. C. 1891) 45 Fed. 209. See, also, Lawrence v. Potter (1900) 60 Pac. 147, 22 Wash. 32.

—— **Land department.**—See, also, notes to § 699, ante.

The enumeration of certain causes for a contest before the land department does not preclude the department from hearing contests for other causes. Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163; Lawrence v. Potter (1900) 60 P. 147, 22 Wash. 32.

The determination of the land department that the settler has complied with the statutory requirements as to residence is conclusive on the courts. Thompson v. Basler (1906) 84 Pac. 161, 148 Cal. 646, 113 Am. St. Rep. 321.

Notice to settler.—The cancellation of a homestead entry upon due notice to the entryman, and after a hearing in the case, cannot be regarded as a mere nullity, when set up against his mortgagee, because the latter had no notice of the proceeding, but the entry no longer constitutes prima facie evidence in favor of such mortgagee. Guaranty Sav. Bank v. Bladow (1900) 20 Sup. Ct. 425, 427, 176 U. S. 448, 44 L. Ed. 540, affirming and modifying judgment (1896) 69 N. W. 41, 6 N. D. 108.

The notice covers such matters only as are alleged, and these are the only questions that can be passed on. Johnson v. Lee (1881) 47 Mich. 52, 10 N. W. 76.

Cited without definite application, Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231; Moss v. Dowman (1900) 20 Sup. Ct. 429, 431, 176 U. S. 413, 44 L. Ed. 526; Grubbs v. U. S. (1900) 105 Fed. 314, 319, 44 C. C. A. 513; U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243; Savage v. Worsham (C. C. 1896) 72 Fed. 601, 602; U. S. v. Mills (C. C. 1909) 169 Fed. 686, reversed (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4553. (Act July 1, 1879, c. 63, § 1.) Leave of absence where crops destroyed or seriously injured by grasshoppers.

It shall be lawful for homestead [and pre-emption] settlers on the public lands, [and in all cases where pre-emptions are authorized by law,] where crops have been or may be destroyed or seriously injured by grasshoppers, to leave and be absent from said lands, under such rules and regulations, as to proof of the same, as the Commissioner of the General Land Office shall prescribe; but in no case shall such absence extend beyond one year continuously; and during such absence no adverse rights shall attach to said lands, such settlers being allowed to resume and perfect their settlement as though no such absence had occurred. (21 Stat. 48.)

This section was part of an act entitled "An act for the relief of settlers on the public lands in districts subject to grasshopper incursions," cited above.

Section 2 of the act extended the time for making final proof and payment upon pre-emption claims.

That section and the words inclosed in brackets in this section became inoperative upon the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097, and of the timber-culture laws by Act March 3, 1891, c. 561, § 1, post, § 5116.

More comprehensive provisions for leaves of absence on account of destruction or failure of crops were made by Act March 2, 1889, c. 381, § 3, post, § 4554. See, also, notes to § 4552, ante.

Cited without definite application, U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4554. (Act March 2, 1889, c. 381, § 3, as amended, Act Dec. 29, 1894, c. 14.) Leave of absence on destruction or failure of crops, sickness, or other unavoidable casualty.

That whenever it shall be made to appear to the register and receiver of any public land office, under such regulations as the Secretary of the Interior may prescribe, that any settler upon the public domain under existing law is unable by reason of a total or partial destruction or failure of crops, sickness, or other unavoidable casualty, to secure a support for himself, herself, or those dependent upon him or her upon the lands settled upon, then such register and receiver may grant to such settler a leave of absence from the claim upon which he or she has filed for a period not exceeding one year at any one time, and such settler so granted leave of absence shall

forfeit no rights by reason of such absence: Provided, That the time of such actual absence shall not be deducted from the actual residence required by law. That if any such settler has heretofore forfeited his or her entry for any of said reasons, such person shall be permitted to make entry of, not to exceed a quarter section on any public land subject to entry under the homestead law, and to perfect title to the same under the same conditions in every respect as if he had not made the former entry. (25 Stat. 854. 28 Stat. 599.)

This section was amended by Act Dec. 29, 1894, c. 14, cited above, by adding to the proviso at the end of the section as originally enacted the words beginning, "That if any such settler has heretofore forfeited," to the end of the section as set forth here.

Further as to leaves of absence, see notes to § 4552, ante.

Cited without definite application,
U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4555. (Res. Sept. 30, 1890, No. 59.) Time for payment extended.

Whenever it shall appear by the filing of such evidence in the offices of any register and receiver as shall be prescribed by the Secretary of the Interior that any settler on the public lands, by reason of a failure of crops for which he is in no wise responsible, is unable to make the payment on his homestead [or pre-emption] claim required by law, the Commissioner of the General Land Office is hereby authorized to extend the time for such payment for not exceeding one year from the date when the same becomes due. (26 Stat. 684.)

The words "or pre-emption," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

§ 4556. (Act Sept. 5, 1914, c. 294.) Homestead entry or desert-land entry after former entry lost, forfeited, or abandoned, without fault.

Any person otherwise duly qualified to make entry or entries of public lands under the homestead or desert-land laws, who has heretofore made or may hereafter make entry under said laws, and who, through no fault of his own, may have lost, forfeited, or abandoned the same, or who may hereafter lose, forfeit, or abandon same, shall be entitled to the benefits of the homestead or desert-land laws as though such former entry or entries had never been made: Provided, That such applicant shall show to the satisfaction of the Secretary of the Interior that the prior entry or entries were made in good faith, were lost, forfeited, or abandoned because of matters beyond his control, and that he has not speculated in his right nor committed a fraud or attempted fraud in connection with such prior entry or entries. (38 Stat. 712.)

This was an act entitled "An act providing for second homestead and desert-land entries," cited above.

Provisions somewhat similar to those of this act, but applying only to homestead entries, of Act March 2, 1889, c. 381, § 2, 25 Stat. 854, Act June 5, 1900, c. 716, § 3, 31 Stat. 270, and Act April 28, 1904, c. 1776, § 1, 33 Stat. 527, were superseded by Act Feb. 8, 1908, c. 19, 35 Stat. 6, which was superseded by Act Feb. 3, 1911, c. 34, 36 Stat. 896, and that act was, in turn, superseded by this section.

Provisions for second desert-land entries were made by Act March 26, 1908, c. 103, 35 Stat. 48, which were also superseded by Act Feb. 3, 1911, c. 34, 36 Stat. 896, and later by this section.

A homestead entry in Alaska is not barred by a prior entry in any other state or territory, by Act July 8, 1916, c. 228, § 1, post, § 5046a.

§ 4557. (R. S. § 2298.) Limitation of amount entered for homestead.

No person shall be permitted to acquire title to more than one quarter-section under the provisions of this chapter.

Act May 20, 1862, c. 75, § 6, 12 Stat. 393.

Homestead entries after a former entry not perfected, or additional to a

former entry of less than one quarter section, were provided for by subsequent acts, post, §§ 4560–4562.

Homestead entries after commutation or after loss or forfeiture of a former entry were provided for by Act June 5, 1900, c. 716, § 2, post, § 4583.

All parties who had purchased land in Greer county, Okl., from the State of Texas, prior to March 16, 1896, were entitled to perfect their titles to said lands under the provisions of the homestead laws, notwithstanding the fact that they have already had the benefit of the homestead laws as to other lands, by Act March 1, 1899, c. 328, post, § 5044.

Special limitations of the amount to be entered for homestead in Alaska were prescribed by the amendment of Act May 14, 1898, c. 299, § 1, by Act March 3, 1903, c. 1002, post, § 5046, and Act July 8, 1916, c. 228, § 1, post, § 5046a.

Provisions for additional entries or second entries on ceded Indian lands or lands in Indian reservations opened to settlement, contained in various acts, are set forth or referred to post, under chapter 10 I of this Title, "Ceded Indian Reservations."

Notes of Decisions

Departmental regulations.—A regulation requiring an affidavit stating whether the entryman has made other entries is suitably addressed to the enforcement of this section. U. S. v. Smull (1915) 35 Sup. Ct. 349, 350, 236 U. S. 405, 50 L. Ed. 641.

Cited without definite application, Ard v. Brandon (1895) 15 Sup. Ct. 406, 407, 156 U. S. 537, 39 L. Ed. 524; Richards v. U. S. (1909) 175 Fed. 911, 99 C. C. A. 401; Huntington v. Same (1909) 175 Fed. 950, 99 C. C. A. 440.

§ 4558. (Act Aug. 30, 1890, c. 837, § 1.) Limitation of aggregate amount entered under any land laws.

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act. (26 Stat. 391.)

This was a provision of the sundry civil appropriation act for the fiscal year 1891, cited above.

Homestead entries of 320 acres or less of nonmineral, nonirrigable, etc., lands, not containing merchantable timber, in certain states and territories named, were permitted, by Act Feb. 19, 1909, c. 160, and Act June 17, 1910, c. 298, post, §§ 4563–4574.

Homestead entries of not exceeding in area 640 acres of lands within certain designated boundaries in the State of Nebraska were allowed, and former homestead entries were not to be a bar thereto, by provisions of the Kinkaid Act of April 28, 1904, c. 1801, amended by Act May 29, 1908, c. 220, § 7, post, §§ 4576–4578.

Special limitations of the amount to be entered in Alaska were prescribed by Act May 14, 1898, c. 299, § 1, 30 Stat. 409, amended by Act March 3, 1903, c. 1002, post, § 5046, and Act July 8, 1916, c. 228, § 1, post, § 5046a.

The entries, etc., mentioned in this provision as validated by this act were entries, etc., which would have been valid but for the withdrawal of arid lands from entry by provisions of Act Oct. 2, 1888, c. 1069, which were repealed by a preceding provision of this act, post, § 4696.

The application of this provision was limited to agricultural lands, not including in the maximum amount lands entered under mineral land laws, by Act March 3, 1891, c. 561, § 17, post, § 4559.

Notes of Decisions

Limitation of amount in case of prior entries.—The limitation did not operate upon entries made prior to the date of the act. And an applicant who, by such prior entries had already acquired title to 320 acres was not precluded from acquiring title to an additional quantity, not exceeding 320 acres, by homestead entry, timber land, or other claim under the land laws, filed subsequent to the date of the act. (1890) 19 Op. Atty. Gen. 704.

Timber and stone entries.—See notes to § 4671 et seq., post.

This limitation applies to timber and stone entries. Shenk v. Aumiller (D. C. 1914) 217 Fed. 969.

§ 4559. (Act March 3, 1891, c. 561, § 17.) Lands entered under mineral land laws not included in amount limited.

The provision of "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-one, and for other purposes," which reads as follows, viz: "No person who shall after the passage of this act enter upon any of the public lands with a view to occupation, entry, or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate under all said laws," shall be construed to include in the maximum amount of lands the title to which is permitted to be acquired by one person only agricultural lands and not to include lands entered or sought to be entered under mineral land laws. (26 Stat. 1101.)

This provision was part of section 17 of Act March 3, 1891, c. 561, to repeal timber-culture laws and for other purposes, cited above.

The preceding portion of the section, which restricted reservations for reservoir sites to the land actually necessary, etc., is set forth post, § 4698.

The provision of the sundry civil appropriation act for the fiscal year 1891, referred to in this section, is set forth ante, § 4558.

Notes of Decisions

Stone and timber lands.—Stone and timber lands are subject to the 320-acre limitation. Shenk v. Aumiller (D. C. 1914) 217 Fed. 969.

§ 4560. (Act March 2, 1889, c. 381, § 6.) Additional entry after final proof on former entry of less than one quarter-section.

Every person entitled, under the provisions of the homestead laws, to enter a homestead, who has heretofore complied with or who shall hereafter comply with the conditions of said laws, and who shall have made his final proof thereunder for a quantity of land less than one hundred and sixty acres and received the receiver's final receipt therefor, shall be entitled under said laws to enter as a personal right, and not assignable, by legal subdivisions of the public lands of the United States subject to homestead entry, so much additional land as added to the quantity previously so entered by him shall not exceed one hundred and sixty acres: Provided, That in no case shall patent issue for the land covered by such additional entry until the person making such additional entry shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered and otherwise fully complied with such laws: Provided, also, That this section shall not be construed as affecting any rights as to location of soldiers certificates heretofore issued under section two thousand three hundred and six of the Revised Statutes. (25 Stat. 854.)

R. S. § 2306, mentioned in this section is set forth post, § 4594.

Additional entries by one who has entered less than one-quarter section of land, might be made upon land contiguous to the former entry without proof of residence, under the provisions of Act April 28, 1904, c. 1776, § 2, post, § 4561.

Cited without definite application,
U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4561. (Act April 28, 1904, c. 1776, § 2.) Additional entry of land contiguous to former entry of less than one quarter section.

Any homestead settler who has heretofore entered, or may hereafter enter, less than one-quarter section of land may enter other and additional land lying contiguous to the original entry which shall not, with the land first entered and occupied, exceed in the aggregate one hundred and sixty acres, without proof of residence upon and cultivation of the additional entry; and if final proof of settlement and cultivation has been made for the original entry when the additional

entry is made, then the patent shall issue without further proof: Provided, That this section shall not apply to or for the benefit of any person who does not own and occupy the lands covered by the original entry: And provided, That if the original entry should fail for any reason prior to patent, or should appear to be illegal or fraudulent, the additional entry shall not be permitted, or, if having been initiated, shall be canceled. (33 Stat. 527.)

This section and the section next following were part of an act entitled "An act providing for second and additional homestead entries, and for other purposes."

Section 1 of this act provided that any person who had theretofore made entry under the homestead laws, but should show to the satisfaction of the General Land Office that he was unable to perfect the entry on account of an honest mistake as to the character of the land, etc., should be entitled to the benefit of the homestead laws as though such former entry had not been made. It was superseded by the broader provisions of Act Feb. 8, 1908, c. 19, 35 Stat. 6, which was itself superseded by Act Feb. 3, 1911, c. 34, ante, § 4556.

This section re-enacted the provisions of Act March 2, 1889, c. 381, § 5, 25 Stat. 854, in the same language, with the addition, after the words at the beginning, "That any homestead settler who has heretofore entered," of the words, "or may hereafter enter," and the omission, after the words of the first proviso, "That this section shall not apply to or for the benefit of any person who," of the words, "at the date of making application for entry hereunder," which were in said former section.

Additional entries, after final proofs on former entry of less than one quarter-section, of land not contiguous thereto, were provided for by Act March 2, 1889, c. 381, § 6, ante, § 4560.

Notes of Decisions

Additional entry.—The right to enter land as an additional homestead cannot be exercised upon unsurveyed land, and land taken must be contiguous to the land already occupied by the entryman; and land that is separated from the homestead by a meandered navigable arm of a navigable river is not contiguous. Switzler v. Earnheart (Or. 1911) 117 Pac. 296.

§ 4562. (Act April 28, 1904, c. 1776, § 3.) Commutation of entries under this act not allowed.

Commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this Act. (33 Stat. 527.)

Rev. St. § 2301, mentioned in this section, is set forth post, § 4589.

Provisions for commutation of homestead entries theretofore made, by payment of the government price for the land, were made by Act June 15, 1880, c. 227, § 2, 21 Stat. 237. They are omitted as temporary merely, and executed.

§ 4563. (Act Feb. 19, 1909, c. 160, § 1, as amended, Act June 13, 1912, c. 166.) Enlarged homestead entries of nonmineral, nonirrigable, etc., lands, not containing merchantable timber, in certain States; lands to be designated as not irrigable.

Any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivisions, under the provisions of this Act, in the States of Arizona, California, Colorado, Montana, Nevada, New Mexico, North Dakota, Oregon, Utah, Washington, and Wyoming, three hundred and twenty acres, or less, of nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body, and not over one and one-half miles in extreme length: Provided, That no lands shall be subject to entry under the provisions of this Act until such lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation at a reasonable cost from any known source of water supply. (35 Stat. 639. 37 Stat. 132.)

This section and the five sections next following were an act entitled "An act to provide for an enlarged homestead."

The amendment of this section by Act June 13, 1912, c. 166, cited above,

consisted in the addition of California and North Dakota to the States included in the act, and in the designation of Arizona and New Mexico as States, instead of Territories, as in the original section.

Provisions similar to those of this act for entries of enlarged homesteads in the State of Idaho, were contained in Act June 17, 1910, c. 298, as amended by Act Feb. 11, 1913, c. 39, post, §§ 4569–4574.

The first five sections of this act were made applicable to South Dakota and Kansas by Act March 4, 1915, c. 150, § 2, post, § 4568c, and Act March 3, 1915, c. 84, post, § 4568d.

§ 4564. (Act Feb. 19, 1909, c. 160, § 2.) Applications for entry; affidavits; fees.

Any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this Act, and shall pay the fees now required to be paid under the homestead laws. (35 Stat. 639.)

R. S. § 2290, mentioned in this section, is set forth ante, § 4531.

§ 4565. (Act Feb. 19, 1909, c. 160, § 3, as amended, Act Feb. 11, 1913, c. 39, and Act March 3, 1915, c. 91.) Additional entry of land contiguous to former entry, not to exceed limitation.

Any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: Provided, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this Act, as provided by section one thereof. (35 Stat. 639. 37 Stat. 666. 38 Stat. 957.)

This section, as originally enacted, read as follows: "Any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry." It was amended by Act Feb. 11, 1913, c. 39, cited above, by inserting the word "entry" between the words "upon which" and the words "final proof has not been made," and by the omission of the words at the end of the section beginning "and residence upon and cultivation of the original entry," etc. It was again amended by Act March 3, 1915, c. 91, cited above, to read as set forth above.

The section 1 of this act, referred to in this section, is set forth ante, § 4563.

All pending entries made in good faith under this act by persons who, before making such entry, had acquired title to less than 160 acres under the homestead law, and were, therefore, disqualified to make additional entries, were validated by Act Aug. 24, 1912, c. 381, post, § 4575.

Entries, under this section, of lands added to the Colorado and Pike National Forests, in Colorado, were authorized by Act Sept. 8, 1916, c. 474, 39 Stat.

§ 4566. (Act Feb. 19, 1909, c. 160, § 4, as amended, Act Feb. 11, 1913, c. 39, and Act March 3, 1915, c. 91.) Proof of cultivation upon making final proofs; final proofs upon additional entries; extension of time for final proofs upon additional entries.

At the time of making final proof, as provided in section twenty-two hundred and ninety-one of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by himself and two credible witnesses that at least one-sixteenth of the area embraced in such entry was continuously cultivated for agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-eighth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry: Pro-

vided, That any qualified person who has heretofore made, or who hereafter makes, additional entry under the provisions of section three of this Act to an entry upon which final proof has not been made, may be allowed to perfect title to his original entry by showing compliance with the provisions of section twenty-two hundred and ninety-one of the Revised Statutes, respecting such original entry, and thereafter in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date of such original entry, but the cultivation required upon entries made under this Act must be shown respecting such additional entry, which cultivation, while it may be made upon either the original or additional entry or upon both entries, must be cultivation in addition to that relied upon and used in making proof upon the original entry; or, if he elects, his original and additional entries may be considered as one, with full credit for residence upon and improvement made upon his original entry, in which event the amount of cultivation herein required shall apply to the total area of the combined entry, and proof may be made upon such combined entry whenever it can be shown that the cultivation required by this section has been performed; and to this end the time within which proof must be made upon such a combined entry is hereby extended to seven years from the date of the original entry: Provided further, That where an entry is made as additional to an entry upon which final proof has theretofore been submitted by an entryman who still owns and occupies the land thus entered, the entryman in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date thereof, but the cultivation required upon entries made under this Act must be shown respecting such additional entry and must be performed upon the land included therein to the extent and for the period required in connection with the original entries under this Act, proof of which must be submitted within five years from and after the date of the additional entry: Provided further, That nothing herein contained shall be so construed as to require residence upon the combined entry in excess of the period of residence as required by section twenty-two hundred and ninety-one of the Revised Statutes. (35 Stat. 639. 37 Stat. 666. 38 Stat. 957.)

This section, as originally enacted, contained only provisions similar to those preceding the provisos in the section as set forth here, which required proofs of cultivation of one-eighth and one-fourth of the area embraced in the entry, in the second and third years, respectively. It was amended by reducing said amount to one-sixteenth and one-eighth, respectively, and by adding the first and third provisos, by Act Feb. 11, 1913, c. 39, cited above, while the second proviso was added by Act March 3, 1915, c. 91, cited above, making the section read as set forth above.

R. S. § 2291, mentioned in this section, is set forth ante, § 4532.

§ 4567. (Act Feb. 19, 1909, c. 160, § 5.) Right to make homestead entries under Rev. St. § 2289, not affected by act; entries under act not to be commuted.

Nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the States named in section one of this Act under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this Act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this Act shall be commuted. (35 Stat. 639.)

R. S. § 2289, mentioned in this section, is set forth ante, § 4530.

§ 4568. (Act Feb. 19, 1909, c. 160, § 6.) Lands in Utah without supply of water for domestic use to be designated; requirements of residence and cultivation as to such lands.

Whenever the Secretary of the Interior shall find that any tracts

of land, in the State of Utah, subject to entry under this Act, do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not to exceed in the aggregate two million acres, and thereafter they shall be subject to entry under this Act without the necessity of residence: Provided, That in such event the entryman on any such entry shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of such entry, and that after entry and until final proof the entryman shall reside within such distance of said land as will enable him successfully to farm the same as required by this section. (35 Stat. 640.)

A new section, to be known as "section seven," was added to this act by Act July 3, 1916, c. 220, post, § 4568a.

§ 4568a. (Act Feb. 19, 1909, c. 160, § 7, as amended, Act July 3, 1916, c. 220.) Additional entry of land not contiguous to former entry; limitation of amount; patents.

That any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein described, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this Act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: Provided, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this Act as provided by section one thereof: Provided further, That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: And provided further, That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section twenty-three hundred and six of the Revised Statutes.

This was an act entitled "An act to amend an act entitled 'An act to provide for an enlarged homestead,' approved February 19, 1909, by adding a new section to be known as section seven."

R. S. § 2306, mentioned in this section is set forth post, § 4594.

§ 4568b. (Act March 4, 1915, c. 150, § 1.) Enlarged homestead entries; applications for entry of lands not designated as subject to such entry; applications for additional entry of land adjoining original entry.

Where any person qualified to make entry under the provisions of the Act of February nineteenth, nineteen hundred and nine, and Acts amendatory thereof and supplemental thereto, shall make application to enter under the provisions of said Acts any unappropriated public land in any State affected thereby which has not been designated as subject to entry under the Act (provided said application is accompanied and supported by properly corroborated affidavit of the applicant in duplicate, showing prima facie that the land applied for is of the character contemplated by said Acts), such application, together with the regular fees and commissions, shall be received by the register and receiver of the land district in which said land is located, and suspended until it shall have been

determined by the Secretary of the Interior whether said land is actually of that character; that during such suspension the land described in said application shall be segregated by the said register and receiver and not subject to entry until the case is disposed of; and if it shall be determined that such land is of the character contemplated by the said Acts, then such application shall be allowed; otherwise it shall be rejected, subject to appeal: Provided, That the provisions of this Act shall apply to the application of a qualified entryman to make additional entry of unappropriated land adjoining his unperfected homestead entry, the area of which, together with his original entry, shall not exceed three hundred and twenty acres. (38 Stat. 1162, 1163.)

This, and the following section were an act entitled "An act to amend an act entitled 'An act to provide for an enlarged homestead,' and acts amendatory thereof and supplementary thereto," cited above.

Act Feb. 19, 1909, mentioned in this section, is set forth ante, §§ 4563–4568.

§ 4568c. (Act March 4, 1915, c. 150, § 2.) Enlarged homestead entries; provisions therefor extended to South Dakota.

The provisions of this Act and of the first five sections of said Act of February nineteenth, nineteen hundred and nine, and Acts amendatory thereof, excepting the Act of June seventeenth, nineteen hundred and ten, entitled "An Act to provide for an enlarged homestead" in the State of Idaho, shall extend to and include the State of South Dakota. (38 Stat. 1163.)

See notes under § 4568b, ante.

Act Feb. 19, 1905, §§ 1–5, mentioned in this section, are set forth ante, §§ 4563–4567.

Act June 17, 1910, c. 298, also mentioned in this section, is set forth post, §§ 4569–4574.

§ 4568d. (Act March 3, 1915, c. 84.) Enlarged homestead entries; provisions therefor extended to Kansas.

The provisions of sections one to five, inclusive, of the Act entitled "An Act to provide for an enlarged homestead," approved February nineteenth, nineteen hundred and nine (Thirty-fifth Statutes at Large, page six hundred and thirty-nine), as modified and amended, are hereby extended and made applicable to the State of Kansas. (38 Stat. 953.)

This was an act entitled "An act to extend the provisions of an act entitled 'An act to provide for an enlarged homestead,' approved February 19, 1909, to the state of Kansas," cited above.

Act Feb. 19, 1909, §§ 1–5, mentioned in this section, are set forth ante, §§ 4563–4567.

§ 4569. (Act June 17, 1910, c. 298, § 1.) Enlarged homestead entries of non-mineral, non-irrigable lands not containing merchantable timber in Idaho; lands to be designated as not irrigable.

Any person who is a qualified entryman under the homestead laws of the United States may enter, by legal subdivision, under the provisions of this Act, in the State of Idaho, three hundred and twenty acres or less of arid nonmineral, nonirrigable, unreserved, and unappropriated surveyed public lands which do not contain merchantable timber, located in a reasonably compact body and not over one and one-half miles in extreme length: Provided, That no lands shall be subject to entry under the provisions of this Act until the lands shall have been designated by the Secretary of the Interior as not being, in his opinion, susceptible of successful irrigation, at a reasonable cost, from any known source of water supply. (36 Stat. 531.)

This section and the five sections next following were an act entitled "An act to provide for an enlarged homestead."

Provisions similar to those of this act for entries of enlarged homesteads in

certain other states were made by Act Feb. 19, 1909, c. 160, as amended or supplemented by Act June 13, 1912, c. 166, Act Feb. 11, 1913, c. 39, Act March 3, 1915, c. 84, Act March 4, 1915, c. 150, § 2, and Act July 3, 1916, c. 220, ante, §§ 4563–4568d.

§ 4570. (Act June 17, 1910, c. 298, § 2.) Applications for entry; affidavits; fees.

Any person applying to enter land under the provisions of this Act shall make and subscribe before the proper officer an affidavit as required by section twenty-two hundred and ninety of the Revised Statutes, and in addition thereto shall make affidavit that the land sought to be entered is of the character described in section one of this Act, and shall pay the fees now required to be paid under the homestead laws. (36 Stat. 532.)

R. S. § 2290, mentioned in this section, is set forth ante, § 4531.

§ 4571. (Act June 17, 1910, c. 298, § 3, as amended, Act Feb. 11, 1913, c. 39, and Act March 3, 1915, c. 91.) Additional entry of land contiguous to former entry, not to exceed limitation.

Any person who has made, or shall make, homestead entry of lands of the character herein described, and who has not submitted final proof thereon, or who having submitted final proof still owns and occupies the land thus entered, shall have the right to enter public lands, subject to the provisions of this Act, contiguous to his first entry, which shall not, together with the original entry, exceed three hundred and twenty acres: Provided, That the land originally entered and that covered by the additional entry shall have first been designated as subject to this Act, as provided by section one thereof. (36 Stat. 532. 37 Stat. 666. 38 Stat. 957.)

This section, as originally enacted, read as follows: "Any homestead entryman of lands of the character herein described, upon which final proof has not been made, shall have the right to enter public lands, subject to the provisions of this act contiguous to his former entry, which shall not, together with the original entry, exceed three hundred and twenty acres, and residence upon and cultivation of the original entry shall be deemed as residence upon and cultivation of the additional entry." It was amended by Act Feb. 11, 1913, c. 39, cited above, by inserting the word "entry" between the words "upon which" and the words "final proof has not been made," and in the omission of the provision that residence upon and cultivation of the original entry should be deemed residence upon and cultivation of the additional entry, which was contained in the section as originally enacted. It was again amended by Act March 3, 1915, c. 91, cited above, to read as set forth above.

The "section one," referred to in the proviso to this section, is set forth ante, § 4563.

All pending entries made in good faith under this act by persons who, before making such entry, had acquired title to less than 160 acres, and were therefore disqualified to make additional entries, were validated by Act Aug. 24, 1912, c. 381, post, § 4575.

§ 4572. (Act June 17, 1910, c. 298, § 4, as amended, Act Feb. 11, 1913, c. 39, and Act March 3, 1915, c. 91.) Proof of cultivation upon making final proofs; final proofs upon additional entries; extension of time for final proofs upon additional entries.

At the time of making final proof, as provided in section twenty-two hundred and ninety-one of the Revised Statutes, the entryman under this Act shall, in addition to the proofs and affidavits required under said section, prove by himself and two credible witnesses that at least one-sixteenth of the area embraced in such entry was continuously cultivated for agricultural crops other than native grasses, beginning with the second year of the entry, and that at least one-eighth of the area embraced in the entry was so continuously cultivated beginning with the third year of the entry: Provided, That any qualified person who has heretofore made, or who hereafter makes, additional entry under the provisions of section three of this Act to an entry upon which final proof has not been made, may be allowed to perfect title to his original entry

by showing compliance with the provisions of section twenty-two hundred and ninety-one of the Revised Statutes, respecting such original entry, and thereafter in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date of such original entry, but the cultivation required upon entries made under this Act must be shown respecting such additional entry, which cultivation, while it may be made upon either the original or additional entry or upon both entries, must be cultivation in addition to that relied upon and used in making proof upon the original entry; or, if he elects, his original and additional entries may be considered as one, with full credit for residence upon and improvement made upon his original entry, in which event the amount of cultivation herein required shall apply to the total area of the combined entry, and proof may be made upon such combined entry whenever it can be shown that the cultivation required by this section has been performed; and to this end the time within which proof must be made upon such a combined entry is hereby extended to seven years from the date of the original entry: Provided further, That where an entry is made as additional to an entry upon which final proof has theretofore been submitted by an entryman who still owns and occupies the land thus entered, the entryman in making proof upon his additional entry shall be credited with residence maintained upon his original entry from date thereof, but the cultivation required upon entries made under this Act must be shown respecting such additional entry and must be performed upon the land included therein to the extent and for the period required in connection with the original entries under this Act, proof of which must be submitted within five years from and after the date of the additional entry: Provided further, That nothing herein contained shall be so construed as to require residence upon the combined entry in excess of the period of residence as required by section twenty-two hundred and ninety-one of the Revised Statutes. (36 Stat. 532. 37 Stat. 666. 38 Stat. 956.)

This section, as originally enacted, contained only provisions similar to those preceding the provisos in the section as set forth here, which required proofs of cultivation of one-eighth and one-fourth of the area embraced in entry, in the second and third years, respectively. It was amended by reducing said amounts to one-sixteenth and one-eighth, respectively, and by adding the first and third provisos, by Act Feb. 11, 1913, c. 39, cited above, while the second proviso was added by Act March 3, 1915, c. 91, last cited above.

R. S. § 2291, mentioned in this section, is set forth ante, § 4532.

§ 4573. (Act June 17, 1910, c. 298, § 5.) Right to make homestead entries under Rev. St. § 2289, not affected by act; entries under act not to be commuted.

Nothing herein contained shall be held to affect the right of a qualified entryman to make homestead entry in the State of Idaho under the provisions of section twenty-two hundred and eighty-nine of the Revised Statutes, but no person who has made entry under this Act shall be entitled to make homestead entry under the provisions of said section, and no entry made under this Act shall be commuted. (36 Stat. 532.)

R. S. § 2289, mentioned in this section, is set forth ante, § 4530.

§ 4574. (Act June 17, 1910, c. 298, § 6.) Lands without supply of water for domestic use to be designated; requirements of residence and cultivation as to such lands; leaves of absence.

Whenever the Secretary of the Interior shall find that any tracts of land in the State of Idaho subject to entry under this Act do not have upon them such a sufficient supply of water suitable for domestic purposes as would make continuous residence upon the lands possible, he may, in his discretion, designate such tracts of land, not

to exceed in the aggregate three hundred and twenty thousand acres, and thereafter they shall be subject to entry under this Act without the necessity of residence upon the land entered: Provided, That the entryman shall in good faith cultivate not less than one-eighth of the entire area of the entry during the second year, one-fourth during the third year, and one-half during the fourth and fifth years after the date of said entry, and that after six months from date of entry and until final proof the entryman shall reside not more than twenty miles from said land and be engaged personally in preparing the soil for seed, seeding, cultivating, and harvesting crops upon the land during the usual seasons for such work unless prevented by sickness or other unavoidable cause. Leave of absence from a residence established under this section may, however, be granted upon the same terms and conditions as are required of other homestead entrymen. (36 Stat. 532.)

Another section, to be known as "section seven," was added to this section by Act Sept. 5, 1916, c. 440, post, § 4574a.

§ 4574a. (Act June 17, 1910, c. 298, § 6, as amended, Act Sept. 5, 1916, c. 440.) Enlarged homestead entries; noncontiguous lands; occupancy and improvements; soldiers' additional homesteads.

Any person who has made or shall make homestead entry of less than three hundred and twenty acres of lands of the character herein described, and who shall have submitted final proof thereon, shall have the right to enter public lands subject to the provisions of this Act, not contiguous to his first entry, which shall not with the original entry exceed three hundred and twenty acres: Provided, That the land originally entered and that covered by the additional entry shall first have been designated as subject to this Act or the Act of February nineteenth, nineteen hundred and nine (Thirty-fifth Statutes, page six hundred and thirty-nine, as provided by sections one of said Acts; Provided further, That in no case shall patent issue for the land covered by such additional entry until the person making same shall have actually and in conformity with the homestead laws resided upon and cultivated the lands so additionally entered, and otherwise complied with such laws, except that where the land embraced in the additional entry is located not exceeding twenty miles from the land embraced in the original entry no residence shall be required on such additional entry if the entryman is residing on his former entry: And provided further, That this section shall not be construed as affecting any rights as to location of soldiers' additional homesteads under section twenty-three hundred and six of the Revised Statutes. (36 Stat. 532. 39 Stat.)

This section was added by amendment to Act June 17, 1910, c. 298, by Act Sept. 5, 1916, c. 440, cited above.

Act Feb. 19, 1909, c. 160, § 1, mentioned in this section, is set forth ante, § 4563.

R. S. § 2306, also mentioned in this section, is set forth ante, § 4594.

§ 4575. (Act March 4, 1915, c. 148.) Validation of certain entries, made in good faith upon enlarged homesteads, by persons who had theretofore acquired title under the homestead laws.

All pending homestead entries made in good faith prior to January first, nineteen hundred and fourteen, under the provisions of the enlarged homestead laws, by persons who before making such enlarged homestead entry had acquired title to land under the homestead laws and therefore were not qualified to make an enlarged

homestead entry, be, and the same are hereby, validated, if in all other respects regular, in all cases where the original homestead entry was for less than one hundred and sixty acres of land. (38 Stat. 1162.)

This was an act entitled "An act to validate certain homestead entries," cited above.

This section may be regarded as having superseded Act Aug. 24, 1912, c. 381, 37 Stat. 506, which read as follows:

"All pending homestead entries made in good faith prior to September first, nineteen hundred and eleven, under the provisions of the enlarged homestead laws, by persons who, before making such enlarged homestead entry had acquired title to a technical quarter section of land under the homestead law, and therefore were not qualified to make an enlarged homestead entry, be, and the same are hereby, validated, if in all other respects regular, in all cases where the original homestead entry was for less than one hundred and sixty acres of land."

The enlarged homestead laws, referred to in this section, were Act Feb. 19, 1909, c. 160, ante, §§ 4563–4568, and Act June 17, 1910, c. 298, ante, §§ 4569–4574.

Locations made under placer mining laws on phosphate lands were validated by Act Jan. 11, 1915, c. 9, post, § 4640d.

§ 4576. (Act April 28, 1904, c. 1801, § 1.) Limitation of entries within certain boundaries in Nebraska extended; exclusion of irrigable lands from provisions of act.

From and after sixty days after the approval of this Act entries made under the homestead laws in the State of Nebraska west and north of the following line, to wit: Beginning at a point on the boundary line between the States of South Dakota and Nebraska where the first guide meridian west of the sixth principal meridian strikes said boundary; thence running south along said guide meridian to its intersection with the fourth standard parallel north of the base line between the States of Nebraska and Kansas; thence west along said fourth standard parallel to its intersection with the second guide meridian west of the sixth principal meridian; thence south along said second guide meridian to its intersection with the third standard parallel north of the said base line; thence west along said third standard parallel to its intersection with the range line between ranges twenty-five and twenty-six west of the sixth principal meridian; thence south along said line to its intersection with the second standard parallel north of the said base line; thence west on said standard parallel to its intersection with the range line between ranges thirty and thirty-one west; thence south along said line to its intersection with the boundary line between the States of Nebraska and Kansas, shall not exceed in area six hundred and forty acres, and shall be as nearly compact in form as possible, and in no event over two miles in extreme length: Provided, That there shall be excluded from the provisions of this Act such lands within the territory herein described as in the opinion of the Secretary of the Interior it may be reasonably practicable to irrigate under the national irrigation law, or by private enterprise; and that said Secretary shall, prior to the date above mentioned, designate and exclude from entry under this Act the lands, particularly along the North Platte River, which in his opinion it may be possible to irrigate as aforesaid; and shall thereafter, from time to time, open to entry under this Act any of the lands so excluded, which, upon further investigation, he may conclude can not be practically irrigated in the manner aforesaid. (33 Stat. 547.)

This section and the two sections next following constituted the Kinkaid Act entitled "An act to amend the homestead laws as to certain unappropriated and unreserved lands in Nebraska."

Somewhat similar provisions for the entry of homesteads of not to exceed

320 acres in other States were made by Act Feb. 19, 1909, c. 160, as amended and supplemented, ante, §§ 4563–4568d, and Act June 17, 1910, c. 298, as amended and supplemented, ante, §§ 4569–4574a.

Cited without definite application, Ware v. U. S. (1907) 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233, certiorari denied (1907) 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353.

§ 4577. (Act April 28, 1904, c. 1801, § 2, as amended, Act May 29, 1908, c. 220, § 7.) Additional entry of land contiguous to former entry, not to exceed in the aggregate the limitation as extended.

Entrymen under the homestead laws of the United States within the territory above described who own and occupy the lands heretofore entered by them, may, under the provisions of this Act and subject to its conditions, enter other lands contiguous to their said homestead entry, which shall not, with the land so already entered, owned, and occupied, exceed in the aggregate six hundred and forty acres; and residence continued and improvements made upon the original homestead, subsequent to the making of the additional entry, shall be accepted as equivalent to actual residence and improvements made upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same, except in favor of entrymen entitled to credit for military service. (33 Stat. 548. 35 Stat. 466.)

In this section, as originally enacted, the last provision, following the semicolon, was as follows:

"And residence upon the original homestead shall be accepted as equivalent to residence upon the additional land so entered, but final entry shall not be allowed of such additional land until five years after first entering the same."

It was amended to read as set forth here by Act May 29, 1908, c. 220, § 7, last cited above.

Similar provisions as to entries additional to previous entry of less than one quarter section were made by Act April 28, 1904, c. 1776, § 2, ante, § 4561.

Further provisions for additional entries by former homestead entrymen were made by section 3 of this act, post, § 4578.

The qualifications of an entryman under this act were to be determined by the qualifications, except as to citizenship, possessed on the date of his first entry, by Act Aug. 24, 1912, c. 371, post, § 4582.

Cited without definite application, Richards v. U. S. (1909) 175 Fed. 911, 99 C. C. A. 401; Huntington v. Same (1909) 175 Fed. 950, 99 C. C. A. 440.

§ 4578. (Act April 28, 1904, c. 1801, § 3.) Fees and commissions on entries; commutation of entries not allowed; improvements to be shown on final proof; entries under this act by former homestead entrymen.

The fees and commissions on all entries under this Act shall be uniformly the same as those charged under the present law for a maximum entry at the minimum price. The commutation provisions of the homestead law shall not apply to entries under this Act, and at the time of making final proof the entryman must prove affirmatively that he has placed upon the lands entered permanent improvements of the value of not less than one dollar and twenty-five cents per acre for each acre included in his entry: Provided, That a former homestead entry shall not be a bar to the entry under the provisions of this Act of a tract which, together with the former entry, shall not exceed six hundred and forty acres: Provided, That any former homestead entryman who shall be entitled to an additional entry under section two of this Act shall have for ninety days after the passage of this Act the preferential right to make additional entry as provided in said section. (33 Stat. 548.)

Fees and commissions of registers and receivers were prescribed by R. S. § 2238, and subsequent provisions ante, §§ 4473–4476.

Provisions for commutation of homestead entries, mentioned in this section, were contained in R. S. § 2301, and subsequent acts, post, §§ 4589, 4590.

Under section 2 of this act, mentioned in this section, ante, § 4577, a former homestead entryman is entitled to an additional entry of lands contiguous to his former entry.

§ 4579. (Act March 2, 1907, c. 2527, § 1.) Benefits of Kinkaid Act extended to entries made within tract affected between April 28, 1904, and June 28, 1904.

All qualified entrymen who, during the period beginning on the twenty-eighth day of April, nineteen hundred and four, and ending on the twenty-eighth day of June, nineteen hundred and four, made homestead entry in the State of Nebraska within the area affected by an Act entitled "An Act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be entitled to all the benefits of said Act as if their entries had been made prior or subsequent to the above-mentioned dates, subject to all existing rights. (34 Stat. 1224.)

This section and the two sections next following were an act entitled "An act relating to the entry and disposition of certain lands in the State of Nebraska."

Act April 28, 1904, c. 1801, mentioned in this and said other sections of this act, was the Kinkaid Act, set forth ante, §§ 4576–4578.

§ 4580. (Act March 2, 1907, c. 2527, § 2.) Benefits of military service extended to entries under the Kinkaid Act.

The benefits of military service in the Army or Navy of the United States granted under the homestead laws shall apply to entries made under the aforesaid act approved April twenty-eighth, nineteen hundred and four, and all homestead entries hereafter made within the territory described in the aforesaid act shall be subject to all the provisions thereof. (34 Stat. 1224.)

See notes to section 1 of this act, ante, § 4579.

§ 4581. (Act March 2, 1907, c. 2527, § 3.) Isolated tracts within limits affected by the Kinkaid Act to be sold; limitation of amount.

Within the territory described in said Act approved April twenty-eighth, nineteen hundred and four, it shall be lawful for the Secretary of the Interior to order into market and sell under the provisions of the laws providing for the sale of isolated or disconnected tract or parcels of land any isolated or disconnected tract not exceeding three quarter sections in area: Provided that not more than three quarter sections shall be sold to any one person. (34 Stat. 1224.)

See notes to section 1 of this act, ante, § 4579.

§ 4582. (Act Aug. 24, 1912, c. 371.) Determination of qualifications of entrymen making additional entries upon Nebraska arid lands.

The qualifications of a former homestead entryman who has heretofore been permitted to make an additional or another entry under the Act entitled "An Act to amend the homestead laws as to certain unappropriated and unreserved public lands in Nebraska," approved April twenty-eighth, nineteen hundred and four, shall be determined by the qualifications, except as to citizenship, possessed on the date of his first entry in all cases where the rights of third persons shall not have intervened and the additional or second entry has not been canceled. (37 Stat. 499.)

This was an act entitled "An act for the relief of certain homesteaders in Nebraska."

Act April 28, 1904, c. 1801, mentioned in this section, was the Kinkaid Act, set forth ante, §§ 4576–4578.

§ 4583. (Act June 5, 1900, c. 716, § 2.) Additional entry after commutation of former entry.

Any person who has heretofore made entry under the homestead laws and commuted same under provisions of section twenty-three hundred and one of the Revised Statutes of the United States and the amendments thereto shall be entitled to the benefits of the homestead laws, as though such former entry had not been made, except that commutation under the provisions of section twenty-three hundred and one of the Revised Statutes shall not be allowed of an entry made under this section of this Act. (31 Stat. 269.)

This section was part of an act entitled "An act for the relief of the Colorado Cooperative Colony, to permit second homesteads in certain cases, and for other purposes," cited above.

Section 1 of the act extended the time for making final proof and payment for lands located under the desert-land laws by certain named members of the Colorado Cooperative Colony for a period of three years. It is omitted as temporary merely, and local.

Section 3 of the act is set forth post, § 4584.

R. S. § 2301 mentioned in this section, is set forth post, § 4589.

Provisions restricting cancellation of homestead entries made under this section, on the ground that the former entry was commuted under Act June 15, 1880, c. 227, § 2, and reinstating entries canceled on such ground, were made by Act May 29, 1908, c. 220, § 10, 35 Stat. 467. They are omitted as temporary merely, and executed.

§ 4584. (Act June 5, 1900, c. 716, § 3.) Additional entry after loss or forfeiture of former entry; purchasers of Flathead Indian lands.

Any person who prior to the passage of this Act, has made entry under the homestead laws, but from any cause has lost or forfeited the same shall be entitled to the benefits of the homestead laws as though such former entry had not been made: Provided, That persons who purchased land under and in accordance with the terms of an Act entitled "An Act to provide for the sale of lands patented to certain members of the Flathead band of Indians in the Territory of Montana, and for other purposes," approved March second, eighteen hundred and eighty-nine, shall not be held to have impaired or exhausted their homestead rights by or on account of any such purchase. (31 Stat. 270.)

See notes to section 2 of this act, ante, § 4583.

§ 4585. (Act March 3, 1879, c. 191.) Entries within limits of railroad grants; extent; additional entries.

From and after the passage of this act, the even sections within the limits of any grant of public lands to any railroad company, or to any military road company, or to any State in aid of any railroad or military road, shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler, and any person who has, under existing laws, taken a homestead on any even section within the limits of any railroad or military road land-grant, and who, by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new entry after the surrender and cancellation of his original entry, shall be permitted so to do without payment of fees and commissions; and the residence and cultivation of such person upon and of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five

years' residence and cultivation required by law: Provided, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year. (20 Stat. 472.)

This was an act entitled "An act to grant additional rights to homestead settlers on public lands within railroad limits."

Provisions similar to those of this act, relating to odd sections in certain States, were made by Act July 1, 1879, c. 60, post, § 4586.

The lands covered by the additional entry under this act were to be patented without further cost or proof of settlement, etc., by Act May 6, 1886, c. 88, post, § 4587.

Cited without definite application, U. S. v. Chicago, M. & St. P. Ry. Co. (1904) 25 Sup. Ct. 113, 115, 195 U. S. 524, 49 L. Ed. 306; Same v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4586. (Act July 1, 1879, c. 60.) Entries within the limits of railroad grants; extent; additional entries.

From and after the passage of this act the odd sections within the limits of any grant of public lands to any railroad company in the States of Missouri and Arkansas, or to such States respectively, in aid of any railroad where the even sections have been granted to and received by any railroad company or by such States respectively in aid of any railroad shall be open to settlers under the homestead laws to the extent of one hundred and sixty acres to each settler; and any person who has under existing laws taken a homestead on any section within the limits of any railroad grant in said States, and who by existing laws shall have been restricted to eighty acres, may enter under the homestead laws an additional eighty acres adjoining the land embraced in his original entry, if such additional land be subject to entry; or if such person so elect, he may surrender his entry to the United States for cancellation, and thereupon be entitled to enter lands under the homestead laws the same as if the surrendered entry had not been made. And any person so making additional entry of eighty acres, or new entry after the cancellation of his original entry, shall be permitted to do so without payment of fees or commissions; and the residence of such person upon and cultivation of the land embraced in his original entry shall be considered residence and cultivation for the same length of time upon and of the land embraced in his additional or new entry, and shall be deducted from the five year's residence and cultivation required by law: Provided, That in no case shall patent issue upon an additional or new homestead entry under this act until the person has actually, and in conformity with the homestead laws, occupied, resided upon, and cultivated the land embraced therein at least one year. (21 Stat. 46.)

This was an act entitled "An Act to grant additional rights to homestead settlers on public lands within railroad limits in the States of Missouri and Arkansas."

Provisions similar to those of this act, relating to even sections, were made by Act March 3, 1879, c. 191, ante, § 4585.

The lands covered by the additional entry under this act were to be patented without further cost or proof of settlement, etc., by Act May 6, 1886, c. 88, post, § 4587.

Cited without definite application, U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4587. (Act May 6, 1886, c. 88.) Entries within limits of railroad grants; patents for additional entries.

All homestead settlers on public lands within the railway limits restricted to less than one hundred and sixty acres of land, who have heretofore made or may hereafter make the additional entry allowed either by the act approved March third, eighteen hundred

and seventy-nine, or the act approved July first, eighteen hundred and seventy-nine, after having made final proof of settlement and cultivation under the original entry, shall be entitled to have the lands covered by the additional entry patented without any further cost or proof of settlement and cultivation. (24 Stat. 22.)

This was an act entitled "An Act to protect homestead settlers within railway limits and for other purposes."

Act March 3, 1879, c. 191, and Act July 1, 1879, c. 60, mentioned in this act, are set forth ante, §§ 4585, 4586.

(R. S. § 2299. Superseded.)

This section provided that nothing contained in this chapter should be so construed as to impair or interfere with existing pre-emption rights, and also that all persons who filed their applications for a pre-emption right prior to May 20, 1862, should be entitled to all the privileges of this chapter. The first provision was superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097, and the second provision has become inoperative by lapse of time.

§ 4588. (R. S. § 2300.) What minors may have the privileges of this chapter.

No person who has served, or may hereafter serve, for a period not less than fourteen days in the Army or Navy of the United States, either regular or volunteer, under the laws thereof, during the existence of an actual war, domestic or foreign, shall be deprived of the benefits of this chapter on account of not having attained the age of twenty-one years.

Act May 20, 1862, c. 75, § 6, 12 Stat. 393.

§ 4589. (R. S. § 2301, as amended, Act March 3, 1891, c. 561, § 6.) Payment before expiration of five years; rights of applicant.

Nothing in this chapter shall be so construed as to prevent any person who shall hereafter avail himself of the benefits of section twenty-two hundred and eighty nine from paying the minimum price for the quantity of land so entered at any time after the expiration of fourteen calendar months from the date of such entry, and obtaining a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months.

Act May 20, 1862, c. 75, § 8, 12 Stat. 393. Act March 3, 1891, c. 561, § 6, 26 Stat. 1098.

This section, as originally enacted, was as follows:

"Nothing in this chapter shall be so construed as to prevent any person who has availed himself of the benefits of section twenty-two hundred and eighty-nine, from paying the minimum price for the quantity of land so entered, at any time before the expiration of the five years, and obtaining a patent therefor from the Government, as in other cases directed by law, on making proof of settlement and cultivation as provided by law, granting pre-emption rights."

It was amended by Act March 3, 1891, c. 561, § 6, cited above, to read as set forth here, except for the omission of a provision, local in its nature, added at the end of the section by the amendment, that the section should apply to lands on the ceded portion of the Sioux Reservation by Act March 2, 1889, c. 405, 25 Stat. 888, in South Dakota, but should not relieve said settlers from any payments required by law. This provision was amended by adding, after the words "South Dakota," the words "and in the State of Nebraska," by Act Nov. 1, 1893, c. 7, 28 Stat. 4.

The law in force in 1889 governing the commutation of homestead entries, before the amendment mentioned above, was made applicable to commutation of entries by settlers whose former entries on Northern Pacific Railroad indemnity lands had been canceled, by a provision of Act June 3, 1896, c. 316, § 1, 29 Stat. 245, which act allowed such settlers to make new entries under the homestead laws.

The affidavit required by R. S. § 2262, before entry for pre-emption, and by this section, was allowed to be made before the clerk of the county court or of any court of record of the county in which the lands were situated, or, if they were situated in an unorganized county, in a similar manner in any adjacent county, by Act June 9, 1880, c. 164, 21 Stat. 169, which was entitled as an act to amend said two sections. Its provisions were superseded, by the subsequent amendment of R. S. § 2294 by Act March 11, 1902, c. 182, as to

the officers before whom such affidavits, etc., might be made. R. S. § 2294, as so amended, is set forth ante, § 4546.

All settlers under the homestead laws upon agricultural public lands, opened to settlement, acquired prior to May 17, 1900, by treaty or agreement from Indian tribes, who resided upon the tract entered, in good faith, for the period required by existing law, were to be entitled to a patent therefor upon the payment to the local land officers of the usual and customary fees only, and the right to commute any such entry, and pay for said lands in the option of any such settler, and in the time and at the prices then fixed by existing laws, remained in full force and effect by Act May 17, 1900, c. 479, § 1, 31 Stat. 179.

The provisions of Rev. St. § 2301 were extended to all settlers on lands under this act, by Act Jan. 26, 1901, c. 180, 31 Stat. 740. Said settlers, however, were required to pay the price provided in the law under which the original entry was made.

The provisions of this section were not to apply to entries made by Indians who renounced their tribal relations, by Act March 3, 1875, c. 131, § 15, post, § 4611.

The certificates of location or scrip required to be issued in certain cases where claimants of lands in Florida, Louisiana, and Missouri had been adjudged entitled to the land and the land had been disposed of were receivable in commutation of homestead entries, by Act Jan. 28, 1879, c. 30, § 2, post, § 5102.

Premature commutations, without fraud, were confirmed by Act June 3, 1896, c. 312, § 1, 29 Stat. 197, and all commutations of homestead entries were to be allowed after 14 months from date of settlement, by section 2 of that act, post, § 4590.

The commutation provisions of the homestead law are not to apply to entries under the Kinkaid Act of April 28, 1904, c. 1801, which provided for entries of not to exceed 640 acres within certain boundaries in Nebraska, by section 3 of that act, ante, § 4578.

Commutation under the provisions of R. S. § 2301, was not allowed of an entry under Act April 28, 1904, c. 1776, which allowed a homestead entry after a former unperfected entry, and an additional entry of lands contiguous to a former entry of less than one quarter section, by section 3 of that act, ante, § 4562.

No enlarged homestead entry of lands designated as not irrigable, made under Act Feb. 19, 1909, c. 160, or under Act June 17, 1910, c. 298, was to be commuted, by section 5 of each of said acts, ante, §§ 4567, 4573.

The commutation provisions of the homestead laws were not to apply to entries under the Reclamation Act of June 17, 1902, c. 1093, which provided for the construction of irrigation works for the reclamation of arid lands, by a proviso annexed to section 3 of that act, post, § 4702.

Repayment of excess moneys paid on final proof or commutation was provided for by Act March 2, 1907, c. 2568, ante, § 4542, and Act March 26, 1908, c. 102, § 2, set forth ante, § 4492.

Provisions that no final certificate issued upon proof under the commutation provisions of the homestead laws prior to the passage of the act should be canceled solely upon the ground of insufficient residence, where the proof showed that the entryman had resided upon and cultivated the land for eight months within the year preceding the submission of the proof, and that a certificate which had been canceled because of insufficient residence should, upon application made within a year from the passage of the act, be reinstated, were made by Act May 29, 1908, c. 220, § 9, 35 Stat. 467. They are omitted as temporary merely, and executed.

Notes of Decisions

Nature of right.—The commutation of a homestead entry is not an exercise of the pre-emption right. Johnson v. Bridal Veil Lumbering Co. (1893) 24 Or. 182, 33 Pac. 528.

Qualifications of entryman commuting entry.—After the commutation of an entry by one who has declared his intention to become a citizen, and the mortgaging of the land, before any adverse claim, the commissioner of the land office could not forfeit the rights of such entryman and his mortgagee because the former was an alien when he entered the land. Bogan v. Edinburgh American Land Mortg. Co. (1894) 63 Fed. 192, 11 C. C. A. 128.

Alienation before commutation. — An agreement to sell the land, made by the entryman in advance of commuting his entry, is forbidden. Bailey v. Sanders (1913) 33 Sup. Ct. 602, 228 U. S. 603, 57 L. Ed. 985, affirming decree (1910) 177 Fed. 667, 101 C. C. A. 293.

Commutation as consummation of homestead right.—An entryman who has commuted and complied with the law so as to entitle him to a patent is the equitable owner of the land. Doran v. Kennedy (1913) 122 Minn. 1, 141 N. W. 851. See this case for a collation

of authorities. See, also, Birmingham Coal & Iron Co. v. Doe (1913) 181 Ala. 621, 62 So. 26.

Timber depredation before commutation.—The commutation completes the purchase, and so changes the status of the original entry as to deprive the United States of the right to recover for timber previously cut from the land. U. S. v. Freyberg (C. C. 1886) 32 Fed. 195.

Exemption right not abandoned by commutation.—It was so held in McCorkell v. Herron (1905) 103 N. W. 988, 128 Iowa, 324, 111 Am. St. Rep. 201.

Entryman as witness.—The entryman is a competent witness as to his own settlement. Hallock v. U. S. (1911) 185 Fed. 417, 107 C. C. A. 487, writ of certiorari denied (1911) 31 Sup. Ct. 717, 220 U. S. 613, 55 L. Ed. 610.

Cited without definite application, Frost v. Wenie (1895) 15 Sup. Ct. 532, 536, 157 U. S. 46, 39 L. Ed. 614; Whitney v. Taylor (1895) 15 Sup. Ct. 796, 798, 158 U. S. 85, 39 L. Ed. 906; Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231; Guaranty Sav. Bank v. Bladow (1900) 20 Sup. Ct. 425, 176 U. S. 448, 44 L. Ed. 540; Hill v. McCord (1904) 25 Sup. Ct. 96, 99, 195 U. S. 395, 49 L. Ed. 251 (affirming decree McCord v. Hill [1903] 94 N. W. 65, 117 Wis. 306); Hatch v. Ferguson (1895) 66 Fed. 668, 669, 14 C. C. A. 41; Meads v. U. S. (1897) 81 Fed. 684, 686, 26 C. C. A. 229; Gilson v. U. S. (1911) 185 Fed. 484, 107 C. C. A. 584; U. S. v. Reed (C. C. 1886) 28 Fed. 482, 483; Savage v. Worsham (C. C. 1896) 72 Fed. 601, 602; U. S. v. Northern Pac. R. Co. (C. C. 1911) 204 Fed. 485, 486; Same v. Howard (D. C. 1889) 37 Fed. 666, 667.

§ 4590. (Act June 3, 1896, c. 312, § 2.) Commutation allowable after fourteen months.

All commutations of homestead entries shall be allowed after the expiration of fourteen months from date of settlement. (29 Stat. 197.)

This section was part of an act entitled "An act relating to commutations of homestead entries and to confirm such entries when commutation proofs were received by local land offices prematurely."

Section 1 of the act confirmed final certificates of entry theretofore erroneously issued by the officers of a local land office upon premature commutation proofs, where there had been six months actual residence upon the land in good faith prior to the commutation.

Section 3 repealed conflicting acts and parts of acts. Section 4 provided that the act should be in force from its passage.

Commutation after fourteen months from the date of settlement, on proof of settlement and of residence and cultivation for such period, was provided for by Rev. St. § 2301, as amended by Act March 3, 1891, c. 561, § 6, ante, § 4589.

Cited without definite application, Hill v. McCord (1904) 25 Sup. Ct. 96, 99, 195 U. S. 395, 49 L. Ed. 251; McCord v. Hill (1900) 84 N. W. 27, 85 N. W. 145, 111 Wis. 499, affirmed on rehearing (1901) 87 N. W. 481, 111 Wis. 499.

§ 4591. (R. S. § 2302.) No distinction on account of race or color; mineral lands not subject to entry as homestead.

No distinction shall be made in the construction or execution of this chapter, on account of race or color; nor shall any mineral lands be liable to entry and settlement under its provisions.

Act June 21, 1866, c. 127, § 1, 14 Stat. 67.

Notes of Decisions

Mineral lands not subject to homestead entry.—No title from the United States to land known at the time of sale to be valuable for its minerals can be obtained under the homestead laws. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423; Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 140, 123 U. S. 307, 31 L. Ed. 182. See, also, Barden v. Northern Pac. R. Co. (1894) 14 Sup. Ct. 1030, 1036, 154 U. S. 288, 38 L. Ed. 992; Shaw v. Kellogg (1898) 18 Sup. Ct. 632, 643, 170 U. S. 312, 42 L. Ed. 1050; Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936; Burke v. Southern P. R. Co. (1914) 34 Sup. Ct. 907, 911, 234 U. S. 669, 58 L. Ed. 1527; Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296; U. S. v. Reed (C. C. 1886) 28 Fed. 482, 486; U. S. v. Central Pac. R. Co. (C. C. 1899) 93 Fed. 871, 874; Olive Land & Development Co. v. Olmstead (C. C. 1900) 103 Fed. 568; Kansas City M. & M. Co. v. Clay (1892) 3 Ariz. 326, 29 Pac. 9; Standard Quicksilver Co. v. Habishaw (1901) 64 P. 113, 132 Cal. 115; Jameson v. James (Cal. 1909) 100 P. 700.

The words "mineral lands," used in this section, are more general and much

broader than the words "lands on which are situated any known salines or mines," formerly used in the pre-emption and homestead laws. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 46.

One who has a valid homestead entry upon agricultural lands subject to the mineral laws may be devested by a showing that the land is more valuable for mineral than agricultural purposes, if made at any time before final proof and payment is made. Bay v. Oklahoma Southern Gas, Oil & Mining Co. (1903) 73 P. 936, 13 Okl. 425.

Mineral character of land.—A change in the condition of lands subsequent to patent with reference to valuable mineral deposits cannot affect the title as it passed at the time of the sale. Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 141, 123 U. S. 307, 31 L. Ed. 182.

To justify the annulment of a homestead patent as wrongfully covering mineral lands it must appear that the known conditions at the time of the proceedings which resulted in the patent were plainly such as to engender the belief that the land contained mineral deposits of such quality and in such quantity as would render their extraction profitable, and justify expenditures to that end. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936. See, also, U. S. v. Kostelak (D. C. 1913) 207 Fed. 447.

When the right to a patent under the soldier's additional homestead law depends on whether the land is agricultural or mineral, the question will be determined by the conditions existing when applicant complies with the statutory regulations, and, if the land is not known to be chiefly valuable for coal, he acquires a right to a patent which will not be disturbed by a subsequent change in the conditions; but, if before such compliance it is discovered that it is thus valuable, nothing that he subsequently does will give him a right to a patent. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296.

Notwithstanding there is some measure of gold deposited in a tract of land, it is subject to entry as agricultural land, if, under the circumstances as they exist, or as may reasonably be expected, it is more valuable for agriculture than mining. U. S. v. Reed (C. C. 1886) 28 Fed. 482. And see U. S. v. Plowman (1910) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523.

If there were not upon the premises at the time the patent was granted actual known mines capable of being profitably worked, so as to make the land more valuable for mining than for other purposes, the agricultural patent cannot be successfully assailed. U. S. v. Central Pac. R. Co. (C. C. 1899) 93 Fed. 871, 873. See Colorado Coal & Iron Co. v. U. S. (1887) 123 U. S. 307, 328, 8 Sup. Ct. 131, 31 L. Ed. 182.

Selections made as forest reserve lieu lands were subject to the provisions of this section. The actual character of lands entered or selected is a question of fact to be determined by the land department, by applying the rule that they are to be considered mineral or nonmineral according to the use for which they are the more valuable. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Pacific Land & Improvement Co. v. Elwood Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 698, 24 Sup. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073).

Whether lands containing mineral oils are chiefly valuable for such oils is a question of fact, to be proved by the person alleging its mineral character as against a homestead entry. Bay v. Oklahoma Southern Gas, Oil & Mining Co. (1903) 73 P. 936, 13 Okl. 425.

—— **Coal lands.**—See, also, notes to §§ 4659–4665, post.

Actual disclosure of coal within its boundaries is not essential to constitute a tract of public land coal lands, but they are to be deemed such if the adjacent disclosures and other surrounding or external conditions are such as to induce practical coal men to invest in such lands as valuable for coal mining. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936. See, also, Washington Securities Co. v. U. S. (1914) 34 Sup. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming Washington Securities Co. v. U. S. (1912) 194 Fed. 59, 114 C. C. A. 79; U. S. v. Kostelak (D. C. 1913) 207 Fed. 447.

—— **Nonmineral affidavit.**—A regulation of the Land Department requiring applicants under the nonmineral laws to support their applications by showing that the land is nonsaline is valid, and an applicant under the soldier's additional homestead law must comply with that regulation. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296. But it has been held that an entry is not vitiated by a false affidavit. U. S. v. Reed (C. C. 1886) 28 Fed. 482.

Departmental regulations requiring such affidavits were held invalid in U. S. v. Maid (D. C. 1902) 116 Fed. 650.

Effect of homestead entry of mineral lands.—A homestead entry of mineral lands, though subject to cancellation, segregates the land from the public domain. Bunker Hill & Sullivan Min. & Concentrating Co. v. U. S. (1913) 33

Sup. Ct. 138, 226 U. S. 548, 57 L. Ed. 345.

The rule that a homestead entry removes the land out of the public domain is not subject to any exception that without minerals having been discovered on it, and proof of its present value for mineral purposes, another than the homesteader may enter on it merely for the purpose of exploiting it to see if perchance it possesses such value. McLemore v. Express Oil Co. (Cal. 1910) 112 P. 59.

A contestant for a mining claim is not entitled to either joint or adverse possession against the homestead entryman. Bay v. Oklahoma, Southern Gas, Oil & Mining Co. (1903) 73 P. 936, 13 Okl. 425.

Homestead patent to mineral lands—Effect and cancellation.—A homestead patent covering mineral lands, secured by submitting false proofs of the nonmineral character of the lands, although not void or open to collateral attack, is voidable and may be annulled in a suit by the government against the patentee or a purchaser with notice of the fraud. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936. See, also, U. S. v. Diamond Coal & Coke Co. (1911) 191 Fed. 786, 112 C. C. A. 272; Washington Securities Co. v. U. S. (1912) 194 Fed. 59, 114 C. C. A. 79. And as to effect of patent, see, also, Standard Quicksilver Co. v. Habishaw (1901) 64 P. 113, 132 Cal. 115.

A finding of land officers in proceedings resulting in the issuance of patents on commuted homestead entries, that such lands were agricultural and not coal lands, is not conclusive against the government in a suit to cancel the patents as fraudulently procured by misrepresenting their character. Washington Securities Co. v. U. S. (1914) 34 Sup. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree (1912) 194 Fed. 59, 114 C. C. A. 79.

—— Bona fide purchasers.—Grantees of coal land patented to homesteaders on false and fraudulent proofs as to the character of the land held not bona fide purchasers; and hence the patents were subject to cancellation as against them. Washington Securities Co. v. U. S. (1912) 194 Fed. 59, 114 C. C. A. 79; Washington Securities Co. v. U. S. (1914) 34 Sup. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree (1912) 194 Fed. 59, 114 C. C. A. 79.

—— Burden of proof in suit for cancellation.—The government is charged with the burden of proof in a suit to annul a homestead patent as wrongfully covering mineral lands, and must sustain the burden by that class of evidence which commands respect, and that amount of it which produces conviction. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936. And see U. S. v. Kostelak (D. C. 1913) 207 Fed. 447.

(R. S. § 2303. Repealed.)

This section provided that all public lands in Alabama, Mississippi, Louisiana, Arkansas, and Florida, should be disposed of in no other manner than according to the terms and stipulations contained in the preceding provisions of the chapter. It was expressly repealed by Act July 4, 1876, c. 165, 19 Stat. 73.

The repealing act provided that it should not impair the rights of any homestead settler or render any land occupied by such settler subject to entry, and also provided that the lands affected by the act should be offered at public sale and not be subject to private entry until so offered. This last provision was superseded by the provision that no public lands of the United States, except abandoned military or other reservations, and certain other lands, the sale of which at public auction was authorized by acts of Congress of a special nature, having a local application, could be sold at public sale, of Act March 3, 1891, c. 561, § 9, post, § 4753.

Notes of Decisions

Statute construed and applied.—U. S. v. Pratt Coal & Coke Co. (C. C. A. 1883) 18 Fed. 708.

§ 4592. (R. S. § 2304, as amended, Act March 1, 1901, c. 674.) Soldiers' and sailors' homestead.

Every private soldier and officer who has served in the Army of the United States during the recent rebellion for ninety days, and who was honorably discharged and has remained loyal to the Government, including the troops mustered into the service of the United States by virtue of the third section of an Act approved February thirteenth, eighteen hundred and sixty-two, and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the rebellion for ninety days, and who was honorably discharged and has remained loyal to the Govern-

ment, and every private soldier and officer who has served in the Army of the United States during the Spanish war, or who has served, is serving, or shall have served in the said Army during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged; and every seaman, marine, and officer who has served in the Navy of the United States or in the Marine Corps during the Spanish war, or who has served, is serving, or shall have served in the said forces during the suppression of the insurrection in the Philippines for ninety days, and who was or shall be honorably discharged, shall, on compliance with the provisions of this chapter, as hereinafter modified, be entitled to enter upon and receive patents for a quantity of public lands not exceeding one hundred and sixty acres, or one quarter section, to be taken in compact form, according to legal subdivisions, including the alternate reserved sections of public lands along the line of any railroad or other public work not otherwise reserved or appropriated, and other lands subject to entry under the homestead laws of the United States; but such homestead settler shall be allowed six months after locating his homestead and filing his declaratory statement within which to make his entry and commence his settlement and improvement.

Act June 8, 1872, c. 338, § 1, 17 Stat. 333. Act March 1, 1901, c. 674, 31 Stat. 847.

This section was amended by Act March 1, 1901, c. 674, cited above, by inserting the provisions relating to soldiers, seamen, marines, and officers serving during the Spanish war or during the suppression of the insurrection of the Philippines, as set forth here.

The provisions of this section and of R. S. § 2305, post, § 4593, were made applicable to entries on particular ceded Indian lands, with various modifications and special provisions in the different acts, particularly as to the price of the lands and payment thereof, by statutes collected or referred to under chapter 10I of this Title, "Ceded Indian Reservations."

Notes of Decisions

Honorable discharge.—An order disbanding an irregular body of troops (though entirely creditable to the troops thus disbanded) is not an honorable discharge within this section. (1878) 16 Op. Atty. Gen. 148.

Alienation of soldier's right.—See, also, notes to § 4594, post.

The same affidavits in respect to alienation are required from federal soldiers as in other cases. Anderson v. Carkins (1890) 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272.

Cited without definite application, Webster v. Luther (1896) 16 Sup. Ct. 963, 163 U. S. 331, 41 L. Ed. 179; Calhoun v. Violet (1899) 19 Sup. Ct. 324, 325, 173 U. S. 60, 43 L. Ed. 614; Holt v. Murphy (1908) 28 Sup. Ct. 212, 213, 207 U. S. 407, 52 L. Ed. 271; U. S. v. Davis (1913) 34 Sup. Ct. 112, 231 U. S. 183, 58 L. Ed. 177; Puget Mill Co. v. Brown (1893) 59 Fed. 35, 7 C. C. A. 643, affirming (C. C. 1893) 54 Fed. 987; Barnes v. Poirier (1894) 64 Fed. 14, 18, 12 C. C. A. 9; Baker v. Norwood (C. C. 1896) 74 Fed. 997, 999 (affirmed [1898] 19 Sup. Ct. 187, 172 U. S. 269, 43 L. Ed. 443); Ware v. U. S. (1907) 154 Fed. 577, 84 C. C. A. 503, 12 L. R. A. (N. S.) 1053, 12 Ann. Cas. 233 (certiorari denied [1907] 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353); Jones v. U. S. (1908) 162 Fed. 417, 89 C. C. A. 303 (certiorari denied [1908] 29 Sup. Ct. 685, 212 U. S. 576, 53 L. Ed. 657); U. S. v. Diamond Coal & Coke Co. (1911) 191 Fed. 786, 112 C. C. A. 272.

§ 4593. (R. S. § 2305, as amended, Act March 1, 1901, c. 674.) Deduction of military and naval service from time, etc.

The time which the homestead settler has served in the Army, Navy, or Marine Corps shall be deducted from the time heretofore required to perfect title, or if discharged on account of wounds received or disability incurred in the line of duty, then the term of enlistment shall be deducted from the time heretofore required to perfect title, without reference to the length of time he may have served; but no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements:

Provided, That in every case in which a settler on the public land of the United States under the homestead laws died while actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the war with Spain or the Philippine insurrection, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, may proceed forthwith to make final proof upon the land so held by the deceased soldier and settler, and that the death of such soldier while so engaged in the service of the United States shall, in the administration of the homestead laws, be construed to be equivalent to a performance of all requirements as to residence and cultivation for the full period of five years, and shall entitle his widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, to make final proof upon and receive Government patent for said land; and that upon proof produced to the officers of the proper local land office by the widow, if unmarried, or in case of her death or marriage, then his minor orphan children or his or their legal representatives, that the applicant for patent is the widow, if unmarried, or in case of her death or marriage, his orphan children or his or their legal representatives, and that such soldier, sailor, or marine died while in the service of the United States as hereinbefore described, the patent for such land shall issue.

Act June 8, 1872, c. 338, § 1, 17 Stat. 333. Act March 1, 1901, c. 674, 31 Stat. 847.

This section was amended by Act March 1, 1901, c. 674, cited above, by adding, at the end of the section as originally enacted, the proviso, beginning with the words, "Provided, That in every case in which a settler on the public lands," etc., to the end of the section as set forth here.

Similar provisions, somewhat broader in scope, were made by Act June 16, 1898, c. 458, post, § 4604.

See note to R. S. § 2304, ante, § 4592.

Cited without definite application, Anderson v. Carkins (1890) 10 Sup. Ct. 905, 906, 135 U. S. 483, 34 L. Ed. 272; Webster v. Luther (1896) 16 Sup. Ct. 963, 966, 163 U. S. 331, 41 L. Ed. 179; Calhoun v. Violet (1899) 19 Sup. Ct. 324, 325, 173 U. S. 60, 43 L. Ed. 614; Barnes v. Poirier (1894) 64 Fed. 14, 18, 12 C. C. A. 9; U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752; U. S. v. Diamond Coal & Coke Co. (1911) 191 Fed. 786, 112 C. C. A. 272.

§ 4594. (R. S. § 2306.) Persons who have entered less than 160 acres, rights of.

Every person entitled, under the provisions of section twenty-three hundred and four, to enter a homestead who may have heretofore entered, under the homestead laws, a quantity of land less than one hundred and sixty acres, shall be permitted to enter so much land as, when added to the quantity previously entered, shall not exceed one hundred and sixty acres.

Act June 8, 1872, c. 338, § 2, 17 Stat. 333.

Subsequent provisions for the relief of settlers under this section whose entries or locations were canceled, or where the certificates on which such entries had been made were found erroneous or invalid, or had been sold or transferred, were made by Act June 16, 1880, c. 244, Res. April 18, 1904, No. 25, Act March 3, 1893, c. 208, and Act Aug. 18, 1894, c. 301, § 1, post, §§ 4595–4601.

Rights as to location of soldiers' certificates theretofore issued under this section were not affected by Act March 2, 1889, c. 381, § 6, which allowed an additional entry after final proof on former entry of less than one quarter section, by a proviso annexed to that section, ante, § 4560.

Other provisions for additional entries, after a former entry of less than 160 acres, were made by Act April 28, 1904, c. 1776, § 2, and Act April 28, 1904, c. 1801, § 2, ante, §§ 4561, 4577.

Notes of Decisions

Nature of soldier's additional homestead right.—An application for the entry of a soldier's additional homestead is not made under the homestead

laws, but such grant is in the nature of a bounty to the soldier. U. S. v. Lair (D. C. 1902) 118 Fed. 98.

Where a soldier's original entry was within reserved territory, and therefore void, his homestead right cannot be said to have been exercised, and he has no right of additional entry which he may assign. McKenzie v. Fisher (1913) 40 App. D. C. 74.

This section is entirely independent of other sections of this chapter, and the provisions of other sections respecting residence upon land entered are inapplicable to additional entries under this section; and one who has patented land under this section has the right to alien the land without having entered upon it. Rose v. Nevada & G. V. Wood & Lumber Co. (1887) 73 Cal. 385, 15 Pac. 19.

Alienation of soldier's additional homestead right.—The right to enter a soldier's additional homestead is assignable before entry made. Webster v. Luther (1896) 16 Sup. Ct. 963, 163 U. S. 331, 338, 41 L. Ed. 179; Beley v. Naphtaly (1898) 18 Sup. Ct. 354, 357, 169 U. S. 353, 42 L. Ed. 775; Mullen v. Wine (C. C. 1886) 26 Fed. 206 (appeal dismissed Wine v. Mullin [1890] 10 Sup. Ct. 1076, 136 U. S. 654, 34 L. Ed. 553); Pourier v. Barnes (C. C. 1893) 57 Fed. 956 (distinguishing Anderson v. Carkins [1890] 10 Sup. Ct. 905, 135 U. S. 483, 34 L. Ed. 272); U. S. v. Gridley (C. C. 1911) 186 Fed. 544. CONTRA, see Nichols v. Council (1888) 51 Ark. 26, 9 S. W. 305, 14 Am. St. Rep. 20; Stewart v. Sutherland (1892) 93 Cal. 270, 28 Pac. 947. And see Montgomery v. Pacific Coast Land Bureau (1892) 94 Cal. 284, 29 Pac. 640, 28 Am. St. Rep. 122; Clark v. Welch (1908) 118 N. W. 137, 154 Mich. 537, 15 Detroit Leg. N. 816; Webster v. Luther (1892) 50 Minn. 77, 52 N. W. 271; Bradley v. Whitesides (1893) 55 Minn. 455, 57 N. W. 148 (distinguishing Anderson v. Carkins [1890] 135 U. S. 483, 10 Sup. Ct. 905, 34 L. Ed. 272); Whitesides v. Rutan (1893) 53 Minn. 520, 55 N. W. 540; Tuman v. Pillsbury (1895) 60 Minn. 520, 63 N. W. 104; Pardoe v. Merritt (1898) 77 N. W. 552, 75 Minn. 12; Lamson v. Coffin (1907) 114 N. W. 248, 102 Minn. 493; Rogers v. Clark Iron Co. (1908) 116 N. W. 739, 104 Minn. 198; Murray v. White (1911) 113 Pac. 754, 42 Mont. 423, Ann. Cas. 1912A, 1297; Montague v. McCarroll (1894) 10 Utah, 22, 36 Pac. 50; Id. (1897) 49 Pac. 418, 15 Utah, 318; Macintosh v. Renton (1882) 2 Wash. T. 121, 3 Pac. 830; Id. (1888) 3 Wash. T. 431, 19 Pac. 144; Knight v. Leary (1882) 54 Wis. 459, 11 N. W. 600; Gavigan v. Crary (1905) 2 Alaska, 370.

—— **Assignee's rights.**—An assignment which designates the land to be entered does not give the assignee the right, so far as the government is concerned, to locate other public land. U. S. v. Ballinger (1910) 35 App. D. C. 392.

The right to make an additional homestead entry cannot be exercised by an assignee, where the assignor's original entry was within reserved territory, and therefore void, and it does not appear that the assignment was made before the cancellation of the entry. McKenzie v. Fisher (1913) 40 App. D. C. 74.

—— **Substitution by assignee of soldier's additional homestead right rejected as invalid.**—The assignee of a soldier's additional homestead right cannot, when his application has been disallowed because his assignor was not entitled to an additional homestead entry, substitute in support thereof a valid right in place of the one rejected, and give his application precedence over an intervening adverse claim. Robinson v. Lundrigan (1913) 38 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468, affirming judgment (1910) 178 Fed. 230, 101 C. C. A. 590.

Patent.—On the issuance of a patent to land as soldiers' additional homestead to one, his heirs and assigns, who had theretofore assigned his soldier's additional homestead scrip with an irrevocable power of attorney to make entry and to convey the land entered for the sole benefit of the person owning the right, the beneficial ownership passed to the assignee by the doctrine of relation or of enforced estoppel. Rogers v. Clark Iron Co. (1908) 116 N. W. 739, 104 Minn. 198.

The acts of federal officials in allowing location under soldiers' homestead scrip, executing final receipts, and issuing a patent, is evidence that all preliminary steps necessary thereto have been taken. Id.

A patent issued to an assignee of a soldier's additional homestead scrip does not have the effect of a judgment precluding the government from asserting such rights as it may have in case the issuance of the patent was induced by fraud or was the result of mistake. U. S. v. Gridley (C. C. 1911) 186 Fed. 544.

Where the tract in question contained only 40 acres, and plaintiff's grantor had received a patent therefor, reciting that his claim had been established, and the patent issued pursuant to law, and was shown never to have resided upon said land, it must be presumed, in the absence of evidence to the contrary, that he acquired a right to enter it under said acts. Knight v. Leary (1882) 54 Wis. 459, 11 N. W. 600.

—— **Cancellation of patent as against bona fide purchaser.**—A purchaser in good faith and for value of a soldier's additional homestead scrip acquires only a claim which becomes effective if the scrip be valid, and he is not, as against the government issuing to him

a patent, a bona fide purchaser, and the government, on discovering that the scrip is a forgery, may sue to cancel the patent. U. S. v. Gridley (C. C. 1911) 186 Fed. 544.

Mineral lands not subject to homestead entry.—See notes to § 4591.

Nonmineral affidavit by entryman.—See notes to § 4591.

Cited without definite application, Burfenning v. Chicago, St. P., M. & O. R. Co. (1896) 16 Sup. Ct. 1018, 163 U. S. 321, 322, 41 L. Ed. 175; St. Paul, M. & M. Ry. Co. v. Donohue (1908) 28 Sup. Ct. 600, 603, 210 U. S. 21, 52 L. Ed. 941; Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296; U. S. v. Diamond Coal & Coke Co. (1911) 191 Fed. 786, 112 C. C. A. 272; Same v. Reed (C. C. 1892) 53 Fed. 405, 409; Puget Mill Co. v. Brown (C. C. 1893) 54 Fed. 987, 989 (affirmed [1893] 59 Fed. 35, 7 C. C. A. 643); Buckley v. Howe (1890) 86 Cal. 596, 25 Pac. 132.

§ 4595. (Act June 16, 1880, c. 244, § 1.) Soldiers' and sailors' entries canceled; repayment of fees.

In all cases where it shall, upon due proof being made, appear to the satisfaction of the Secretary of the Interior that innocent parties have paid the fees and commissions and excess payments required upon the location of claims under the act entitled "An act to amend an act entitled 'An act to enable honorably discharged soldiers and sailors, their widows and orphan children, to acquire homesteads on the public lands of the United States', and amendments thereto," approved March third, eighteen hundred and seventy-three, and now incorporated in section twenty-three hundred and six of the Revised Statutes of the United States, which said claims were, after such location, found to be fraudulent and void, and the entries or locations made thereon canceled, the Secretary of the Interior is authorized to repay to such innocent parties the fees and commissions, and excess payments paid by them, upon the surrender of the receipts issued therefor by the receivers of public moneys, out of any money in the Treasury not otherwise appropriated, and shall be payable out of the appropriation to refund purchase-money on lands erroneously sold by the United States. (21 Stat. 287.)

This section and the three sections next following were an act entitled "An act for the relief of certain settlers on the public lands, and to provide for the repayment of certain fees, purchase money, and commissions paid on void entries of public lands."

No proof of loyalty was to be required in cases mentioned in this act, by Res. April 18, 1904, No. 25, post, § 4599.

R. S. § 2306, mentioned in this section, is set forth ante, § 4594.

Notes of Decisions

Secretary's award for repayment.—The secretary's award for repayment of fees is not subject to the approval or review of the accounting officers. Denny v. U. S. (1910) 45 Ct. Cl. 162.

Cited without definite application, King v. U. S. (1913) 48 Ct. Cl. 371.

§ 4596. (Act June 16, 1880, c. 244, § 2.) Homestead or other entries canceled or not confirmed; repayment of fees and purchase-money.

In all cases where homestead or timber-culture or desert-land entries or other entries of public lands have heretofore or shall hereafter be canceled for conflict, or where, from any cause, the entry has been erroneously allowed and cannot be confirmed, the Secretary of the Interior shall cause to be repaid to the person who made such entry, or to his heirs or assigns, the fees and commissions, amount of purchase money, and excesses paid upon the same upon the surrender of the duplicate receipt and the execution of a proper relinquishment of all claims to said land, whenever such entry shall have been duly canceled by the Commissioner of the General Land Office, and in all cases where parties have paid double-minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar

and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns. (21 Stat. 287.)

Notes of Decisions

Repayment of price where entries are canceled or not confirmed—Exclusiveness of remedy.—This remedy is not exclusive, but after repayment has been denied by the secretary the court of claims has jurisdiction of such claims. Medbury v. U. S. (1899) 19 Sup. Ct. 503, 504, 173 U. S. 492, 43 L. Ed. 779.

—— **Right to repayment.**—One who seeks to take advantage of this statute must show himself entitled, not only to the land itself, but to everything which the statute has annexed thereto as an incident. Hoffeld v. U. S. (1902) 22 Sup. Ct. 927, 928, 186 U. S. 273, 46 L. Ed. 1160, affirming judgment (1901) 36 Ct. Cl. 26; Hollister v. U. S. (1900) 36 Ct. Cl. 13; Anthracite Mesa Coal Mining Co. v. U. S. (1903) 38 Ct. Cl. 56.

—— **Mistake as to price.**—A voluntary payment by mistake of $2.50 per acre for public lands which, under the acts of congress, could be purchased for $1.25 per acre, gives the purchaser no lawful claim against the United States for repayment of the overcharge, where the mistake on his part was not induced by any attempt to deceive or misrepresentation by the government officials. U. S. v. Edmonston (1901) 21 Sup. Ct. 718, 719, 181 U. S. 500, 45 L. Ed. 971; Miller v. U. S. (1907) 42 Ct. Cl. 121; Elliott v. U. S. (1902) 37 Ct. Cl. 136.

—— **Fraudulent entry.**—Right to repayment of price where entry is canceled, does not apply to cases where entry was fraudulently procured. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 619, 225 U. S. 219, 56 L. Ed. 1063 (affirming judgment [1909] 45 Ct. Cl. 614); Emmons v. U. S (C. C. 1900) 103 Fed. 771.

As to evidence of fraud, see Anthracite Mesa Coal Mining Co. v. U. S. (1903) 38 Ct. Cl. 56.

—— **Cancellation of entry.**—The government is not a party to a suit in equity by one entryman against another, and a decree in favor of one does not operate as a cancellation of the entry of the other. But an award for repayment duly approved is a recognition of a substantial cancellation, and must be treated as an actual cancellation. The omission of a formal order of cancellation should not defeat the manifest intent of the statute. Hollister v. U. S. (1900) 36 Ct. Cl. 13.

Where the error at the time of the entry is in receiving an unauthorized affidavit and in taking the entryman's money, and the entry is subsequently canceled, his assignee may recover back the money. Anthracite Mesa Coal-Mining Co. v. U. S. (1903) 38 Ct. Cl. 56.

—— **"Person who made entry."**—One making entry of coal lands avowedly for his own use is "the person who made such entry," though he made the entry for a corporation, for its benefit. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 618, 225 U. S. 219, 56 L. Ed. 1063, affirming judgment (1909) 45 Ct. Cl. 614. But where the money paid was that of a company to whom the entryman had previously quitclaimed, he could not recover it back, though the entry was set aside. Stoiber v. U. S. (1906) 41 Ct. Cl. 269.

—— **"Assigns."**—The term "assigns" includes a mortgagee who has foreclosed his mortgage and purchased the mortgaged property at sheriff's sale under a decree of the court. U. S. v. Commonwealth Title Ins. & Trust Co. (1904) 24 Sup. Ct. 546, 547, 193 U. S. 651, 48 L. Ed. 830, affirming judgment Commonwealth Title Ins. & Trust Co. v. U. S. (1902) 37 Ct. Cl. 532. But not a purchaser of the original rights of an entryman at an execution sale against him or his grantee. Hoffeld v. U. S. (1902) 22 Sup. Ct. 927, 186 U. S. 273, 46 L. Ed. 1160, affirming judgment (1901) 36 Ct. Cl. 26; Hoffeld v. U. S. (1902) 22 Sup. Ct. 927, 928, 186 U. S. 273, 46 L. Ed. 1160.

Corporate grantee in a quitclaim deed to public land, executed by a person who, having then no interest, afterwards made an entry actually at the instance of a corporation, with its money, is his assign. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 619, 225 U. S. 219, 56 L. Ed. 1063, affirming judgment (1909) 45 Ct. Cl. 614.

—— **Subsequent grantees.**—As between an entryman and a subsequent grantee, who is in possession, claiming through him, at the time the entry is canceled, the grantee is entitled to the purchase money refunded by the government. Leete v. Pacific Mill. & Min. Co. (C. C. 1898) 88 Fed. 957, judgment affirmed Pacific Mill. & Min. Co. v. Leete (1899) 94 Fed. 968, 36 C. C. A. 587.

—— **Surrender of duplicate receipt and execution of relinquishment as condition of repayment.**—A surrender of the duplicate receipt will be presumed from a finding that the Secretary of the Interior ordered repayment "on the relinquishment by the claimants of all claim to the land so canceled," and a further finding that the relinquishment was made "as required by the rules and regulations of the Land Office." U. S. v. Commonwealth Title Ins. & Trust Co. (1904) 24 Sup. Ct. 546, 547, 193 U. S. 651, 48 L. Ed. 830, affirming judgment Commonwealth Title Ins. & Trust Co. v. U. S. (1912) 37 Ct. Cl. 532.

Purchase money paid before cancel-

lation of the entry is not recoverable without a relinquishment of the land. Emmons v. U. S. (C. C. 1890) 42 Fed. 26.

One suing to recover money paid must show that he has surrendered his duplicate receipt, and has executed the relinquishment. U. S. v. Foreman (1897) 48 P. 92, 5 Okl. 237.

Repayment of the double minimum price for land found not to be within limits of railroad land grant.—The statute applies only to cases of mistaken location, etc., and does not authorize repayment where the land was within a railroad grant when patented, but which grant was subsequently forfeited for failure of the grantee to build the road. Medbury v. U. S. (1899) 19 Sup. Ct. 503, 173 U. S. 492, 43 L. Ed. 779.

This provision refers to cases where there was a mutual mistake of fact, or where the route of the road has been so changed as to exclude the land in question. Southworth v. U. S. (1895) 30 Ct. Cl. 78.

§ 4597. (Act June 16, 1880, c. 244, § 3.) Appropriation.

The Secretary of the Interior is authorized to make the payments herein provided for, out of any money in the Treasury not otherwise appropriated. (21 Stat. 287.)

§ 4598. (Act June 16, 1880, c. 244, § 4.) Rules by Commissioner of General Land Office; warrants for payments.

The Commissioner of the General Land Office shall make all necessary rules, and issue all necessary instructions, to carry the provisions of this act into effect; and for the repayment of the purchase money and fees herein provided for the Secretary of the Interior shall draw his warrant on the Treasury and the same shall be paid without regard to the date of the cancellation of the entries. (21 Stat. 287.)

§ 4599. (Res. April 18, 1904, No. 25.) Amendment of Act June 16, 1880, c. 244; proof of loyalty not to be required.

The provisions of "An Act for the relief of certain settlers on the public lands, and to provide for the payment of certain fees, purchase money, and commission paid on void entries of public lands," approved June sixteenth, eighteen hundred and eighty, shall be construed to abolish the necessity for proof of loyalty in the cases mentioned in said Act, and no proof of loyalty shall be required in the cases mentioned in said Act. (33 Stat. 589.)

Act June 16, 1880, c. 244, mentioned in this resolution, is set forth ante, §§ 4595–4598.

§ 4600. (Act March 3, 1893, c. 208.) Soldiers' additional entries invalid; commutation.

Where soldier's additional homestead entries have been made or initiated upon certificate of the Commissioner of the General Land Office of the right to make such entry, and there is no adverse claimant, and such certificate is found erroneous or invalid for any cause, the purchaser thereunder, on making proof of such purchase, may perfect his title by payment of the Government price for the land; but no person shall be permitted to acquire more than one hundred and sixty acres of public land through the location of any such certificate. (27 Stat. 593.)

This was one of several provisos annexed to the appropriation for surveys of the public lands in the sundry civil appropriation act for the fiscal year 1894, cited above.

Notes of Decisions

Adverse claimants—Land department rules.—The statute confines the right to purchase the land to cases where homestead entries have been made or initiated on a certificate of the Commissioner of the General Land Office of the right to make such entry, and then only in cases where there is no adverse claimant, and the department therefore has no power to make a rule cutting off the right of an adverse claimant. Robinson v. Lundrigan (1910) 178 Fed. 230, 101 C. C. A. 590, decree affirmed (1913) 33 Sup. Ct. 255, 227 U. S. 173, 57 L. Ed. 468.

Cited without definite application, Keely v. Gregg (1905) 82 P. 27, 33 Mont. 216, judgment modified on rehearing (1906) 83 P. 222, 33 Mont. 216.

§ 4601. (Act Aug. 18, 1894, c. 301, § 1.) Soldiers' additional homestead certificates; sale.

All soldiers' additional homestead certificates heretofore issued under the rules and regulations of the General Land Office under section twenty-three hundred and six of the Revised Statutes of the United States, or in pursuance of the decisions or instructions of the Secretary of the Interior, of date March tenth, eighteen hundred and seventy-seven, or any subsequent decisions or instructions of the Secretary of the Interior or the Commissioner of the General Land Office, shall be, and are hereby, declared to be valid, notwithstanding any attempted sale or transfer thereof; and where such certificates have been or may hereafter be sold or transferred, such sale or transfer shall not be regarded as invalidating the right, but the same shall be good and valid in the hands of bona fide purchasers for value; and all entries heretofore or hereafter made with such certificates by such purchasers shall be approved, and patent shall issue in the name of the assignees. (28 Stat. 397.)

This was a provision of the sundry civil appropriation act for the fiscal year 1895, cited above.

R. S. § 2306, mentioned in this section, is set forth ante, § 4594.

Notes of Decisions

Alienation of soldiers' additional homestead certificates.—See, also, notes to § 4594, ante.

Until location of land under an additional homestead certificate, the bare right to locate it was transferable. But, notwithstanding a transfer, the location would be made and the patent issued in the name of the original owner. Clark v. Welch (1908) 118 N. W. 137, 154 Mich. 537, 15 Detroit Leg. N. 816.

Soldier's additional homestead scrip is personal property and assignable, notwithstanding the opposed practice of the federal land office. Rogers v. Clark Iron Co. (1908) 116 N. W. 739, 104 Minn. 198.

A contract by an entryman, under a soldier's additional homestead scrip, to convey title to a portion of the land when patent issues as agricultural land, is valid. Murray v. White (1911) 113 P. 754, 42 Mont. 423.

—— **Revocation of power to make transfer effectual.**—Where the right to locate public land under an additional homestead certificate has been transferred for value, the giving to the transferee, or to any person whom he might name, a power to make such transfer effectual, is not a revocable act. Clark v. Welch (1908) 118 N. W. 137, 154 Mich. 537, 15 Detroit Leg. N. 816.

—— **Title acquired by assignee as applicant for land.**—The assignee of a soldier's additional homestead certificate, on filing an application for a specific tract of land, acquires an equitable title therein, which ripens into a legal title, relating back to the date of application on issuance of a government patent. Gilbert v. McDonald (1905) 102 N. W. 712, 94 Minn. 289, 110 Am. St. Rep. 368. See, also, Rogers v. Clark Iron Co. (1908) 116 N. W. 739, 104 Minn. 198.

—— **Transfer of title acquired by applicant.**—The equitable interest obtained by filing application for a specific tract of land by assignee of soldier's additional homestead certificate may be conveyed by quitclaim deed. Gilbert v. McDonald (1905) 102 N. W. 712, 94 Minn. 289, 110 Am. St. Rep. 368.

§ 4602. (R. S. § 2307.) Widows and minor children of persons entitled to homestead, etc.

In case of the death of any person who would be entitled to a homestead under the provisions of section twenty-three hundred and four, his widow, if unmarried, or in case of her death or marriage, then his minor orphan children, by a guardian duly appointed and officially accredited at the Department of the Interior, shall be entitled to all the benefits enumerated in this chapter, subject to all the provisions as to settlement and improvements therein contained; but if such person died during his term of enlistment, the whole term of his enlistment shall be deducted from the time heretofore required to perfect the title.

Act June 8, 1872, c. 338, § 3, 17 Stat. 333.

R. S. § 2304, mentioned in this section, is set forth ante, § 4592.

Notes of Decisions

Assignment of additional homestead right of children of deceased soldier.—The right of the children of a deceased soldier to locate and enter 80

acres of public land as an additional homestead is personal property, and may be sold and assigned to a third party by their guardian. Mullen v. Wine (C. C. 1886) 26 Fed. 206, appeal dismissed Wine v. Mullin (1890) 10 Sup. Ct. 1076, 136 U. S. 654, 34 L. Ed. 553.

Cited without definite application, Galliher v. Cadwell (1892) 12 Sup. Ct. 873, 874, 145 U. S. 368, 36 L. Ed. 738; U. S. v. Davis (1913) 34 Sup. Ct. 112, 231 U. S. 183, 58 L. Ed. 177.

§ 4603. (R. S. § 2308.) Actual service in the Army or Navy equivalent to residence, etc.

Where a party at the date of his entry of a tract of land under the homestead laws, or subsequently thereto, was actually enlisted and employed in the Army or Navy of the United States, his services therein shall, in the administration of such homestead laws, be construed to be equivalent, to all intents and purposes, to a residence for the same length of time upon the tract so entered. And if his entry has been canceled by reason of his absence from such tract while in the military or naval service of the United States, and such tract has not been disposed of, his entry shall be restored; but if such tract has been disposed of, the party may enter another tract subject to entry under the homestead laws, and his right to a patent therefor may be determined by the proofs touching his residence and cultivation of the first tract and his absence therefrom in such service.

Act June 8, 1872, c. 338, § 4. 17 Stat. 333.

Notes of Decisions

Army service equivalent to residence —Cure of defective entry.—An entry on an affidavit failing to state that the entryman's family, or any member thereof, was residing on the land, is cured by this section. Hastings & D. R. Co. v. Whitney (1889) 10 Sup. Ct. 112, 115, 132 U. S. 357, 33 L. Ed. 363.

Cited without definite application, U. S. v. Mills (1911) 190 Fed. 513, 111 C. C. A. 345, 42 L. R. A. (N. S.) 752.

§ 4604. (Act June 16, 1898, c. 458.) Service of homestead settlers in Army or Navy in time of war equivalent to actual residence, etc.

In every case in which a settler on the public land of the United States under the homestead laws enlists or is actually engaged in the Army, Navy, or Marine Corps of the United States as private soldier, officer, seaman, or marine, during the existing war with Spain or during any other war in which the United States may be engaged, his services therein shall, in the administration of the homestead laws, be construed to be equivalent to all intents and purposes to residence and cultivation for the same length of time upon the tract entered or settled upon; and hereafter no contest shall be initiated on the ground of abandonment, nor allegation of abandonment sustained against any such settler, unless it shall be alleged in the preliminary affidavit or affidavits of contest, and proved at the hearing in cases hereafter initiated, that the settler's alleged absence from the land was not due to his employment in such service: Provided, That if such settler shall be discharged on account of wounds received or disability incurred in the line of duty, then the term of his enlistment shall be deducted from the required length of residence without reference to the time of actual service: Provided further, That no patent shall issue to any homestead settler who has not resided upon, improved, and cultivated his homestead for a period of at least one year after he shall have commenced his improvements. (30 Stat. 473.)

This was an act entitled "An act for the protection of homestead settlers who enter the military or naval service of the United States in time of war."

Somewhat similar provisions were made by R. S. § 2305, as amended by Act March 1, 1901, c. 674, ante, § 4593.

This section was made applicable to services rendered in connection with operations in Mexico by Res. Aug. 29, 1916, No. 420, post, § 4604a.

§ 4604a. (Res. Aug. 29, 1916, c. 420.) Act June 16, 1898, c. 458 applicable to military service rendered in connection with operations in Mexico.

The provisions of the Act approved June sixteenth, eighteen hundred and ninety-eight, chapter four hundred and fifty-eight (Thirtieth Statutes at Large, page four hundred and seventy-three), shall be applicable in all cases of military service rendered in connection with operations in Mexico, or along the borders thereof, or in mobilization camps elsewhere, whether such service be in the military or naval organization of the United States or the National Guard of the several States now or hereafter in the service of the United States. (39 Stat.)

This was a joint resolution entitled "Joint Resolution extending the provisions of the act approved June 16, 1898."

Act June 16, 1898, referred to in this section, is set forth ante, § 4604.

§ 4605. (R. S. § 2309.) Who may enter by agent.

Every soldier, sailor, marine, officer, or other person coming within the provisions of section twenty-three hundred and four, may, as well by an agent as in person, enter upon such homestead by filing a declaratory statement, as in pre-emption cases; but such claimant in person shall within the time prescribed make his actual entry, commence settlements and improvements on the same, and thereafter fulfill all the requirements of law.

Act June 8, 1872, c. 338, § 5, 17 Stat. 334.

R. S. § 2304, mentioned in this section, is set forth ante, § 4592.

Notes of Decisions

Entry by agent.—A soldier may enter a homestead claim selected by an agent without ever viewing it. U. S. v. Richards (D. C. 1906) 149 Fed. 443.

Entry pending appeal in violation of rules.—A soldier's declaratory statement filed during the time allowed for an appeal from a decision of the Commissioner of the General Land Office against the validity of a prior homestead entry confers no rights upon the applicant. Holt v. Murphy (1908) 28 Sup. Ct. 212, 213, 207 U. S. 407, 52 L. Ed. 271, affirming decree (1904) 79 Pac. 265, 15 Okl. 12.

§ 4606. (R. S. § 2310.) Chiefs, etc., of Stockbridge Munsees, homestead rights of.

Each of the chiefs, warriors, and heads of families of the Stockbridge Munsee tribes of Indians, residing in the county of Shawana, State of Wisconsin, may, under the direction of the Secretary of the Interior, enter a homestead and become entitled to all the benefits of this chapter, free from any fee or charge; and any part of their present reservation, which is abandoned for that purpose, may be sold, under the direction of the Secretary of the Interior, and the proceeds applied for the benefit of such Indians as may settle on homesteads, to aid them in improving the same.

Act March 3, 1865, c. 127, § 4, 13 Stat. 562.

More comprehensive provisions extending the benefit of the homestead laws to Indians abandoning tribal relations and to Indians located on public lands were made by Act March 3, 1875, c. 131, § 15, and Act July 4, 1884, c. 180, § 1, post, §§ 4611, 4612.

§ 4607. (R. S. § 2311.) Exemption of homestead of Stockbridge Munsees.

The homestead secured, by virtue of the preceding section, shall not be subject to any tax, levy, or sale; nor shall it be sold, conveyed, mortgaged, or in any manner incumbered, except upon the decree of the district court of the United States, as provided in the following section.

Act March 3, 1865, c. 127, § 4, 13 Stat. 562.

(R. S. § 2312. Transferred to Title XXV.)

This section provided that any of the chiefs, warriors or heads of families of the Stockbridge Munsees might be admitted to all the rights of citizenship by the district court in the manner therein provided. It is set forth under Title XXV, "Citizenship," ante, § 3950.

§ 4608. (Act June 13, 1902, c. 1080, § 1.) Homestead laws extended over former Ute Indian Reservation in Colorado; certain entries prohibited.

That the provisions of the homestead laws be, and are hereby, extended over and shall apply to the lands included within the limits of the former Ute Indian Reservation in Colorado not included in any forest reservation, in addition to the existing laws relating to cash entries thereon: Provided, That no selection or entry of lands in lieu of land included within a forest reservation or of soldiers' or sailors' additional homesteads shall be allowed within said limits. (32 Stat. 384.)

This section and the two sections next following were an act entitled "An act providing for free homesteads in the Ute Indian Reservation in Colorado."

§ 4609. (Act June 13, 1902, c. 1080, § 2.) Reimbursement of Ute Indian fund.

All sums of money that may be lost to the Ute Indian fund by reason of the passage of this Act shall be paid into the fund by the United States, and all moneys received by reason of the commutation of any homestead entry shall be credited to said Ute Indian fund. (32 Stat. 384.)

§ 4610. (Act June 13, 1902, c. 1080, § 3.) Lands on which the Government has improvements excepted from act.

No lands shall be included in any location or settlement under the provisions of this Act on which the United States Government has valuable improvements. (32 Stat. 384.)

§ 4611. (Act March 3, 1875, c. 131, § 15.) Indians abandoning tribal relations entitled to benefit of homestead laws.

Any Indian born in the United States, who is the head of a family, or who has arrived at the age of twenty-one years, and who has abandoned, or may hereafter abandon, his tribal relations, shall, on making satisfactory proof of such abandonment, under rules to be prescribed by the Secretary of the Interior, be entitled to the benefits of the act entitled "An act to secure homesteads to actual settlers on the public domain," approved May twentieth, eighteen hundred and sixty-two, and the acts amendatory thereof, except that the provisions of the eighth section of the said act shall not be held to apply to entries made under this act: Provided, however, That the title to lands acquired by any Indian by virtue hereof shall not be subject to alienation or incumbrance, either by voluntary conveyance or the judgment, decree, or order of any court, and shall be and remain inalienable for a period of five years from the date of the patent issued therefor: Provided, That any such Indian shall be entitled to his distributive share of all annuities, tribal funds, lands, and other property, the same as though he had maintained his tribal relations; and any transfer, alienation, or incumbrance of any interest he may hold or claim by reason of his former tribal relations shall be void. (18 Stat. 420.)

This section was part of the deficiency appropriation act for the fiscal year 1875, cited above.

Section 16 of that act confirmed entries made by Indians prior to the passage of the act, or subsequent thereto and prior to the promulgation of the regulations to be established by the Secretary of the Interior under the authority of this section. It is omitted, as temporary merely, and executed.

Act May 20, 1862, c. 75, mentioned in this section, was incorporated, with the acts amendatory thereof, into this chapter of the Revised Statutes; sec-

tion 8 of that act, excepted by this section, was incorporated into R. S. § 2301, ante, § 4589.

Indians located on public lands may avail themselves of the homestead laws by a provision of Act July 4, 1884, c. 180, § 1, post, § 4612.

No distinction is to be made in the construction or execution of this chapter, on account of race or color, by R. S. § 2302, ante, § 4591.

Notes of Decisions

Restrictions on alienation or incumbrance of lands acquired by Indians—Power of Congress.—See, also, notes to § 4612, post.

The limitation made by this section on the Indian's power of alienation is valid. Taylor v. Brown (1893) 13 Sup. Ct. 549, 550, 147 U. S. 640, 37 L. Ed. 313.

Congress has the power to determine when the guardianship over Indians shall cease, and may extend the period of limitation on the alienation of land by an Indian at any time before the issuance to him of final patent. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790, decree reversed Hemmer v. U. S. (1912) 204 Fed. 898, 123 C. C. A. 194.

—— **Period of restriction.**—The computation of time should include the day of the issue of the patent. Taylor v. Brown (1893) 13 Sup. Ct. 549, 551, 147 U. S. 640, 37 L. Ed. 313, affirming (1888) 40 N. W. 525, 5 Dak. 335. And see Goodrum v. Buffalo (1908) 162 Fed. 817, 89 C. C. A. 525 (affirming judgment [Ind. T. 1907] 104 S. W. 942); Ewers v. Same (1908) 162 Fed. 828, 89 C. C. A. 536 (affirming judgment Goodrum v. Same [Ind. T. 1907] 104 S. W. 944). Compare U. S. v. Saunders (C. C. 1899) 96 Fed. 268, 269.

When an act continuing the homestead privilege, with an enlargement of the time of restriction on alienation from 5 to 25 years, is passed while an Indian is a mere occupant of the land entered, and before he has obtained title, he may, even if he is not obliged to, take title under that act. Frazee v. Spokane County (1902) 69 P. 779, 29 Wash. 278; Frazee v. Piper (1908) 98 P. 760, 51 Wash. 278. And see Felix v. Yaksum (1914) 137 P. 1037, 77 Wash. 519.

—— **Effect of omissions or errors in patent.**—A restriction on the alienation of land patented to an Indian is effective, and all persons are charged with notice thereof, whether or not it is stated in the patent, or even if the patent erroneously states a limitation different from the one prescribed by the act which in fact governs the grant. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790 (decree reversed Hemmer v. U. S. [1912] 204 Fed. 898, 123 C. C. A. 194, following Taylor v. Brown [1893] 13 Sup. Ct. 549, 147 U. S. 640, 37 L. Ed. 313, affirming Id. [1888] 5 Dak. 335, 40 N. W. 525); Eells v. Ross (1894) 64 Fed. 417, 12 C. C. A. 205. Compare U. S. v. Saunders (C. C. 1899) 96 Fed. 268.

—— **Effect of restrictions on contracts and tax levies.**—Statute construed as affecting the right of alienation of an Indian homesteader, and held to render void contracts and tax levies through which rights and liens were claimed. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790; Id. (1912) 204 Fed. 898, 123 C. C. A. 194.

Lands entered and patented to Indians under this act were exempt from taxation for a period of five years from the date of the patent issued therefor. (1888) 19 Op. Atty. Gen. 161.

—— **Enforcement of restrictions by government.**—The United States may maintain a suit in its own name to enforce such restrictions. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790, decree reversed Hemmer v. U. S. (1912) 204 Fed. 898, 123 C. C. A. 194.

In a suit to set aside a sale of timber on Indian lands and the grant of a right of way for 50 years, a defense, involving a determination that the decision of the Land Department that the Indian was not within Act March 3, 1875, was erroneous, and requiring a reformation of the patent by changing the restriction of alienation from 25 to 5 years, all by way of collateral attack on the patent, was unsustainable. U. S. v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212.

Indians abandoning tribal relations entitled to share in tribal property.—Such Indians can share. Oakes v. U. S. (1909) 172 Fed. 305, 97 C. C. A. 139.

Cited without definite application, Nelson v. Northern Pac. R. Co. (1903) 23 S. Ct. 302, 309, 188 U. S. 108, 47 L. Ed. 406.

§ 4612. (Act July 4, 1884, c. 180, § 1.) Indians located on public lands entitled to benefit of homestead laws; patents.

Such Indians as may now be located on public lands, or as may, under the direction of the Secretary of the Interior, or otherwise, hereafter, so locate may avail themselves of the provisions of the homestead laws as fully and to the same extent as may now be done by citizens of the United States; and to aid such Indians in making selections of homesteads and the necessary proofs at the proper land offices, one thousand dollars, or so much thereof

as may be necessary, is hereby appropriated; but no fees or commissions shall be charged on account of said entries or proofs. All patents therefor shall be of the legal effect, and declare that the United States does and will hold the land thus entered for the period of twenty-five years, in trust for the sole use and benefit of the Indian by whom such entry shall have been made, or, in case of his decease, of his widow and heirs according to the laws of the State or Territory where such land is located, and that at the expiration of said period the United States will convey the same by patent to said Indian, or his widow and heirs as aforesaid, in fee, discharged of said trust and free of all charge or incumbrance whatsoever. (23 Stat. 96.)

This was a provision of the Indian appropriation act for the fiscal year 1885, cited above.

Notes of Decisions

Restrictions on alienation of lands acquired by Indians—Power of Congress.—Congress can determine when the guardianship over Indians shall cease, and may extend the period of limitation on the alienation of land by an Indian at any time before the issuance of final patent. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790, decree reversed Hemmer v. U. S. (1912) 204 Fed. 898, 123 C. C. 194.

—— **Period of restriction.**—This act did not affect land to which an Indian had perfected his right of homestead prior to its passage. U. S. v. Saunders (C. C. 1899) 96 Fed. 268. It did not extend from 5 years to 25 years the restriction on alienation of lands acquired by an Indian homesteader under the preceding section, which was not repealed or modified. Hemmer v. U. S. (1912) 204 Fed. 898, 123 C. C. A. 194, reversing decree U. S. v. Hemmer (D. C. 1912) 195 Fed. 790.

Where an Indian entryman was not entitled to make final proof until after the enactment of this act, the patent was issuable under it, so that the 25 years' prohibition of alienation applied. (1888) 19 Op. Atty. Gen. 161. See, also, Frazee v. Spokane County (1902) 69 P. 779, 29 Wash. 278; Same v. Piper (1908) 98 P. 760, 51 Wash. 278; Felix v. Yaksum (1914) 137 P. 1037, 77 Wash. 519.

—— **Effect of omissions of errors in patent.**—See, also, notes to § 4611, ante.

A restriction on the alienation of land patented to an Indian is effective, and all persons charged with notice thereof whether or not it is stated in the patent, or even if the patent states a limitation different from the one prescribed by the act governing the grant. U. S. v. Hemmer (D. C. 1912) 195 Fed. 790, decree reversed (1912) 204 Fed. 898, 123 C. C. A. 194.

—— **Effect of restrictions on contracts and tax levies.**—See, also, notes to § 4611, ante.

An attempted sale within the 25-year period is void. Frazee v. Piper (1908) 98 Pac. 760, 51 Wash. 278.

A conveyance of a right of way over a homestead granted by the Land Department to a Nooksack Indian for 50 years, with all privileges, etc., for the construction of a logging railroad, held a violation of a trust restriction in the Indian's patent, precluding alienation for 25 years, as provided by Act July 4, 1884. U. S. v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212.

Lands are exempt from taxation for a period of twenty-five years from the date of the patent. (1888) 19 Op. Atty. Gen. 161.

—— **Citizenship of Indian.**—An Indian who had become a citizen was within the statute. Frazee v. Spokane County (1902) 69 Pac. 779, 29 Wash. 278.

Act Feb. 8, 1887, § 6, conferring citizenship on Indians having severed their tribal relations, held not to entitle them to enter public lands under the homestead laws free from restrictions, nor preclude the government from including in a patent to an Indian a 25-year trust restriction, as provided by Act July 4, 1884. U. S. v. Cain-Bonness Lumber & Timber Co. (D. C. 1914) 215 Fed. 212.

Entry by Indians maintaining tribal relations.—A body of Indians born and dwelling outside of the territorial limits of the United States, and still maintaining their tribal relations, cannot, without authority of Congress, enter upon and occupy our public domain as emigrants. (1887) 18 Op. Atty. Gen. 557.

(R. S. §§ 2313–2316. Obsolete.)

These sections of the Revised Statutes incorporated the provisions of Act June 10, 1872, c. 424, §§ 2–4, 17 Stat. 381, which provided for the opening of the unoccupied lands of the Ottawa and Chippewa Indian reservation in Michigan to homestead entry by the Indians and others in accordance with the

provisions of the act. By its terms the act was limited to entries made within six months of its passage, and it has therefore become obsolete.

Subsequent provisions relating to homestead entries, etc., of the lands mentioned in Rev. St. §§ 2313–2316, were made by Act March 3, 1875, c. 188, 18 Stat. 516, amended by Act May 23, 1876, c. 105, 19 Stat. 55.

Provisions relating to homestead entries on lands acquired from the Indians and opened for settlement or other disposition are collected or referred to under chapter 10 I of this Title, "Ceded Indian Reservations."

(R. S. § 2317. Superseded.)

This section provided that every person having a homestead, under this chapter, who, at the end of the third year of his residence thereon, should have had under cultivation, for two years, one acre of timber, the trees not more than twelve feet apart, and in a good, thrifty condition, for each sixteen acres of such homestead, should, on due proof, receive his patent for such homestead; incorporating provisions of Act March 3, 1873, c. 277, § 4, 17 Stat. 606, part of the act to encourage the growth of timber on the western prairies. These provisions were re-enacted in the amendment of that act by Act March 13, 1874, c. 55, 18 Stat. 21, but were omitted from Act June 14, 1878, c. 190, 20 Stat. 113, which amended the act last mentioned to read as there set forth, and was itself repealed by Act March 3, 1891, c. 561, § 1, post, § 5116.

CHAPTER SIX

Mineral Lands and Mining Resources

Sec.
4613. Mineral lands reserved.
4614. Mineral lands open to purchase by citizens.
4615. Length of mining-claims upon veins or lodes.
4616. Proof of citizenship.
4617. Affidavit of citizenship, before whom made.
4618. Locators' rights of possession and enjoyment.
4619. Owners of tunnels, rights of.
4620. Regulations made by miners.
4621. Expenditure of money on tunnels.
4622. Patents for mineral lands, how obtained.
4623. Adverse claim; proceedings on.
4624. Adverse claim; oath of claimant, before whom made.
4625. Adverse claim; findings by jury; costs.
4626. Description of vein claims on surveyed and unsurveyed lands.
4627. Pending applications; existing rights.
4628. Conformity of placer-claims to surveys, limit of.
4629. Subdivisions of ten-acre tracts; maximum of placer locations.
4630. Conformity of placer-claims to surveys; limitation of claims.
4631. What evidence of possession, etc., to establish a right to a patent.
4632. Proceedings for patent for placer-claim, etc.
4633. Entry of building stone lands under placer mining laws.
4634. Previous provisions not repealed.
4635. Entry of petroleum or other mineral oil lands under placer mining laws.
4636. Assessment work on contiguous oil lands, located as placer mining claims, of same owner.
4637. Patents for oil or gas lands, located or claimed under mining laws, not to be denied because of transfer before discovery thereon of oil or gas.
4637a. Agreements, with applicants for patents for oil or gas lands included in order of withdrawal, as to disposition of oil or gas, or proceeds thereof, pending determination of title thereto; money accruing from lands within Naval Petroleum Reserves to be set aside as Navy Petroleum Fund.
4638. Public lands in Utah, withdrawn or classified as oil lands, open to entries under the homestead and desert land laws, to selection by the State under grants of Congress or the Carey Act, and to withdrawal under the Reclamation Act; reservation of oil and gas; limitation of desert land entries; previous entries validated.
4639. Applications for oil lands in Utah under this act.
4640. Patent for oil lands in Utah; reservation of oil and gas; damages caused by prospecting or removal of oil and gas.
4640a. Lands withdrawn or classified as containing phosphate, etc., oil, gas, etc., minerals, subject to appropriation, etc., entry, or purchase under nonmineral land laws, to obtain title with reservation to United States of deposits on account of which lands were so withdrawn, classified, etc.

Sec.
4640b. Patents for lands located, entered, etc., with reservation to United States of deposits on account of which lands were withdrawn, classified, etc., as valuable; prospecting for, and mining and removing reserved deposits; disproving classification, and showing nonmineral character of lands.
4640c. Persons having located, entered, etc., under nonmineral land laws, lands subsequently withdrawn, classified, etc., as valuable for phosphate, etc., oil, gas, etc., minerals, to receive patents with reservation to United States of deposits on account of which lands were so withdrawn, classified, etc.
4640d. Locations heretofore, under placer-mining laws, of lands having deposits of phosphate rock, valid; patents thereon.
4641. Entry of saline lands under placer mining laws.
4642. Surveyor-general to appoint surveyors of mining-claims, etc.
4643. Verification of affidavits, etc.
4644. Where veins intersect, etc.
4645. Patents for non-mineral lands, etc.
4646. What conditions of sale may be made by local legislature.
4647. Vested rights to use of water for mining, etc.; right of way for canals.
4648. Patents, pre-emptions, and homesteads subject to vested and accrued water-rights.
4649. Mineral lands in which no valuable mines are discovered open to homesteads.
4650. Mineral lands, how set apart as agricultural lands.
4651. Additional land districts and officers; power of the President to provide.
4652. Provisions of this chapter not to affect certain rights.
4653. Mineral lands in certain States excepted.
4654. Mineral lands in Missouri and Kansas; disposal as agricultural lands.
4655. Mineral lands in Alabama; disposal as agricultural lands.
4656. Reclassification of lands in Alabama, as agricultural or mineral lands.
4657. Lands designated as agricultural to be subject to homestead entry.
4658. Grants of lands to States or corporations not to include mineral lands.
4659. Entry of coal-lands.
4660. Pre-emption of coal lands.
4661. Pre-emption claims of coal-land to be presented within sixty days, etc.
4662. Only one entry allowed.
4663. Conflicting claims.
4664. Rights reserved.
4665. Rights of entrymen under nonmineral land laws of lands subsequently classified as coal lands; disposal of coal deposits under coal-land laws.
4665a. New or supplemental patents, without reservation, for lands patented with reservation of coal deposits, subsequently classified as noncoal.
4666. Coal lands subject to homestead or desert-land entry, to selection under Carey Act, and to withdrawal under Reclamation Act, with reservation of coal, etc.; limitation and conditions of entries; application of act to prior nonmineral entries.
4667. Applications for entry, etc., under act.
4668. Patents for lands, with reservation of coal, etc.; disposal of coal deposits; prospecting for coal; damages from mining to surface owners; mining by owners for domestic use; right to disprove classification as coal lands.
4669. Selection of coal lands by States; sale of coal lands in isolated or disconnected tracts; reservation of coal thereon, and right to prospect and mine it.
4670. Coal lands in Alabama opened to agricultural entry.

§ 4613. (R. S. § 2318.) Mineral lands reserved.

In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law.

Act July 4, 1866, c. 166, § 5, 14 Stat. 86.

All lands in Oklahoma were declared to be non-mineral in character, and proof of that fact was not to be required as a condition precedent to final entry thereon, by Act March 3, 1891, c. 543, § 16, post, § 5027.

Mineral lands were excepted from grants of lands to States for support of schools and other public purposes by acts making such grants, as follows: Colorado, Act March 3, 1875, c. 139, § 15, 18 Stat. 476; California, Act March 1, 1877, c. 81, § 4, 19 Stat. 268; North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889, c. 180, § 18, 25 Stat. 681; Idaho, Act July 3, 1890, c. 656, § 13, 26 Stat. 217; Wyoming, Act July 10, 1890, c. 664, § 13, 26 Stat. 224; Oklahoma, Act March 3, 1891, c. 543, § 38, 26 Stat. 1044.

Town-site entries by incorporated towns and cities on mineral lands, but

not to include mining rights, were provided for by Act March 3, 1891, c. 561, § 16, post, § 4799.

The felling and removal of timber on public mineral lands for mining and other purposes was permitted by Act June 3, 1878, c. 150, post, §§ 4989–4991.

The provisions for the sale of public lands chiefly valuable for timber, but unfit for cultivation, of Act June 3, 1878, c. 151, as amended by Act Aug. 4, 1892, c. 375, § 2, post, §§ 4671–4673, were not to defeat any bona fide claim under any law of the United States, or to authorize the sale of any mining claim, or the improvements of any bona fide settler on lands containing gold, silver, cinnabar, copper, or coal, by a proviso annexed to section 1 of said act, post, § 4671.

Lands embraced within the limits of any forest reservation, which, upon investigation, were found to be mineral in character, were to be restored to the public domain, by Act June 4, 1897, c. 2, § 1, par. 12, post, § 5133, and all mineral lands in any forest reservations, which are subject to entry under the existing mining laws, shall continue to be subject to such location and entry, notwithstanding any provisions therein contained.

Provisions relating to the disposal of mineral or coal lands within abandoned military reservations were made by Act July 5, 1884, c. 214, § 5, post, § 5006.

The Pikes Peak, Plum Creek, and South Platte Forest Reserves in Colorado were opened to the location of mining claims for gold, silver, and cinnabar, by Act Feb. 20, 1896, c. 28, 29 Stat. 11.

The public lands ceded by the Shoshone and Bannock Indians of the Fort Hall Reservation, Idaho, were opened to settlement under the mining laws, by Act June 6, 1900, c. 813, § 5, 31 Stat. 676.

Persons entering any of the public lands with a view to occupation, entry, or settlement under any of the land laws were restricted to 320 acres in the aggregate, by Act Aug. 30, 1890, c. 837, § 1, ante, § 4558. By Act March 3, 1891, c. 561, § 17, ante, § 4559, this provision was not to be construed to include lands entered or sought to be entered under the mineral land laws.

The mining laws were extended to Alaska by Act June 6, 1900, c. 786, § 27, post, § 5095.

Provisions, similar to those of this chapter, for the reservation from sale of public lands in the Philippine Islands valuable for minerals, and the purchase of mineral deposits and the location of mining claims thereon, were made by the act temporarily to provide for the administration of the affairs of civil government in the Philippine Islands, and for other purposes, Act July 1, 1902, c. 1369, §§ 20–62, ante, §§ 3830–3872.

The reclassification of the public lands of Alabama, to determine which of said lands were in fact agricultural lands and which mineral lands, was authorized by Act March 27, 1906, c. 1347, post, §§ 4656, 4657.

Notes of Decisions

I. System of mining laws

1. Basis of system.
2. Customs of miners as part of system.
3. Policy as to mineral lands.

II. Ownership and disposal of mineral lands

4. Reservation of mineral lands.
5. Mode of acquiring title to mineral lands.
6. Mineral lands acquired only under mining laws.
7. Disposal of mineral lands as agricultural lands.
8. Validity of contracts between claimants.

III. Mineral character of lands

9. Application of term "mineral."
10. Extent of mineral deposits contemplated by mining laws.
11. Valuable mineral deposits—Questions of fact.
12. —— Pleading and proof.
13. Entries for agricultural purposes.
14. Mineral and agricultural contestants—Burden of proof.
15. Particular mineral deposits included.

I. SYSTEM OF MINING LAWS

1. Basis of system.—The general scheme in reference to mineral lands is contained in this and other sections of this chapter. Black v. Elkhorn (1896) 16 Sup. Ct. 1101, 1102, 163 U. S. 445, 41 L. Ed. 221; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 228, 175 U. S. 571, 44 L. Ed. 276; Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co. (1905) 25 Sup. Ct. 266, 270, 196 U. S. 337, 49 L. Ed. 501; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 456, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

The act of May 10, 1872, is the foundation of the existing system for acquiring rights in public mineral lands, and its provisions are found in this and the following sections. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 605, 116 U. S. 687, 29 L. Ed. 774. See, also, McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 673, 38 C. C. A. 354 (reversed [1901] 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656); Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 17, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Lakin v. Dolly (C. C. 1891) 53 Fed. 333, 336 (affirmed [1893] 54 Fed. 461, 4 C. C. A. 438); Cosmos Ex-

ploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 47.

For history of legislation, see Del Monte Mining & M. Co. v. Last Chance Mining & Milling Co. (1898) 18 Sup. Ct. 895, 897, 171 U. S. 55, 43 L. Ed. 72.

These sections must be construed together. Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378, 410.

2. Customs of miners as part of system.—See, also, notes to § 4614, post.

These are recognized. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

3. Policy as to mineral lands.—See, also, notes to § 4614.

This section is declaratory of the general policy of the government as to mineral lands. Kansas City Min. & Milling Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326.

This section is a clear declaration of the policy of the government to reserve only such mineral lands as are valuable as such. Richards v. Dower (1889) 22 Pac. 304, 81 Cal. 44; Callahan v. James (1903) 74 P. 853, 141 Cal. 291.

Grant of lands to Utah by Enabling Act July 16, 1894, is qualified by this section, and does not include mineral or coal lands. Sweet v. U. S. (1915) 228 Fed. 421, 143 C. C. A. 3; Milner v. Same (1915) 228 Fed. 431, 143 C. C. A. 13.

II. OWNERSHIP AND DISPOSAL OF MINERAL LANDS

4. Reservation of mineral lands.—This section declares generally that lands valuable for minerals shall be reserved from sale except as otherwise directed by law. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 402, 29 L. Ed. 423; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 447, 41 L. Ed. 221; Diamond Coal, etc., Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 249, 58 L. Ed. 936; Northern Pac. R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 603, 610; U. S. v. Central Pac. R. Co. (C. C. 1898) 84 Fed. 218, 220; Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43, 44; Madison v. Octave Oil Co. (1908) 99 Pac. 176, 154 Cal. 768, 771; Van Ness v. Rooney (1911) 116 Pac. 392, 160 Cal. 131, 140; Hawke v. Deffebach (1885) 22 N. W. 480, 4 Dak. 20; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 411; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 142; Merrill v. Dixon (1880) 15 Nev. 401, 407; City of Deadwood v. Whittaker (1900) 81 N. W. 908, 12 S. D. 515, 522. See U. S. v. San Pedro & Canon del Agua Co. (1888) 17 Pac. 337, 4 N. M. (Gild.) 405.

The only lands excluded from any but mineral entry are lands valuable for minerals or such as contain valuable mineral deposits. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 35 L. Ed. 238; C. C. M. & M. Co. v. Uinta T. M. & T. Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 345, 49 L. Ed. 501; U. S. v. Plowman (1910) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523. See, also, Merrill v. Dixon (1880) 15 Nev. 401.

Public mineral lands may be reserved by the President for military or other public purposes. (1881) 17 Op. Atty. Gen. 230.

The public mineral lands are reserved from sale except as directed, but are not reserved from public uses. City of Deadwood v. Whittaker (1900) 81 N. W. 908, 12 S. D. 515, 522. See Murray v. City of Butte (1887) 14 Pac. 656, 7 Mont. 61.

5. Mode of acquiring title to mineral lands.—See, also, notes to § 4613 et seq., post.

The policy of the government has been to recognize the rights of discoverers of valuable mineral deposits to appropriate for mining purposes the ground embracing their discoveries, and to extract therefrom ores without rendering any account to the government therefor. Forbes v. Gracey (1876) 94 U. S. 762, 763, 24 L. Ed. 313; Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 1 C. C. A. 192; O'Connell v. Pinnacle Gold Mine Co. (C. C. 1904) 131 Fed. 106, 109, affirmed (1905) 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919.

Title to land known to be valuable for minerals must be obtained in the way prescribed by the laws specially authorizing the sale of such lands. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 98, 115 U. S. 392, 29 L. Ed. 423; Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 135, 1 C. C. A. 192 (affirmed [1897] 17 Sup. Ct. 671, 166 U. S. 620, 41 L. Ed. 1139); U. S. v. Central Pac. R. Co. (C. C. 1898) 84 Fed. 218, 220.

This and succeeding sections provide for the acquisition of title to unappropriated mineral lands belonging to the United States and states the mode of procedure in acquiring such title, and intrusts the disposal of mineral as well as all other lands to the Land Department. Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 Pac. 333, 11 Ariz. 241, 247.

By this and the following section Congress has provided the manner in which the government title to mineral lands may be acquired. South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 37.

6. Mineral lands acquired only under mining laws.—See, also, notes to §§ 4790, 4798, post.

No title to land known to be valuable for minerals can be obtained under the

town-site laws. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423.

Only lands valuable for mineral are subject to appropriation as mining claims. Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814.

7. Disposal of mineral lands as agricultural lands.—See, also, notes to § 4591, ante.

Title to known mineral land cannot be secured under an agricultural entry. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 402, 29 L. Ed. 423; Diamond Coal, etc., Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 238, 58 L. Ed. 936; U. S. v. Culver (C. C. 1892) 52 Fed. 81, 82; Murray v. White (1911) 113 Pac. 754, 42 Mont. 423; Gold Hill Quartz Min. Co. v. Ish (1873) 5 Or. 104.

It is not the policy of the government to dispose of its mineral lands as agricultural or in any other way than as mineral lands, to be devoted to the pursuit of mining as provided in the mining statutes. Ivanhoe Mining Co. v. Consolidated Min. Co. (1880) 102 U. S. 167, 174, 26 L. Ed. 126; Northern Pacific R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 613.

If lands are valuable for mineral and are knowingly purchased as agricultural lands, the patent issued by the government conveys no title and may be set aside in an action brought on behalf of the United States. U. S. v. Culver (C. C. 1892) 52 Fed. 81, 83.

But a homestead title to land containing minerals is good, as against a subsequent mining claim located thereon. Standard Quicksilver Co. v. Habishaw (1901) 64 P. 113, 132 Cal. 115. See, also, U. S. v. Reed (C. C. 1886) 28 Fed. 482.

A patent from the United States government for lands as agricultural lands passes no interest in or title to mining claims upon the land or to known deposits of the precious metals. U. S. v. San Pedro & Canon del Agua Co. (1888) 17 Pac. 337, 4 N. M. (Gild.) 405. See Gold Hill, etc., Min. Co. v. Ish (1873) 5 Or. 104

Title to nonknown mineral land can not be secured under agricultural entry. Murray v. White (1910) 113 Pac. 754, 42 Mont. 423, 439, Ann. Cas. 1912A, 1297.

Mineral lands are reserved from entry and settlement by the pre-emption and homestead statutes, but open to purchase by citizens of the United States. U. S. v. San Pedro & Canon del Agua Co. (1888) 17 Pac. 337, 4 N. M. (Gild.) 405.

8. Validity of contracts between claimants.—See, also, notes to § 4618, post.

Neither the statute nor public policy renders invalid a contract made in settlement of litigation over a disputed boundary between mining claims, by which one of the claimants binds himself, on obtaining title from the United States, to convey the portion in dispute to the other. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 43 L. Ed. 320, affirming decree (Mont. 1898) 51 P. 824.

A contract between two claimants, whereby each relinquishes a portion of his claim, so that one can receive a part of the ground under a mineral application and the other the remaining portion under his agricultural application, is not unlawful. Murray v. White (1910) 13 Pac. 754, 42 Mont. 423, Ann. Cas. 1912A, 1297.

III. MINERAL CHARACTER OF LANDS

9. Application of term "mineral."—To render lands valuable for mineral, there must be minerals in such quantities as to justify the expenditure of effort to extract them. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 99, 115 U. S. 392, 29 L. Ed. 423; O'Keefe v. Cannon (C. C. 1892) 52 Fed. 898; Madison v. Octave Oil Co. (1908) 99 Pac. 176, 154 Cal. 768. And see Cascaden v. Bartolis (1906) 146 Fed. 739, 741, 77 C. C. A. 496. See, also, U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571; Montana Cent. Ry. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814 (affirmed [1896] 77 Fed. 249, 23 C. C. A. 156); U. S. v. Central Pac. R. Co. (C. C. 1899) 93 Fed. 871.

To attach mineral character to public lands it is not sufficient to demonstrate that adjacent lands are mineral in character. Outcroppings on the land itself are more or less evidentiary but by no means conclusive of its mineral character, and off the land their value as evidence rapidly lessens. U. S. v. Kostelak (D. C. 1913) 207 Fed. 447.

The term "mineral" is not applicable to the vast tracts of country in the mining states which contain precious metals in small quantities but not to a sufficient extent to justify the expense of their exploitation. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 519, 35 L. Ed. 238; Montana Cent. R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 815.

The term "lands valuable for minerals" and the term "valuable mineral deposits" of section 4614, post, and the word "mine," used in section 4619, post, the expression "valuable deposits" in section 4622, post, and the phrase "mines of gold" in section 4798, post, all refer to substantially the same thing and embrace both veins or lodes and placers. Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 33.

The term "lands valuable for minerals," as used in this statute, has not always been strictly applied to natural mineral substances by the officers of the Land Department. Johnson v. Cal-

ifornia Lustral Co. (1899) 59 P. 595, 127 Cal. 283, 286.

10. Extent of mineral deposits contemplated by mining laws.—The exceptions of mineral land from pre-emption and settlement as contemplated by the statutes do not exclude all lands in which minerals may be found, but only those where the mineral is in sufficient quantity to add to their richness and to justify expenditure for its extraction, and known to be such at the date of the grant. The term "mineral" in the sense of this statute is not applicable to lands which contain precious metals in small quantity but not to a sufficient extent to justify the expense of their exploitation. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 519, 524, 35 L. Ed. 238; U. S. v. Plowman (1910) 30 Sup. Ct. 299, 216 U. S. 372, 374, 54 L. Ed. 523; Northern Pac. R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 600; U. S. v. Central Pac. R. Co. (C. C. 1898) 84 Fed. 218, 220.

To bring land within the terms of this section it must at least be shown that it contains metals in quantities sufficient to render it available and valuable for mining purposes. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 520, 35 L. Ed. 238; Alford v. Barnum (1873) 45 Cal. 482; Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207; Merrill v. Dixon (1880) 15 Nev. 401, 407. See U. S. v. Diamond Coal & Coke Co. (1911) 191 Fed. 786, 791, 112 C. C. A. 272.

The nature and extent of the deposit of minerals which will make a tract of land "mineral" or constitute a mine thereon within the meaning of this section has not been judicially determined. U. S. v. Reed (C. C. 1886) 28 Fed. 482, 486, 487.

The statute does not reserve any land from entry as a homestead because some one works some portion of it as mineral ground without any reference to the fact of whether there are any paying mines or not, but nothing short of known mines on the land capable of being worked at a profit is sufficient to prevent such entry. Id.

Nothing short of known mines on lands ordinarily capable of being worked at a profit, as compared with any gain or profit that may be derived therefrom when entered under the homestead law, is sufficient to prevent such entry. Id.

11. Valuable mineral deposits—Questions of fact.—It may be an open question in any case whether a location includes lands valuable for minerals or whether it is based upon a barren seam or fissure. Montana Cent. R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814.

12. —— Pleading and proof.—In a contest as to whether lands contain mineral it is proper to prove that at the time of the entry the lands were not known to contain mineral. Northern Pac. R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 600, reversed (1894) 14 Sup. Ct. 1030, 154 U. S. 288, 38 L. Ed. 992.

In a contest as to whether or not lands are known mineral lands it is sufficient as a matter of pleading to allege that such lands never did contain and do not now contain known minerals in lode deposits of any value sufficient to justify expenditure of time or money in efforts to extract the same. O'Keefe v. Cannon (C. C. 1892) 52 Fed. 898, 899.

13. Entries for agricultural purposes.—The courts approve the rule of the land department to the effect that if the land is worth more for agriculture than mining, it is not mineral land, although it may contain some measure of gold or silver. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 522, 35 L. Ed. 238; U. S. v. Reed (C. C. 1886) 28 Fed. 482.

Where land has been explored and worked by miners for many years and finally abandoned, it cannot thereafter be assumed to be lands valuable for mineral within the meaning of this statute, where it has been pre-empted and used for agricultural purposes. U. S. v. Reed (C. C. 1886) 28 Fed. 482, 487.

Mere mineral prospect or hope cannot keep lands from being entered for agricultural purposes. Id.

14. Mineral and agricultural contestants—Burden of proof.—In the absence of fraud, imposition, or mistake, the determination of the land department as to character of the land is conclusive. Barden v. Northern Pac. R, Co. (1894) 14 Sup. Ct. 1030, 154 U. S. 288, 38 L. Ed. 992; Northern Pac. Ry. Co. v. Soderberg (C. C. 1898) 86 Fed. 49; Traphagen v. Kirk (1904) 77 Pac. 58, 30 Mont. 562. See, also, U. S. v. Lavenson (D. C. 1913) 206 Fed. 755, and notes § 699, ante.

In controverted cases as to whether land is agricultural or mineral in character the rule of the land department is that it will be considered agricultural or mineral according as it is more valuable for mining or agricultural purposes, and its determination of that fact based upon knowledge obtained at the time as to the character of the land is conclusive. Barden v. Northern Pac. R. Co. (1894) 14 Sup. Ct. 1030, 154 U. S. 288, 329, 38 L. Ed. 992; Northern Pacific R. Co. v. Soderberg (C. C. 1898) 86 Fed. 49, 50. See U. S. v. Lavenson (D. C. 1913) 206 Fed. 755, 763; Brownfield v. Bier (1894) 39 P. 461, 15 Mont. 403, 415.

The rule of the land department is that if the land is worth more for agricultural than for mining it is not mineral land within the meaning of this section, though it may contain some measure of gold or silver or both. U.

S. v. Reed (C. C. 1886) 28 Fed. 482, 486.

In determining whether land is more valuable for mining than for agriculture, the advantages of hydraulic mining cannot be considered, where there is no available water for that purpose. Id.

In determining whether land is more valuable for its mineral deposits than for agriculture no account can be taken of the profits that would or might result from mining under other and more favorable circumstances and conditions than are actually existing. Id.

15. Particular mineral deposits included.—See, also, notes to § 4614, post.

Actual disclosure of coal within its boundaries is not essential to constitute a tract coal lands. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936, affirming U. S. v. Diamond Coal & Coke Co. (1911) 191 Fed. 786, 112 C. C. A. 272. See, also, Washington Securities Co. v. U. S. (1914) 34 Sup. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree (1912) 194 Fed. 59, 114 C. C. A. 79; Milner v. U. S. (1915) 228 Fed. 431, 143 C. C. A. 13.

The term "lands valuable for minerals" applies to all lands chiefly valuable for nonmetalliferous deposits, such as alum, asphaltum, borax, guano, diamonds, gypsum, marble, mica, slate, amber, petroleum, limestone, and building stone, rather than for agricultural purposes. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 205, 84 C. C. A. 651. See, also, Johnson v. California Lustral Co. (1899) 59 Pac. 595, 127 Cal. 283.

Coal lands are "mineral lands." U. S. v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 498, judgment affirmed Northern Pac. R. Co. v. U. S. (1910) 176 Fed. 706, 101 C. C. A. 117, appeal dismissed (1912) 32 Sup. Ct. 533, 223 U. S. 746, 56 L. Ed. 640. But see, also, Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 30 L. Ed. 170, affirming decree U. S. v. Mullen (C. C. 1882) 10 Fed. 785; Milner v. U. S. (1915) 228 Fed. 431, 143 C. C. A. 13.

Saline lands are mineral lands. Garrard v. Silver Peak Mines (1899) 94 Fed. 983, 36 C. C. A. 603. See Morton v. Nebraska (1874) 88 U. S. (21 Wall.) 660, 22 L. Ed. 639; Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326.

Lands valuable solely or chiefly for granite quarries are "mineral lands." Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 369, 188 U. S. 526, 47 L. Ed. 575, affirming decree (1900) 104 Fed. 425, 43 C. C. A. 620.

Mineral lands include, not only metalliferous lands, but all such as are chiefly valuable for their deposits of a mineral character, which are useful in the arts or valuable for purposes of manufacture. Id.

Petroleum or mineral oil is "mineral." Burke v. Southern Pac. R. Co. (1914) 34 Sup. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527.

The presence of a thick vein of coal in public land does not render its character mineral, when not shown to be susceptible of mining at a profit. Johnson v. California Lustral Co. (1899) 59 Pac. 595, 127 Cal. 283.

Lands containing rock called "lustral" or "paint stone" have been held to be mining grounds. Id.

Gypsum is a mineral, and lands containing it are mineral lands. Madison v. Octave Oil Co. (1908) 99 P. 176, 154 Cal. 768.

Lands valuable for deposits of phosphate are to be classed as mineral lands. Johnson v. California Lustral Co. (1899) 59 Pac. 595, 127 Cal. 283, 287.

§ 4614. (R. S. § 2319.) Mineral lands open to purchase by citizens.

All valuable mineral deposits in lands belonging to the United States, both surveyed and unsurveyed, are hereby declared to be free and open to exploration and purchase, and the lands in which they are found to occupation and purchase, by citizens of the United States and those who have declared their intention to become such, under regulations prescribed by law, and according to the local customs or rules of miners in the several mining-districts, so far as the same are applicable and not inconsistent with the laws of the United States.

Act May 10, 1872, c. 152, § 1, 17 Stat. 91.

Lands withdrawn from settlement, location, sale, etc., and reserved for water-power sites, irrigation, classification, etc., under Act June 25, 1910, c. 421, were to be open to exploration, discovery, occupation, and purchase, under the mining laws, as to minerals other than coal, oil, gas, and phosphates, by section 2 of said act, ante, § 4524.

Notes of Decisions

I. Ownership of minerals and mineral lands
1. Government ownership.
2. Grant to state.
3. Mining on public land permitted.
4. Policy to encourage mining.

II. Disposal of mineral lands
5. Acquisition under prior laws.
6. Land department charged with disposal of mineral lands.
7. Mineral lands open to purchase.
8. Mineral lands in reservations excluded.

II. Disposal of mineral lands—Cont'd
9. Lands valuable for mineral—Meaning and proof.
10. —— Burden of proof in contest between mineral and agricultural claimant.
11. —— Proof insufficient.
12. Variety of minerals included.

III. Mining locations
13. What constitutes location and effect thereof.
14. Mining claim distinguished from location.
15. Number of locations.
16. Mode of initiating rights.
17. —— Trespass or intrusion upon lands.
18. Discovery essential.
19. Extralateral rights.
20. Possessory rights of locators and owners.
21. Occupation—Meaning.
22. Title of locator.
23. State regulations of locations.
24. Customs of miners—Effect of section on rules and customs.
25. —— Validity and operation of rules and customs.

IV. Qualifications of locators
26. Citizens authorized to make locations.
27. Corporations.
28. Citizenship as issue, and proof thereof.
29. —— Issue and proof in ordinary suits.
30. Alien as locator.
31. Alien as joint locator.
32. Transfer by citizen to alien.
33. Transfer by alien to citizen.
34. Alien qualifying as citizen.
35. Alienage as ground for attack on title.
36. Minors.
37. Agents.
38. Land office employés.

V. Mining claim as property
39. Ownership and transfer.
40. Dower rights.

VI. Patent
41. Effect as conveyance.

VII. Jurisdiction
42. Federal courts.

I. OWNERSHIP OF MINERALS AND MINERAL LANDS

1. Government ownership.—Mines of the precious metals belong to the eminent domain of the political sovereignty. (1856) 7 Op. Atty. Gen. 636.

Under the common law of England mines of gold and silver were the exclusive property of the crown and did not pass under a grant by the king under the general designation of lands or mines. Hicks v. Bell (1853) 3 Cal. 219. See U. S. v. San Pedro & Canon, etc., Co. (1888) 17 Pac. 337, 4 N. M. (Gild.) 405.

The United States, has no title to mines or minerals found upon lands of private persons. Moore v. Smaw (1861) 17 Cal. 199, 79 Am. Dec. 123.

The statutes asserting paramount title to the United States to mineral lands are in harmony with the laws and practices of other countries on the same subject. U. S. v. San Pedro & Canon del Agua Co. (1888) 17 P. 337, 4 N. M. (Gild.) 405.

While the superior title to mineral lands is in the United States and no state or territorial law can effect in any manner this superior title or control the United States in its disposition of such lands, yet by a valid location of a mining claim the locator acquires a qualified ownership that is recognized as property. Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 563.

2. Grant to state.—The grant of lands by the Enabling Act to the state of Utah for school purposes was not a sale, and neither this nor the preceding section apply. Sweet v. U. S. (1915) 228 Fed. 421, 143 C. C. A. 3.

3. Mining on public land permitted.—Lands disposed of by patent are no longer public lands, and no miners have a right to go upon them to mine. Francoeur v. Newhouse (C. C. 1889) 40 Fed. 618; Boggs v. Merced Min. Co. (1859) 14 Cal. 279.

Ores dug from lands under a mining claim are free from any lien, claim, or title of the United States, and are subject to state taxation as other personal property. Forbes v. Gracey (1876) 94 U. S. 762, 763, 24 L. Ed. 313.

Congress has by tacit consent permitted the mining of ores containing precious metals from government lands without receiving any compensation, and without requiring the miners to buy or pay for such land. Forbes v. Gracey (1876) 94 U. S. 762, 763, 24 L. Ed. 313; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 16, 50 C. C. A. 79, 61 L. R. A. 230.

The license given a locator by this section to occupy and work the mining ground is sufficient for that purpose until withdrawn by Congress, without purchasing it. U. S. v. Nelson (D. C. 1878) Fed. Cas. No. 15,864.

One finding and taking possession of gold on public land may recover it from any one taking it away from him. Burns v. Clark (1901) 66 P. 12, 133 Cal. 634, 85 Am. St. Rep. 233.

This and other sections of the statute are said to be the charter of the miner's rights upon the public domain. Shreve v. Copper Bell Min. Co. (1891) 28 P. 315, 11 Mont. 309, 332.

One who takes granite from the public domain and shapes it for a tombstone becomes the exclusive owner thereof, though he does not acquire the exclusive right to the land. O'Sullivan v. Schultz (1899) 57 P. 279, 22 Mont. 541.

4. Policy to encourage mining.—By this statute Congress has declared it to be the policy of the country to encourage the development of its mineral resources, and it is a declaration of the freedom of mineral land to exploration and occupation. Heydenfeldt v. Daney

(1876) 93 U. S. 634, 638, 23 L. Ed. 995; Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 449, 27 L. Ed. 226; McKinley v. Wheeler (1889) 9 Sup. Ct. 638, 130 U. S. 630, 632, 32 L. Ed. 1048. See Creede & Cripple Creek, etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 342, 49 L. Ed. 501; Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1, 25, 129 Am. St. Rep. 1093.

The policy of the government has been to recognize the rights of discoverers of valuable mineral deposits to appropriate for mining purposes the ground embracing their discoveries and to take therefrom the ores without rendering any account to the government therefor. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 109.

The general purpose of the mining laws was to encourage citizens of the United States to assume the hazards of searching for and extracting the valuable minerals deposited in the public lands, and it was supposed that by reason of the stimulus thus given to the production of mineral wealth and rendering the same available to commerce and the arts the public would indirectly receive a compensation commensurate with the value of the grant, and thus the legislation is approved as embodying a wise public policy. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 682.

II. DISPOSAL OF MINERAL LANDS

5. Acquisition under prior laws.—This act is not retroactive, and therefore a patent thereunder does not affect the rights of owners of ledges acquired previous to the passage of that act, the apexes of which are within the limits of the premises granted, and the patentee does not acquire the right to such ledges. Eclipse Gold & Silver Min. Co. v. Spring (1881) 59 Cal. 304. See, also, Blake v. Butte Silver Min. Co. (1877) 2 Utah, 54.

The original act of July 26, 1866 (14 Stat. 251), declares that all mineral deposits on public lands are free and open to exploration and the lands in which they are found are open to occupation and purchase by properly qualified persons. Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 449, 450, 27 L. Ed. 226.

The acts of July 26, 1866 (14 Stat. 251), and of May 10, 1872 (17 Stat. 91), both provided for the acquisition of title by patent to mineral lands. The first act applied to such as constituted lode claims, and the second to such as constituted placer claims. Id.

The act of July 26, 1866 (14 Stat. 251), remained in force only six years, and was then superseded by the act of May 10, 1872 (17 Stat. 91), the substance of which is embodied in the various sections of the revised statutes. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 65, 43 L. Ed. 72.

The right to purchase a mining claim was in the nature of a pre-emption right. Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989.

6. Land department charged with disposal of mineral lands.—See, also, notes to § 699, ante.

Lands containing mineral deposits and declared to be open to exploration and purchase belong to the United States, and until the legal title has passed these lands are within the jurisdiction of the Land Department, and while equitable rights may be established yet Congress retains a certain measure of control. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 70, 43 L. Ed. 72. See, also, Shaw v. Kellogg (1898) 18 Sup. Ct. 632, 170 U. S. 312, 42 L. Ed. 1050; Sheldon v. Seatter (1910) 4 Alaska, 95: Heckman v. Mumford (1911) 4 Alaska, 299.

Whether a certain tract is mineral or not is a question of fact, on which the decision of the department is conclusive, except in cases of fraud. Johnson v. Drew (1898) 18 Sup. Ct. 800, 802, 171 U. S. 93, 43 L. Ed. 88.

7. Mineral lands open to purchase.—By this section all minerals and all public mineral lands, both surveyed and unsurveyed, are declared to be free and open to exploration and occupation by all citizens of the United States, and those who have declared their intention to become such, under regulations prescribed by law and according to local customs and rules of miners. O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 515, 516, 35 L. Ed. 238; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 63, 43 L. Ed. 72; Ducie v. Ford (1891) 11 Sup. Ct. 417, 418, 138 U. S. 587, 34 L. Ed. 1091; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 228, 175 U. S. 571, 44 L. Ed. 276; Lockhart v. Johnson (1901) 21 Sup. Ct. 665, 666, 181 U. S. 516, 45 L. Ed. 979; Creede & Cripple Creek Mining & Milling Co. v. Uinta Tunnel, Mining & Transportation Co. (1905) 25 Sup. Ct. 266, 268, 196 U. S. 337, 49 L. Ed. 501; Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 50 L. Ed. 717; U. S. v. Plowman (1910) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710; Billings v. Aspen Min., etc., Co. (C. C. A. 1892) 52 Fed. 250, 251; Johnston v. Morris (1896) 72 Fed. 890, 897, 19 C. C. A. 229; Waterloo Mining Co. v. Doe (1897) 82 Fed. 45, 49, 27 C. C. A. 50; Lone Jack Min. Co. v. Megginson (C. C. A. 1897) 82

Fed. 89, 93; McFadden v. Mountain View Min., etc., Co. (C. C. A. 1899) 97 Fed. 670, 673; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 13, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Webb v. American Asphaltum Min. Co. (C. C. A. 1907) 157 Fed. 203, 204; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 526; Woodruff v. North Bloomfield Gravel Min. Co. (C. C. 1884) 18 Fed. 753, 800; Collins v. Bubb (C. C. 1896) 73 Fed. 735; McFadden v. Mountain View Min., etc., Co. (C. C. 1898) 87 Fed. 154, 155; O'Connell v. Pinnacle Gold Min. Co. (C. C. 1904) 131 Fed. 106, 109 (affirmed [1905] 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. [N. S.] 919); Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 789; Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272; Altoona Quicksilver Min. Co. v. Integral, etc., Co. (1896) 45 Pac. 1047, 114 Cal. 100, 104; Madison v. Octave Oil Co. (1908) 99 Pac. 176, 154 Cal. 768, 777; Bernard v. Parmelee (1907) 92 Pac. 658, 6 Cal. App. 537, 539; Duggan v. Davey (1886) 4 Dak. 110, 26 N. W. 887; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 148; Hand v. Cook (1907) 92 Pac. 3, 29 Nev. 518, 530; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Bay v. Oklahoma Southern Gas, Oil & Mining Co. (1903) 73 Pac. 936, 13 Okl. 425; Allen v. Dunlap (1893) 33 Pac. 675, 24 Or. 229, 233; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 5 Utah, 3, 11 Pac. 515. See Lohman v. Helmer (C. C. 1900) 104 Fed. 178, 181; Hanson v. Craig, 170 Fed. 62, 95 C. C. A. 338; Ferris v. McNally (1912) 121 Pac. 889, 45 Mont. 20, 27.

Townsite lands, when unoccupied, are subject to location and sale for mining purposes. Steel v. St. Louis Smelting & Refining Co. (1882) 1 Sup. Ct. 389, 391, 106 U. S. 447, 27 L. Ed. 226; See, also, Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 101, 115 U. S. 392, 29 L. Ed. 423; Davis v. Wiebold (1891) 11 Sup. Ct. 628, 631, 139 U. S. 507, 35 L. Ed. 238. And notes to §§ 4790, 4798, post.

A lode claim may be located after a patent for a placer claim. Mutchmor v. McCarty (1906) 87 Pac. 85, 149 Cal. 603. See, also, notes to § 4632, post.

Lands known to be valuable for minerals are subject to disposition by the United States under the mining laws only. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 406, 29 L. Ed. 423; Colorado Coal, etc., Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 327, 31 L. Ed. 182; Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 35 L. Ed. 238. See Ivanhoe Min. Co. v. Consolidated Min. Co. (1880) 102 U. S. 167, 174, 26 L. Ed. 126; Richards v. Dower (1889) 22 Pac. 304, 81 Cal. 44; Callahan v. James (1903) 74 Pac. 853, 141 Cal. 291.

The government of the United States has opened all minerals and public mineral lands to exploration and purchase, and, as a reward to the successful explorer, grants to him the right to extract and possess the mineral within certain prescribed limits. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 535, 28 L. Ed. 1113; Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 402, 29 L. Ed. 423; Parley's Park Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 130 U. S. 256, 261, 32 L. Ed. 906; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 550; Wright v. Lyons (1904) 77 Pac. 81, 45 Or. 167, 172. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 62.

Mineral lands are not subject to acquisition under the homestead laws. Diamond Coal, etc., Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 238, 58 L. Ed. 936. This section provides for the disposition alike of lodes and veins, and of placer deposits. Mutchmor v. McCarty (1906) 87 Pac. 85, 149 Cal. 603, 610.

The entire mining statute contemplates that the right or privilege of exploration and occupation is given as preliminary to a purchase by the locator, and that if it shall be ascertained that the location contains valuable mineral deposits he will proceed without unnecessary delay to obtain a patent therefor by making proof of location and labor thereon and payment of the purchase price. U. S. v. Nelson (D. C. 1878) Fed. Cas. No. 15,864.

A mineral location on public land, dedicated to a city for street purposes, is not necessarily in conflict with the rights of the city. City of Butte v. Mikosowitz (1909) 102 P. 593, 39 Mont. 350.

Lands within the boundaries of a Mexican or Spanish grant in New Mexico are open to exploration and purchase within the meaning of this section of the statute. Lockhart v. Wills (1898) 54 Pac. 336, 9 N. M. 344, 347, 352. Same v. Leeds (1900) 63 Pac. 48, 10 N. M. 568, 594.

8. Mineral lands in reservations excluded.—The location of a mining claim on land within an Indian reservation, and a relocation two years after the opening of the reservation, cannot be made the basis of a mineral patent as against one who located the same claim four months after the opening of the reservation, and otherwise complied with the law. Kendall v. San Juan Silver Min. Co. (1892) 12 Sup. Ct. 779, 780, 144 U. S. 658, 36 L. Ed. 583, affirming (Colo. 1886) 12 Pac. 198, 9 Colo. 349, and distinguishing Noonan v. Caledonia Min. Co. (1887) 7 Sup. Ct. 911, 121 U. S. 393, 30 L. Ed. 1061.

See, also, McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 38 C. C. A. 354, reversing (C. C. 1898) 87 Fed. 154, reversed (1901) 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656.

The President has power to reserve a portion of the unoccupied public lands for an Indian reservation, notwithstanding this section. Gibson v. Anderson (1904) 131 Fed. 39, 65 C. C. A. 277.

A discovery of mineral within a tract of land reserved by proper authority, and used for naval purposes, is without effect and void, and will not sustain a location of a mining claim. The discovery of such mineral within the boundaries of such reservation will not sustain a mineral location which lies partly within and partly without such reservation. The whole mining claim is void. Behrends v. Goldsteen (1902) 1 Alaska, 518.

Mineral lands included in a military reservation are not open to exploration and purchase. But, it is otherwise where a right has attached in favor of the locator before such lands are reserved. (1881) 17 Op. Atty. Gen. 230.

9. Lands valuable for mineral—Meaning and proof.—See, also, notes to § 4613, ante.

In order to bring land within the class subject to mineral entry it must appear that the land is known at the time to be valuable for its minerals and that minerals are found in such quantity as to justify expenditures in the effort to extract them. Dower v. Richards (1894) 14 Sup. Ct. 452, 151 U. S. 658, 663, 38 L. Ed. 305; Madison v. Octave Oil Co. (1908) 99 Pac. 176, 154 Cal. 768. See Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 404, 29 L. Ed. 423; U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571; Shreve v. Copper Bell Min. Co. (1891) 11 Mont. 309, 28 Pac. 315; U. S. v. San Pedro & Canon del Agua Co. (1888) 17 Pac. 337, 4 N. M. (Gild.) 405.

It is essential to the validity of a mining claim that the ground be mineral in character. Zeiger v. Dowdy (1911) 114 Pac. 565, 13 Ariz. 331, following Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 49 L. Ed. 770.

Lands recognized as mineral by the standard authorities, where the same is found in quantity and quality to render the land sought to be patented more valuable on this account than for agricultural purposes, comes within the purview of the mining act. Northern Pacific R. Co. v. Soderberg (1900) 104 Fed. 425, 427, 43 C. C. A. 620; Id. (1903) 23 Sup. Ct. 365, 188 U. S. 526, 47 L. Ed. 575.

Land must appear as mineral in character as a present fact and from actual production of mineral. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 520, 35 L. Ed. 238.

Actual disclosure of coal within its boundaries is not essential to constitute a tract of public land coal lands. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 240, 58 L. Ed. 936.

The mineral character of the land in controversy must appear as a fact and it must be shown that mineral exists in such quantities as will justify expenditures in an effort to obtain it. Id.

The form and mode of occurrence of valuable ore, however controlling and influential in determining its geological character, is not a matter upon which it can be excluded from the terms of the statute. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 354.

The term "valuable mineral deposits" includes diamonds. (1872) 14 Op. Atty. Gen. 115.

A location of a mine is not invalid, as against a subsequent location, because a portion thereof was made on agricultural land, which was afterwards patented, where the agricultural land could be profitably worked as a mine only by commencing on the other portion of the location, and the money expended on such other portion was sufficient to make a valid location of the whole, the subsequent locator not connecting his claim with the holders of the agricultural patent. Richard v. Wolfling (1893) 98 Cal. 195, 32 Pac. 971.

The decisions of the officers of the federal Land Department show that some lands have been held subject to location as mineral under the mining laws which can scarcely be regarded as the subject of mining in the ordinary sense. Johnson v. California Lustral Co. (1899) 59 P. 595, 127 Cal. 283, 286.

The term "valuable mineral deposits" in this section, the expression "lands valuable for minerals" in section 4613, ante, and the word "mines" in section 4619, post, the term "valuable deposits" in section 4622, post, as well as the expression "mines of gold" in section 4798, post, all refer to substantially the same thing and embrace both veins or lodes and placers. Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 33.

10. —— Burden of proof in contest between mineral and agricultural claimant.—A person who purchases a part of the public domain as agricultural lands with a knowledge that it is mineral land does not acquire a good title. U. S. v. Culver (C. C. 1892) 52 Fed. 81.

In a controversy between a mineral and an agricultural claimant the question is whether the mineral character of the land is such as to make the land more valuable for mining than for agricultural purposes, or whether the mineral character is shown to be such as to warrant the conclusion that min-

erals might be obtained by well-known processes of mining in sufficient quantities and of such value as to make it more profitable for mining than agriculture. McLemore v. Express Oil Co. (1910) 112 P. 59, 158 Cal. 559, 566, 139 Am. St. Rep. 147.

Where land rated as agricultural is claimed as a mining location the burden is on the mineral claimant to show by a preponderance of the evidence that the land is more valuable for mining than for agricultural purposes as a present fact, and not that it may possibly develop minerals of such a quantity and of such a character as to establish its mineral value. Id.

In a contest between a mineral and an agricultural claimant the question is whether as a present fact the land is more valuable for the mineral it contains than for agricultural purposes. Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207.

11. —— Proof insufficient.—The term "mineral" or "mineral lands" is not applicable to lands in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 404, 29 L. Ed. 423; Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207; U. S. v. San Pedro & Canon, etc., Co. (1888) 17 Pac. 337, 4 N. M. (Gild.) 405. See, also, Western Pac. R. Co. v. U. S. (1883) 2 Sup. Ct. 862, 108 U. S. 510, 27 L. Ed. 806; Mullan v. Same (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 30 L. Ed. 170; Colorado Coal, etc., Co. v. Same (1887) 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182; Alford v. Barnum (1873) 45 Cal. 482, 484.

Proof that neighboring or adjoining lands are mineral in character, or that the land in controversy may by possibility develop minerals in such quantity as will establish its mineral rather than its agricultural character, is not sufficient to show its present mineral character. Blackburn v. U. S. (1897) 48 P. 904, 5 Ariz. 162, 166. See U. S. v. Reed (C. C. 1886) 28 Fed. 482; Madison v. Octave Oil Co. (1908) 99 P. 176, 154 Cal. 768, 772.

12. Variety of minerals included.—Lands chiefly valuable for building stone they contained held to be mineral. Northern Pac. Ry. Co. v. Soderberg (1900) 104 Fed. 425, 43 C. C. A. 620, decree affirmed (1903) 23 Sup. Ct. 365, 188 U. S. 526, 47 L. Ed. 575. See, also, Loney v. Scott (Or. 1910) 112 Pac. 172.

The mineral deposits mentioned in this and succeeding sections include nonmetalliferous deposits such as alum, amber, asphaltum, borax, diamonds, gypsum, limestone, marble, mica, petroleum, and building stone, as well as deposits bearing gold, silver, and other metals. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 205, 84 C. C. A. 651.

The words "mineral" and "mineral deposit" are generally used in a sense which excludes salines, because saline lands had not been subject to disposal under the mineral land laws. Leonard v. Lennox (1910) 181 Fed. 760, 767, 104 C. C. A. 296.

Calcium phosphate or rock phosphate is mineral within the meaning of the mining laws. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 836, 120 C. C. A. 160. See Northern Pacific R. Co. v. Soderberg (1903) 188 U. S. 526, 23 Sup. Ct. 365, 47 L. Ed. 575; Webb v. American Asphaltum Co. (1907) 157 Fed. 203, 84 C. C. A. 651.

Lands containing deposits of asphaltum, borax, auriferous cement, fire clay, gypsum, kaolin, limestone, marble, mica, petroleum, slate, and like substances come within the operation of the mining laws when shown to be more valuable because of such deposits than for agricultural purposes. Johnson v. California Lustral Co. (1899) 59 P. 595, 127 Cal. 283, 286; Nephi Plaster, etc., Co. v. Juab County (1907) 93 P. 53, 33 Utah, 114, 118, 14 L. R. A. (N. S.) 1043.

Bog iron is not a mineral. Johnson v. California Lustral Co. (1899) 59 P. 595, 127 Cal. 283, 286.

III. MINING LOCATIONS

See, also, notes to the following sections of the mining laws.

13. What constitutes location, and effect thereof.—See, also, notes to §§ 4615, 4618, post.

In order that the locator may obtain a right to mining property by virtue of his location, the same must be made upon the unappropriated lands of the United States. Girard v. Carson (1896) 22 Colo. 345, 44 Pac. 508; Pacific Coast Min. etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348. See, also, Hall v. Arnott (1889) 80 Cal. 348, 22 Pac. 200; Goldberg v. Bruschi (1905) 81 Pac. 23, 146 Cal. 708.

To make a valid mining location surface ground, including the vein or lode, must be appropriated, and such surface must be the property of the United States. Traphaagen v. Kirk (1904) 77 Pac. 58, 30 Mont. 562. See State v. District Court (1901) 65 Pac. 1020, 25 Mont. 504.

Mineral lands, which have been the subject of conflicting locations, do not become unoccupied mineral lands by the mere forfeiture of one of such locations. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 720, 198 U. S. 443, 49 L. Ed. 1119.

The mining laws grant to a mineral locator more than the mere right to the surface of his claim and to the veins or lodes which have their apices therein; and this section declares the lands

in which valuable mineral deposits are found to be open to occupation and purchase. St. Louis Min., etc., Co. v. Montana Min. Co. (1902) 113 Fed. 900, 902, 51 C. C. A. 530, 64 L. R. A. 207.

The rights which miners exercised under the implied license prior to the enactment of the mining statutes were analogous to the rights which they now have under this section and 4620, post, except that the acts of Congress are more specific in defining the limitations as to the quantity of ground that may be appropriated and the manner of defining boundaries of mining claims and the giving and recording of notices of the rights claimed. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 109.

The lands located are referred to as mining claims and the locators as the owners thereof prior to the time of an application for patent. McFeters v. Pierson (1890) 24 P. 1076, 15 Colo. 201, 204, 22 Am. St. Rep. 388.

A location under this section carries with it the grant of an easement from the Government to the person making the location in the ground located; and this easement is the right to the possession and the right to purchase when the law has been fully complied with. Tibbitts v. Ah Tong (1883) 2 P. 759, 4 Mont. 536, 537. See Robertson v. Smith (1871) 1 Mont. 410, 414; Belk v. Meagher (1878) 3 Mont. 65, 79.

The location is the foundation of the possessory title, and possession thereunder, as required by law and local rules and customs, keeps the title alive, and the government holds the superior title in trust for the person thus holding the possessory title. Tibbitts v. Ah Tong (1883) 2 P. 759, 4 Mont. 536, 538.

The rights accruing to the locator of a mining claim under this section, and by virtue of the provisions of section 4618, post, exclude the theory that such locator acquires a mining easement, or the right merely to the possession of the surface ground of his claim for mining purposes only, and that such ground may be purchased by other persons for other purposes, subject only to the necessary use of his mining rights. Mantle v. Noyes (1884) 5 P. 856, 5 Mont. 174, 291; Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378, 414.

This section, in connection with section 2322, R. S., is in effect an offer to sell the public mineral lands by the owner, and a locator, by making a location thereon, accepts the offer and thereby closes the contract of purchase, and the purchaser becomes entitled to a conveyance on compliance with all the terms of the contract. Id.

Land legally segregated from occupancy or appropriation may be conveyed by the government as a mining claim. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129 P. 308.

Where a claim to land legally segregated from occupancy or appropriation is conveyed, the government has no further right to patent a claim located wholly within its boundaries.

14. Mining claim distinguished from location.—The declaration that lands containing valuable deposits of mineral are open to exploration is the first where land in which mineral is found is declared to be a substantial integral part of the claim. Watervale Min. Co. v. Leach (1893) 33 Pac. 418, 4 Ariz. 34, 59.

By this section the mineral deposits are opened to exploration and purchase, and the land in which they are found is opened to occupation and purchase to the extent or amount defined, and the land so defined constitutes a mining claim when properly located. Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 412.

15. Number of locations.—See notes to § 4615, post.

16. Mode of initiating rights.—See, also, notes to § 4615 et seq., post.

The use of an unclaimed piece of ground for buildings and for the construction of a tunnel to aid in the working of a claim, does not initiate any right to the ground as an independent mining claim. Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685.

Individual right to acquire title to nonmineral lands can only be initiated by settlement thereon and improvements or by purchase; but rights to mining claim are initiated by discovery of valuable deposits, and mining ground may be appropriated by a location of a mining claim, as this is the mode of acquiring title to mining claims. Collins v. Bubb (C. C. 1896) 73 Fed. 735, 739.

Where the person in possession does not claim government title under the land laws, his rights are those of a mere licensee and he must give way at the instance of one who makes a valid entry; but, until a valid entry is made, only the government can complain of his occupancy. Zeiger v. Dowdy (Ariz. 1911) 114 Pac. 565.

Acquiring mining ground by location is procuring such right by purchase. Meyendorf v. Frohner (1879) 3 Mont. 282.

One who makes improvements on public land knowing that it is open to exploration and sale for its minerals, and who takes no steps to secure title or right to possession under the laws or the local rules and customs of miners, has no valid claim of possession or of compensation for improvements as an adverse holder in good faith, as against a patentee from the United States. Helstrom v. Rodes (1906) 83 Pac. 730, 30 Utah, 122.

17. —— Trespass or intrusion upon lands.—An intrusion upon lands occupied by another for the purpose of locating a mining claim is but a naked unlawful trespass and cannot initiate a right of pre-emption. Cowell v. Lammers (1884) 21 Fed. 200, 203; Atherton v. Fowler (1877) 96 U. S. 513, 24 L. Ed. 732; Hosmer v. Wallace (1878) 97 U. S. 575, 24 L. Ed. 1130; Quinby v. Conlan (1881) 104 U. S. 420, 26 L. Ed. 800; Doll v. Meador (1860) 16 Cal. 320. See Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371, 380; Weese v. Barker (1883) 2 Pac. 919, 7 Colo. 178; Meyendorf v. Frohner (1879) 3 Mont. 282, 335; Lockhart v. Leeds (1900) 63 Pac. 48, 10 N. M. 568, 597.

A valid mining claim cannot be initiated by the commission of a trespass. Traphaagen v. Kirk (1904) 77 Pac. 58, 30 Mont. 562, following Clipper Mining Co. v. Eli Mining & Land Co. (1904) 24 S. Ct. 632, 634, 194 U. S. 220, 48 L. Ed. 944, and cases cited.

A prospector cannot enter upon a prior placer location for the purpose of prospecting for or locating unknown lodes or veins. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 225, 48 L. Ed. 944.

No right can be initiated by a forcible, fraudulent, or clandestine entry upon a mining claim in the actual possession of another for the purpose of locating a claim thereon or initiating any rights to such ground, and pending a discovery of mineral the actual possession of an intending locator of a mining claim will be protected to permit him to explore further for mineral and to prevent breaches of the peace; but if while such occupant is so engaged another enters the land peaceably and not clandestinely or fraudulently and first makes discovery, he shall be prior in right. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 485, 123 C. C. A. 548.

No right of pre-emption can be established to a mining claim where the claimant intruded upon the actual possession of another, though the latter has no other valid title than possession. Cowell v. Lammers (C. C. 1884) 21 Fed. 200, 203; Atherton v. Fowler (1877) 96 U. S. 513, 24 L. Ed. 732.

Where public land has been granted to private parties, other parties have no right afterwards to enter on the land and prospect for gold. No right can be initiated by a trespass on private lands. Francoeur v. Newhouse (C. C. 1889) 40 Fed. 618.

18. Discovery essential.—See, also, notes to § 4615, post.

The local rules and customs of miners all recognize discovery, followed by appropriation, as the foundation of the possessor's title, and development by working as the condition of its retention. Jennison v. Kirk (1878) 98 U. S. 453, 457, 25 L. Ed. 240; Jackson v. Roby (1883) 3 Sup. Ct. 301. 109 U. S. 440, 27 L. Ed. 990; Gillis v. Downey (1898) 85 Fed. 483, 486, 29 C. C. A. 286; Consolidated Republican, etc., Co. v. Lebanon Min. Co. (1886) 12 P. 212, 9 Colo. 343, 344. See O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Golden v. Murphy (1909) 103 Pac. 394, 105 Pac. 99, 31 Nev. 395, 410.

Exploration must precede discovery, and discovery and occupation must precede purchase. U. S. v. Ringeling (1889) 20 Pac. 643, 8 Mont. 353, 359.

Neither this nor the succeeding section requires as a prerequisite to the location of a mining claim that a locator discover rock in place bearing any of the precious metals named in the statute sufficient to justify persons pursuing any particular phase of any particular occupation in life only, as distinguished from any others, in spending time and means in prospecting and developing the ground within the limits of the location. McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 211, 33 L. R. A. 851, 56 Am. St. Rep. 579.

19. Extralateral rights.—See, also, notes to § 4618, post.

This section, considered alone, would convey title to such minerals only as are found beneath the surface; but other sections grant extra lateral rights. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. (1898) 18 Sup. Ct. 895, 899, 171 U. S. 55, 43 L. Ed. 72.

The right of the owner of a lode claim to pursue a vein on its dip downward outside the vertical side lines of his claim does not include the right to run a horizontal tunnel from his claim into an adjoining patented claim for the purpose of reaching the vein in its descent through such adjoining claim. St. Louis Mining & Milling Co. v. Montana Mining Co. (1904) 24 S. Ct. 654, 655, 194 U. S. 235, 48 L. Ed. 953.

20. Possessory rights of locators and owners.—See, also, notes to § 4618, post.

Congress recognizes the possessory rights of miners as ascertained among themselves by the rules which have become the laws of mining districts regarding these mining claims, but in doing so it has not parted with the title to the land, except in cases where the land has been sold according to law. Forbes v. Gracey (1876) 94 U. S. 762, 763, 24 L. Ed. 313; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 449, 41 L. Ed. 221; Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 135, 1 C. C. A. 192; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 553; O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 109.

Actual possession is no more necessary to protect the title to a mining

claim that it is to protect the title to property acquired under any other grant from the United States. Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 296, 7 C. C. A. 233; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 370; Id. (1899) 80 N. W. 135, 12 S. D. 7, 9, 50 L. R. A. 184.

By the terms of this section the locator of a mining claim has a possessory title thereto and the right to the exclusive possession and enjoyment thereof, and this exclusive possession and enjoyment includes the right to work the claim, to extract the mineral therefrom, the right to the exclusive property in such mineral as well as the right to defend his possession. Belk v. Meagher (1878) 3 Mont. 65, 78. See Tibbitts v. Ah Tong (1882) 2 Pac. 759, 4 Mont. 536, 547.

The statute having clearly provided that mineral deposits are open to location by citizens of the United States and those who have declared their intention to become such, and that locators of mining claims upon complying with the laws shall have the exclusive right of possession and enjoyment of the surface and that claims shall be subject to relocation upon the failure to do the required work, these provisions ought not to be modified or repealed by the courts because there is another section providing that the claimant may waive his rights by failure to adverse an application for patent, or because a senior locator or others not parties to the litigation may forfeit their rights by failure to do the required work. Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 138, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

It is not necessary in order to constitute possession that parties entering on unsurveyed government mineral lands be actually on the property at the time of wrongful entry by strangers. Davis v. Dennis (1906) 85 Pac. 1079, 43 Wash. 54.

21. Occupation—Meaning.—The right of occupation granted by this section is conditioned upon the performance of a certain amount of labor upon the mining claim, and if the claim is a vein or lode the locator may purchase the same upon proof of the performance of the conditions precedent by paying the stipulated price, or if it is a placer claim by paying the statutory price for such claim. U. S. v. Nelson (D. C. 1878) Fed. Cas. No. 15,864; Ladda v. Hawley (1880) 57 Cal. 51, 55.

The term "occupation," as used in this section of the statute, is equivalent to possession, and the right to locate is included in the right to occupy, and incident to a location is the right of possession. Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536, 539.

This section declaring that ground in which mineral deposits are found shall be open to occupation and purchase is in harmony with section 4618, post, which gives the exclusive possession and enjoyment of the surface ground to the locator of the mineral deposit. Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 413; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 290.

The occupation of lands containing valuable mineral deposits given by this section is not limited by section 4790, post, to the necessary use of the ground located for mining purposes. Talbott v. King (1886) 9 Pac. 434, 6 Mont. 76, 99. See Mullins v. Butte Hardware Co. (1901) 65 Pac. 1004, 25 Mont. 525, 531, 87 Am. St. Rep. 430.

22. Title of locator.—See, also, notes to § 4618, post.

Title to mineral lands cannot be acquired by occupancy unless the occupancy is for the purpose of mining or extracting the minerals. Burns v. Clark (1901) 66 Pac. 12, 133 Cal. 634, 85 Am. St. Rep. 233; Same v. Schoenfeld (1905) 81 Pac. 713, 1 Cal. App. 121, 124.

Under the existing mining statutes the title to a mining claim does not rest entirely on possession, but it rests upon a statutory grant. Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 296, 7 C. C. A. 233.

A citizen locating a mining claim on the public domain may acquire one of three possible estates, viz., by locating the claim in compliance with the statutes, rules, and regulations, he may acquire a possessory right, both the equitable and legal title remaining in the United States, or, after making such location, he may comply with further requirements, pay the required purchase price, and acquire the equitable title, or he may obtain a patent, thus divesting the government of all interest both legal and equitable. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675.

The title of the first taker of mineral deposits is confirmed by express statutory grant. Burns v. Clark (1901) 66 Pac. 12, 133 Cal. 634, 636, 85 Am. St. Rep. 233. See Forbes v. Gracey (1876) 94 U. S. 762, 24 L. Ed. 313.

The title to valuable mineral deposits in the public domain is confirmed in the first taker. Burns v. Schoenfeld (1905) 81 Pac. 713, 1 Cal. App. 121, 124.

A conveyance from the original locator of a mining claim and possession thereunder cannot ripen into a perfect title unless the original locator secures title from the government, and the right of possession of the grantees in such a conveyance exists only while the locator or his vendees with notice remain in possession, and terminates as soon as the locator abandons the claim. Conn v. Oberto (1904) 76 Pac. 369, 32 Colo. 313.

23. State regulations of locations.—Supplementary regulations prescribed by a state are not invalid on the theory that they were enacted in the exercise of an unlawful delegation by Congress of legislative power. Butte City Water Co. v. Baker (1905) 196 U. S. 119, 49 L. Ed. 409, 25 Sup. Ct. 211, holding state regulations valid.

The several states have power to regulate the location of mining claims, where such regulations are not in conflict with the constitution and laws of the United States. Id.

The expression in this section "under regulations prescribed by law" is ample enough to embrace regulations prescribed by local legislatures as well as those prescribed by congress. O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 257.

24. Customs of miners—Effect of section on rules and customs.—By this section mineral lands are open to purchase under regulations prescribed by law and according to the local customs and rules of miners. Parley's Park Silver-Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 130 U. S. 256, 32 L. Ed. 906; Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610. See, also, Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 727, 177 U. S. 505, 44 L. Ed. 864. But miners are not authorized to determine how the title to land itself may be acquired. Benson Mining & Smelting Co. v. Alta Mining & Smelting Co. (1892) 12 Sup. Ct. 877, 878, 145 U. S. 428, 36 L. Ed. 762.

The phrase "mining district" means a section of country usually designated by name, and described or understood as being confined within certain natural boundaries, in which gold or silver, or both, are found in paying quantities, and which is worked under rules and regulations prescribed by the miners therein. U. S. v. Smith (C. C. 1882) 11 Fed. 487, 491.

All existing rights to the public lands were recognized to the extent that they had attached or been acquired under local rules or customs not inconsistent with the laws of the United States. Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 371, 89 Am. St. Rep. 207.

It is a fair presumption that congress by this section intended to affirm and continue in force the well-known custom in the mining states of the location of mining claims by agents. Schultz v. Keeler (1888) 13 P. 481, 2 Idaho (Hasb.) 333. See Id. (1889) 21 P. 418, 2 Idaho (Hasb.) 568; Rush v. French (1874) 25 Pac. 816, 1 Ariz. 99, 116; Murley v. Ennis (1874) 2 Colo. 300; Boucher v. Mulver Hill (1871) 1 Mont. 306, 310.

Congress by express enactment has sanctioned and continued in force all local laws and customs not inconsistent with the laws of the United States. Schultz v. Keeler (1888) 13 Pac. 481, 2 Idaho (Hasb.) 333. See Id. (1889) 21 Pac. 418, 2 Idaho (Hasb.) 568.

A custom limiting placer claims in a particular locality to 80 rods in length is not in conflict with the laws of Congress and can be regarded as reasonable. Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265. See Smelting Co. v. Kemp (1881) 104 U. S. 636, 652, 26 L. Ed. 313; Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 535, 28 L. Ed. 1113; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522.

Local customs or rules of miners must be complied with the same as United States laws. Strickland v. Commercial Min. Co. (1909) 104 Pac. 965, 55 Or. 48, 51.

25. —— Validity and operation of rules and customs.—A local custom or local mining rule does not, like a statute, acquire validity by the mere enactment, but from customary obedience and acquiescence of the miners. It is void whenever it falls into disuse or is generally disregarded. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Harvey v. Ryan (1872) 42 Cal. 626.

The federal mining laws recognize and sanction the custom of the miners among organized mining districts to adopt local laws or rules governing the location, recording, and working of claim, not in conflict with state or federal legislation. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312. See, also, Territory v. Lee (1874) 2 Mont. 124.

It is a question of fact for the jury whether or not a mining law or custom is in force; but, when shown to have been in force, the presumption is that it continues in force until the contrary is proved, and parol evidence is admissible to show whether the rule or custom is in force or not. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (1881) 11 Fed. 666.

Where the statute law is in conflict with mining regulations, the latter must give way. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Woodruff v. North Bloomfield Gravel Min. Co. (C. C. 1884) 18 Fed. 753; Williams & Kellinger Original Co. v. Winthrop Min. Co. (1882) 60 Cal. 631.

Local rules and regulations of miners, are not subjects of judicial notice. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

It is not essential that mining districts should be organized and local rules adopted, in order that mining claims may be held and the government titles acquired. A compliance with the

mining laws of the United States is sufficient to secure the claim. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

The local rules and regulations of the mining district, not in conflict with the United States laws, must be followed. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442.

IV. QUALIFICATIONS OF LOCATORS

26. Citizens authorized to make locations.—The class of persons named in this section are the only persons who can acquire mineral land from the government. Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296, 302; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 566; Strickley v. Hill (1900) 62 Pac. 893, 22 Utah, 257, 264, 83 Am. St. Rep. 786. See Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536; Lavagnino v. Uhlig (1903) 71 Pac. 1046, 26 Utah, 1, 16, 99 Am. St. Rep. 808.

The license contained in this section to explore, occupy, and purchase any of the lands of the United States containing mineral deposits is confined to the citizens of the United States and those who have declared their intention to become such. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536, 540. See Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112, 119.

A person seeking to acquire any right of location and purchase of a mining claim must either be a citizen of the United States or must have declared his intention to become such. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 526; Jackson v. Dines (1889) 21 Pac. 918, 13 Colo. 90, 93. See O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105, 108.

A resident of one state is not prohibited from taking up and locating a mining claim in another state in his own name or from employing citizens and residents of such latter state to locate claims in their own names for his benefit, and this rule applies to a foreign corporation. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 119.

It is no fraud on the government or third persons for a prospector to locate a mine in the name of a nonresident and to receive a deed to the property from such nonresident, in the absence of any miners' rules and regulations disqualifying nonresidents from being locators. Rush v. French (1874) 1 Ariz. 99, 25 Pac. 816.

The question of citizenship is one for the jury, and not for the court. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

The United States have granted to their citizens and to those who have declared their intention to become such the right to explore and occupy the public mineral lands. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 455.

27. Corporations.—See, also, notes to § 4616, post.

A corporation whose members are all citizens of the United States is competent to locate a mining claim. McKinley v. Wheeler (1889) 9 Sup. Ct. 638, 130 U. S. 630, 32 L. Ed. 1048; Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 463, 17 C. C. A. 190. See, also, Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105.

This section does not preclude a private corporation formed under the laws of a state, whose members are citizens of the United States, from locating a mining claim on the public lands. McKinley v. Wheeler (1889) 9 Sup. Ct. 638, 130 U. S. 630, 636, 32 L. Ed. 1048; U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 60, 137 U. S. 160, 34 L. Ed. 640; Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 72, 75 Am. St. Rep. 718. See, also, U. S. v. Northwestern Express, Stage & Transportation Co. (1897) 17 Sup. Ct. 206, 207, 164 U. S. 686, 41 L. Ed. 599.

A corporation is to be deemed a citizen within the meaning of the statute, and as such is competent to purchase and hold a mining claim. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 538.

A foreign corporation using a domestic corporation for the purpose of acquiring title to mining claims is not an innocent purchaser. Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337, 342.

28. Citizenship as issue, and proof thereof.—See, also, notes to § 4616, post.

Proof of the citizenship of the original locator is necessary in a suit on an adverse claim. McKinley Creek Min. Co. v. Alaska United Min. Co. (1902) 22 Sup. Ct. 84, 183 U. S. 563, 571, 46 L. Ed. 331; Duncan v. Eagle Min. Co. (1910) 111 Pac. 588, 48 Colo. 569, 573, 139 Am. St. Rep. 288. See Lee v. Justice Min. Co. (1892) 29 Pac. 1020, 2 Colo. App. 112.

When the citizenship of a locator is put in issue it is necessary to be proved to justify judgment in favor of such locator and his assigns, under the provisions of this section. Id.

Under the provisions of this section it is necessary, when application is made for the issuance of evidence of title to mining property, to show that the applicant is a citizen of the United States, or has declared his intention to become such. Billings v. Aspen Min.,

etc., Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181.

The limitation of this section as to the requirement of citizenship of the locator of a mine does not require the heirs of a locator as against the colocators to prove the citizenship of their ancestor or his declaration of intention to become a citizen. Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 342, 2 C. C. A. 252. See Id. (1892) 52 Fed. 250, 3 C. C. A. 69.

A presumption of citizenship which prevails where it is sought to overturn a title long recognized as valid does not prevail where the citizenship of the locator of a mining claim has been contested from the time of the location. Wood v. Aspen Min. Co. (C. C. 1888) 36 Fed. 25, 26.

On an adverse to an application for a patent to a mining claim, the objection that the locators were aliens is properly made; it being in effect made on behalf of the government. Matlock v. Stone (1905) 91 S. W. 553, 77 Ark. 195; Billings v. Aspen Mining & Smelting Co. (1892) 52 Fed. 250, 251, 3 C. C. A. 69. And see Tonopah Traction Min. Co. v. Douglas (C. C. 1903) 123 Fed. 936; Duncan v. Eagle Rock Gold Mining & Reduction Co. (1910) 111 Pac. 588, 48 Colo. 569, 139 Am. St. Rep. 288.

An allegation of citizenship, or its equivalent, is necessary to constitute a good complaint. Keeler v. Trueman (1890) 15 Colo. 143, 25 Pac. 311. Rosenthal v. Ives (1887) 2 Idaho, 244, 12 Pac. 904.

And where it alleges the citizenship of only one of several plaintiffs, the action will be dismissed as to all plaintiffs except him. Lee Doon v. Tesh (1885) 68 Cal. 43, 6 Pac. 97, 8 Pac. 621.

Defendants, who base their title upon an entry and location by a corporation, must aver that the corporation was organized under the laws of the United States, or of some state or territory thereof, and that its members were citizens. Thomas v. Chisholm (1889) 13 Colo. 105, 21 Pac. 1019.

A corporation suing to support an adverse against an application for a patent to lode mining claims, and relying on a purchase of claims located by third persons, must prove that the third persons were citizens, or had declared their intention of becoming citizens, so that they were competent original locators. Duncan v. Eagle Rock Gold Mining & Reduction Co. (1910) 111 P. 588, 48 Colo. 569, 139 Am. St. Rep. 288.

29. —— Issues and proof in ordinary suits.—Where locator's title is of recent origin his citizenship must be proved by the record of the court. Wood v. Aspen Mining & Smelting Co. (C. C. 1888) 36 Fed. 25.

In suits to quiet title to a mining claim, brought in a state court, the fact as to whether a party is or is not a citizen is immaterial. Thompson v. Spray (1887) 72 Cal. 528, 14 Pac. 182; Gruwell v. Rocco (1903) 74 Pac. 1028, 141 Cal. 417.

And where plaintiff relies on a location by a certain person, he may prove, without having averred, that such person was a citizen or had filed a declaration of intention to become such. Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 Pac. 1047, 114 Cal. 100.

The complaint in a suit, based on title, to recover a mining claim, need not aver that complainant is a citizen, or has declared his intention to be such; though, if his ownership is based on a location under United States laws, he must prove such citizenship or declaration. Harris v. Kellogg (1897) 49 Pac. 708, 117 Cal. 484.

And so in an ordinary civil suit for injuries to a mining claim, it is not necessary for the plaintiff in the first instance to allege his citizenship, and compliance with the law, but a general averment of his title or possession is sufficient McFeters v. Pierson (1890) 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388. Compare Jackson v. Dines (1889) 13 Colo. 90, 21 Pac. 918. And see Buckley v. Fox (1902) 67 Pac. 659, 8 Idaho, 248, distinguishing Bohanon v. Howe (1888) 2 Idaho, 417, 17 Pac. 583; Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 75 Am. St. Rep. 718; Davis v. Dennis (1906) 85 Pac. 1079, 43 Wash. 54.

30. Alien as locator.—The question whether an alien can inherit an interest in a mining claim is determined, not by the federal law, but by laws of the state. Billings v. Ass'n Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252, rehearing denied (1892) 52 Fed. 250, 3 C. C. A. 69. His right to inherit, as against every person but the United States, is determined by the laws of the state in which the claim is located. Lohmann v. Helmer (C. C. 1900) 104 Fed. 178.

The objection of alienage may prevent an alien from acquiring title to a mining claim and such an objection may be made by any adversary interested in a proceeding to procure title to mining property from the United States, and the objection of alienage is based solely on the right of the Government to interpose such fact as a bar to his procuring or holding the title; but if a patent has been issued to an alien it cannot be attacked by a third party. Billings v. Aspen Min., etc., Co. (1892) 52 Fed. 250, 3 C. C. A. 69; Lone Jack Min. Co. v. Megginson (1897) 82 Fed. 89, 93, 27 C. C. A. 63; Duncan v. Eagle Min. Co. (1910) 111 Pac. 588, 48 Colo. 569, 576, 139 Am. St. Rep. 288. See Sherlock v. Leighton (1900) 63 Pac. 580, 934, 9 Wyo. 297, 312.

Aliens who have not declared their in-

tention to become citizens of the United States are not within the provisions of this section, and by a necessary implication are prohibited from the exercise of the rights conferred by it. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610.

When a case is brought in support of an application in the Land Department for a patent to mining property the sovereign is in fact a party to the proceeding for the procurement of title, and the question of alienage is therefore necessarily presented, and the necessary qualifications prescribed by the statute must appear. Lohman v. Helmer (C. C. 1900) 104 Fed. 178, 181. See Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43.

This section declares that the mineral deposits in the public lands are open to occupation and purchase by citizens of the United States and those who have declared their intention to become such, but it does not prevent an alien from purchasing or owning a mining claim. Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 179.

A person who is not a citizen of the United States and has not declared his intention to become such is not qualified to locate a mining claim. Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296, 298; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 566. See Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536.

The right of purchasing mineral lands of the United States is restricted by this section to citizens of the United States and those who have declared their intention to become such, and hence aliens are excluded from the enjoyment of the privilege. Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536, 539.

The right to locate and the right to possess a mining claim are parts of the same grant, and neither can exist without the other; and if an alien who is incapable of making a location acquires the grant by assignment or conveyance his possession thereunder is of no consequence, as an alien cannot become the government's grantee he cannot become such by being the grantee of the government's grantee. Tibbitts v. Ah Tong (1883) 2 P. 759, 4 Mont. 536, cited and approved in Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 180.

31. Alien as joint locator.—If a citizen and an alien jointly locate a claim, not exceeding the amount of ground allowed by law to one locator, such location is valid as to the citizen, and a conveyance from both of such locators to a citizen gives a valid title. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Strickley v. Hill (1900) 62 Pac. 893, 22 Utah, 257, 83 Am. St. Rep. 786. See Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 73, 75 Am. St. Rep. 718.

The United States may by proper proceedings deprive an alien of the benefits of a location made by him, but colocators of such alien cannot avail themselves of the right of escheat belonging to the government. Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 342, 2 C. C. A. 252. See Billings v. Aspen Min., etc., Co. (1892) 52 Fed. 250, 3 C. C. A. 69; Lone Jack Min. Co. v. Megginson (1897) 82 Fed. 89, 93. 27 C. C. A. 63; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181.

The alienage of a joint locator of a mine does not have the effect of transferring his interest to his colocators. Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 342, 2 C. C. A. 252.

An alien who has expended time, labor, and money in prospecting for and locating a mine conjointly with others cannot be ousted by them or refused the right to participate in the proceeds thereof by reason of his alienage. Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Id. (1892) 52 Fed. 250, 3 C. C. A. 69; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181.

Aliens may, with others, take by purchase mineral lands or mining claims, and their grantors, having acquired the title of the United States thereto, have power to convey the same, and aliens may always hold such property until office found, though they may be exposed to the danger of forfeiting the lands to the state upon such inquest of office found. Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 180. See Ferguson v. Neville (1882) 61 Cal. 356.

A mining claim located by an association of persons assigning to each a particular part of the vein is not void because one of such locators was an alien, but the law will be vindicated by declaring void the particular location of such alien, without regard to the effect of such a holding. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 326. See Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 60.

The interest of a locator is not invalidated by the fact that a colocator is an alien, where he was not aware of such disability and did not collude with him in his attempted fraud. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

32. Transfer by citizen to alien.—The transfer of a mining claim by a qualified locator to an alien is not to be treated as, ipso facto, an abandonment, nor is it analogous to the casting of descent upon an alien. Manuel v. Wulff

(1894) 14 Sup. Ct. 651, 152 U. S. 505, 38 L. Ed. 532; Gorman Min. Co. v. Alexander (1892) 2 S. D. 557, 51 N. W. 346; Id. (1892) 3 S. D. 3, 51 N. W. 349. CONTRA, see Tibbitts v. Ah Tong (1883) 4 Mont. 536, 2 Pac. 759.

The alien grantee takes by virtue of the conveyance, and not by operation of law. His incapacity to take and hold, by reason of alienage, can be questioned by the government only, and is removed by naturalization before judgment rendered in proceedings on adverse claim to a patent. Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 38 L. Ed. 532.

While the same qualification is required in those who may purchase mining property as is required of those who may possess such property, this does not render possessory rights any the less property which is susceptible of distinct ownership or involve the consequence that their transfer to unqualified persons would operate as a forfeiture. Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 510, 38 L. Ed. 532; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181.

The validity of a mining location is destroyed on a transfer of a claim to a person not authorized either to make the location or to keep it alive. Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 510, 38 L. Ed. 532; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181; Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536.

A bona fide resident, though not a citizen, nor having declared an intention to become such, may by conveyance acquire and hold the title of the locators of an unpatented mining claim, and has a full right to convey the same. Ferguson v. Neville (1882) 61 Cal. 356. Compare (1875) 15 Op. Atty. Gen. 29.

33. Transfer by alien to citizen.—If an alien locator performs all the acts necessary to a valid location by a citizen, and then conveys to a citizen, who takes possession and continues to perform all the conditions required by law to hold such claim, such citizen thereby acquires and holds a valid title to the claim, as against all persons having acquired no right therein before such conveyance by the alien. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 75 Am. St. Rep. 718; Stewart v. Gold, etc., Co. (1905) 82 Pac. 475, 29 Utah, 443, 447, 110 Am. St. Rep. 719. See Strickley v. Hill (1900) 62 Pac. 893, 22 Utah, 257, 266, 83 Am. St. Rep. 786.

A person qualified to locate a mining claim under this section may sell and convey his possessory right to a person not so qualified, and a qualified person may purchase from such unqualified one and obtain a valid title to an unpatented mining claim. Ferguson v. Neville (1882) 61 Cal. 356; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 566. See Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43, 49.

The location of mining claim by an alien is cured by a grant to a citizen. Stewart v. Gold & Copper Co. of Bingham (1905) 82 Pac. 475, 29 Utah, 443, 110 Am. St. Rep. 719.

34. Alien qualifying as citizen.—It is the practice of the land department to give retroactive effect to a declaration of intention in such cases. Yerke v. U. S. (1899) 19 Sup. Ct. 441, 442, 173 U. S. 439, 43 L. Ed. 760.

Nominally this section discriminates against the alien generally, but in fact against the Chinaman only, because all aliens, including the Congo negro, and excepting the Mongolian, are permitted to become naturalized, and therefore to locate and occupy mining lands. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610.

Upon declaring his intention to become a citizen, an alien may have advantage of work previously done, and of a record previously made by him in locating a mining claim. Croesus M., M. & S. Co. v. Colorado Land & Mineral Co. (C. C. 1884) 19 Fed. 78.

The alien grantee of a qualified locator of a mining claim takes by virtue of the conveyance, and not by operation of law. His incapacity to take and hold, by reason of alienage, is removed by naturalization before judgment rendered in proceedings on adverse claim to a patent. Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 38 L. Ed. 532.

The fact that a mining claim is located by an alien does not render the location illegal or void, but, at most, it is only voidable at the instance of the government; and a subsequent declaration of intention to become a citizen by a locator, or one having an interest in the claim, prior to the inception of any adverse rights, relates back to the date of the location or acquisition of the alien's interest, and validates the transaction. Shea v. Nilima (1904) 133 Fed. 209, 66 C. C. A. 263.

The subsequent declaration of intention to become a citizen, by an alien who had explored and located a mining claim on public lands, relates back to the date of the location, and, in the absence of adverse rights attaching prior to the declaration, operates to validate the location. Lone Jack Min. Co. v. Megginson (1897) 82 Fed. 89, 27 C. C. A. 63.

An alien 21 years of age who is honorably discharged after serving an enlistment in the United States army occupies the status of one who has declared his intention to become a citizen, under the homestead law, and the same rule applies to mineral lands. Strickley v. Hill (1900) 62 Pac. 893, 22 Utah, 257, 268, 83 Am. St. Rep. 786.

But see Anthony v. Jillson (1890) 83 Cal. 296, 23 Pac. 419.

35. **Alienage as ground for attack on title.**—The location of a mining claim by an alien, and the rights following therefrom, are voidable, not void, and are free from attack by any one except the government. Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 38 L. Ed. 532; McKinley Creek Min. Co. v. Alaska United Min. Co. (1902) 22 Sup. Ct. 84, 183 U. S. 563, 46 L. Ed. 331; Lone Jack Min. Co. v. Megginson (1897) 82 Fed. 89, 27 C. C. A. 63; Tornanses v. Melsing (1901) 109 Fed. 710, 47 C. C. A. 596; Shea v. Nilima (1904) 133 Fed. 209, 215, 66 C. C. A. 263; Providence Gold-Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323; Matlock v. Stone (1905) 91 S. W. 553, 77 Ark. 195, 199; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440; Justice Min. Co. v. Lee (1895) 40 Pac. 444, 21 Colo. 260 (reversing judgment [1892] 29 Pac. 1020, 2 Colo. App. 112); Gorman Min. Co. v. Alexander (1892) 2 S. D. 557, 51 N. W. 346; Id. (1892) 3 S. D. 3, 51 N. W. 349; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362; Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 75 Am. St. Rep. 718; Stewart v. Gold & Copper Co. of Bingham (1905) 82 Pac. 475, 29 Utah, 443, 110 Am. St. Rep. 719. Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252 (rehearing denied [1892] 52 Fed. 250, 3 C. C. A. 69, distinguishing O'Reilly v. Campbell [1886] 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669). And see Territory v. Lee (1874) 2 Mont. 124. Compare North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 526; Duncan v. Eagle Rock Gold Mining & Reduction Co. (Colo. 1910) 111 Pac. 588; Rosenthal v. Ives (1887) 2 Idaho, 244, 12 Pac. 904; Bohanon v. Howe (1888) 2 Idaho, 417, 17 Pac. 583; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

A different rule to the effect that a citizen may relocate land located by an alien, if it can be done peaceably. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312; Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 75 Am. St. Rep. 718.

One who asserts title to a mining claim under a location made by an alien and two citizens cannot defeat the claims of the alien's heirs on the ground that an alien cannot be a locator; the right to defeat a title on the ground of alienage being reserved to the government alone. Billings v. Aspen Min. & Smelting Co. (1892) 52 Fed. 250, 3 C. C. A. 69, affirming (1892) 51 Fed. 338, 2 C. C. A. 252, and distinguishing O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669.

An agreement between two aliens to acquire or locate mining claims for their joint benefit is not void; nor does the fact of their alienage prevent one, who subsequently declared his intention to become a citizen, from enforcing the contract by recovering his interest in a claim located in the name of the other pursuant to such agreement. Shea v. Nilima (1904) 133 Fed. 209, 66 C. C. A. 263.

A qualified locator may relocate a mining claim in the possession of an alien who has not declared his intention to become a citizen, if relocation be made without force or violence, and prior to declaration of intention or conveyance to a citizen. Wilson v. Triumph Consol. Min. Co. (1899) 56 P. 300, 19 Utah, 66, 75 Am. St. Rep. 718.

36. **Minors.**—Minors who are citizens may locate placer mining claims. Thompson v. Spray (1887) 14 Pac. 182, 72 Cal. 528. But they cannot acquire coal lands. See section 4659, post, and Davis v. Dennis (1906) 85 Pac. 1079, 43 Wash. 54.

37. **Agents.**—There is no provision of law prohibiting the location of a mining claim or the doing of any of the acts required to complete the appropriation by an agent, and the fact that the locator acted by agent in such matters does not invalidate the location. McCulloch v. Murphy (C. C. 1903) 125 Fed. 147; Moore v. Steelsmith (1901) 1 Alaska, 121; Gore v. McBrayer (1861) 18 Cal. 583; Murley v. Ennis (1874) 2 Colo. 300; Wenner v. McNulty (1887) 14 Pac. 643, 7 Mont. 30; Whiting v. Straup (1908) 95 Pac. 849. See, also, Rush v. French (1874) 1 Ariz. 99, 25 Pac. 816.

But an agent, trustee, or other person, who occupies a fiduciary relationship toward the original locator of a claim, will not be permitted to relocate it secretly, and thus secure to himself advantages flowing from a breach of his obligations. Thompson v. Burk (1904) 2 Alaska, 249. See, also, Van Valkenburg v. Huff (1865) 1 Nev. 142.

When a mining location is made by one person in his own name, at the request and expense of, and for the benefit of another person, such other person is entitled to the possession of the mining ground, and the locator holds the legal title in trust for the benefit of the person at whose expense the location was made. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

38. **Land office employés.**—See notes to § 698, ante.

V. MINING CLAIM AS PROPERTY

39. **Ownership and transfer.**—See, also, notes to § 4618, post.

A mining claim perfected under the statute is property which may be bought, sold, and conveyed, and which passes by descent. Forbes v. Gracey (1876) 94 U. S. 762, 765, 24 L. Ed. 313; Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Black v.

Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 550; O'Connell v. Pinnacle Gold Mines Co. (1905) 140 Fed. 854, 855, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919; Trinity Gold Dredging & Hydraulic Co. v. Beaudry (1915) 223 Fed. 739, 139 C. C. A. 269; Alexander v. Sherman (1887) 16 Pac. 45, 2 Ariz. 326, 329; Phœnix Min., etc., Co. v. Scott (1898) 54 Pac. 777, 20 Wash. 48, 50.

40. Dower rights.—The estate of the locator in a mining claim before patent is not such an estate that dower attaches to it. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Id. (1892) 52 Fed. 859, 862, 3 C. C. A. 312, affirming on this point; Id. (C. C. 1892) 49 Fed. 549, overruling on this point. See Black v. Elkhorn Min. Co. (C. C. 1891) 47 Fed. 600; O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 107; Id. (1905) 140 Fed. 854, 856, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919; Bechtol v. Bechtol (1905) 2 Alaska, 397, 401.

VI. PATENT

41. Effect as conveyance.—See, also, notes to §§ 4618, 4622, post.

The patent of a placer mining claim carries with it title to the surface included within the lines of the location, and it is not competent for the land officers to insert in it a reservation excluding from its operation buildings and improvements erected upon the land by the preceding occupant, who claimed it as a part of a town site. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 29 L. Ed. 423; Sparks v. Pierce (1885) 6 Sup. Ct. 102, 115 U. S. 408, 29 L. Ed. 428.

Under the statute a patent for a mining claim conveys the subsurface as well as the surface, and the only limitation on the exclusive title thus conveyed is the right to pursue a vein which on its dip enters the subsurface. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 194 U. S. 235, 237, 48 L. Ed. 953.

VII. JURISDICTION

42. Federal courts.—See, also, notes to §§ 991, 1214, 1533, ante, and §§ 4618, 4620, 4622, 4623, post.

The right of possession to mining claims given by this and other sections does not necessarily confer jurisdiction on a federal court, regardless of citizenship, as such an action may involve the question of the right of possession only. Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 508, 44 L. Ed. 864.

This section, with others, expressly provides that the right of possession may be determined by local customs or rules of miners; and accordingly the right of possession may not involve any question under the constitution or laws of the United States, but simply a determination of local rules and customs or state statutes. Id.

A bill which shows that the validity of a location depends on the question whether or not the locators discovered a mineral deposit within the limits of the claim discloses a federal question. Nevada Sierra Oil Co. v. Miller (C. C. 1899) 97 Fed. 681.

Where a bill shows that the determination of conflicting claims requires the application and construction of the federal mining laws, a federal court has jurisdiction of the suit for such purpose, the property in controversy being alleged to be of the requisite statutory value. Id.

§ 4615. (R. S. § 2320.) Length of mining-claims upon veins or lodes.

Mining-claims upon veins or lodes of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits, heretofore located, shall be governed as to length along the vein or lode by the customs, regulations, and laws in force at the date of their location. A mining-claim located after the tenth day of May, eighteen hundred and seventy-two, whether located by one or more persons, may equal, but shall not exceed, one thousand five hundred feet in length along the vein or lode; but no location of a mining-claim shall be made until the discovery of the vein or lode within the limits of the claim located. No claim shall extend more than three hundred feet on each side of the middle of the vein at the surface, nor shall any claim be limited by any mining regulation to less than twenty-five feet on each side of the middle of the vein at the surface, except where adverse rights existing on the tenth day of May, eighteen hundred and seventy-two, render such limitation necessary. The end-lines of each claim shall be parallel to each other.

Act May 10, 1872, c. 152, § 2, 17 Stat. 91.

Notes of Decisions

I. Construction and application of mining laws
1. Construction.
2. Objects of mining laws.
II. Vein or lode, or other valuable deposits
3. Definitions.
4. Strict definitions.

II. Vein or lode, or other valuable deposits—Cont'd

5. What constitutes.
6. What does not constitute.
7. What constitutes a lode.
8. Vein, lode, or rock in place.
9. Determination and proof of existence.

III. Mining locations or claims

10. Nature and effect.
11. Meaning of terms "location" and "mining claim."
12. Location on vein or lode.
13. Location on apex of vein.
14. Location on unappropriated public lands.
15. —— Tide lands.
16. Manner and method of making.
17. Lode and placer claims as methods of acquisition—Kinds of mineral or vein.
18. —— Particular deposits.
19. —— Relative rights of locators.
20. Qualifications of locator.
21. Number of claims permitted.
22. Extralateral rights.
23. Form, dimensions, and surface lines—Location along vein or lode.
24. —— Measurements determined by vein or lode.
25. —— Parallelogram in form.
26. —— Length and width of location.
27. —— Location and direction of side lines.
28. —— Location and direction of end lines.
29. —— Parallelism of end lines.
30. —— Want of parallelism of end lines.
31. —— Lines laid upon senior location.
32. —— Excessive claims.
33. —— Patent, to excessive claim.
34. —— Lode claim within limits of placer claim.
35. —— Tunnel site.
36. Discovery—Object and nature of requirement.
37. —— Discovery as initial act.
38. —— Discovery as prerequisite.
39. —— Basis of rights and sources of title.
40. —— Discovery as unit.
41. —— Discovery of rock in place.
42. —— Discovery within limits of location or claim.
43. —— Discovery outside of location, or within limits of another claim.
44. —— Discovery shaft.
45. —— Relation between discovery and location.
46. —— Sufficiency of discovery.
47. —— Extent and value of discovery.
48. —— Discovery insufficient.
49. —— Discovery as question of fact, and proof.
50. —— Possession of claim pending discovery.
51. —— Priority of discovery, and effect thereof.
52. Location notice.
53. State regulations.
54. Rules and customs of miners.

I. CONSTRUCTION AND APPLICATION OF MINING LAWS

1. Construction.—The only lands excluded from any but mineral entry are lands valuable for minerals or containing valuable mineral deposits. U. S. v. Plowman (1910) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523.

The right granted by statute to locate mining claims, prior to the acquisition of a vested right, is not an obstruction either to the disposition or the reservation of the public lands. Gibson v. Anderson (1904) 131 Fed. 39, 41, 65 C. C. A. 277.

It is only by compliance with these and other sections of the statute that the locator can initiate rights to a mining claim. Sharkey v. Candiani (1905) 85 P. 219, 48 Or. 112, 124, 7 L. R. A. (N. S.) 791.

2. Objects of mining laws.—While the right to mineral lands is initiated by a location after discovery of mineral and such mining claims may be held and worked without purchase, yet the law authorizing the exploration also provides for their location, entry, and purchase. McFadden v. Mountain View Min., etc., Co. (1899) 97 Fed. 670, 680, 38 C. C. A. 354.

These mining statutes were not drawn by geologists, but were framed for the protection of miners in the claims which they had located and developed, and they must receive such a construction as will carry out this purpose, and the object of Congress was to avoid any limitation in the application of this act which a scientific definition of any of these terms might impose. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 290. See Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 254, 23 C. C. A. 156; Gregory v. Pershbaker (1887) 73 Cal. 109, 115; Ambergris Min. Co. v. Day (1906) 85 Pac. 401, 12 Idaho, 108, 117.

The object of this and other sections is to permit the development of the mining resources rather than the sale of the mineral lands, and accordingly congress permits persons to dig out and take the ores found in lands belonging to the government without receiving any compensation therefor. Reservation of Lands (1881) 17 Op. Atty. Gen. 230, 232. See Forbes v. Gracey (1876) 94 U. S. 762, 24 L. Ed. 313.

The mining statutes were not enacted in the interests of science but for the purpose of protecting the rights of miners in claims located by them, and these statutes should be construed with such liberality as to effect such purpose and protect miners in claims located upon any kind of vein or lode of quartz or other rock in place bearing any of the metals named in the acts, regardless of the kind or character of rock or formation in which the mineral may have been found. Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185, 196.

II. VEIN OR LODE OR OTHER VALUABLE DEPOSITS

3. Definitions.—The definitions of a vein or lode as given by the courts apply generally to the character and formation of the vein in the particular district where the claim is located, and from such definition cannot apply to

conditions and surroundings of mining districts in other states or to different district in the same state. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 536, 29 L. Ed. 712; Migeon v. Montana, etc., R. Co. (C. C. A. 1896) 77 Fed. 249, 255; Shoshone Min. Co. v. Rutter (C. C. A. 1898) 87 Fed. 801, 807; Lange v. Robinson (C. C. A. 1906) 148 Fed. 799, 802; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Hyman v. Wheeler (C. C. 1886) 29 Fed. 347; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 121; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 703; Stinchfield v. Gillis (1892) 30 Pac. 839, 96 Cal. 33, 37; Armstrong v. Lower (1882) 6 Colo. 393; Golden Terra Min. Co. v. Smith (Mahler) (1881) 11 N. W. 98, 2 Dak. 377; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110; Burke v. McDonald (1887) 2 Idaho, 310; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449; Overman Silver Min. Co. v. Corcoran (1880) 15 Nev. 147; Harrington v. Chambers (1881) 1 Pac. 362, 3 Utah, 94, 115. See Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 115; McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 211, 33 L. R. A. 851, 56 Am. St. Rep. 579; Columbia Copper Min. Co. v. Dutchess Min., etc., Co. (1904) 79 Pac. 385, 13 Wyo. 244.

A definition of a vein or lode should be sufficiently broad to embrace deposits of the several metals or ores mentioned in the statute. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 835, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 484, 123 C. C. A. 548; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 113; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 335; Brownfield v. Bier (1895) 39 Pac. 461, 15 Mont. 403, 412; Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185, 196.

In order for a court to determine whether a vein or lode exists a definition of these terms is necessary. Iron Silver Min. Co. v. Cheesman (1885) 6 Sup. Ct. 481, 116 U. S. 529, 536, 29 L. Ed. 712.

The meaning of the terms, vein, lode, or ledge is determined by the sense in which they are used and by the meaning given to them by miners and not by the acts of congress. Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 290.

The words "vein or lode," as used in the statute, and as understood by miners, are applicable to any body or belt of mineralized rock lying within clearly-defined boundaries, separating it from the country, or nonmineral, rock. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

The word "lode" is properly defined as a "zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock," and does not apply to a bed of gravel from which particles of gold may be washed, although such gravel may be inclosed within defined boundaries. Gregory v. Pershbaker (1887) 73 Cal. 109, 14 Pac. 401.

The terms "vein" and "lode" are synonymous, and same definition as such terms as used in this section must be applied to them in section 4632, post. Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138. And see Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 341, 109 U. S. 550, 27 L. Ed. 1028, reversing Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 829.

The definitions of veins vary according to the facts under consideration, and the term is not susceptible of any arbitrary definition applicable to many cases, but must be controlled in a measure by the conditions of locality and deposit. The distinguishing feature between a vein and the formation inclosing it may be visible, as it must have boundaries; but it is not necessary that these be seen, as their existence may be determined by assay and analysis. The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place in the general mass of the surrounding formation. Golden v. Murphy (1909) 103 Pac. 394, 105 Pac. 99, 31 Nev. 395, 427. See Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 29 L. Ed. 712; Hyman v. Wheeler (C. C. 1886) 29 Fed. 347; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92.

A definition of vein or lode that would exclude any one of the metals mentioned would be defective and its application, in interpretation, would not be in harmony with the spirit and intent manifested from contexts, and would indicate that the mining statutes were not enacted in the interest of science but for the purpose of protecting the right of miners in mining claims located and developed. Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185, 196.

4. Strict definitions.—A vein or lode is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201; Stewart Mining Co. v. Ontario Mining Co. (1915) 35 S. Ct. 610, 614, 237 U. S. 350, 59 L. Ed. 989; Eureka

Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413; Iron Silver Min. Co. v. Cheesman (C. C. 1881) 8 Fed. 297, 301; Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 355; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 792, 793; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 485, 83 Am. St. Rep. 92; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 150; Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185; Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490, 574. And see U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571; Waterloo Mining Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 120; Montana Cent. R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 815 (affirmed [1896] 77 Fed. 249, 23 C. C. A. 156); Golden v. Murphy (1909) 103 Pac. 394, 31 Nev. 395, rehearing denied (1909) 105 Pac. 99, 31 Nev. 395.

A vein or lode is a seam or fissure in the earth's crust filled with quartz or with some kind of rock in place containing gold, silver, or other valuable mineral deposits named in the statute. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 530; Jupiter Min. Co. v. Bodie Consol., etc., Min. Co. (C. C. 1881) 11 Fed. 666, 675; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 125; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 335; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 136, 30 L. R. A. 803, 52 Am. St. Rep. 665.

The words "vein" or "lode" may embrace any description of deposit in the general mass of the country, and whether it is a bed, or segregated vein, or gash vein, or true fissure vein, or merely a deposit, and in all such cases they are lodes if in veins; and if they do not come under the description of the latter they do under that of the former, and are recognized as such by the miners. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 536, 91 Am. St. Rep. 87; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 150. See King v. Amy & Silversmith Consol. Min. Co. (1890) 24 Pac. 200, 9 Mont. 543.

A vein or lode is defined to be a seam or layer of any substance, more or less wide, intersecting the rock or strata, and not corresponding with the stratification, and is often limited in the language of miners to such a layer or course of metal or ore. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 792; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 485, 83 Am. St. Rep. 92.

A "lode or vein" is a body of mineral or mineral-bearing rock so far as it may continue unbroken and without interruption in the general mass of the mountain. Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201.

A vein or lode is mineral-bearing rock or other earthy matter in place in a fissure in rock having its boundaries sharply defined by rocky walls in place, and a lode location is the location of such a lode or vein in the manner prescribed by the statute. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 204, 84 C. C. A. 651; San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 835, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 484, 123 C. C. A. 548.

Calcium phosphate or rock phosphate is found in horizontal veins or what is commonly called blanket veins, and when so found must be located as lode claims. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 836, 120 C. C. A. 160. See Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548; Id. (D. C. 1912) 198 Fed. 942.

A vein or lode is a body of mineral or mineral body of rock within defined boundaries in the general mass of the mountain, and it is not affected by the thinness of the matter in particular places, nor does the fact that it is occasionally found in the general course of the vein or shoot in pockets deeper down into the earth, or higher up, and there may be a total in interruption of ore matter; but it is sufficient if the contact remains on each side, and the limestone and porphory are still preserved, and the vein of mineral matter is found within a short distance pursuing the same contact. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

A vein or lode is any class of deposits of mineral matter coming from the same source, impressed with the same forms and appearing to have been created by the same processes. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413. See Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 536, 91 Am. St. Rep. 87.

"Vein" or "lode" embraces any description of deposit inclosed in the general mass of the country rock, regardless of technical geological distinctions as to beds, segregated veins, gash veins, true fissure veins, or mere deposits. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414. See, also, Myers v. Lloyd (1910) 4 Alaska, 263.

A vein or lode authorized to be located is a seam or fissure in the earth's crust filled with quartz, or some other kind of rock, in place, carrying gold, silver, or other valuable mineral de-

posits named in the statute. It may be very thin or many feet thick, or irregular in thickness; and it may be rich or poor, provided it contains a trace of any of the metals named in the statute. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 530; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666. And see Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309.

A vein or lode is a fissure in the earth filled with quartz in place carrying gold and silver or other minerals. Consolidated Wyoming Gold Min. Co. v. Campion Min. Co. (C. C. 1894) 63 Fed. 540, 544.

The controlling characteristic of a vein is a continuous body of mineral-bearing rock in place in the general mass of the surrounding formation, and is a mineral-bearing vein within the meaning of the law if it possesses these requisites and carries mineral in appreciable quantities, though its boundaries have not been ascertained. Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92.

A "lode" or "vein," within the meaning of those terms as used in the mining acts, is that which is so called by miners. Harrington v. Chambers (1881) 3 Utah, 94, 1 Pac. 362.

The fact that cinnabar is usually found in fissures of the earth's crust, or in veins or lodes as defined by geologists, but occurs generally in fibrous or amorphous masses, bedded in shale or slate rock, is sufficient to show that congress did not intend to adopt or follow purely scientific definitions in the enactment of these statutes. Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185, 195.

The fact that lead is frequently found between strata in flat cavities, in beds within sandstones and rudimentary limestones, formations that do not answer to veins or lodes when speaking with scientific accuracy, would show that congress by this and previous statutes did not intend to adopt the scientific definitions of veins or lodes. Id.

The fact that the terms "veins" and "lodes" have been used by congress in connection with each other is suggestive that it was intended to avoid any limitation in the application of these acts which might be imposed by a scientific definition of either term. Id.

Rock or matter of any kind, in order to constitute a vein or lode must be metalliferous and contain such mineral value as will distinguish it from the country rock, especially where no well-defined walls appear. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

The definition of a vein must be considered with reference to the formations and characteristics of the particular district in which the vein is located. Id.

5. **What constitutes.**—This section is intended to be liberal and broad enough to apply to any kind of a vein or lode of quartz or other rock-bearing mineral in whatever kind, character, or formation the mineral may be found, and should be so construed as to protect locators of mining claims who have discovered rock in place bearing any minerals named and sufficient to justify the expenditure of time and money in prospecting and developing the ground located. Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Lange v. Robinson (1906) 148 Fed. 799, 802, 79 C. C. A. 1; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 120; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 544; Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814; Bonner v. Meikle (C. C. 1897) 82 Fed. 697; King Solomon Tunnel & Development Co. v. Mary Verna Min. Co. (1912) 127 P. 129, 22 Colo. App. 528, 538; Burke v. McDonald (1890) 2 Idaho, 646; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 117; Murray v. White (1910) 113 Pac. 754, 42 Mont. 423, 433, Ann. Cas. 1912A, 1297; Fox v. Myers (1906) 86 Pac. 793, 29 Nev. 169, 185; Harrington v. Chambers (1881) 1 Pac. 362, 3 Utah, 94; Columbia Copper Min. Co. v. Dutchess, etc., Co. (1904) 79 Pac. 385, 13 Wyo. 244, 253.

The veins, lodes, or fissures within the meaning of this section are usually found in the surrounding rock and can be readily traced. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 534, 29 L. Ed. 712; Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 695, 29 L. Ed. 774; Buffalo Zinc & Copper Co. v. Crump (1902) 70 Ark. 525, 536.

Where the evidence shows well-defined boundaries, very slight proof of ore or mineral within such boundaries will be sufficient to prove the existence of a vein or lode, as such boundaries constitute a fissure; and if ore is found in such a fissure, though at considerable intervals and in small quantities, it will still be a vein or lode. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 355; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 794; Columbia Copper Min. Co. v. Dutchess Min., etc., Co. (1904) 79 P. 385, 13 Wyo. 244, 253.

A vein can not be said to exist merely because rock is crushed, shattered, or even fissured, and what constitutes a vein must depend somewhat upon the nature of the country in which it is alleged to be found, but a true vein may be barren in some places; and a court will not declare as a matter of law that a whole limestone area thousands of feet wide is one vein. Mammoth Min. Co. v. Grand Central Min. Co. (1909)

29 Sup. Ct. 413, 213 U. S. 72, 76, 53 L. Ed. 702; Grand Central Min. Co. v. Mammoth Min. Co. (1905) 83 P. 648, 29 Utah, 490.

The words "vein or lode" within the meaning of the last clause of this section are intended to apply "to such veins or lodes" as were described in the first clause of this section and have the same meaning; that is, a vein or lode "of quartz or other rock in place bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits." Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 120.

Congress intended by the term "vein or lode" to embrace and include all forms of deposit which are located in the general mass of the mountain by whatever name they may be known, regardless of distinctions in the technical uses of the terms. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,-414; Synnott v. Shaughnessy (1885) 7 Pac. 82, 2 Idaho (Hasb.) 122.

When seams containing mineral-bearing earth and rock are discovered on a claim before its location, similar to seams that had induced other miners to locate claims in the district, and which by development had proved to be a part of a well-defined lode or vein containing ore of great value, it is a sufficient compliance with the statute. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223, affirming decree Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37, reversed (1900) 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864.

A deposit of phosphate rock confined between well-defined boundaries varying in thickness from a few inches to 10 or 12 feet, confined between well-defined boundaries, constitutes a vein or lode of mineral-bearing rock in place within the general mass or the mountain and is subject to disposition under the lode mining laws. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 836, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 481, 123 C. C. A. 548.

A continuous body of mineralized rock lying within any other well-defined boundaries on the earth's surface and under it would equally constitute in the eyes of the miner a lode, and this section is applicable to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock, and includes all deposits of mineral matter found throughout a mineralized zone or belt coming from the same source, impressed with the same forms, and appearing to have been created by the same processes. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 793. See Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

The vein cannot be followed outside the surface lines unless it can be traced continuously from one claim to the other. If the mineral is not continuous, it must be ascertained whether there are continuous boundaries inclosing the vein. Leadville Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,-158.

The jointure or union of rocks differing in character, or of the same character, not like a fissure, is a lode or vein, and if in some space between such rock there is found a material which sometimes or even frequently exists with valuable ore in lodes, it is immaterial in this respect; and it appears that as to all such contacts and all such deposits as are found in the neighborhood of Leadville a lode can not exist without valuable ore. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,-398.

Whether what is commonly called a contact is to be regarded as a vein or lode depends upon whether it contains valuable ore, but if there is value the form in which it appears is of no importance; and if it is iron or manganese, carbonate of lead, or something else yielding silver, the result is the same, as the law will not distinguish between different kinds and classes of ores if they have appreciable value in the metal for which the location was made; and it is not necessary that the ore shall be of economical value for treatment, but it is sufficient if there is something ascertainable and beyond a mere trace, and which can be positively and certainly verified as existing in the ore; and in the case of silver the value is measured by ounces; and if there is one or more ounces in a ton of ore, it is sufficient, other conditions being satisfied, to establish the existence of a lode. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,398. See Stevens v. Williams (C. C. 1879) Fed. Cas. Nos. 13,413, 13,414.

The existence of a vein or lode is not affected by a casual and occasional interruption if there is a general and pervading continuance of the mineral matter pursuing the same general course, bounded by the same rocky matter above and below. Stevens v. Williams (C. C. 1879) Fed. Cas. Nos. 13,413, 13,-414. See Phillpotts v. Blasdel (1872) 8 Nev. 62; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 76 (dissenting opinion).

A vein or lode is a continuous bed of mineralized rock lying within any other well-defined boundaries of the earth's surface and under it, and the term is used in the act of congress as applicable to any zone or bed of mineralized rock lying within boundaries clearly

separating it from the neighboring rock. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

It is the surrounding mass of the country rock which incloses the lode rather than the material of which it is composed that gives it its character as such, and the presence of mere sand or friable material which cannot strictly be called rock does not affect the character of the lode, as it is in such case a vein or lode in place, if the wall on each side is fixed and immovable. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

To make an ore body continuous it must be deposited in that form or removed bodily with its inclosing rocks from the place in which it is found. Iron Silver Min. Co. v. Cheesman (C. C. 1881) 8 Fed. 297, 301.

The result is the same whether the ore is in the form of a broken mass of blue and brown limestone between regular walls of the same rocks or a part of such strata is solid formation, mineral by replacement of some of their constituents with valuable materials, and the name which science may apply to it is of no importance. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 353; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 794.

Veins and lodes have many characteristics, and they may lie in fissures or other openings in the rock, may contain materials differing or in some respects corresponding to such rock, may be of tabular form and of a branded structure, and may have selvages and slickensides in the fissures and openings, and some of these characteristics may be common to all lodes and veins while others are of rare occurrence. Id.

An impregnation to the extent to which it may be traced as a body of ore is as fully within the terms of the statute in reference to veins and lodes as any other form of deposit. Id.

While a vein or lode must have boundaries, it is not necessary that they must be such as can be seen; and it is sufficient if it can be determined by classifying it as a segregated or contact fissure vein, or as a bed or impregnation of ore, and it need not be separated from the country rock by planes or strata of such rock visible to the eye. Id.

A fissure in the earth's crust and openings in its rock and strata, made by some force of nature in which the mineral is deposited, may be regarded as important, if not essential, in determining what is a vein or lode; but to the miner such fissure and its walls are only of importance as indicating the boundaries within which he may look for and reasonably expect to find mineral ore. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 792.

Where within a belt of yellow porphyry are numerous seams, crevices, fissures, and deposits where the quartz rock and decomposed rock and matter are found, containing mineral sufficiently diffused to justify miners in giving to the yellow porphyry the general designation of "mineralized matter—metal-bearing rock," it constitutes a vein or lode, authorizing a valid location. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

To constitute a vein it is not necessary that there be a clean fissure, filled with mineral, as it may exist when filled in places with other matter, but the fissure must have form, and be well-defined, with hanging and foot walls. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

Between the hanging and foot walls of a fissure vein there are found bodies of quartz varying in richness, and there are many places varying in length between the quartz bodies or pay shoots where no quartz will be found in the fissure between the walls, yet the vein exists and may be as well defined as if it was filled with quartz. Id.

The presence of clay, selvages, slickensides, striations, and ribbing of the walls is as strong evidence of the permanency and continuity of a fissure vein as the existence of the quartz itself. Id.

In many ledges having distinct hanging and foot walls the country beyond either is more or less mineralized and at times even small deposits of ores are found beyond the limits of such walls, yet it cannot be said that such mineralized country rock constitutes a part of the ledge. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1903) 134 Fed. 268, 273.

The statutory requirement of lode or vein is satisfied if the zone or belt as a whole bears any of the valuable deposits mentioned in the statute. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 791.

A deposit of mineralized quartzite, a formation of purely sedimentary origin, about 10 feet in thickness, inclosed between a stratum of limestone and a separate and distinct bed of quartzite, with a slight dip, constitutes a vein or lode within the meaning of the mining laws. Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110.

Though, to constitute a vein, it is not required that well-defined walls be developed or paying ore found within them, there must be rock, clay, or earth so colored or decomposed by the mineral element as to mark and distinguish it from the inclosing country. Burke v. McDonald (1890) 2 Idaho, 646, 33 Pac. 49.

Any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt, within defined boundaries, which a person is willing to spend his time and money to follow, in expectation of finding ore, is the subject of a valid location; and,

when the metallic vein matter appears at the surface, a valid location of a ledge deep in the ground to which such vein matter leads may be made. Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185.

Where the boundaries of what is claimed to be a vein are not well, or not at all, defined, either at the surface or at depth, the value of the material must be so in excess of the country rock as to differentiate it from such rock; else the material cannot be held to constitute a vein. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

What values the filling or material of a fissure should contain to constitute it a vein must necessarily depend upon the characteristics of the district or country in which the vein or lode, in any particular instance claimed to exist, is located, and upon the character, as to boundaries, of the vein itself. Id.

The mere fact that sedimentary rock is broken, crushed, seamed, stained, and fissured does neither constitute such material a vein nor an apex of a vein, where no hanging wall nor foot wall appears, where the mineralization of such crushed material is not appreciably greater than that existing generally throughout the sedimentary area, and where the same kind of crushed and brecciated material exists elsewhere and generally within that area. Id.

6. What does not constitute.—The term vein or lode cannot be applied to every metalliferous zone of country to which boundaries can be found, as this would reduce all mining districts to one lode. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 54, 27 C. C. A. 50; Mt. Diablo, Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886. See Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

Two veins or ore bodies, lying near together in country rock of liparite, each having clearly-defined foot and hanging walls, with the usual characteristics of lodes or veins, held to be separate lodes or veins, and not to be considered as constituting, with the mass of liparite between them, a single mineralized zone or lode, though the intervening liparite was more broken up than that lying outside, and to some extent impregnated with silver. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 27 C. C. A. 50.

A vein or lode does not come within this section if it lies horizontally; but if it departs from a horizontal position at all, the degree of departure is immaterial. Leadville Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158.

A broad metalliferous zone having within its limits true fissure veins, plainly bounded, cannot be regarded as a single vein or lode, although such zone may itself have boundaries which can be traced. Mount Diablo Mill & Mining Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

Ore disseminated at intervals, or found in channels, chutes, cavities, pockets, of other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a vein or lode within the meaning of the statute. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 789.

Where deposits of ore are only found in vugs in small quantities, lying in no general direction, widely separated, and found in excavations only after driving a tunnel for a considerable distance through hard quartz rock, and where such vugs of ore lay in detached cavities, more or less like a trough, and wholly surrounded by or enveloped in such quartzite rock, such deposits would not constitute a vein or lode within the meaning of this statute. Id.

7. What constitutes a lode.—Whatever a miner would follow with the expectation of finding ore has been adopted and may be regarded as a practical test of what is to be considered a lode under this section. King Solomon Tunnel & Dev. Co. v. Mary Verna Min. Co. (1912) 127 Pac. 129, 22 Colo. App. 528, 538; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 115. See Eureka Consol. Min. Co. v. Richmond Min. Co. (1880) 103 U. S. 839, 26 L. Ed. 557; Harrington v. Chambers (1881) 3 Utah, 94, 1 Pac. 362.

A lode is whatever the miners could follow and find ore. Burke v. McDonald (1892) 29 Pac. 98, 3 Idaho (Hasb.) 296; Harrington v. Chambers (1881) 3 Utah, 94, 1 Pac. 362, decree affirmed Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 28 L. Ed. 452.

The term "lode" simply means the formation by which a miner can be led or guided, and is an alteration of the verb "lead," and whatever a miner can follow expecting to find ore is a lode. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548. See Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 535, 91 Am. St. Rep. 87; Moxon v. Wilkinson (1876) 2 Mont. 421; Montana Coal, etc., Co. v. Livingston (1898) 52 P. 780, 21 Mont. 59; Noyes v. Clifford (1908) 94 Pac. 842. 37 Mont. 138, 149.

While metalliferous rock in place may be so found within defined boundaries as to require recognition as a lode, though not in a fissure, yet a broad metalliferous zone cannot be permitted to swallow up under the name of lode true fissure veins found within its limits. Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

An irregular mass of mineral matter is within the meaning of the descriptive terms "vein" or "lode." Stevens v.

Williams (C. C. 1879) Fed. Cas. No. 13,413.

Whenever a miner finds a valuable mineral deposit in the body of the earth he calls it a lode, whatever its form may be and however it may be situated, and whatever its extent in the body of the earth. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore, and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347.

If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode. Id.

A body of mineral, or mineral bearing rock, in the general mass of country rock, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be. Id.

A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be, and in the existence and to the extent of such body boundaries are implied. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 353; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 795.

While the elements of a vein or lode are the body of mineral or mineral-bearing rock and boundaries, yet a body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries are, as boundaries are implied. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 794.

Broken, crushed, disintegrated, fissured limestone, between a wall of quartzite on one side, and a belt of clay or shale on the other, and which is permeated in all directions with minerals, constitutes a lode, within the meaning of this statute. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 943; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 127.

To constitute a vein it is not necessary that there be a clean fissure, filled with mineral as it may exist when filled in places with other matter, but the fissure must have form, and be well-defined, with hanging and foot walls. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

A lode is a zone, belt, or body of quartz or other rock lodged in the earth's crust, and presenting two essential and inherent characteristics viz.: (1) It must be held "in place" within or by the adjoining country rock; and (2) it must be impregnated with some of the minerals or valuable deposits mentioned in the statute. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 789, 791.

In order to constitute a lode it is not necessary that the minerals shall be evenly distributed throughout the zone or belt, but it may carry pay streaks near either side or in its center, while in some places the zone may be nearly barren of mineral and in others disclose pockets rich in minerals; and parts of it may carry ore of a very low grade, while other parts contain valuable mineral deposits. Id.

The words "vein," "lode," and "ledge" are used as synonymous terms in the common parlance of miners as well as in the statute and decisions of courts. Synnott v. Shaughnessy (1885) 7 Pac. 82, 2 Idaho, 111, 116.

8. Vein, lode, or rock in place.—Mineral found at a depth of several hundred feet with the rock on either side fixed solid and immovable, no matter where it was originally found or deposited, is in place within the meaning of the law. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 484, 123 C. C. A. 548; Jones v. Prospect Mountain Min. Co. (1892) 31 Pac. 642, 21 Nev. 339.

A mining locator is not required to know the manner in which a mineral deposit had its origin, whether mineralized waters have ascended from below through fissures in the rock and deposited their solutions therein or whether the deposit has been washed into the fissures by the elements, or brought from a distance as alluvium, but it is sufficient for him to know that a mineral deposit is in place between walls of rock, is a lode, and may be located as a lode claim. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 485, 123 C. C. A. 548.

Where the mass overlaying the ore is mere drift, or a loose deposit, the ore is not "in place," so as to give the owners of a claim the right to follow the dip within the lines of an adjoining claim. Tabor v. Dexler (C. C. 1878) Fed. Cas. No. 13,723.

A vein or lode cannot be in place unless it is within the general mass of the mountain, and it must be inclosed by or held within the general mass of fixed and immovable rock, and it is not enough to find a vein or lode lying on the top of a fixed or immovable rock, though covered with the superficial mass of loose material and débris. Leadville Min. Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158.

A vein is "in place," when inclosed in the general mass of the "country

rock," as distinguished from the superficial mass known as "alluvium," "detritus," or "débris." Leadville Min. Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158; Stevens v. Gill, Id. 13,398; Same v. Williams, Id. 13,414.

A vein or lode to be in place within the meaning of this section, means in the general mass of the mountain, as distinguished from being upon the surface or covered only by the movable parts called slide or débris, and if in the general mass of the mountain it is still in place, though the inclosing rocks may have sustained fractures and dislocations in the general movement or upheaval of the country. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,398. See Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

A vein or lode in place means a vein or lode lying in a fixed position in the general mass of country rock, or in the general mass of the mountain, and as distinguished from such country rock the vein or superficial deposit may have been brought into its present position by the elements, have been washed down from above, or have come there as alluvium or diluvium from a considerable distance. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

A vein or lode is in place if the ore body is continuous to the extent that it may maintain that character whether deposited in that form or removed bodily with its inclosing rocks to the place in which it may be found. Iron Silver-Min. Co. v. Cheesman (C. C. 1881) 8 Fed. 297, judgment affirmed (1886) 6 Sup. Ct. 481, 116 U. S. 529, 29 L. Ed. 712.

This section makes a distinction between rock or quartz held in place by the adjoining country rock and bunches or blotches of rock or quartz simply lying or resting on the earth's surface without any walls, and also pieces or bowlders detached from the earth's crust usually found in mountain gulches and along the beds of streams in mineral country. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 790.

A body of rock or quartz in place having clearly defined walls and of great width and continuing for a long distance sinking deep into the earth's crust is not a lode if it is totally barren of mineral. Id.

9. Determination and proof of existence.—There are four classes of cases where the courts have been called upon to determine what constitutes a lode or vein within the meaning of the different provisions of the statutes: (1) As between miners who have located on the same lode; (2) as between placer and lode claimants; (3) between mineral claimants and parties holding townsite patents to the same; (4) between mineral and agricultural claimants of the same land. Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 254-255, 23 C. C. A. 156; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 117; Fox v. Myers (1906) 86 Pac. 793, 29 Nev. 169, 183. See Grand Central Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490, 574.

A determination as to what is a vein, lode, or ledge of rock in place bearing gold or silver, or other precious metals, must be arrived at from the evidence of miners, as a question of fact, and their understanding of the meaning of these terms must control or give meaning to the acts of Congress. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 290; Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 115. See Overman Silver Min. Co. v. Corcoran (1880) 15 Nev. 147; Columbia Copper Min. Co. v. Dutchess Min., etc., Co. (1905) 79 Pac. 385, 13 Wyo. 244, 256.

With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347.

Proof of a barren contact between blue and brown limestone is not sufficient to establish a vein or lode, but it must carry ore to some extent and of some value to constitute such vein or lode. Id.

Proof of ore in mass and a position in the body of a mountain is sufficient to show the existence of a lode of the dimensions of such ore, and so far as it prevails the ore is a lode, whatever its form or structure may be, and it is unnecessary to decide any question of fissures, contacts, selvages, slickensides, or other marks of distinction. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 353; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 793.

A party seeking to prove the existence of a lode or vein may rely upon any characteristics that he can find in the ground in dispute and prove the same by witnesses who accept such features as establishing the fact, while the opposite party may disprove the proposition by showing the absence of all other characteristics of a vein or lode. Id.

Proof that the strata lying along the plane of contact between blue and brown limestone has mineralized to the extent of showing value in gold and silver, and distinguishable from other parts of the mountain by carrying ore and by association with the plane of contact, may constitute a mineralized zone, and such a zone is clearly a vein or lode within the meaning of this statute. Id.

In determining either the fact or the likelihood of the existence of a vein or lode of ore a court or jury may con-

sider the topography of the mountain, its geological formation, with its sands, limes, porphyry, quartzite, and granite formation, together with the mineralized rock in body and detachments. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 795.

The presence of a vein or lode may be determined by assay and analysis. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 354.

Certain geological formations and strata and substances and fissures are the usual concomitants and incidents of the presence of an ore vein, and in tracing out the lay and trend of ore deposits the presence or absence of such concomitants is important. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 796.

The determination of the question as to whether a given deposit is a vein, lode, or ledge does not constitute a federal question within the meaning of the statute giving federal courts jurisdiction and the right to remove a cause to a federal court. Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 291.

Whether a particular vein or lode is such a one as is referred to in these sections is a question of fact and not of law. Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 290. See Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 537, 29 L. Ed. 712; Hyman v. Wheeler (C. C. 1886) 29 Fed. 347; Illinois Silver Min. & Mill. Co. v. Raff (1894) 7 N. M. 336, 34 Pac. 544.

Any dispute as to whether a given parcel of land is a vein or lode is a question of fact to be determined by men experienced in mining, and it can not be determined as a matter of law. Blue Bird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 292. See Largey v. Blue Bird Min. Co. (C. C. 1892) 49 Fed. 292; Columbia Copper Min. Co. v. Dutchess Min., etc., Co. (1904) 79 Pac. 385, 13 Wyo. 244, 256.

Where one has discovered a lode, and has done what is necessary to a valid location, slight proof will establish, prima facie, the fact that the lode extends through the whole length of the claim. Armstrong v. Lower (1882) 6 Colo. 393; Id. (1883) 6 Colo. 581.

The essential elements of a vein are mineral or mineral-bearing rock and boundaries, and, in case of controversy, where one of these elements is well established, very slight evidence may be accepted as to the existence of the other. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

III. MINING LOCATIONS OR CLAIMS

10. Nature and effect.—A location of a mining claim is not made by taking possession alone, but by working on the ground, recording and doing whatever else is required for that purpose by the acts of Congress and the local laws and regulations. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266; 196 U. S. 337, 346, 49 L. Ed. 501; Ware v. White (1906) 81 Ark. 220, 228; Sweet v. Webber (1884) 4 Pac. 752, 7 Colo. 443, 450; Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263, 277; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 120; Garfield Min., etc., Co. v. Hammer (1886) 8 Pac. 153, 6 Mont. 53, 59; Purdum v. Laddin (1899) 59 Pac. 153, 23 Mont. 386, 389; Hickey v. Anaconda Copper Min. Co. (1905) 81 P. 806, 33 Mont. 46, 63; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Lockhart v. Wills (1898) 54 Pac. 336, 9 N. M. 344, 357; Patterson v. Tarbell (1894) 37 Pac. 76, 26 Or. 29, 35; Wright v. Lyons (1904) 77 Pac. 81, 45 Or. 167, 170. See Work Min., etc., Co. v. Doctor Jack Pot Min. Co. (1912) 194 Fed. 620, 625, 114 C. C. A. 392; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Horswell v. Ruiz (1885) 7 Pac. 197, 67 Cal. 111; Lalande v. McDonald (1887) 13 Pac. 347, 2 Idaho (Hasb.) 307; Noyes v. Black (1883) 2 Pac. 769, 4 Mont. 527; Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536; Upton v. Larkin (1885) 6 Pac. 66, 5 Mont. 600, 603; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791.

The right of location upon the mineral lands of the United States is a privilege granted by Congress, but it can only be exercised within the limits prescribed by the grant. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474, 479.

It is sufficient to give a right to the occupant of mining ground on the government domain to show its appropriation by such occupant by means which are a substantial compliance with the law and which, in view of the surrounding circumstances, will give notice to those who have a right to know that the particular mining ground is subject to the dominion and control of a private claimant. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 419; Eilers v. Boatman (1881) 2 Pac. 66, 3 Utah, 159, 164.

The location is the initial step taken by the locator to indicate the place and extent of the surface which he desires to acquire. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 74, 43 L. Ed. 72.

Under the act of July 26, 1866 (14 Stat. 251), the location was of the lode; but under the act of May 10, 1872, the

location is that of a piece of land containing the top or apex of a lode. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 194 U. S. 235, 238, 48 L. Ed. 953.

Location is the act or series of acts by which the right of exclusive possession of mineral veins and the surface of mineral lands is vested in the locator. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 346, 49 L. Ed. 501.

The word "location" is frequently used in its more restricted sense, excluding discovery. Uinta Tunnel Min. & Transp. Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 73 C. C. A. 35.

A location must be good when made, and each claimant must stand on his own location and can take only what it will give him under the law. Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155.

Lode mining claims must conform to the vein or lode, and it would be impracticable if not impossible to make them always conform to the public surveys, and section 2327 of the Revised Statutes expressly provides that they need not conform to the public surveys. State of Washington v. Ross (1909) 104 Pac. 216, 55 Wash. 242, 244.

11. Meaning of terms "location" and "mining claim."—A mining claim is a parcel of land containing precious metal in the soil or rock and a location is the act of appropriating such parcel of land according to law or to certain established rules. St. Louis Smelting & Ref. Co. v. Kemp. (1881) 104 U. S. 636, 649, 26 L. Ed. 875; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 661; Poire v. Wells (1882) 6 Colo. 406, 412; Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 34; Salisbury v. Lane (1900) 63 Pac. 383, 7 Idaho, 370, 385; Territory v. Mackey (1888) 19 Pac. 395, 8 Mont. 168, 173; Mammoth Min. Co. v. Juab County (1894) 37 Pac. 348, 10 Utah, 232, 236.

The use of the words "mines or mining claims" is evidently intended to distinguish between cases in which the miner is the owner of the soil, and therefore has perfect title to the mine, and those in which the miner does not have title to the soil, but works the mine under what is well known in the mining districts and what is recognized by the act of congress as a "mining claim." Forbes v. Gracey (1876) 94 U. S. 762, 766, 24 L. Ed. 313; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 550.

The terms "location" and "mining claim" are often used indiscriminately to denote the same thing. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 74, 43 L. Ed. 72. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 649, 26 L. Ed. 875; Creede, etc., Min. Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 347, 49 L. Ed. 501; Poire v. Wells (1882) 6 Colo. 406, 412; Territory v. Mackey (1888) 19 Pac. 395, 8 Mont. 168, 173.

The word "claim" denotes a particular piece of ground to which a miner has a recognized vested and exclusive right of possession for the purpose of extracting precious metals therefrom. Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 1 C. C. A. 192, affirmed (1897) 17 Sup. Ct. 671, 166 U. S. 620, 41 L. Ed. 1139.

The word "location," as applied to mining claims, means, first, all the acts, including discovery, requisite to perfect the right of discovery, and, second, the placing of the claims, the posting of the notice, and the markings of the boundaries. Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 73 C. C. A. 35. See, also, Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. (1898) 18 Sup. Ct. 895, 899, 171 U. S. 55, 43 L. Ed. 72; Creede & C. C. Min. & Mill. Co. v. Unita Tunnel Min. & Transp. Co. (1905) 25 Sup. Ct. 266, 270, 196 U. S. 337, 49 L. Ed. 501; Smith v. Union Oil Co. (1913) 135 Pac. 966, 166 Cal. 217.

The location is a piece of land including the vein. Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250.

A difference exists between a vein or lode, and a vein or lode mining claim in that a vein or lode may be entirely concealed beneath the surface of the earth and not known to exist, while a lode mining claim is on the surface, exposed to view, and designated by stakes and monuments so that its boundaries may be readily traced. Mantle v. Noyes (1885) 5 P. 856, 5 Mont. 274, 289.

12. Location on vein or lode.—This section permits mining claims to be located only upon veins or lodes of quartz or other rock in place carrying gold, silver, copper, and other minerals named, or other valuable deposits. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50; San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 835, 120 C. C. A. 160; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 122.

The surface should be located in conformity with the course of the vein. Dwinnel v. Dyer (1904) 78 Pac. 247, 145 Cal. 12, 20, 7 L. R. A. (N. S.) 763; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 457; Paul v. Cragnaz (1900) 59 Pac. 857, 60 Pac. 983, 25 Nev. 293, 328, 47 L. R. A. 540.

This section contemplates that the location of a lode or vein claim shall be along the course of such lode or vein. Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 485, 30 L. Ed. 1140. See Catron v.

Old (1897) 48 Pac. 687, 23 Colo. 433, 437, 58 Am. St. Rep. 256.

A court has no power to make a new location of a mining claim for every vein that may be found within the surface lines of such location and thereby enlarge the rights of the original locator. Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, 557.

The law fixes no limit to the size or prominence of a mineral-bearing vein before a mining location can be made thereon. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 601.

This section treats of mining claims upon veins or lodes of quartz or other rock in place bearing gold. Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 114.

13. Location on apex of vein.—See, also, notes to § 4618, post.

The apex of a vein is not necessarily a point, but in fact is often a line of great length. Larkin v. Upton (1892) 12 Sup. Ct. 614, 144 U. S. 19, 23, 36 L. Ed. 330; Debney v. Iles (1907) 3 Alaska, 438, 451.

14. Location on unappropriated public lands.—See, also, notes to § 4618, post.

The ground located on must be a part of the public domain. Brown v. Gurney (1906) 26 Sup. Ct. 509, 511, 201 U. S. 184, 50 L. Ed. 717; Girard v. Carson (1896) 44 Pac. 508, 22 Colo. 345; Fisher v. Seymour (1897) 49 Pac. 30, 23 Colo. 542; Emerson v. Akin (1914) 140 Pac. 481, 26 Colo. App. 40. See Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 29 L. Ed. 348; Noonan v. Caledonia Gold Min. Co. (1887) 7 Sup. Ct. 911, 121 U. S. 393, 30 L. Ed. 1061; Kendall v. San Juan Min. Co. (1892) 12 Sup. Ct. 779, 144 U. S. 658, 36 L. Ed. 583; Emerson v. Akin (1914) 140 Pac. 481, 26 Colo. App. 40; Swanson v. Kettler (1909) 105 Pac. 1059, 17 Idaho, 321, 334; Indiana Nevada Mining Co. v. Gold Hills Min. & Mill. Co. (1912) 126 Pac. 965, 35 Nev. 158.

15. —— Tide lands.—See, also, notes to § 5047, post.

A mining location cannot be made on lands lying below the line of ordinary high tide, and the department is without authority to grant any concession whatever as to lands so located. Shively v. Bowlby (1894) 14 Sup. Ct. 548, 152 U. S. 1, 58, 38 L. Ed. 331; Heine v. Roth (1905) 2 Alaska, 416, 425.

16. Manner and method of making.—The order in which the several steps necessary to a valid location of a mining claim are performed is not essential, except so far as one is dependent upon the other. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 352, 49 L. Ed. 501.

A mining claim must be located upon at least one known vein or lode, but the vein or lode is not the entire claim, as a claim may be 600 feet wide though the known vein or lode to include which it is located is not 12 inches in width. Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

This section provides mainly the method of locating a mining claim. Harper v. Hill (1911) 113 P. 162, 159 Cal. 250, 253.

17. Lode and placer claims as methods of acquisition—Kinds of mineral or vein.—Title to a horizontal vein or deposit, or blanket vein, may be acquired under the sections relating to veins, lodes, etc. Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 400, 36 L. Ed. 201.

This section repeals section 2 of the act of July 26, 1866, and gives qualified citizens of the United States the right to locate and acquire by means of lode mining claims veins or lodes of quartz or other rock in place bearing gold, silver, copper, lead, tin or other valuable deposits. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 205, 84 C. C. A. 651.

Whether a valuable mineral deposit may be secured by a lode claim or a placer is determined by the form and character of the deposit, and, if it is a vein or lode in rock in place, it may be secured by a lode claim, but, if it is not, it can be secured by a placer claim only. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 84 C. C. A. 651. See Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 695, 29 L. Ed. 774; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 228, 48 L. Ed. 944; San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160; Bevis v. Markland (C. C. 1904) 130 Fed. 226.

This section, together with section 4628, post, shows that the plan of the legislation by Congress was to provide two general methods of purchasing mineral deposits from the United States; the first by lode mining claims where the valuable deposits sought were in lodes or veins, or rock in place, and the second by placer mining claims where the deposits were not in veins or lodes or in rock in place, but were loose, scattered, or disseminated upon or under the surface of the land. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 205, 84 C. C. A. 651. See San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160.

18. —— Particular deposits.—Asphaltum in lodes or veins in rock in place may be entered by means of lode mining claims. The test which determines whether a mineral deposit may be secured by lode claim or by placer claim

is the form and character of the deposit. If it is in a vein in rock in place it must be secured by a lode claim, but if not in a vein in rock in place, it may be secured by a placer claim. The words "other valuable deposit" includes nonmetalliferous as well as metalliferous deposits. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 205, 84 C. C. A. 651.

Ground containing blanket veins of calcium phosphate between strata of country rock held subject to location as a vein or lode, and not as a placer. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548, reversing decree (D. C. 1912) 198 Fed. 942.

Cinnabar is not found in any fissure of the earth's crust or in any lode as defined by geologists, yet this section speaks of lodes of quartz or rock in place bearing cinnabar. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

A discovery of black iron and manganese outcroppings is sufficient to justify the location of a mining claim, as it is no more than a careful miner desiring to secure the fruits of his discovery would do. Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

Under this section a valid location of a quartz claim cannot be made upon porphyry or limestone merely on the theory that the locator was willing to expend his time and money in prospecting for a vein or lode. Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 124.

19. —— Relative rights of locators.—See, also, notes to § 4632, post.

An applicant for patent for a placer claim cannot claim title to a known lode or vein existing within the surface lines of his placer claim. Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 553, 27 L. Ed. 1028.

The rights conferred and the conditions upon which they are held are different in placer claims and lode claims. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 680, 32 L. Ed. 571. And see Kansas City Min. etc., Co. v. Clay (1892) 29 Pac. 386, 3 Ariz. 326, 334; Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 Pac. 333, 11 Ariz. 241.

Where the entry of the locator of a lode claim within the boundaries of a prior existing placer claim was a trespass no right could be initiated thereby. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 230, 48 L. Ed. 944. See Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 436; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 17, 50 C. C. A. 79, 61 L. R. A. 230.

Except as provided by this section the owner of a placer claim is entitled to all mineral deposits contained therein. Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 515.

When this section is read in connection with section 4632, post, it is apparent that the character of the vein or lode which is excepted from the placer patent is the same kind of a vein or lode bearing the same character and extent of value as that mentioned in this section. Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 149.

20. Qualifications of locator.—See, also, notes to § 4614, ante.

The location of a mining claim cannot be sustained where it is not made in the names of bona fide locators. Cook v. Klonos (1908) 164 Fed. 529, 537, 90 C. C. A. 403.

A discovery of gold on a placer mining claim by one holding an option to purchase the claim, but before he has exercised such option, and while the right of possession remains in the locator, inures to the benefit of his location. Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116.

21. Number of claims permitted.—Congress has not yet seen proper to put a limitation on the number of mining claims that one individual or a single corporation may locate or acquire, and whether it shall ever deem it wise to do so rests with that body and not with the courts. Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 583, 66 C. C. A. 299.

While the law prescribes a limitation to the size of a single location, yet there is no limitation to the number of claims a single person may hold by purchase and which may be included in a single patent, described by a single survey showing only the exterior boundaries. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 600. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875.

The mining laws do not restrict discoverers to a single claim, nor do they require a locator to apply for a patent conveying the title to any claim within any specified time, or, in fact, at all. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 109.

22. Extralateral rights.—See, also, notes to § 4618, post.

The location as made on the surface by the locator determines the extent of his rights below the surface. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

The right of location is not dependent on the course of the vein beyond the limits of the claim. Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131

Fed. 579, 66 C. C. A. 299, writ of certiorari denied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622.

23. **Form, dimensions, and surface lines—Location along vein or lode.**—The surface claim ought to conform to the course of the vein, and the end lines be at right angles to the side lines. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442. CONTRA, Watervale Min. Co. v. Leach (Ariz. 1893) 33 Pac. 418.

The intent of the statute is that mining locations on lodes or veins shall be made lengthwise in the general direction of such vein or lode on the surface of the earth where they are discoverable, and that the end lines are to cross such lode or vein and extend perpendicularly downward, and are to be continued in their own direction either way horizontally. Flagstaff Silver Min. Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 485, 30 L. Ed. 1140.

The statute proceeds on the theory that a claim on a lode, following its outcroppings on the surface for a certain distance with a definite extension on each side of the middle of the vein, would generally take the form of a parallelogram. It accordingly provided for the length and width of the claim upon a vein at the surface and especially provided that the end lines shall be parallel to each other. Iron Silver Min. Co. v. Elgin Min., etc., Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 205, 30 L. Ed. 98.

A valid location may be made of three separate claims adjoining each other where the surface area of the three together is equivalent to the amount which this section permits a locator to take or locate on a single lode. Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

This section regulates the surface dimensions of a mining location. Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 148.

Where the strike of the vein passes perpendicularly through the end lines of the location, the fact that between the end lines the outcrop is forced by the surface influences of slides and débris to meander so as to make slight variations from the general trend of the strike, does not prevent the side lines from being parallel with the vein; it being only necessary in such case that they should be substantially parallel. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

All that a locator can do is to find ore and lay out his claim parallel with the course of the vein as indicated by the surface outcrop, and take what subsequent developments show his location entitles him to. Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. (C. C. 1904) 131 Fed. 339, 343.

24. —— **Measurements determined by vein or lode.**—A miner may hold the place in which he may be working against all others having no better right; but when he asserts title to a full claim of 1,500 feet in length, and 300 feet in width, he must prove a lode extending throughout the claim. Zollars v. Evans (C. C. 1880) 5 Fed. 172.

A location is not valid beyond the limits of the lode on which the discovery is based. Terrible Min. Co. v. Argentine Min. Co. (C. C. 1883) 89 Fed. 583.

25. —— **Parallelogram in form.**—The principles of law and the construction of the statutes, as applied to locations made in the form of a parallelogram, cannot be extended where a location is made in the form of an octagon or a curved figure in the shape of a horseshoe. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 291, 4 C. C. A. 329.

These regulations have been construed as showing an intent that mining locations shall be in the shape of a parallelogram, the end lines crossing the strike of the vein at nearly right angles to it and the side lines substantially parallel to the strike. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Empire, etc., Min. Co. v. Tombstone, etc., Min. Co. (C. C. 1900) 100 Fed. 910, 913.

These statutes were enacted upon the theory that veins and lodes of mineral-bearing rock in their general course could be readily ascertained, and by locating a claim in the form of a parallelogram 1,500 feet in length and 600 feet in width there would be no difficulty in including the lode within the surface ground so located. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 290, 4 C. C. A. 329.

A mining location must be in the form of a parallelogram and the location so marked on the ground that its boundaries can be readily traced. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 458, 17 C. C. A. 190.

The location of a mining claim is made by taking up a quantity of land in the form of a parallelogram, 1,500 feet in length and 300 feet on each side of the middle of the vein at the surface. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 111.

A lode claim cannot exceed 1,500 feet in length by 600 feet in width, and should be in the form of a parallelogram having its side lines equidistant from the center of the lode, with end lines parallel to each other. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

A lode claim is not required to be in the form of a parallelogram, but if a fissure vein deviates literally at an angle it is reasonable as the primary

purpose of the statute is to grant the mineral that the location should deviate with it, and if the mineral is deposited in an irregular shaped mass it can in no wise affect the interests of either the United States or adjoining locators as to the particular form of the location in order to cover the mass. Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

A surface parallelogram not less than 50 feet in width must be located according to the provisions of this section. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 457.

26. —— **Length and width of location.**—Since the enactment of this section the Land Department has no power to issue a patent to a quartz lode to any surface ground exceeding 300 feet in width on each side of the middle of the vein or lode, and a patent so issued is void as to the excess over 300 feet, and is subject to collateral attack. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Parley's Park, etc., Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 130 U. S. 256, 262, 32 L. Ed. 906; Northern Pacific R. Co. v. Cannon (1893) 54 Fed. 252, 258, 4 C. C. A. 303; Lakin v. Roberts (1893) 54 Fed. 461, 463, 4 C. C. A. 438; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 821, 49 C. C. A. 637; Lakin v. Dolly (C. C. 1891) 53 Fed. 333, 337; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 941. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; Carson City Gold, etc., Co. v. North Star Min. Co. (1897) 83 Fed. 658, 668, 28 C. C. A. 333; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547; McElligott v. Krogh (1907) 90 Pac. 823, 151 Cal. 126, 133.

This section provides that all mining claims of quartz lodes located prior to its passage should be governed as to the length of the claim along the lode by the customs, regulations, and laws in force at the date of their location, and that subsequent claims so located should not exceed 1,500 feet in length along the vein or lode. Lakin v. Dolly (C. C. 1891) 53 Fed. 333, 337; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 120; McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 212, 33 L. R. A. 851, 56 Am. St. Rep. 579.

By a location under this section the locator may claim 1,500 feet in length along the linear course of the lode with 150 feet on each side of it, making the location 300 feet in width, and 1,500 feet in length. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414; Armstrong v. Lower (1882) 6 Colo. 393, 399. See Patterson v. Hitchcock (1877) 3 Colo. 533; Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

This section regulates the size of mining claims and limits the width of a location to 300 feet on each side of the middle of the vein at the surface, but permits it to be reduced by local mining regulations to any width not less than 25 feet on each side of the middle of the vein at the surface. Lakin v. Dolly (C. C. 1891) 53 Fed. 333, 337; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 409.

By this section a mining claim cannot extend more than 1,500 feet in length along the vein or lode. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 47, 29 L. Ed. 348.

This section authorizes citizens of the United States, and those who have declared their intention to become such; who discover a vein or lode upon the public land carrying any valuable mineral deposits, to locate and claim the same not exceeding 1,500 feet along its length and not exceeding 300 feet along its width at the middle of the surface and make the end lines of the claim parallel. Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 583, 66 C. C. A. 299.

In the absence of any local mining rule or custom in force at the time of a location, a mining location may, under this statute, extend to the distance of 300 feet on each side of the middle of the vein at the surface and 1,500 feet in length along such vein. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 527.

Under this section no lode mining claim can extend more than 300 feet on each side of the middle of the vein at the surface, and a locator must assume that some place on the earth's surface represented the middle of the vein, and from such point he can not exceed the statutory limit. Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. (C. C. 1904) 131 Fed. 339, 341.

Prior to the act of May 10, 1872 (17 Stat. 91), of which this section is a part, there was no law giving a width to a quartz mining claim of not exceeding 300 feet on each side of the center, and there was no law of the United States prescribing the method by which a gold mine could be prosecuted and worked. Dower v. Richards (1887) 15 Pac. 105, 73 Cal. 477, 479.

A single qualified locator may take up 1,500 feet of a vein with the surface ground extending 300 feet on each side thereof, and an association of a dozen or a hundred locators can take no more. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 326.

27. —— **Location and direction of side lines.**—See, also, notes to § 4618, post.

Where the course of a vein or lode is across the claim, instead of in the direction of its length, the side lines of the location become the end lines, and the end lines the side lines, for the purpose of determining extralateral rights. Flagstaff Silver Min. Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed.

253; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 1359, 122 U. S. 478. 30 L. Ed. 1140 (affirming judgment Van Zandt v. Argentine Min. Co. [C. C. 1881] 8 Fed. 725); King v. Amy & Silversmith Consol. Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 38 L. Ed. 419 (reversing [1890] 24 P. 200, 9 Mont. 543); Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859 (reversing judgment [1894] 61 Fed. 557, 9 C. C. A. 613); Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 294; 4 C. C. A. 329; New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; Last Chance Mining Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 588, 66 C. C. A. 299, certiorari denied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622.

The original locator has an unquestioned right to change the lines of his original location so long as such change does not interfere with the existing rights of others acquired previous to such change. Erhardt v. Boaro (1885) 5 S. Ct. 560, 113 U. S. 527, 533–536, 28 L. Ed. 1113; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 806, 31 C. C. A. 223; McEvoy v. Hyman (C. C. 1885) 25 Fed. 596, 600; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 395; Thompson v. Spray (1887) 14 Pac. 182, 72 Cal. 528, 529; Strepey v. Stark (1884) 5 Pac. 111, 7 Colo. 614, 620; Craig v. Thompson (1887) 16 Pac. 24, 10 Colo. 517; Frisholm v. Fitzgerald (1898) 53 Pac. 1109, 25 Colo. 290; Duncan v. Fulton (1900) 61 Pac. 244, 15 Colo. App. 140, 148; Morrison v. Regan (1902) 67 Pac. 955, 8 Idaho, 291; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110.

The lines of a location as made by the locator are the only lines that will be recognized, as the courts have no power to establish new lines or make a new location. Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 38 L. Ed. 419; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 130, 30 L. R. A. 803, 52 Am. St. Rep. 665. See Dagget v. Yreka Min., etc., Co. (1906) 86 Pac. 968, 149 Cal. 357, 373.

Where lines are drawn inaccurately and irregularly, a court can only give to the miner such rights as his improper location warrants under the statute; but it cannot relocate his claim and make new side lines or end lines. Where the court finds that what are called side lines are in fact end lines it will, in determining the lateral rights, treat such side lines as end lines and such end lines as side lines, but it will not make a new location for him and thereby enlarge his rights. The locator must stand upon his own location and take what the law gives him thereunder. King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 228, 38 L. Ed. 419; Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 87, 43 L. Ed. 72; McWilliams v. Winslow (1905) 82 Pac. 538, 34 Colo. 341, 344; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 130, 30 L. R. A. 803, 52 Am. St. Rep. 665. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 4 C. C. A. 329; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613; Del Monte Min. Co. v. New York, etc., Co. (C. C. 1895) 66 Fed. 212; King v. Amy & Silversmith, etc., Min. Co. (1890) 24 Pac. 200, 9 Mont. 543.

Mistakes in drawing the lines of a location can only be avoided by postponing the markings of the boundaries until sufficient explorations are made to ascertain the course and direction of the vein. King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 229, 38 L. Ed. 419.

A side line common to two claims cannot be considered an end line to another claim. Saint Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 667, 44 C. C. A. 120, 56 L. R. A. 725.

Where the strike of the vein passes perpendicularly through the end lines of the location, the fact that between the end lines the outcrop is forced by the surface influences of slides and débris to meander so as to make slight variations from the general trend of the strike, does not prevent the side lines from being parallel with the vein; it being only necessary in such case that they should be substantially parallel. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

When a location, as surveyed and certified, is intercepted by another valid claim going through it perpendicularly or obliquely, this fact does not necessarily make the line of such intersection the end line of the location, if such location extends beyond the intersecting claim. Id.

Where a prospector or locator by mistake has actually located a claim crosswise of a vein instead of parallel thereto, then his side lines as located become his end lines and he cannot proceed beyond the limit of a vertical plane extended downward therefrom. Empire, etc., Min. Co. v. Tombstone, etc., Min. Co. (C. C. 1900) 100 Fed. 910, 913. See Empire, etc., Min. Co. v. Tombstone, etc., Min. Co. (C. C. 1904) 131 Fed. 339, 344.

Where the location was crosswise of

the vein, the side lines were really end lines, considering the direction of the lode on the surface, and the rights of the locators were restricted to the area within the side lines 300 feet on each side of the vein or lode. Southern California Ry. Co. v. O'Donnell (1906) 85 Pac. 932, 3 Cal. App. 382.

28. —— **Location and direction of end lines.**—The fact that one locator did not contest his right to a controverted piece of ground lying between the apex of the vein and his end line does not deprive him of his right to draw his end line at the point where the vein actually crosses his side line, and thus leave out the controverted piece of ground. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 293, 4 C. C. A. 329; Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 850. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 683, 157 U. S. 683, 688, 39 L. Ed. 859; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613; Tyler Min. Co. v. Last Chance Min. Co. (1898) 90 Fed. 15, 17, 32 C. C. A. 498.

A relocation of a claim which conflicts with another claim, so as to exclude the part in conflict, though accompanied by an express statement that the line of the other claim becomes an end line of the new location, is not a concession or agreement that such line is an end line of the other claim. Coincidence of lines between claims does not make them either side lines or end lines. Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 43 L. Ed. 170, affirming decree (1896) 72 Fed. 978, 19 C. C. A. 323.

A boundary line agreed on by conflicting claimants may determine their rights in the length of the lode. Kennedy Mining & Milling Co. v. Argonaut Mining Co. (1903) 23 Sup. Ct. 501, 504, 189 U. S. 1, 47 L. Ed. 685.

As the law requires the location to be made along the course or strike of a vein at the surface, the end lines must of necessity be at right angles to the course, but end lines cannot be made a matter of legal inference and deduction from established facts for the purpose of controlling the act of the locator. Elgin Min., etc., Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 381.

In the location of mining claims, "end lines" must be established as required by the statute; and, where the locator fails to do this, the courts will not fix them by implication. If the end lines be absent, or so placed as not to define the right of the locator to the exterior parts of the lode, the defect cannot be supplied. Elgin Min. & S. Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, judgment affirmed Iron Silver Min. Co. v. Elgin Min. & S. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98.

End lines, as designated in a location certificate, are not necessarily in law the end lines unless they actually cross the actual outcrop of the vein or lode. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 790.

The fact that a location is cut by another valid claim crossing it obliquely does not make the line of such intersection the end line of the location when the location extends beyond the intersecting claim. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

Where part of the end of a location is adjudged to be in conflict with a prior claim, and thereupon the owners of the prior claim quitclaim the land in conflict to the owners of said location, whose possession thereof is not interrupted, the location will continue to include the land in conflict. Id.

The end lines should be laid out at right angles to the vein. Daggett v. Yreka Min. & Mill. Co. (1906) 86 P. 968, 149 Cal. 357.

Where the end lines of a mining claim are not at right angles with the side lines, the distance between the side lines, and not the length of the end lines, measures the width of the claim. Davis v. Shepherd (1903) 72 P. 57, 31 Colo. 141.

The lines could not be so fixed as to include ground not covered by the original location. Tiggeman v. Mrzlak (1909) 105 P. 77, 40 Mont. 19.

29. —— **Parallelism of end lines.**—Parallelism of the end lines of any mining claim located since the act of 1872 is essential to the exercise of the right to follow a vein in its downward dip outside of the side lines of a location. Iron Silver Min. Co. v. Elgin Mining & Smelting Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 208, 30 L. Ed. 98 (affirming judgment Elgin Mining & Smelting Co. v. Iron Silver Min. Co. [C. C. 1882] 14 Fed. 377); Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 628; Daggett v. Yreka Min. & Mill. Co. (1906) 86 Pac. 968, 149 Cal. 357. See King v. Amy & Silversmith, etc., Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 567. See, also, Big Hatchet Consol. Min. Co. v. Colvin (1904) 75 Pac. 605, 19 Colo. App. 405.

The end lines must be parallel in order that going downward the locator shall acquire no further length of the vein than the planes of those lines extended downward inclose. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 84, 43 L. Ed. 72; Bunker Hill & S. Min., etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 601, 66 C. C. A. 99; Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263, 272.

The purpose of requiring the end lines to be parallel was not to secure to the

locator a tract in the shape of a parallelogram, nor to require the surveys of mineral lands to be like the ordinary public surveys in retangular form; but the requirement that the end lines should be parallel was for the purpose of bounding the underground extralateral rights which the owner of the location may exercise. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 84, 43 L. Ed. 72; Bunker Hill & S. Min., etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 601, 66 C. C. A. 99. See Big Hatchet Consol. Min. Co. v. Colvin (1904) 75 Pac. 605, 19 Colo. App. 405, 410.

The object of the statute requiring the end lines to be parallel is sufficiently met if the location is made lengthwise of the vein or lode in a quadrangular shape, notwithstanding the end lines are not exactly parallel, and the locator has the right to make the end lines parallel where such change does not interfere with the rights of third persons. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 293, 4 C. C. A. 329; Doe v. Waterloo Min. Co. (C. C. 1893) 23 P. 365, 54 Fed. 935, 941; Doe v. Sanger (1890) 83 Cal. 203.

There is no inherent necessity for requiring the end lines of mining claims to be parallel, yet the statute so specifically prescribes; and the courts cannot ignore this provision and hold that a locator failing to comply with the statute has all the rights that a strict compliance would give him. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 67, 70, 43 L. Ed. 72.

The purpose of the parallelism of end lines was to give the claimant as much of the vein or lode on its downward course as he had at the surface, and no more. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 669, 28 C. C. A. 333.

This section requires that the end lines of each claim shall be parallel to each other, and if not so placed, or if so placed as not to define the right of the locator to the exterior parts of the vein or lode, the defect cannot be supplied. Elgin Min., etc., Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 379.

It is not intended by this statute that where the strike of a vein passes perpendicularly through the end lines the mere meanderings of the outcrop between such end lines caused by the surface influences of slides and débris on the mountain sides should absolutely control the question of parallelism, but the spirit and reason of the statute require that the settled and permanent course of the vein on its strike, as nature fixed it, should control where the zigzagging is restricted to slight variations from the general direction and trend of the strike. Cheesman v. Hart (C. C. 1890) 42 Fed. 98, 99.

This section is based upon the ideal locations of parallelism that can scarcely exist in actual practice, and substantial compliance is sufficient, as the miner may be compelled by law to make the lines of his location upon the surface ground before the facts can be sufficiently ascertained in order to make the proper parallelism, and the statute is to be liberally construed in his favor so as to give him the full benefit in its spirit and intent, and in order to carry out the policy of the government in opening up the mineral lands to exploration and development. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 548.

Where a portion of a lode mining claim is sold, and, as described in the conveyance, one of the end lines is not parallel to the end line of the claim, such line nevertheless becomes an end line, as between the owners of the two portions. Boston & M. Consol. Copper & Silver Min. Co. v. Montana Ore-Purchasing Co. (C. C. 1898) 89 Fed. 529.

30. —— Want of parallelism of end lines.—If the end lines of a claim are laid obliquely to the course of the outcrop of a vein, then the locator cannot follow the dip of such vein outside of his surface lines. Iron Silver Min. Co. v. Elgin Min., etc., Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; Colorado Central, etc., Min. Co. v. Turck (1892) 50 Fed. 888, 896, 2 C. C. A. 67; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 289, 4 C. C. A. 329; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626; Catron v. Old (1897) 48 P. 687, 23 Colo. 433, 436, 58 Am. St. Rep. 256. See Flagstaff Mining Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Colorado Central, etc., Min. Co. v. Turck (1893) 54 Fed. 262, 266, 4 C. C. A. 313; Colorado Central, etc., Min. Co. v. Turck (1895) 70 Fed. 294, 17 C. C. A. 128; King v. Amy & Silversmith Consol. Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 567.

The provision requiring the lines of each claim to be parallel to each other is merely directory, and no consequence attaches to a deviation from such provision. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548 (affirmed in Richmond Min. Co. v. Eureka Consol. Min. Co. [1880] 103 U. S. 839, 26 L. Ed. 557); Horswell v. Ruiz (1885) 67 Cal. 111, 7 Pac. 197; Doe v. Sanger (1890) 83 Cal. 203, 23 Pac. 365. But see Iron Silver Min. Co. v. Elgin Mining & Smelting Co. (1886) 6 Sup. Ct. 1177,

1184, 118 U. S. 196, 30 L. Ed. 98; affirming Elgin Min. & Smelting Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 379. See, also, Kennedy Mining & Milling Co. v. Argonaut Mining Co. (1903) 23 S. Ct. 501, 503, 189 U. S. 1, 47 L. Ed. 685; Del Monte Mining & Milling Co. v. New York & Last Chance Mining Co. (C. C. 1895) 66 Fed. 212, 214.

The want of parallelism of the end lines cannot be made the basis of an objection because their convergence, when extended in the direction of the dip of the vein, would give a contestant of a mining claim less, instead of more, than the law provides. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 602; Argonaut Min. Co. v. Kennedy Min., etc., Co. (1900) 63 Pac. 148, 131 Cal. 15, 29, 82 Am. St. Rep. 317; Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 Pac. 834, 146 Cal. 147, 153, 9 L. R. A. (N. S.) 940.

The act of May 10, 1872 (17 Stat. 91), requiring the end lines to be parallel does not apply to a location that was made under the act of July 26, 1866 (14 Stat. 251), and the patent for which was issued prior to the taking effect of the act of 1872. Iron Silver Min. Co. v. Elgin (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 208, 30 L. Ed. 98. See Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 291, 4 C. C. A. 329; King v. Amy & Silversmith Consol. Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 567.

The act of July 26, 1866 (14 Stat. 251) did not require that the end lines be parallel, but they might converge or diverge; but the act required that they must be straight. Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 312, 43 L. Ed. 170.

The requirement of parallelism of end lines does not apply where the location had been made at the time of the passage of this act and the proceedings under the prior act had then so far advanced as to exclude adverse claims. East Central Eureka Mining Co. v. Central Eureka Mining Co. (1907) 27 Sup. Ct. 258, 259, 204 U. S. 266, 51 L. Ed. 476.

Where defendants' mining claim is in the form of an isosceles triangle, they cannot follow their lode or vein on its downward dip, through the side lines of their claim, into plaintiff's claim. Parallelism in the end lines of the claim is essential to the exercise of such right. Montana Co. v. Clark (C. C. 1890) 42 Fed. 626.

That the end lines are not parallel does not invalidate the location, but only affects extralateral rights. Gibson v. Hjul (Nev. 1910) 108 Pac. 759. And see Kennedy Min. & Mill. Co. v. Argonaut Min. Co. (1903) 23 Sup. Ct. 501, 189 U. S. 1, 47 L. Ed. 685.

31. —— Lines laid upon senior location.—A valid location of a mining claim may be made although some of the lines are across or upon a valid senior location, if no forcible entry is made. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 77-80, 43 L. Ed. 72; Crown Point Min. Co. v. Buck (1899) 97 Fed. 462, 465, 38 C. C. A. 278; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 52 C. C. A. 219; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 604, 66 C. C. A. 99; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 400, 407; Davis v. Shepherd (1903) 31 Colo. 141, 150, 72 Pac. 57. See State v. District Court (1901) 65 Pac. 1020, 25 Mont. 504, 509, 517 (distinguished).

In the absence of objection on the part of a prior locator a subsequent locator has the legal right as against the government and all subsequent locators to locate his lines upon or over such prior location. Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665; Id. (C. C. 1903) 134 Fed. 268, 271.

Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground extralateral rights not in conflict with any rights of the senior location. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72. See, also, Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200; Crown Point Min. Co. v. Buck (1899) 97 Fed. 462, 38 C. C. A. 278.

Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location, though patented, for the purpose of defining or securing to such junior locator underground or extralateral rights not in conflict with any rights of the senior locator. Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665. See Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 59, 85, 43 L. Ed. 72.

A competent locator has the right to initiate a valid claim to unappropriated public land by a peaceable adverse entry thereon while it is in the possession of those who have no superior right to acquire the title or hold the possession. Thallman v. Thomas (1901) 111 Fed. 277, 279, 49 C. C. A. 317; San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 834, 120 C. C. A. 160. See Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548; Nevada Sierra Oil Co. v.

Home Oil Co. (C. C. 1899) 98 Fed. 673, 680.

A locator may place his lines on a prior mining location with the consent of such prior locator, or when it is done openly without objection on his part, and thereby acquire the extralateral rights conferred by statute, and it seems that this may be done on patented ground where such lines are laid with the consent or openly and peaceably. Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 419, 52 C. C. A. 219. See Id. (1904) 131 Fed. 591, 605, 66 C. C. A. 99.

The locator of a lode mining claim has the legal right to lay an end line of his claim on the surface of a prior claim, in the absence of objection by the owner; and, as against the government and subsequent locators, such location carries precisely the same rights, both surface and extralateral, as it would if all its lines were laid on unappropriated ground. Empire State-Idaho Mining & Development Co. v. Bunker Hill & S. Mining & Concentrating Co. (1904) 131 Fed. 591, 66 C. C. A. 99, appeal dismissed (1906) 26 Sup. Ct. 754, 200 U. S. 613, 50 L. Ed. 620.

A locator of a mining claim may lay the boundaries thereof, if done openly and without any forcible, clandestine, surreptitious, or otherwise fraudulent entry, upon an existing mining claim of another, and without objection on the part of such other owner, and a location thus made carves out, as against the government and all subsequent locators, a segment of the vein throughout its entire depths, which belongs to such locator. Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 604, 66 C. C. A. 99. See Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 S. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 52 C. C. A. 219.

Lode locations are often so placed as to leave between them irregular parcels of ground, and a discoverer of mineral on such irregular parcels may be unable to locate the same without making his end lines parallel unless he is permitted to place such end lines on territory already claimed by prior locators, and in such case he is permitted to make an overlapping location, if it can be done peaceably and without affecting the rights of the senior locator. Stenfjeld v. Espe (1909) 171 Fed. 825, 827, 96 C. C. A. 497. See Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

For the purpose of locating a mining claim with parallel lines, parts of the lines may be within another claim, though within the overlaps the rights of the older claim prevail. Bunker Hill & S. Mining & Concentrating Co. v. Empire State Idaho Mining & Developing Co. (C. C. 1901) 106 Fed. 471, judgment reversed Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1902) 114 Fed. 417, 52 C. C. A. 219, writ of certiorari denied Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (1902) 22 Sup. Ct. 941, 186 U. S. 482, 46 L. Ed. 1260. See, also, Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 400.

One may extend the lines of a mining claim over and across ground belonging to a prior location, and hold segregated pieces of ground within the exterior boundaries of the location, not exceeding the maximum area allowed by law. Clark v. Mitchell (1913) 134 Pac. 449, 35 Nev. 464.

That a portion of a mining claim upon which the location notice is posted may by mistake overlap a pre-existing claim does not invalidate the location, but it is still good as to the part not in conflict. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 Pac. 275; Santa Rita Min. Co. v. Upton, Id.

32. —— **Excessive claims.**—A location in excess of the statutory limit is voidable only as to the excess, if it is made in good faith and does not injure any one else. Richmond Mining Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 877; English v. Johnson (1860) 17 Cal. 107, 76 Am. Dec. 574; Thompson v. Spray (1887) 72 Cal. 528, 14 Pac. 182; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547; McElligott v. Krogh (Cal. 1907) 90 Pac. 823; Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250; Madeira v. Sonoma Magnesite Co. (Cal. App. 1912) 130 Pac. 175; Gobert v. Butterfield (1913) 136 Pac. 516, 23 Cal. App. 1; Atkins v. Hendree (1867) 1 Idaho, 95; Stem-Winder Min. Co. v. Emma & Last Chance Consol. Min. Co. (1889) 2 Idaho (Hasb.) 456, 21 Pac. 1040; Nicholls v. Lewis & Clark Mining Co. (1910) 109 Pac. 846, 18 Idaho, 224, 231, 28 L. R. A. (N. S.) 1029; Flynn Group Mining Co. v. Murphy (1910) 109 Pac. 851, 18 Idaho, 266, 269, 138 Am. St. Rep. 201; Hauswirth v. Butcher (1882) 4 Mont. 299, 1 Pac. 714; Rose v. Richmond Min. Co. (1882) 17 Nev. 25, 27 Pac. 1105 (affirmed Richmond Min. Co. v. Rose [1885] 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273); Hansen v. Fletcher (1894) 10 Utah, 266, 37 Pac. 480. See Glacier Mountain, etc., Min. Co. v. Willis (1888) 8 Sup. Ct. 1217, 127 U. S. 471, 32 L. Ed. 172; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657; Burke v. McDonald (1890) 33 Pac. 49, 2

Idaho, 679; Gohres v. Illinois, etc., Min. Co. (1902) 67 Pac. 666, 40 Or. 516; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 73 (dissenting opinion). See, also, Gohres v. Illinois & J. Gravel Min. Co. (1902) 67 Pac. 666, 40 Or. 516; McPherson v. Julius (1903) 95 N. W. 428, 17 S. D. 98.

A mining claim located in excess of the dimensions permitted under the mining laws of the United States and the rules of miners adopted in the mining districts not in conflict therewith is not wholly void, but the excess may be rejected and the claim be held good for the remainder. Richmond Min. Co. v. Rose (1885) 114 U. S. 576, 579, 580, 5 Sup. Ct. 1055, 29 L. Ed. 273; Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 218, 60 C. C. A. 155; Montague v. Labay (1905) 2 Alaska, 575; Souter v. Maguire (1889) 21 Pac. 183, 78 Cal. 543; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547, 551; Hoban v. Boyer (1906) 85 Pac. 837, 37 Colo. 185; Moorhead v. Erie Min., etc., Co. (1908) 96 Pac. 253, 43 Colo. 408; Stemwinder Min. Co. v. Emma & Last Chance, etc., Min. Co. (1889) 21 Pac. 1040, 2 Idaho (Hasb.) 456; Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679; Wilson v. Freeman (1904) 75 Pac. 84, 29 Mont. 470 (note), 68 L. R. A. 833; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 59, 60; Nash v. McNamara, (1908) 93 Pac. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Hansen v. Fletcher (1894) 37 Pac. 480, 10 Utah, 266, 272; Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155. See Mining Co. v. Tarbet (1878) 98 U. S. 463, 464, 25 L. Ed. 253; Gohres v. Illinois, etc., Min. Co. (1902) 67 Pac. 666, 40 Or. 516.

A claim, as discoverer of a mining vein, to an additional location thereon, which injured no one at the time it was made, and was made in good faith, in reliance on an actual discovery of a vein afterwards found to be part of the lode of great width previously discovered, may be sustained as to such additional location. Richmond Mining Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273.

Generally claims located in excess of the statutory quantity are void. Haws v. Victoria Copper Min. Co. (1895) 16 S. Ct. 282, 160 U. S. 303, 315, 40 L. Ed. 436. And see Leggatt v. Stewart (1883) 2 Pac. 320, 5 Mont. 107.

The unintentional inclusion in a mining location of a trifle more than the statutory amount is an irregularity which does not vitiate the location, but only makes it necessary to exclude such excess. Waskey v. Hammer (1912) 32 S. Ct. 187, 223 U. S. 85, 90, 56 L. Ed. 359. See McIntosh v. Price (1903) 121 Fed. 716, 58 C. C. A. 136; Zimmerman v. Funchion (1908) 161 Fed. 859, 89 C. C. A. 53.

A mining claim in excess of the maximum amount permitted by the statute is not void, and the defect may be remedied by abandoning the excess. Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 726. See Zimmerman v. Funchion (1908) 89 C. C. A. 53, 161 Fed. 859; Waskey v. Hammer (1909) 95 C. C. A. 305, 170 Fed. 31; Jones v. Wild Goose Min., etc., Co. (1910) 101 C. C. A. 349, 177 Fed. 95, 29 L. R. A. (N. S.) 392; Cardoner v. Stanley Consol. Min. & Mill. Co. (C. C. 1911) 193 Fed. 517.

Where the exterior boundaries of a mineral location include such an unreasonable excessive area that they cannot be said to impart notice to a prospector of a mineral location or discovery within the reasonable distance of a lawful claim, the location will be held void on the ground that the boundaries had not been marked and established as required by law. Nicholls v. Lewis & Clark Mining Co. (Idaho, 1910) 109 Pac. 846. See, also, Flynn Group Mining Co. v. Murphy (Idaho, 1910) 109 Pac. 851.

It is contrary to the policy of the law to permit a mining claim of excessive size to be staked. Swanson v. Koeninger (1913) 137 Pac. 891, 25 Idaho, 361.

33. —— **Patent to excessive claim.**—A patent cannot be issued for a mining claim exceeding 300 feet in width, although the original location was wider, and was made under the law of July 26, 1866, by which the width of claims was regulated according to the custom of miners; and, where a patent is issued for the full width of such claim, it is void as to the excess, and section 4627 (R. S. § 2328) does not preserve a right to the issuance of a patent covering the full width of the original location. Lakin v. Roberts (1893) 54 Fed. 461, 462, 4 C. C. A. 438, affirming (C. C. 1891) 53 Fed. 333, certiorari denied (1893) 14 Sup. Ct. 1148, 154 U. S. 507, 38 L. Ed. 1077.

A patent for a consolidated claim, issued under the act of 1866, is not void merely because the ground patented exceeds the 300 feet in width allowed by this section in the case of any one location, but varies in width from 650 to 1,250 feet. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 668, 28 C. C. A. 333 (distinguishing Lakin v. Dolly [C. C. 1891] 53 Fed. 333, and Same v. Roberts [1893] 4 C. C. A. 438, 54 Fed. 461, certiorari denied [1898] 18 Sup. Ct. 940, 171 U. S. 687); Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597.

The land office has no power to issue a patent to a mining claim extending more than 300 feet in width on each side of the middle of the lode, and such patent, if issued, is void as to such excess, and can be collaterally attacked;

but one patent may embrace two or more claims on the same lode. Lakin v. Dolly (C. C. 1891) 53 Fed. 333, 336, following St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875, judgment affirmed Lakin v. Roberts (1893) 54 Fed. 461, 4 C. C. A. 438. And see Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1900) 106 Fed. 241, 243.

A patent for a lode mining claim is not restricted to the surface ground which may be taken under a single location, and the fact that a patent includes ground extending more than 300 feet on either side of the lode or vein does not render it invalid on its face as to the excess. Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657.

34. —— **Lode claim within limits of placer claim.**—See, also, notes to § 4632, post.

The locator of a known lode or vein within the limits of a placer claim is entitled to at least 25 feet of the surface on each side of the lode or vein. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 S. Ct. 632, 194 U. S. 220, 231, 48 L. Ed. 944.

A lode claim within the limits of a placer location, patented by a person other than the owner of the placer location, is limited to 25 feet of the surface on each side of the middle of the vein. Mt. Rosa Mining, Milling & Land Co. v. Palmer (1899) 56 Pac. 176, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245.

This section refers to lode locations which do not conflict with any other class of mineral locations, and does not apply to lode locations within the limits of a placer claim. Id.

35. —— **Tunnel site.**—See, also, notes to § 4619, post.

One who locates a tunnel and discovers a lode may claim 750 feet of the lode each way from the point of discovery. Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510.

As to meaning of "line of the tunnel," see Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550.

36. **Discovery—Object and nature of requirement.**—The object of the law in requiring a discovery to precede the location of a mining claim is to insure good faith on the part of the locator and prevent frauds upon the government. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 808, 31 C. C. A. 223; Lange v. Robinson (1906) 148 Fed. 799, 79 C. C. A. 1; Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440; Overgaard v. Westerberg (1906) 3 Alaska, 168, 175; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho. 108, 118; Ferris v. McNally (1912) 121 Pac. 889, 45 Mont. 20, 22, 25; Fox v. Myers (1906) 86 Pac. 793, 29 Nev. 169, 184. See Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 117. See, also, Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116.

The purpose of the law is to reward the discoverer and to prevent the location of land not found to be mineral. Waskey v. Hammer (1912) 32 S. Ct. 187, 223 U. S. 85, 56 L. Ed. 359.

The provision as to discovery is mandatory. Ledoux v. Forester (C. C. 1899) 94 Fed. 600, 601.

The lode is the principal thing, and the surface ground only incident thereto. Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

37. —— **Discovery as initial act.**—All rights inuring to the benefit of the locator are based upon the initial act of location and the first requirement of the law is discovery. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 349, 49 L. Ed. 501; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 19, 129 Am. St. Rep. 1093.

Discovery is the initial act upon which all mining rights are based, including the right of appropriation and possession, and this is the source of title to mining claims. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 349, 49 L. Ed. 501. See Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685.

No rights can be acquired under the statute by location before the discovery of a vein or lode within the limits of the claim located. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 530; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666. See, also, Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 335; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 136, 30 L. R. A. 803, 52 Am. St. Rep. 665.

A valid location of a mining claim must show in the discovery shaft a vein or lode of valuable ore in rock in place. Terrible Min. Co. v. Argentine Min. Co. (C. C. 1883) 89 Fed. 583.

A location void at the time it is made for want of discovery, or because a discovery was made on the prior patented claim, continues and remains void; and is not cured or made effectual by subsequent discovery, as, under the statute, discovery must precede location. Upton v. Larkin (1885) 6 Pac. 66, 5 Mont. 600, 604.

38. —— **Discovery as prerequisite.**—An appropriate discovery of mineral is as necessary to the lawful location of a placer mining claim as to the location of a lode claim. Steele v. Tanana Mines R. Co. (1906) 148 Fed. 678, 78 C. C. A. 412; Hanson v. Craig (1909) 170 Fed. 62, 64, 95 C. C. A. 338; Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440; Barnette v. Freeman (1904) 2 Alaska, 286; Redden v. Harlan

(1905) 2 Alaska, 402; Bulette v. Dodge (1905) 2 Alaska, 427; Charlton v. Kelly (1906) 2 Alaska, 532; Cook v. Johnson (1908) 3 Alaska, 506; Zeiger v. Dowdy (Ariz. 1911) 114 Pac. 565 (following Chrisman v. Miller [1905] 25 Sup. Ct. 468, 197 U. S. 313, 49 L. Ed. 770); New England & Coalinga Oil Co. v. Congdon (Cal. 1907) 92 Pac. 180; Garibaldi v. Grillo (Cal. App. 1912) 120 Pac. 425; Spokane Portland Cement Co. v. Larson (Wash. 1912) 128 Pac. 641; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 129 Am. St. Rep. 1093. See Steele v. Tanana Mines R. Co. (1906) 148 Fed. 678, 78 C. C. A. 412. But see Gregory v. Pershbaker (1887) 73 Cal. 109, 14 Pac. 401.

An actual mineral discovery is essential to the valid location of a mining claim. Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 456, 228 U. S. 243, 57 L. Ed. 820; Enterprise Mining Co. v. Rico-Aspen Consol. Min. Co. (1895) 66 Fed. 200, 204, 13 C. C. A. 390 (affirmed [1897] 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96); Uinta Tunnel Min., etc., Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 566, 73 C. C. A. 35; Hall v. McKinnon (1911) 193 Fed. 572, 577, 113 C. C. A. 440; U. S. v. Lavenson (D. C. 1913) 206 Fed. 755, 763; Moore v. Steelsmith (1901) 1 Alaska, 121; Tuolumne Consol. Min. Co. v. Maier (1901) 66 Pac. 863, 134 Cal. 583; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791; Regan v. Whittaker (1901) 85 N. W. 863, 14 S. D. 373; Union Min., etc., Co. v. Leitch (1901) 64 Pac. 829, 24 Wash. 585, 588, 85 Am. St. Rep. 961. And see Erhardt v. Boaro (D. C. 1881) 8 Fed. 860 (judgment reversed [1885] 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113, decree reversed [1885] 5 Sup. Ct. 565, 113 U. S. 537, 28 L. Ed. 1116); Healey v. Rupp (1900) 63 P. 319, 28 Colo. 102; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108.

A discovery of a vein or lode on unoccupied and unappropriated mineral lands of the United States, is a prerequisite to a valid location of a mining claim. Cook v. Klonos (1908) 164 Fed. 529, 90 C. C. A. 403 (judgment modified on rehearing [1909] 168 Fed. 700, 94 C. C. A. 144); Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 Pac. 71, 36 Nev. 543 (reversing judgment on rehearing [1913] 129 Pac. 308, 35 Nev. 392, rehearing denied [1914] 141 P. 849); Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155.

There can be no valid location of petroleum lands, under the mineral laws relating to placer claims, without a prior valid discovery of mineral within the limits of the claim. Nevada Sierra Oil Co. v. Miller (C. C. 1899) 97 Fed. 681; Olive Land & Development Co. v. Olmstead (C. C. 1900) 103 Fed. 568; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211; Smith v. Union Oil Co. (1913) 135 Pac. 966, 166 Cal. 217; Bay v. Oklahoma Southern Gas, Oil & Mining Co. (1903) 73 P. 936, 13 Okl. 425.

Marking the boundaries and recording, without discovery or any attempt to find mineral on the claim, "would be justly treated as a mere speculative proceeding, and would not of itself initiate any right." Bulette v. Dodge (1905) 2 Alaska, 427.

Mineral must be discovered before there can be a location of a surface lode or a lode in a tunnel. Corning Tunnel Co. v. Pell (1878) 4 Colo. 507. See, also, Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 Pac. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 Pac. 308, 35 Nev. 392, rehearing denied (1914) 141 Pac. 849.

This section contemplates that a vein or lode must be discovered before a valid location can be made, and prescribes the size of the location and the fact that the boundaries of the claim must be marked upon the ground, and this could not be done without a previous discovery of a vein or lode in order to make the required measurements. Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 123.

To constitute a valid location of a mining claim, there must be a discovery and the exterior boundaries of the claim must be properly marked. Nicholls v. Lewis & Clark Min. Co. (1910) 109 Pac. 846, 18 Idaho, 224, 232, 28 L. R. A. (N. S.) 1029.

The locator must show that the location was made upon a vein or lode of quartz with knowledge on his part, before the location was made, of the existence of mineral there. Hayes v. Lavagnino (1898) 53 P. 1029, 17 Utah, 185.

39. —— **Basis of rights and sources of title.**—It is not necessary that the locator should be the first discoverer of the vein; but it must be known and claimed by him in order to give validity to his location. McMillen v. Ferrum Min. Co. (1905) 25 Sup. Ct. 533, 534, 197 U. S. 343, 49 L. Ed. 784; Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; Jupiter Min. Co. v. Bodie, etc., Min. Co. (C. C. 1881) 11 Fed. 666, 676; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 128; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 679; Willeford v. Bell (1897) 49 P. 6, 117 Cal. xvii; McMillen v. Ferrum Min. Co. (1903) 74 P. 461, 32 Colo. 38, 105 Am. St. Rep. 64; Wenner v. M'Nulty (1887) 14 Pac. 643, 7 Mont. 30; Hayes v. Lavagnino (1898) 53 P. 1029, 17 Utah, 185. See, also, Anvil Hydraulic Co. v. Scandia Mining Syndicate (1912) 4 Alaska, 479; O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248.

Discovery and appropriation are the

source of title to mining claims. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 550; McCleary v. Broaddus (Cal. App. 1910) 111 Pac. 125; Honaker v. Martin (1891) 27 Pac. 397, 11 Mont. 91, 96; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 Pac. 71, 76, 36 Nev. 543; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 124. See Jennison v. Kirk (1878) 98 U. S. 453, 25 L. Ed. 240; Jackson v. Roby (1883) 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; O'Reilly v. Campbell (1886) 116 U. S. 418, 6 Sup. Ct. 421, 29 L. Ed. 669; McElligott v. Krogh (1907) 90 Pac. 823, 151 Cal. 126; Childers v. Laham (1914) 142 Pac. 924, 19 N. M. 301.

A location on account of the discovery of a vein or lode can only be made by a discoverer or one who claims under him. Gwillim v. Donnellan (1885) 115 U. S. 45, 50, 5 Sup. Ct. 1110, 29 L. Ed. 348; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 414.

A title under mineral location merely, without discovery of minerals, is good as against all persons except the government of the United States. Hullinger v. Big Sespe Oil Co. (Cal. App. 1915) 151 Pac. 369.

40. —— **Discovery as unit.**—A discoverer of any part of an apex gets the right to its entire width even where a portion of such width may be outside of the surface side lines of his claim extended downward vertically; though he has no right to the extralateral surface, he has a right to the extralateral lode beneath the surface. Lawson v. U. S. Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 15, 52 L. Ed. 65; St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Empire State, etc., Co. v. Bunker Hill Min., etc. Co. (1902) 114 Fed. 417, 52 C. C. A. 219; Last Chance Min. Co. v. Bunker Hill, etc., Min. Co. (1904) 131 Fed. 579, 66 C. C. A. 299; Empire State, etc., Co. v. Bunker Hill Min., etc., Co. (1904) 131 Fed. 591, 66 C. C. A. 99. See U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587; Keely v. Ophir Hill Consol. Min. Co. (1909) 169 Fed. 601, 604, 95 C. C. A. 99.

A location by an association of persons is but a single location, and a single discovery is sufficient. Merced Oil Mining Co. v. Patterson (1912) 122 Pac. 950, 162 Cal. 358. And see Merced Oil Min. Co. v. Patterson (Cal. 1908) 96 P. 90; McDonald v. Montana Wood Co. (1894) 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

The same discovery point cannot be used for the location of two mining claims. Reynolds v. Pascoe (1901) 66 P. 1064, 24 Utah, 219. See Larkin v. Upton (1892) 12 Sup. Ct. 614, 144 U. S. 19, 36 L. Ed. 330; Reiner v. Schroder (1905) 80 Pac. 517, 146 Cal. 411; Healy v. Rupp (1900) 63 Pac. 319, 28 Colo. 102; McKinstry v. Clark (1882) 1 Pac. 759, 4 Mont. 370, 393; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449; Phillips v. Brill (1908) 95 Pac. 856, 17 Wyo. 26, 40.

41. —— **Discovery of rock in place.**—When the locator finds the rock in place, containing mineral, he has made a discovery, within the meaning of the statute, whether the rock or earth assays high or low. Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 255, 23 C. C. A. 156; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Lange v. Robinson (1906) 148 Fed. 799, 801, 79 C. C. A. 1; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 676; Debney v. Iles (1907) 3 Alaska, 438, 450; McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 212, 33 L. R. A. 851, 56 Am. St. Rep. 579; Fox v. Myers (1906) 86 Pac. 793, 29 Nev. 169, 184.

It is the finding of the mineral rock in place as distinguished from float rock that constitutes a discovery and warrants the prospector in locating a mining claim. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Lange v. Robinson (1906) 148 Fed. 799, 801, 79 C. C. A. 1; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 120; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 703; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 676; McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 33 L. R. A. 851, 56 Am. St. Rep. 579; Murray v. White (1911) 113 Pac. 754, 42 Mont. 423, 433, Ann. Cas. 1912A, 1297. See Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309; Noyes v. Clifford (1908) 94 P. 842, 37 Mont. 138.

It is requisite to a valid location and to the ownership of the title to a lode mining claim, that there should be a discovery of ore, gold or silver bearing mineral in rock in place. Terrible Min. Co. v. Argentine Min. Co. (C. C. 1883) 89 Fed. 583; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787; Armstrong v. Lower (1882) 6 Colo. 393; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 150; Overman Silver Min. Co. v. Corcoran (1880) 15 Nev. 147. See Myers v. Lloyd (1910) 4 Alaska, 263; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87; King v. Amy & Silversmith Min. Co. (1890) 24 Pac. 200, 9 Mont. 543. And see Zollars v. Evans (C. C. 1880) 5 Fed. 172; Gibson v. Hjul (Nev. 1910) 108 Pac. 759.

Any discovery of quartz or other rock

in place, bearing any of the precious metals specified, constitutes a "discovery of a vein or lode." Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106. And see Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234.

The mining laws declare what shall constitute a discovery. Cook v. Johnson (1908) 3 Alaska, 506, 531. See Shreve v. Copper Bell (1891) 28 Pac. 315, 11 Mont. 309, 343.

If the rock discovered is in place and carries enough precious metal in it to justify the locator in spending his time and money in prospecting and developing the ground located, then such a discovery is valid and the location may be made no matter what the locator's vocation may be, as the law does not discriminate in this respect and its justification to locate extends to any citizen who complies with its requirement. McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 211, 33 L. R. A. 851, 56 Am. St. Rep. 579.

The discovery of a vein in rock in place such as a miner would be willing to follow in the expectation of finding ore of commercial value shows a location made in good faith. Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 116. See Michael v. Mills (1896) 45 P. 429, 22 Colo. 439; McShane v. Kenkle (1896) 44 P. 979, 18 Mont. 208, 33 L. R. A. 851, 56 Am. St. Rep. 579.

42. —— **Discovery within limits of location or claim.**—No mining claim can be located and no patent issued until the actual discovery of a vein or lode within the limits of the claim as located; this is a prerequisite to a valid title. Gwillim v. Donnellan (1885) 115 U. S. 45, 47, 5 Sup. Ct. 1110, 29 L. Ed. 348; Sullivan v. Iron Silver Min. Co. (1892) 143 U. S. 431, 438, 12 Sup. Ct. 555, 36 L. Ed. 214; King v. Amy & Silversmith Min. Co. (1894) 152 U. S. 222, 226, 14 Sup. Ct. 510, 38 L. Ed. 419; Haws v. Victoria, etc., Min. Co. (1895) 160 U. S. 303, 314, 16 Sup. Ct. 282, 40 L. Ed. 436; Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 448, 16 Sup. Ct. 1101, 41 L. Ed. 221; Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. (1897) 17 Sup. Ct. 762, 763, 167 U. S. 108, 42 L. Ed. 96 (affirming [1895] 66 Fed. 200, 204, 13 C. C. A. 390); Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 S. Ct. 895, 171 U. S. 55, 70, 43 L. Ed. 72; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 S. Ct. 266, 196 U. S. 337, 343, 345, 353, 49 L. Ed. 501; Chrisman v. Miller (1905) 25 S. Ct. 468, 197 U. S. 313, 321, 49 L. Ed. 770; Lawson v. U. S. (1907) 28 S. Ct. 15, 207 U. S. 1, 13, 52 L. Ed. 65; Waskey v. Hammer (1912) 32 S. Ct. 187, 223 U. S. 85, 90, 56 L. Ed. 359; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 295, 4 C. C. A. 329; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 216, 218, 60 C. C. A. 155; Hanson v. Craig (1909) 170 Fed. 62, 95 C. C. A. 338 (reversing judgment [1908] 161 Fed. 861, 89 C. C. A. 55); Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725, 727; Cheesman v. Hart (C. C. 1890) 42 Fed. 98; Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685, 689; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 111; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 698; Perigo v. Erwin (C. C. 1898) 85 Fed. 904, 905; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151; Overgaard v. Westerberg (1906) 3 Alaska, 168; Cascaden v. Bortolis, Id. 200; Conway v. Hart (1900) 62 Pac. 44, 129 Cal. 480; Daggett v. Yreka Min. & Mill. Co. (1906) 86 Pac. 968, 149 Cal. 357; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211; Harper v. Hill (Cal. 1911) 113 Pac. 162; Olaine v. McGraw (1913) 129 Pac. 460, 164 Cal. 424; McCleary v. Broadway (1910) 111 Pac. 125, 14 Cal. App. 60; Garibaldi v. Grillo (Cal. App. 1912) 120 Pac. 425; Bryan v. McCaig (1887) 15 Pac. 413, 10 Colo. 309, 313; Girard v. Carson (1896) 22 Colo. 345, 44 Pac. 508; Michael v. Mills (1896) 22 Colo. 439, 45 Pac. 429; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92; Brewster v. Shoemaker (1900) 63 Pac. 309, 28 Colo. 176, 53 L. R. A. 793, 89 Am. St. Rep. 188; Gemmel v. Swain (1903) 72 Pac. 662, 28 Mont. 331, 98 Am. St. Rep. 570; Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19; Street v. Delta Mining Co. (1910) 112 Pac. 701, 42 Mont. 371; Ferris v. McNally (Mont. 1912) 121 Pac. 889; Lockhart v. Washington Gold & Silver Mining Co. (N. M. 1911) 117 Pac. 833; Bay v. Oklahoma Southern, etc., Min. Co. (1903) 73 Pac. 936, 13 Okl. 425, 436; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362; Regan v. Whittaker (1901) 85 N. W. 863, 14 S. D. 373; McPherson v. Julius (1903) 95 N. W. 428, 17 S. D. 98; Union Min. & Mill. Co. v. Leitch (1901) 64 Pac. 829, 24 Wash. 585, 85 Am. St. Rep. 961; Dean v. Omaha-Wyoming Oil Co. (1913) 128 Pac. 881, 21 Wyo. 133. See Dahl v. Raunheim (1889) 10 S. Ct. 74, 132 U. S. 260, 269, 33 L. Ed. 324; McMillen v. Ferrum Min. Co. (1902) 74 Pac. 461, 32 Colo. 38, 43, 105 Am. St. Rep. 64. See, also, Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408; Upton v. Larkin (1888) 7 Mont. 449, 17 Pac. 728.

The discovery must lie within the limits of the location, and if the title to the discovery fails so must the location which rests upon it. Gwillim v. Donnellan (1885) 115 U. S. 45, 50, 5 Sup. Ct. 1110, 29 L. Ed. 348; Waskey v. Ham-

mer (1912) 32 Sup. Ct. 187, 188, 223 U. S. 85, 91, 56 L. Ed. 359; Id. (1909) 170 Fed. 31, 35, 95 C. C. A. 305; Behrends v. Goldsteen (1902) 1 Alaska, 518, 525; Miller v. Girard (1893) 3 Colo. App. 278, 33 P. 69 (following Miller v. Hamley [1903] 74 P. 980, 31 Colo. 495, 498). See Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449, 458; Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96, 127.

The loss of a discovery upon which a mining location is based invalidates the location unless another and sufficient discovery has been made within the remaining portion prior to an application for patent or the assertion of an adverse claim. Gwillim v. Donnellan (1885) 115 U. S. 45, 50, 51, 5 Sup. Ct. 1110, 29 L. Ed. 348; Girard v. Carson (1896) 22 Colo. 345; Silver City Gold & Silver Min. Co. v. Lowry (1899) 57 Pac. 11, 19 Utah, 334, 345.

As between two locators, the boundaries of whose respective claims include common territory, priority of location confers the better title, provided a vein in place was discovered in the discovery shaft, and provided, also, that it extended to the ground in controversy. In such case the rights of the parties are not changed by the fact that the senior location was on the dip of the lode; the junior on the top or apex. Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725, judgment affirmed Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140.

The fact that a mining claim which has gone to final entry without adverse claim includes the original discovery on which a prior claim was based does not necessarily defeat the right of the prior locator to the remainder of his claim, provided other veins have been discovered on such portion, and it appears that there was no actual intent to abandon the claim. Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748.

This section measures the extent of the rights of a locator of a mining claim made on a surface discovery and makes a discovery of a lode or vein within the limits of the location a prerequisite to a valid location. Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550, 555. See Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811; Burke v. McDonald (1888) 13 Pac. 351, 2 Idaho (Hasb.) 339; Harrington v. Chambers (1881) 1 Pac. 362, 3 Utah, 94.

This section forbids the location of mining claims until a discovery of a vein or lode within surface lines of the location. Bay v. Oklahoma Southern, etc., Min. Co. (1903) 73 Pac. 936, 13 Okl. 425, 430.

If the existence of a vein be shown beyond the lines of the conflicting survey and an application be made for patent, the application will not be denied because of a sale or surrender of some other portion of the lode originally embraced in the discovery and location. Silver City Min. Co. v. Lowry (1899) 57 Pac. 11, 19 Utah, 334, 348. See Gwillim v. Donnellan (1885) 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Little Pittsburgh Consol Min. Co. v. Amie Min. Co. (C. C. 1883) 17 Fed. 57.

A patent will not issue on an application that excludes therefrom the land upon which is situated the discovery shaft and improvements, and where the proof fails to show the discovery of mineral within the claim applied for. Silver City Min. Co. v. Lowry (1899) 57 Pac. 11, 19 Utah, 334, 345.

An entry cannot be made of the residue of an original mining claim, a part of which has been patented, where no proof is made that any vein or lode, having its apex within the ground sought to be entered, exists or has been discovered. Id.

If a senior locator permits a junior location that contains the original discovery point to come to patent without protest, the residue of his original claim will be validated by a second discovery within the surface lines and outside of such junior location, where such discovery was made before patent was actually issued for such junior location, and he may hold all the ground not included in the patent of such junior location, notwithstanding the loss of the original discovery. Id.

43. —— Discovery outside of location, or within limits of another claim. —A mining location based upon a discovery within the limits of an existing valid location is void. Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Swanson v. Sears (1912) 32 Sup. Ct. 455, 224 U. S. 180, 56 L. Ed. 721 (affirming judgment Same v. Kettler [1910] 105 Pac. 1059, 1065, 17 Idaho, 321, 339); Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; Little Pittsburgh Consol. Min. Co. v. Amie Min. Co. (C. C. 1883) 17 Fed. 57; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 628; Behrends v. Goldsteen (1902) 1 Alaska, 518, 525; Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358, 363; Tuolumne Consol. Min. Co. v. Maier (1901) 66 Pac. 863, 134 Cal. 583; Armstrong v. Lower (1882) 6 Colo. 393; Id. (1883) 6 Colo. 581; Michael v. Mills (1896) 45 Pac. 429, 22 Colo. 439; Miller v. Hamley (1903) 74 Pac. 980, 31 Colo. 495, 498; McMillen v. Ferrum Min. Co. (1903) 74 Pac. 461, 32 Colo. 38, 105 Am. St. Rep. 64; Sullivan v. Sharp (1905) 80 Pac. 1054, 33 Colo. 346; Emerson v. Akin (1914) 140 Pac. 481, 26 Colo. App. 40; Upton v. Larkin (1888) 7 Mont. 449, 17 Pac. 728; Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19; Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129

Pac. 308; Id. (1914) 138 Pac. 71, 74, 36 Nev. 543; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96; McPherson v. Julius (1903) 95 N. W. 428, 17 S. D. 98; Watson v. Mayberry (1897) 49 P. 479, 15 Utah, 265; Reynolds v. Poscoe (1901) 66 Pac. 1064, 24 Utah, 219; Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155. See, also, Clipper Min. Co. v. Eli Min. & Land Co. (1904) 24 Sup. Ct. 632, 634, 194 U. S. 220, 48 L. Ed. 944; Lavignino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408; Girard v. Carson (1896) 44 Pac. 508, 22 Colo. 345; Fisher v. Seymour (1897) 49 Pac. 30, 23 Colo. 542.

The discovery of mineral must be on unoccupied lands of the government. If the discovery is made within the patented claim of another, the claim is void. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 29 L. Ed. 348; Moyle v. Bullene (1896) 44 Pac. 69, 7 Colo. App. 308; Upton v. Larkin (1885) 6 P. 66, 5 Mont. 600.

A discovery outside of the limits of the surface lines of a location, no matter what its proximity to such lines, is not sufficient to make a valid location. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 223 U. S. 85, 91, 56 L. Ed. 359.

Where a location monument and shaft of a mining claim have been included within the exterior boundaries of a patented claim, there can be no valid location of such claim as to the remaining vacant ground by filing an amended certificate, but any such attempted relocation must be regarded as a new and independent location, and no rights can attach thereto by virtue of the extinguished location of the original claim, and no rights can attach to such new and independent location by virtue of its being a part of the original but extinguished location. Indiana-Nevada Min. Co. v. Gold Hills Min., etc., Co. (1912) 126 Pac. 965, 35 Nev. 158, 165.

44. —— **Discovery shaft.**—There is no provision for a discovery shaft in the federal statutes. McMillen v. Ferrum Min. Co. (1903) 74 Pac. 461, 32 Colo. 38, 43, 105 Am. St. Rep. 64.

The same rule applies to shafts as to veins or lodes, and a discovery must be found before any right to them vests. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 114, 42 L. Ed. 96.

Where the locators of two association claims which overlap are sinking shafts at the same time, the first to discover mineral has priority of right, although the location was staked after the other, if it was made openly and peaceably. Hall v. McKinnon (1911) 193 Fed. 572, 577, 113 C. C. A. 440. See Hanson v. Craig (1909) 170 Fed. 62, 95 C. C. A. 338.

If a miner, after sinking a shaft, fails to find a lode, and then sinks another shaft, in which he does find one, he may make the latter his discovery shaft, on which location may be based. Terrible Min. Co. v. Argentine Min. Co. (C. C. 1883) 89 Fed. 583.

A discovery and discovery shaft may be anywhere along the course of a vein or lode within the end lines of a location, may be nearer one end than the other, may be nearer one side line than the other, and is not required to be within any given distance from either of the side lines. Taylor v. Parenteau (1897) 48 Pac. 505, 23 Colo. 368, 374.

A discovery will sustain a valid location, although a portion of the discovery shaft is upon an adjoining located claim. Upton v. Larkin (1888) 7 Mont. 449, 17 Pac. 728, judgment affirmed in Larkin v. Upton (1892) 12 Sup. Ct. 614, 144 U. S. 19, 36 L. Ed. 330.

The discovery shaft need not be located at the shaft which contains the vein upon the discovery of which the locator bases his claim. O'Donnell v. Glenn (1888) 8 Mont. 248, 19 Pac. 302.

A discovery shaft which was bisected by the west end line of the claim was sufficient to support a location, so that such location was not affected by the fact that a subsequent location overlapped the west end line and included the discovery. Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19.

A discovery of a vein or lode by the sinking of a discovery shaft is a substantial compliance with the provisions of this section, and knowledge on the part of locators of the existence of mineral entitles them to make a location, although the original discovery was made by some one other than the locators. Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185, 191. See Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666.

45. —— **Relation between discovery and location.**—This statute does not require a discovery before location, or that the location shall precede the discovery; it simply provides that both acts shall be completed before the right of possession vests; and the order in which the statutory requirements are complied with is immaterial so long as the rights of others do not intervene. Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 217, 218, 60 C. C. A. 155; Uinta Tunnel Min., etc., Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 567, 73 C. C. A. 35; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Zollars v. Evans (C. C. 1880) 5 Fed. 172; Jupiter Min. Co. v. Bodie Consol Min. Co. (C. C. 1881) 11 Fed.

666; Perigo v. Erwin (C. C. 1898) 85 Fed. 904 (decree affirmed Erwin v. Perego [1899] 93 Fed. 608, 611, 35 C. C. A. 482); Heman v. Griffith (1901) 1 Alaska, 264; Russell v. Dufresne (1902) 1 Alaska, 486; Redden v. Harlan (1905) 2 Alaska, 402; Bulette v. Dodge (1905) 2 Alaska, 427; Charlton v. Kelly (1906) 2 Alaska, 532; Thompson v. Spray (1887) 14 Pac. 182, 72 Cal. 528, 533; Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 448, 98 Am. St. Rep. 63; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211, 214; McCleary v. Broaddus (1910) 111 Pac. 125, 14 Cal. App. 60; Strepey v. Stark (1884) 7 Colo. 614, 619, 5 Pac. 111; Healey v. Rupp (1906) 86 Pac. 1015, 37 Colo. 25; Upton v. Larkin (1885) 6 Pac. 66, 5 Mont. 600, 602; La Grande Invest. Co. v. Shaw (1903) 72 Pac. 795, 74 Pac. 919, 44 Or. 416, 422; Cedar Canyon Consol. Min. Co. v. Yarwood (1902) 67 Pac. 749, 27 Wash. 271, 91 Am. St. Rep. 841; Protective Min. Co. v. Forest City Min. Co. (1909) 99 Pac. 1033, 51 Wash. 643. See Erhardt v. Boaro (1885) 113 U. S. 527, 536, 5 Sup. Ct. 560, 28 L. Ed. 1113; Biglow v. Conradt (1908) 159 Fed. 868, 871, 87 C. C. A. 48; Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748, 749; Crown Point Min. Co. v. Crismon (1901) 65 Pac. 87, 39 Or. 364.

A location is made valid by a discovery of minerals at any time after the location, provided that such discovery is made before any valid location of the same claim, or any rights are claimed, by other persons. Erwin v. Perego (1899) 93 Fed. 608, 611, 35 C. C. A. 482; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co. (1902) 119 Fed. 164, 169, 57 C. C. A. 200 (judgment affirmed Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. [1905] 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501); Uinta Tunnel Min., etc., Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 73 C. C. A. 35; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 675; Tuolumne Consol. Min. Co. v. Maier (1901) 66 Pac. 863, 134 Cal. 583; Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439; McGinnis v. Egbert (1884) 8 Colo. 41, 5 Pac. 652; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92; Brewster v. Shoemaker (1900) 63 P. 309, 28 Colo. 176, 53 L. R. A. 793, 89 Am. St. Rep. 188; Eureka Exploration Co. v. Tom Moore Min. & Mill. Co. (1912) 123 Pac. 655, 52 Colo. 623; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791; Whiting v. Straup (Wyo. 1908) 95 Pac. 849; Dean v. Omaha-Wyoming Oil Co. (1913) 128 Pac. 881, 21 Wyo. 133. See, also, Treasury Tunnel Mining & Reduction Co. v. Boss (1903) 74 Pac. 888, 32 Colo. 27, 105 Am. St. Rep. 60; La Grande Inv. Co. v. Shaw (1903) 72 Pac. 795, 44 Or. 416, reversed (1904) 74 Pac. 919, 44 Or. 416. But see Upton v. Larkin (1885) 5 Mont. 600, 6 Pac. 66; Id. (1888) 7 Mont. 449, 17 Pac. 728.

While the statute requires a discovery before a valid location can be made, yet, if a location is made and a discovery follows, the location is valid if made before the claim has been appropriated by another. Erwin v. Perego (1899) 93 Fed. 608, 611, 35 C. C. A. 482; Uinta Tunnel, etc., Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 567, 73 C. C. A. 35; Zollars v. Evans (C. C. 1880) 5 Fed. 172, 175; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 680; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 108; Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 448, 98 Am. St. Rep. 63; Dwinell v. Dyer (1904) 78 Pac. 247, 145 Cal. 12, 20, 7 L. R. A. (N. S.) 763; McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449, 457; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 124, 7 L. R. A. (N. S.) 791. See Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439, 443.

The marking of boundaries and filing of location certificates may precede discovery, or discovery may precede them, but no location is valid until both are complete, and the earlier act inures to the benefit of the locator as of the date of the later act, subject to all intervening rights. Erhardt v. Boaro (1885) 113 U. S. 527, 536, 5 Sup. Ct. 560, 28 L. Ed. 1113; Erwin v. Perego (C. C. A. 1899) 93 Fed. 608, 611; Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min., etc., Co. (C. C. A. 1902) 119 Fed. 164, 169, 170; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Jupiter Min. Co. v. Bodie Consol., etc., Co. (C. C. 1881) 11 Fed. 666, 676, 678, 696; Thompson v. Spray (1887) 14 Pac. 182, 72 Cal. 528, 533; Strepey v. Stark (1884) 5 Pac. 111, 7 Colo. 614. See Tuolumne Consol. Min. Co. v. Maier (1901) 66 Pac. 863, 134 Cal. 583, 585; Crown Point Min. Co. v. Crismon (1901) 65 Pac. 87, 39 Or. 364, 367.

A second discovery made after the restaking of a claim is valid where no rights intervene and the location is incomplete at the date of the second discovery. Erhardt v. Boaro (1885) 113 U. S. 527, 5 Sup. Ct. 560, 28 L. Ed. 1113; Debney v. Iles (1907) 3 Alaska,

438, 449; Golden Terra Min. Co. v. Smith (1881) 11 N. W. 98, 2 Dak. 377. See Perigo v. Erwin (C. C. 1898) 85 Fed. 904, 906.

If a person should make a location in all other respects regular and in accordance with the laws, rules, regulations, and customs in force at the time, upon a supposed vein, before discovering the true vein or lode, and should do sufficient work to hold the claim and should thereafter discover the vein or lode within the limits of the claim located before any other person had acquired any rights therein, his claim would be good and the location valid. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 676; Patchen v. Keeley (1887) 14 Pac. 347, 19 Nev. 404. See Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190; Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; Perego v. Erwin (C. C. 1898) 85 Fed. 904, 905; Russell v. Dufresne (1902) 1 Alaska, 486, 490; Debney v. Iles (1907) 3 Alaska, 438, 449; Cook v. Johnston (1908) 3 Alaska, 506, 528; Brewster v. Shoemaker (1900) 63 Pac. 309, 28 Colo. 176, 53 L. R. A. 793, 89 Am. St. Rep. 188; Golden Terra Min. Co. v. Smith (1881) 11 N. W. 97, 2 Dak. 377; Wenner v. McNulty (1887) 14 Pac. 643, 7 Mont. 30.

The right to the exclusive possession of a mining claim depends upon a valid location, which, in turn, depends upon the existence of a discovery of mineral within the boundaries of the claim, but if all the acts prescribed by law are performed, including a discovery, prior to the initiation of rights in a third person, it cannot be held that the order of these acts is essential to the creation of the rights given by a valid location. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 352, 49 L. Ed. 501; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 19, 129 Am. St. Rep. 1093.

While no location of a mining claim can be made until discovery, yet subsequent discoveries may validate earlier locations and may inure to the benefit of the locator as against the United States and all parties whose rights were initiated subsequent to such discovery. Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min., etc., Co. (1902) 119 Fed. 164, 169, 57 C. C. A. 200; Healey v. Rupp (1906) 37 Colo. 25, 28, 86 Pac. 1015. See Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92.

The discovery of the vein or lode before any other steps are taken to perfect the location is not required by this section, which means nothing more than that no location shall be considered complete until there has been a disdiscovery. Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. (1905) 25 Sup. Ct. 266, 271, 196 U. S. 337, 351, 49 L. Ed. 501, affirming judgment Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200.

The fact that a locator, on discovering his boundaries exceeded the amount of ground to which he was entitled, drew in one line so as to exclude the excess, and in so doing excluded the hole in which he made his discovery, did not vitiate his entire claim provided he made another discovery within the boundaries as readjusted before any rights in the premises were acquired by another. Waskey v. Hammer (1909) 170 Fed. 31, 95 C. C. A. 305, motion to recall mandate denied (1910) 179 Fed. 273, 102 C. C. A. 629, and judgment affirmed (1912) 32 Sup. Ct. 187, 223 U. S. 85, 56 L. Ed. 359.

A prospector, who failed to follow up his discovery of mineral by any effort towards completing the statutory location of a mining claim, cannot, as against intervening rights, post his discovery notice four years afterwards, and have the inception of his claim date from the discovery. Pelican & Dives Min. Co. v. Snodgrass (1886) 9 Colo. 339, 12 Pac. 206.

46. —— **Sufficiency of discovery.**—To constitute a prior discovery which will support a location of ground as an oil placer claim, the locator must have actually discovered oil within the limits of the claim. Mere surface indications of the existence of oil therein, however strong, are not sufficient, nor is the existence of oil upon adjoining lands. Nevada Sierra Oil Co. v. Miller (C. C. 1899) 97 Fed. 681, 688; Same v. Home Oil Co. (C. C. 1899) 98 Fed. 673; New England & Coalinga Oil Co. v. Congdon (Cal. 1907) 92 Pac. 180; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 129 Am. St. Rep. 1093; Dean v. Omaha-Wyoming Oil Co. (1913) 128 Pac. 881, 21 Wyo. 133.

It is only necessary to discover a genuine mineral vein or lode, whether small or large, rich or poor, at the point of discovery within the lines of the location to entitle the miner to make a valid location of such vein or lode. After discovery and location it often requires much time and labor and great expense to develop a vein or lode sufficiently to determine whether it is really a valuable mine or not, and a location is necessary before incurring such expense. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 675; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 125; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 790.

The apex of a vein is not necessarily a point, but often a line of great length,

and any portion of the apex on the course or strike of the vein found within the limits of a claim is a sufficient discovery to entitle the locator to obtain title. Larkin v. Upton (1892) 12 Sup. Ct. 614, 144 U. S. 19, 36 L. Ed. 330 (affirming Upton v. Larkin [Mont. 1888] 17 Pac. 728); Debney v. Iles (1907) 3 Alaska, 438.

This section does not impose any conditions upon the locator as to the value or extent of the ore discovered, but simply provides that no location of a mining claim shall be made until the discovery of a vein or lode. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 321, 49 L. Ed. 770; Book v Justice Min. Co. (C. C. 1893) 58 Fed. 106, 125. See U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571; Same v. Lavenson (D. C. 1913) 206 Fed. 755, 763; Burke v. McDonald (1892) 29 Pac. 98, 3 Idaho, 296.

This section does not intend that the locator of a mining claim shall determine the precise extent and character of the mineral or the continuity of the ore, and the existence of the rock in place bearing mineral before he can make a valid location. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 120. See Cascaden v. Bortolis (1908) 162 Fed. 267, 271, 89 C. C. A. 247, 15 Ann. Cas. 625; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440, 443.

There must be such a discovery of mineral as gives reasonable evidence of the presence of a vein or lode, or if a placer claim that it is valuable for such mining. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 323, 49 L. Ed. 770. See Cascaden v. Bortolis (1908) 162 Fed. 267, 268, 89 C. C. A. 247, 15 Ann. Cas. 625.

A discovery made in running a tunnel where there were small seams of iron oxide, quartz, and small quantities of carbonate of lead, and where the indications were of a character which the miners in that district would follow in the expectation of finding ore, and where the rock in such seams was different from the country rock, and where such seams were similar in character to the seams or veins of mineral matter that had induced other miners to locate claims in the same district, is a sufficient discovery to justify a belief in the existence of a lode or vein of great value, and to show that the location was made in good faith and not upon a conjectural or imaginary existence of a vein or lode, which cannot be permitted. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223. See King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 227, 38 L. Ed. 419; Lange v. Robinson (1906) 148 Fed. 799, 802, 79 C. C. A. 1.

Even slight indications of a defined and mineral bearing ledge have been held sufficient to support a location of a valid mining claim. Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 813.

If discovery is made within the limits of the claim, and is sufficient to justify a prudent man in spending his labor, time, and money in further work, it is sufficient, without regard to the altitude or depth of its location. Overgaard v. Westerberg (1906) 3 Alaska, 168. And see Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108.

It is enough that gold and silver bearing rock showing on the surface is found. Score v. Griffin (1905) 80 P. 331, 9 Ariz. 295, reversed (1905) 83 Pac. 350, 9 Ariz. 347.

A valid location of a lode mining claim may be made on a vein whenever the prospector has discovered such indications of mineral that he is willing to spend his time and money in following, with the expectation of finding ore; and it is not necessary that the prospector be "justified" in his expectation of finding ore. It may be made of a ledge deep in the ground and appearing at the surface, not as ore, but as vein matter only. Burke v. McDonald (1892) 2 Idaho, 1022, 29 Pac. 98.

A charge that: "It is not necessary that the work by which the discovery vein or lead is discovered and made visible should be made by the locators. It is sufficient if, at the time of the location, the vein or lead is exposed to view, and its existence shown by the locator, for these facts would be equivalent to discovery"—is correct. Wenner v. McNulty (1887) 7 Mont. 30, 14 Pac. 643.

It is enough to entitle the discoverer to protect his mining rights if ore or metalliferous rock be found in place sufficient to warrant a prudent man in spending time and money on it, though it may not contain ore in paying quantities. Muldrick v. Brown (1900) 61 Pac. 428, 37 Or. 185. See Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811; Burke v. McDonald (1888) 13 Pac. 351, 2 Idaho (Hasb.) 339; Harrington v. Chambers (1881) 1 Pac. 362, 3 Utah, 94.

The fact that one-half of the diameter of the well is on the claim is a sufficient showing of discovery within the claim; and it may not be inferred that the well deviated away from the claim in its descent, in the absence of evidence to the contrary. Phillips v. Brill (Wyo. 1908) 95 Pac. 856.

47. —— **Extent and value of discovery.**—The requirements of the statute have been met where minerals have been discovered and the evidence is sufficient to justify a person of ordinary prudence in making an expenditure of labor and money, with a reasonable prospect of success, in developing a

valuable mine. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 471, 197 U. S. 313, 49 L. Ed. 770 (affirming judgments Miller v. Chrisman [1903] 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 98 Am. St. Rep. 63); Migeon v. Montana Central Railway Co. (1896) 77 Fed. 249, 255, 23 C. C. A. 156; Cascaden v. Bartolis (1906) 146 Fed. 739, 741, 77 C. C. A. 496; Steele v. Tanana Mines R. Co. (C. C. A. 1906) 148 Fed. 678, 680; Lange v. Robinson (1906) 148 Fed. 799, 802, 803, 79 C. C. A. 1; Charlton v. Kelly (1907) 156 Fed. 433, 84 C. C. A. 295, 13 Ann. Cas. 518; Cascaden v. Bortolis (1908) 162 Fed. 267, 268, 89 C. C. A. 247, 15 Ann. Cas. 625; Multnomah Mining, Milling & Development Co. v. U. S. (1914) 211 Fed. 100, 102, 128 C. C. A. 28; Mason v. Washington-Butte Mining Co. (1914) 214 Fed. 32, 130 C. C. A. 426; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 703; U. S. v. Lavenson (D. C. 1913) 206 Fed. 755; Charlton v. Kelly (1906) 2 Alaska, 532; Cook v. Johnson (1908) 3 Alaska, 506; Mutchmor v. McCarty (1906) 87 Pac. 85, 149 Cal. 603; Murray v. White (1911) 113 Pac. 754, 42 Mont. 423; Fox v. Myers (Nev. 1906) 86 Pac. 793; Golden v. Murphy (Nev. 1909) 103 Pac. 394, rehearing denied (1909) 105 Pac. 99.

A locator has made a discovery when he has found mineral in place in sufficient quantity to justify him in the expenditure of time and labor thereon, and whether the rock assays high or low, but with this qualification that it was never intended that the courts should weigh the scales to determine the value of the mineral found as between a prior and a subsequent claimant of a mining claim on the same lode. Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Lange v. Robinson (1906) 148 Fed. 799, 802, 79 C. C. A. 1; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 117; Fox v. Myers (1906) 86 Pac. 793, 29 Nev. 169, 184; Golden v. Murphy (1909) 103 Pac. 394, 105 P. 99, 31 Nev. 395, 429. See Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223; McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 214, 33 L. R. A. 851, 56 Am. St. Rep. 579.

The law does not contemplate that the locator shall show a paying mine at the time of the location. Cook v. Johnson (1908) 3 Alaska, 506, 541; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 338, 343; Brownfield v. Bier (1895) 39 Pac. 461, 15 Mont. 403, 409.

The discovery of mineral on a hillside may, as against other placer locators of the same ground, be sufficient for a court to say that there had been a discovery of mineral in place, as courts do not weigh scales to determine the value of mineral found as between a prior and a subsequent locator of a mining claim on the same lode. Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 255, 23 C. C. A. 156; Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 936. See McShane v. Kenkle (1896) 44 Pac. 979, 18 Mont. 208, 214, 33 L. R. A. 851, 56 Am. St. Rep. 579.

While a vein or lode discovered by a locator in the side of a hill or mountain and within well-defined walls will assay but a small amount per ton as compared with the cost of extracting, removing, and milling the ore, yet the miner may have good reason to believe from his experience and from that of others in the same mining district that the ore is liable to be richer at a greater depth than at the point of the discovery, still he has made such a discovery as will entitle him to make a valid location within the meaning of the statute. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 124; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440, 443.

A prospector or miner is not prohibited by the statute from making a valid location until he has fully demonstrated that the vein or lode of quartz or other rock in place bearing gold or silver which he has discovered will pay all the expenses in removing extracting, crushing, and reducing the ore, and leave a profit to himself. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 124; Fox v. Myers (1906) 86 Pac. 793, 29 Nev. 169, 185.

The discovered vein or lode on which a location can be based must be one that from all indications has a present or prospective value. Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814; Madison v. Octave Oil Co. (1908) 99 Pac. 176, 154 Cal. 768, 772.

Where a valid mineral location of many years standing is attacked on the ground that there was no actual discovery of a vein or lode such attack should be sustained by evidence so clear and persuasive as to satisfy the mind that the alleged discovery was in fact false. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 791. See Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 150.

It is the finding of mineral in rock in place that constitutes the discovery, and it is not necessary that the vein or lode should contain mineral of such nature that a practical miner, if he encountered it, would feel justified in following it up, with the reasonable expectation of finding paying mineral. Nor is it required, that the paying mineral necessary to justify the location of the claim should be found at the time and place of the discovery, but it is sufficient if the development of the vein showed that paying mineral exists within the limits of the location. McShane v. Kenkle (1896) 18 Mont. 208, 44 Pac. 979, 33 L. R. A. 851, 56 Am. St. Rep. 579.

When it is said that a location may be sustained by the discovery of mineral deposits of such value as to at least

justify the exploration of the lode in the expectation of finding ore sufficiently valuable to work, it is a very different question from telling a jury that the geological fact of the continuity of a vein to a certain point may be determined by what a practical miner might do in looking for some hoped-for continuity. Golden v. Murphy (1909) 103 Pac. 394, 105 Pac. 99, 31 Nev. 395, 429. See U. S. v. Iron Silver Min. Co. (1888) 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 343; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 136, 30 L. R. A. 803, 52 Am. St. Rep. 665.

Any deposit of mineral matter, or indication of a vein or lode, found in a mineralized zone or belt within defined boundaries that a person is willing to spend his time and money to develop, in expectation of finding ore, may be the subject of a valid location, and when metallic vein matter appears at the surface a valid location of a ledge deep in the ground to which such vein matter leads may be made. Hayes v. Lavagnino (1898) 53 Pac. 1029, 17 Utah, 185, 196. See Burke v. McDonald (1892) 29 Pac. 98, 3 Idaho, 296; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309; Harrington v. Chambers (1881) 1 Pac. 362, 3 Utah, 94.

48. —— **Discovery Insufficient.**—Mere indications of mineral, however strong, are not sufficient to answer to requirements of the statute on the subject of discovery either as to lode or placer claims. Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 412, 36 L. Ed. 201; Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 323, 49 L. Ed. 770; Lange v. Robinson (1906) 148 Fed. 799, 803, 79 C. C. A. 1; Charlton v. Kelly (1907) 156 Fed. 433, 436, 84 C. C. A. 295, 13 Ann. Cas. 518; Cascaden v. Bartolis (1908) 162 Fed. 267, 268, 89 C. C. A. 247, 15 Ann. Cas. 625; Multnomah Min., etc., Co. v. U. S. (1914) 211 Fed. 100, 101, 128 C. C. A. 28; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 675; Olive Land, etc., Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 672; Charlton v. Kelly (1906) 2 Alaska, 532; Mutchmor v. McCarthy (1906) 87 Pac. 85, 149 Cal. 603, 612; Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 152. See Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; King v. Amy & Silversmith, etc., Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 227, 38 L. Ed. 419; Migeon v. Montana Central R. Co. (1896) 23 C. C. A. 156, 77 Fed. 249; Brownfield v. Bier (1895) 39 Pac. 461, 15 Mont. 403.

A belief in the existence of mineral not based on any discovery or tracing does not amount to a discovery and does not meet the requirements of this statute. Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 31 L. Ed. 466; Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 36 L. Ed. 214; Cascaden v. Bortolis (1906) 3 Alaska, 200, 209; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 152. See Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Brownfield v. Bier (1895) 39 Pac. 461, 15 Mont. 403; Casey v. Thieviege (1897) 48 Pac. 394, 19 Mont. 341, 61 Am. St. Rep. 511.

There must be something beyond a mere guess on the part of a miner to authorize him to make a location which will exclude others from the ground, such as the discovery of minerals therein or in such proximity as to justify a reasonable belief in their existence and to protect the locator while making the necessary excavations. Erhardt v. Boaro (1885) 113 U. S. 527, 536, 5 Sup. Ct. 560, 28 L. Ed. 1113; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Lange v. Robinson (1906) 148 Fed. 799, 802, 79 C. C. A. 1. See Behrends v. Goldsteen (1902) 1 Alaska, 518, 525; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 115.

Slight surface indications of mineral do not constitute a discovery, but the law requires something more than conjecture, hope, or even indications, as mere indications, however strong, are not sufficient to answer the requirements of the statute. Charlton v. Kelly (1907) 156 Fed. 433, 435, 84 C. C. A. 295, 13 Ann. Cas. 518; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 675; Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 98 Am. St. Rep. 63. See U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571; King v. Amy & Silversmith, etc., Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 38 L. Ed. 419; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 19.

Not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute. Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 404, 36 L. Ed. 201; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 152. See Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Cook v. Johnson (1908) 3 Alaska, 506, 536; Brownfield v. Bier (1895) 39 Pac. 461, 15 Mont. 403; Casey v. Thieviege (1897) 48 Pac. 394, 19 Mont. 341, 61 Am. St. Rep. 511.

This section provides that no location can be made until the discovery of a vein or lode, and no rights can be re-

quired under this statute by a location made before the discovery of a vein or lode within the limits of the claim, and the discovery of detached pieces of quartz or mere bunches of quartz not in place is not sufficient to answer the statutory requirement. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 675.

Gold in land does not characterize it as mineral unless it is in paying quantities. Johnson v. California Lustral Co. (1899) 59 Pac. 595, 127 Cal. 283, 286; Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207. See U. S. v. Reed (C. C. 1886) 28 Fed. 482.

A mining claim located "in the hope of finding some ore in it at some time" does not constitute a valid location where there has been no actual discovery of mineral. Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685, 689.

Proof of the presence of mineral on other and adjoining claims is not sufficient to establish any element of discovery. Cascaden v. Bortolis (1906) 3 Alaska, 200.

49. —— Discovery as question of fact and proof.—Whether a vein or lode has been discovered or exists within the limits of a particular location is always a question of fact, and it is likewise a question of fact as to the continuity of ore and mineral matter constituting the width and extent of any lode. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 807, 31 C. C. A. 223; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230; Lange v. Robinson (1906) 148 Fed. 799, 803, 79 C. C. A. 1; Cascaden v. Bortolis (1908) 162 Fed. 267, 271, 89 C. C. A. 247, 15 Ann. Cas. 625; Hanson v. Craig (C. C. A. 1909) 170 Fed. 62, 64; Ebner Gold Min. Co. v. Alaska-Juneau Min. Co. (C. C. A. 1914) 210 Fed. 599, 603; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 126; Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814; Ledoux v. Forester (C. C. 1899) 94 Fed. 600; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 414; Charlton v. Kelly (1905) 2 Alaska, 532; Overgaard v. Westerberg (1906) 3 Alaska, 168; Cook v. Johnson (1908) 3 Alaska, 506; Tuolumne Consol. Min. Co. v. Maier (1901) 66 Pac. 863, 134 Cal. 583, 585; Garibaldi v. Grillo (1912) 120 Pac. 425, 17 Cal. App. 540; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 484, 83 Am. St. Rep. 92; McMillen v. Ferrum Min. Co. (1902) 74 Pac. 461, 32 Colo. 38, 43, 105 Am. St. Rep. 64; Specie Payment Gold Min. Co. v. Kirk (1914) 139 Pac. 21, 56 Colo. 275; Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299, 307; Upton v. Larkin (1885) 6 Pac. 66, 5 Mont. 600, 604; Id. (1888) 7 Pac. 728, 7 Mont. 449, 457; Gemmell v. Swain (1903) 72 Pac. 662, 28 Mont. 331, 335, 98 Am. St. Rep. 570; Ferris v. McNally (1912) 121 Pac. 889, 45 Mont. 20, 22, 25; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 457; Columbia Cooper Min. Co. v. Dutchess Min., etc., Co. (1905) 79 Pac. 385, 13 Wyo. 244, 253. See Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 36 L. Ed. 201; Multnomah Min., etc., Co. v. U. S. (1914) 211 Fed. 100, 128 C. C. A. 28; Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 116; Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 150; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 19, 129 Am. St. Rep. 1093.

When the controversy over the right of possession to mineral land is between two mineral claimants the rule as to the sufficiency of a discovery is more liberal than when the controversy is between a mineral claimant and an agricultural claimant. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 323, 49 L. Ed. 770; Steele v. Tanana Mines R. Co. (1906) 148 Fed. 678, 680, 78 C. C. A. 412; Lange v. Robinson (1906) 148 Fed. 799, 803, 79 C. C. A. 1.

The burden of proving a prior discovery is on the party asserting it. Sands v. Cruikshank (1901) 87 N. W. 589, 15 S. D. 142; Dean v. Omaha-Wyoming Oil Co. (1913) 128 Pac. 881, 21 Wyo. 133.

In a controversy as to the priority of location of a placer mining claim depending on the sufficiency of a discovery and where the claimant shows that gold had been actually found within the limits of the claim, he is entitled to supplement such proof by showing the situation, character, value, and mineralogical condition of adjacent claims, and to show that his claim is in a gold bearing placer region, and he may prove by the opinions of experienced miners that the discovery made in connection with the conditions and location of adjacent claims is sufficient to justify him in developing the claim. Cascaden v. Bortolis (1908) 162 Fed. 267, 271, 89 C. C. A. 247, 15 Ann. Cas. 625.

In a controversy as to the validity of a location it is not necessary that an assignee or purchaser from the original locator should prove the physical fact of a discovery of minerals, but this may be inferred from the certificate of locations, the manifestations of workings done, the long tenure of the claim, the development of a vein on the claim by subsequent working, and from all the surrounding circumstances. Cheesman v. Hart (C. C. 1890) 42 Fed. 98, 102.

In any case it may be an open question whether a location includes lands valuable for minerals, or whether it is based upon a barren seam or fissure.

Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814. See Madison v. Octave Oil Co. (1908) 99 Pac. 176, 154 Cal. 768.

Proof of a record of a prior location, and the marking of it on the ground, will not defeat a subsequent location, in the absence of proof of a discovery by the prior locators. The record and the marking are not sufficient to authorize the court to presume a discovery. Smith v. Newell (C. C. 1898) 86 Fed. 56.

To sustain an adverse claim filed against an application for a patent on a mining claim on the ground of a prior conflicting location, there must be evidence reasonably tending to show discovery before the prior location was made. Ledoux v. Forester (C. C. 1899) 94 Fed. 600.

As between a prior and subsequent locator of the same ground, the courts will view the evidence tending to establish the senior locator's discovery in the most favorable light such evidence will reasonably justify. Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108.

50. —— Possession of claim pending discovery.—See, also, notes to § 4618, post.

A prospector on the public mineral domain may protect himself in his possession while he is searching for mineral, and such possession is good as a possessory title against all the world except the Government of the United States. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230; Crossman v. Pendery (C. C. 1881) 8 Fed. 693; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 123. See Johanson v. White (1908) 160 Fed. 901, 903, 88 C. C. A. 83; Garthe v. Hart (1887) 15 Pac. 93, 73 Cal. 541.

Under this section one locating a claim prior to the discovery of the lode can hold possession of the surface as against one possessing or claiming no better right. Field v. Grey (1881) 1 Ariz. 404, 25 Pac. 793; Patterson v. Tarbell (1894) 37 Pac. 76, 26 Or. 29, 37.

A miner may hold the place in which he is working against all others having no better right, but if he asserts title to a full claim of 1,500 feet in length and 300 feet in width he must prove a lode extending throughout the claim. Zollars v. Evans (C. C. 1880) 5 Fed. 172, 173.

Proof of work on a vein within a well-defined surface claim not exceeding 1,500 feet in length and 600 feet in width is sufficient to establish the right of possession without proof of any record of such claim. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 323.

51. —— Priority of discovery and effect thereof.—Priority of discovery is an essential fact in determining the right of possession to mining ground, as such discovery gives priority of right against naked location and possession. Johanson v. White (1908) 160 Fed. 901, 88 C. C. A. 83; Cook v. Klonos (1908) 164 Fed. 529, 536, 90 C. C. A. 403 (modified on rehearing [1909] 168 Fed. 700, 94 C. C. A. 144); Crossman v. Pendery (C. C. 1881) 8 Fed. 693. See Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Johanson v. White (1908) 160 Fed. 901, 88 C. C. A. 83; Horswell v. Ruiz (1885) 7 Pac. 197, 67 Cal. 111; Garthe v. Hart (1887) 15 Pac. 93, 73 Cal. 541; Gemmell v. Swain (1903) 72 Pac. 662, 28 Mont. 331, 98 Am. St. Rep. 570. See, also, Bevis v. Markland (C. C. 1904) 130 Fed. 226.

Where an original discovery of a vein upon which a mining location is based is included within the surface boundaries of a junior location which goes to patent without protest from the prior locator, but before patent a new discovery has been made on such prior location within the boundaries of the junior location as patented and within the surface boundaries of the prior location as originally located and development work is being prosecuted in good faith by such prior locator, his claim is valid and holds as to all ground not included in the patent of the junior locator, notwithstanding the loss of the original discovery. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 415; Silver City Gold, etc., Min. Co. v. Lowry (1899) 19 Utah, 334, 57 Pac. 11. See Lowry v. Silver City Gold, etc., Min. Co. (1900) 21 Sup. Ct. 104, 179 U. S. 196, 45 L. Ed. 151; Waskey v. Hammer (1909) 170 Fed. 31, 35, 95 C. C. A. 305.

Where a discovery was made within the original boundaries of a claim six or seven months before an attempt was made to extend the boundaries so as to include ground previously located and occupied by another locator, such discovery has relation to the original boundaries of the claim, and not the claim within the extended boundaries, so as to confer any rights in the overlap on which the other locator subsequently made the first discovery. Biglow v. Conradt (1908) 159 Fed. 868, 87 C. C. A. 48. See Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735.

Where locators of two overlapping association claims are sinking shafts at the same time the first to discover mineral has priority, though the location was staked after the other, if made openly and peaceably. Hanson v. Craig (1909) 170 Fed. 62, 95 C. C. A. 338 (reversing judgment on rehearing [1908] 161 Fed. 861, 89 C. C. A. 55); Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440.

Discovery fixes the date of location with respect to all parties who have

made the discoveries provided by law within the boundaries of overlapping claims. Hall v. McKinnon (1911) 193 Fed. 572, 577, 113 C. C. A. 440.

Where the locator of a mining claim permitted a third person to enter thereon and sink a shaft within the boundaries in which mineral in rock in place was discovered, and a location made without protest before the first locator made a discovery and location, such second locator has the priority of right. Crossman v. Pendery (C. C. 1881) 8 Fed. 693, 694. See Johanson v. White (1908) 160 Fed. 901, 903, 88 C. C. A. 83.

As between two locators, the boundaries of whose respective claims include common territory, priority of location confers the better title, provided a vein in place was discovered, and provided, also, that it extended to the ground in controversy. In such case the rights of the parties are not changed by the fact that the senior location was on the dip of the lode; the junior on the top or apex. Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725, judgment affirmed Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140.

The discovery of a vein of mineral on a claim with a portion of which another claim conflicts, before a relocation of such conflicting claim, constitutes the same a prior location to that of the conflicting claim. Fisher v. Seymour (1897) 49 Pac. 30, 23 Colo. 542.

Since a discovery shaft which bisected the west end line of a mining claim was sufficient to support a lode location, a subsequent location which overlapped the west end line, and included the discovery, would be void to the extent of the conflict. Tiggeman v. Mrzlak (Mont. 1909) 105 Pac. 77.

52. Location notice.—A notice of location posted upon mineral land before discovery of a vein or lode is an absolute nullity. Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 698; Gemmell v. Swain (1903) 72 Pac. 662, 28 Mont. 331, 336, 98 Am. St. Rep. 570. See Upton v. Larkin (1885) 6 Pac. 66, 5 Mont. 600.

A location notice must conform to the requirements of this section. Seidler v. Lafave (1889) 20 Pac. 789, 5 N. M. 44.

53. State regulations.—The location of a valid mining claim under the federal statute must be made in conformity with any valid State legislation that may exist in the particular State in which the mineral land is situated, as well as with any valid existing local rules and regulations of mining districts. Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 678; Ambergris Min. Co. v. Day (1906) 85 Pac. 109, 12 Idaho, 108, 123; Empire Copper Co. v. Henderson (1908) 99 Pac. 127, 15 Idaho, 635, 638; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 132; Ferris v. McNally (1912) 121 Pac. 889, 45 Mont. 20, 25. See Erhardt v. Boaro (1885) 113 U. S. 527, 533, 5 Sup. Ct. 560, 28 L. Ed. 1113; Iron Silver Min. Co. v. Elgin Min. Co. (1886) 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98; Parley's Park, etc., Min. Co. v. Kerr (1889) 130 U. S. 256, 9 Sup. Ct. 511, 32 L. Ed. 906; Kendall v. San Juan Min. Co. (1892) 144 U. S. 658, 664, 12 Sup. Ct. 779, 36 L. Ed. 583; Enterprise Min. Co. v. Rico-Aspen Min. Co. (1897) 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96; Butte City Water Co. v. Baker (1905) 196 U. S. 119, 25 Sup. Ct. 211, 49 L. Ed. 409; Creede & Cripple Creek Min. Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 S. Ct. 266, 196 U. S. 337, 346, 49 L. Ed. 501; Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; Northmore v. Simmons (1899) 97 Fed. 386, 38 C. C. A. 211; White v. Lee (1889) 21 Pac. 363, 78 Cal. 593, 12 Am. St. Rep. 115; Kern Oil Co. v. Crawford (1903) 76 Pac. 1111, 143 Cal. 298, 3 L. R. A. (N. S.) 993; Saxton v. Perry (1910) 107 P. 281, 47 Colo. 263, 273; Sisson v. Sommers (1899) 55 Pac. 829, 24 Nev. 379, 77 Am. St. Rep. 815; Copper Globe Min. Co. v. Allman (1901) 64 Pac. 1019, 23 Utah, 410.

This section makes no provision for a discovery shaft and this may be required or permitted by local statute. O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 251.

54. Rules and customs of miners.—By implication the statute confers upon the miners the right to limit the width of a lode claim to 25 feet on each side of the middle of the vein. Northmore v. Simmons (1899) 97 Fed. 386, 388, 38 C. C. A. 211; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 527; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666.

A location made in accordance with the local rules and customs of miners in force at the time is recognized and protected by the mineral laws of the United States subsequently enacted. Glacier Mountain, etc., Min. Co. v. Willis (1888) 8 Sup. Ct. 1217, 127 U. S. 471, 482, 32 L. Ed. 172.

The question as to what rules are in force is a fact to be determined by the commissioner of the general land office when the patent is issued. Parley's Park Silver Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 513, 130 U. S. 256, 32 L. Ed. 906.

A local mining regulation, adopted after the location of a claim, cannot limit the extent thereof. Table Mt. Tunnel Co. v. Stranahan (1866) 31 Cal. 387.

A mining custom, limiting placer claims to 80 rods in length, not being in conflict with any act of congress or local law, will be enforced. Rosenthal v. Ives (1887) 2 Idaho, 244, 12 Pac. 904.

§ 4616. (R. S. § 2321.) Proof of citizenship.

Proof of citizenship, under this chapter, may consist, in the case of an individual, of his own affidavit thereof; in the case of an association of persons unincorporated, of the affidavit of their authorized agent, made on his own knowledge, or upon information and belief; and in the case of a corporation organized under the laws of the United States, or of any State or Territory thereof, by the filing of a certified copy of their charter or certificate of incorporation.

Act May 10, 1872, c. 152, § 7, 17 Stat. 94.

The affidavit mentioned in this section may be made before the clerk of any court of record or notary public of any State or Territory, by Act April 26, 1882, c. 106, § 2, post, § 4617.

Notes of Decisions

Individual locator.—The affidavit of the locator, accompanying the recorded notice of location, as to his citizenship, is prima facie evidence of that fact. Hammer v. Garfield Mining & Milling Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 32 L. Ed. 964; Stolp v. Treasury Gold Min. Co. (1905) 80 Pac. 817, 38 Wash. 619. And see Dean v. Omaha-Wyoming Oil Co. (1913) 128 Pac. 881, 21 Wyo. 133.

Nothing to the contrary appearing, the locator will be presumed to be a citizen of the United States. Jantzon v. Arizona Copper Co. (1889) 20 Pac. 93, 3 Ariz. 6; Garfield M. & M. Co. v. Hammer (1886) 6 Mont. 53, 8 Pac. 153.

This section is referred to as part of the legislative scheme in Forbes v. Gracey (1876) 94 U. S. 762, 763, 24 L. Ed. 313; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

The land department must consider and pass on the qualifications of the applicant. Steel v. St. Louis Smelting & Refining Co. (1882) 1 Sup. Ct. 389, 392, 106 U. S. 447, 27 L. Ed. 226.

Objection that the locator is not a citizen cannot be urged for the first time on appeal. O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 422, 116 U. S. 418, 29 L. Ed. 669.

Proof of citizenship may consist of the affidavit of the locator. McKinley v. Wheeler (1889) 9 Sup. Ct. 638, 639, 130 U. S. 630, 32 L. Ed. 1048.

The affidavit of the locator is admissible in evidence to prove his citizenship. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 11 Fed. 125.

The statute contemplates an affidavit to some extent based on information and belief. Id.

The burden of proving citizenship is on the locator where his citizenship is expressly denied. Wood v. Aspen Mining & Smelting Co. (C. C. 1888) 36 Fed. 25.

Where the locator's title is of recent origin, and his citizenship is denied, the fact of his naturalization or of his declaration of intention to become a citizen must be proved by the record of some court of competent jurisdiction. Id.

Proof of birth within the United States is sufficient to establish the citizenship of a locator in the absence of a showing of subjection to a foreign power. Thompson v. Spray (1887) 72 Cal. 528, 14 Pac. 182.

The provision for proof of citizenship by affidavit is not exclusive of other modes of proof. Id.

The fact that one has been enlisted and honorably discharged is a strong circumstance to show naturalization, in the absence of direct proof of naturalization. Strickley v. Hill (1900) 62 Pac. 893, 22 Utah, 257, 83 Am. St. Rep. 786.

On a contest as to whether the locator was a citizen, secondary evidence was admissible to prove that he had been naturalized. Id.

Where contest is made to the locator's application for a patent, he must prove by competent evidence that he has made a declaration of intention to become a citizen. Id.

Citizenship may be proved like any other fact, and is a question for the court and jury to pass upon. Id.

Unincorporated association as locator.—In case of an association of persons unincorporated, the proof of citizenship may consist of an affidavit of an authorized agent made upon his own knowledge or upon information and belief. O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 422, 116 U. S. 418, 29 L. Ed. 669.

This section contemplates an affidavit on information and belief where the naturalization of a person other than the person making the affidavit is concerned, and the affidavit of an authorized agent of an unincorporated association may be on information and belief. North Noonday Mining Co. v. Orient Mining Co. (C. C. 1880) 11 Fed. 125, 126.

Corporation as locator.—A corporation organized and existing under the laws of the state, is to be deemed a citizen of the United States. U. S. v. North Western Express Stage & Transportation Co. (1897) 17 Sup. Ct. 206, 207, 164 U. S. 686, 41 L. Ed. 599 (referring to this section as part of the legislative scheme). North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 538.

A corporation, all of whose members are citizens of the United States, is

competent to locate a mining claim. McKinley v. Wheeler (1888) 130 U. S. 630, 9 Sup. Ct. 638, 32 L. Ed. 1048; Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105.

A certified copy of the articles of incorporation of a mining company is sufficient to establish the citizenship of the stockholders as the law presumes that stockholders are all citizens of the State of incorporation. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 463, 17 C. C. A. 190; Jackson v. White Cloud Gold Min. & Mill Co. (1906) 85 Pac. 639, 36 Colo. 122, 124.

The citizenship of stockholders in a corporation need not be proved, to establish its right to patent a claim, otherwise than by showing that the corporation is organized under the laws of a state. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11. See, also, Jackson v. White Cloud Gold Min. & Mill Co. (1906) 85 Pac. 639, 36 Colo. 122; Duncan v. Eagle Rock Gold Mining & Reduction Co. (1910) 111 Pac. 588, 48 Colo. 569, 139 Am. St. Rep. 220.

Where plaintiff in adverse proceedings alleges that it is a corporation organized under the laws of the state, and the answer admits the allegation, it is not necessary to prove the citizenship of the stockholders. Jackson v. White Cloud Gold Min. & Mill Co. (1906) 85 Pac. 639, 36 Colo. 122. See, also, Duncan v. Eagle Rock Gold Mining & Reduction Co. (Colo. 1910) 111 Pac. 588.

§ 4617. (Act April 26, 1882, c. 106, § 2.) Affidavit of citizenship, before whom made.

Applicants for mineral patents, if residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit required for proof of citizenship before the clerk of any court of record or before any notary public of any State or Territory. (22 Stat. 49.)

This section was part of an act to amend R. S. § 2326, in regard to mineral lands, and for other purposes.

Section 1 of the act is set forth post, § 4624.

§ 4618. (R. S. § 2322.) Locators' rights of possession and enjoyment.

The locators of all mining locations heretofore made or which shall hereafter be made, on any mineral vein, lode, or ledge, situated on the public domain, their heirs and assigns, where no adverse claim exists on the tenth day of May, eighteen hundred and seventy-two, so long as they comply with the laws of the United States, and with State, territorial, and local regulations not in conflict with the laws of the United States governing their possessory title, shall have the exclusive right of possession and enjoyment of all the surface included within the lines of their locations, and of all veins, lodes, and ledges throughout their entire depth, the top or apex of which lies inside of such surface-lines extended downward vertically, although such veins, lodes, or ledges may so far depart from a perpendicular in their course downward as to extend outside the vertical side-lines of such surface locations. But their right of possession to such outside parts of such veins or ledges shall be confined to such portions thereof as lie between vertical planes drawn downward as above described, through the end-lines of their locations, so continued in their own direction that such planes will intersect such exterior parts of such veins or ledges. And nothing in this section shall authorize the locator or possessor of a vein or lode which extends in its downward course beyond the vertical lines of his claim to enter upon the surface of a claim owned or possessed by another.

Act May 10, 1872, c. 152, § 3, 17 Stat. 91.

Notes of Decisions

I. Common-law rule of ownership
1. Application to mineral lands.

II. Mining locations or claims
2. Location as basis of title.
3. Location by agent.
4. Vein and lode synonymous.
5. What constitutes vein, lode, or ledge.
6. Evidence of existence of vein or lode.
7. Discovery essential.

III. Possessory rights
8. Construction of statute.
9. —— Protection of prior rights.
10. Object of location statute.
11. Effect of location as grant and bar to subsequent location.
12. Locations on existing claims.
13. —— Forcible or fraudulent entries.
14. —— Overlapping claims.
15. —— Relocation of claims.

III. Possessory rights—Cont'd

16. —— Invalidity of prior location or claim.
17. Ownership acquired by location.
18. Locator not required to purchase or obtain patent.
19. Extent and effect of surface ownership and possession.
20. Exclusive right to possession of surface.
21. Ownership of surface and veins.
22. Locator's possessory title and rights as against intruders.
23. Possessio pedis.
24. Mining location as property.
25. Mining location as real property.
26. Dower in mining claim.
27. Mode of sale or transfer of claims.
28. Taxation of mining claims.
29. Title acquired by possession under statute of limitations.
30. Rights of heirs and assigns.
31. Locations not subject to reservation or disposal by government.

IV. Ownership of veins

32. Application of section to veins.
33. Extent and limitations on ownership.
34. Presumptions as to ownership of veins.
35. Presumption of ownership overcome by proof.
36. Ownership of intersecting veins and right of way.

V. Extralateral rights

37. Nature and extent of right.
38. Construction of statute.
39. —— Purpose and effect of statute.
40. Possessory rights affected by grant.
41. Dip or downward course of vein as limit of rights.
42. Dip and downward course of vein defined.
43. Right to follow vein on strike.
44. Surface location determines rights.
45. Location on apex of vein essential.
46. Subsurface vein as basis of location.
47. Position of apex determines possession and ownership of veins or lodes.
48. Location lengthwise of vein essential.
49. Irregular or cross locations.
50. Veins crossing side line before reaching end line.
51. End lines of location—Establishment and direction.
52. —— End lines adjustable.
53. —— Vertical planes of end lines.
54. —— End lines of all veins within location.
55. —— Parallelism of end lines.
56. —— Side lines as end lines.
57. —— Presumptions as to lines after patent.
58. Identity and continuity of vein—Identity.
59. —— Continuity of vein essential.
60. —— Effect of want of identity and continuity.
61. Vein extending into placer claim.
62. Vein extending into agricultural lands.
63. Burden of proof in asserting extralateral rights.
64. Conflicting rights and priorities.
65. Priority of location as affecting right.
66. Junior locator's rights.
67. Location lines laid on existing claims.
68. Entry upon surface or ground of adjoining claims.

VI. Trespass

69. Presumptions and justification.

VII. Patent

70. Effect.

VIII. Rules and regulations of miners

71. Validity and effect.

IX. State regulations

72. Extent and validity.

X. Jurisdiction of courts

73. Federal questions.

I. COMMON-LAW RULE OF OWNERSHIP

1. Application to mineral lands.—The common-law rule that whoever owns the surface is entitled to all beneath does not apply to lode mining claims. Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 629; Bullion Min. Co. v. Croesus Gold, etc., Min. Co. (1866) 2 Nev. 168, 90 Am. Dec. 526; U. S. v. San Pedro & Canon del Agua Co. (1887) 17 P. 337, 4 N. M. (Gild.) 405. And see Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

Congress intended by this section to change the common-law rule which reserved in every grant from the crown all precious metal. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50.

This section gives the locator of a vein the right to follow it throughout its entire depth outside of the vertical side lines of the surface location contrary to the common-law rule. Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 851.

This section, conferring what is known as the apex right, is in derogation of the common law which granted to the owner of lands all veins within the vertical lines of his land to the center of the earth, and the presumption is that the owner of the lands has the right to veins and ore bodies within his vertical side lines. Collins v. Bailey (1912) 125 Pac. 543, 22 Colo. App. 149, 162.

The enlargement of the common-law possessory right given by this section is incident only to a claim located in the manner provided by law, and the exercise of such right operates to the abridgment of the possession of every tenement penetrated or intersected by a vein having its top or apex in a superior tenement. Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 122.

Where the apex of a vein was in defendant's location, but he had no right to follow it beyond the vertical plane of its south line, owing to such line being an end line, plaintiff, whose location was situated south of that of defendant, and who had not the apex of the vein within the exterior boundaries of his claim, was entitled, as against defendant, to the ores beneath plaintiff's surface, since, it being land that is granted under the statute, he was entitled to the ores beneath the surface by common-law right. Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac.

326, 25 Mont. 139, 53 L. R. A. 491, 87 Am. St. Rep. 386.

A patent for a mining claim grants the fee not to the surface and ledge only, but to the land containing the apex of the vein or lode, and the right to follow the vein upon its dip between the vertical planes of the parallel end lines is an expansion of the rights conferred by a common-law grant, and it is subject to the corresponding right of an adjoining locator to follow his vein in its course downward beneath the surface included in the first grant, and in these two respects only do the rights conferred by the statute differ from those held under the common law. Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 147, 53 L. R. A. 491, 87 Am. St. Rep. 386. See Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Boston & Montana Min. Co. v. Montana Ore Producing Co. (1903) 188 U. S. 632, 23 Sup. Ct. 434, 47 L. Ed. 626; Maloney v. King (1901) 64 Pac. 351, 25 Mont. 188, 192; State v. District Court, etc. (1901) 65 Pac. 1020, 25 Mont. 504, 519; State v. District Court, etc. (1903) 73 Pac. 230, 28 Mont. 528, 540; Maloney v. King (1904) 76 Pac. 4, 30 Mont. 158, 161.

II. MINING LOCATIONS OR CLAIMS

2. Location as basis of title.—See, also, notes to § 4615, ante.

There can be no right of possession to a mining claim which is not based on a valid location. Hamilton v. Huson (1898) 53 Pac. 101, 21 Mont. 9.

To obtain the exclusive possession of a mining claim, there must be a location completed in conformity with law. Street v. Delta Mining Co. (1910) 112 Pac. 701, 42 Mont. 371. And see Callahan v. James (Cal. 1902) 71 Pac. 104, reversed (1903) 74 Pac. 853, 141 Cal. 291.

Actual possession of mineral land without a location is valid only as against a mere intruder. Ferris v. McNally (Mont. 1912) 121 Pac. 889.

3. Location by agent.—See, also, notes to § 4614.

A location of a mining claim may be made by one person in the name of another. Moore v. Hamerstag (1895) 109 Cal. 122, 41 Pac. 805.

4. Vein and lode synonymous.—The words "vein," "lode," or "ledge," are used in the statute to designate a mineral deposit in rock in place, and they are supposed to be nearly synonymous in meaning. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 533, 29 L. Ed. 712; Id. (C. C. 1881) 8 Fed. 297, 301. See U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 680, 32 L. Ed. 571.

The words "vein," "lode," and "ledge" used in this section are regarded as synonymous. Synnott v. Shaughnessy (1885) 7 Pac. 82, 2 Idaho (Hasb.) 122.

5. What constitutes vein, lode, or ledge.—See, also, notes to § 4615, ante.

A lode or vein is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. A body of mineral or mineral-bearing rock in the general mass of the mountain, so far as it may continue unbroken and without interruption, may be regarded as a lode, whatever the boundaries may be. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 483, 116 U. S. 529, 531, 29 L. Ed. 712; Mammoth Min. Co. v. Grand Central Min. Co. (1909) 29 Sup. Ct. 413, 213 U. S. 72, 77, 53 L. Ed. 702; Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah. 490. And see Golden v. Murphy (1904) 75 Pac. 625, 27 Nev. 379 (rehearing denied [1904] 76 Pac. 29, 27 Nev. 379); Id. (1909) 103 Pac. 394, 31 Nev. 395 (rehearing denied [1909] 105 Pac. 99).

A vein or lode as used in this statute applies to any zone or belt of mineralized rock lying within boundaries clearly separating it from the neighboring rock. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 531, 29 L. Ed. 712; Mammoth Min. Co. v. Grand Central Min. Co. (1909) 29 S. Ct. 413, 213 U. S. 72, 77, 53 L. Ed. 702; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,-413.

If a vein or lode was formed originally between different strata or different kinds of rock, and by subsequent upheaval or depression the whole mass was broken into fragments and a new fissure formed on the face of the infracted rock, and a new or different position thus given the vein or lode, it gains by that circumstance a new end or terminal point, and it may be held by a proper location. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 670; Iron Silver Min. Co. v. Murphy (D. C. 1880) 3 Fed. 368, 373. See Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 942.

Where there are well-defined boundaries, very slight evidence of ore within such boundaries is sufficient to prove the existence of a lode. Such boundaries constitute a fissure, and if ore is found therein, though at considerable intervals, and in small quantities, it is called a lode or vein. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 536, 29 L. Ed. 712; Mammoth Min. Co. v. Grand Central Min. Co. (1909) 29 Sup. Ct. 413, 213 U. S. 72, 77, 53 L. Ed. 702.

A lode may, and often does, contain more than one vein. See U. S. v. Iron

Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 680, 32 L. Ed. 571.

The usual definition of a vein or lode is an aggregation of mineral matter containing ores in fissures of rocks. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 54, 27 C. C. A. 50.

Strata lying along the plane of contact between blue and brown limestone, if mineralized to the extent of showing valuable minerals, and distinguishable from other parts of the country rock by carrying ore, and by association with the plane of contact, constitute a lode, as far as the strata lying on or near the contact may show ore in appreciable quantities. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347.

If the entire mass of limestone in which a body of ore lies has been mineralized in the same way as the body of ore, and to some extent, and the body of ore is a casual concentration of unusual richness, the body of ore is not a lode. Id.

A body of mineral, or mineral bearing rock, in the general mass of country rock, so far as it may continue unbroken, and without interruption, is a lode, whatever the boundaries may be. Id.

An impregnation, to the extent to which it may be traced as a body of ore, is a vein, lode, or ledge, whether the ore is separated from the country rock by planes or strata of that rock visible to the eye, or is determinable in other ways, as by assay and analysis. Id.

Ore disseminated at intervals, or found in channels, chutes, cavities, pockets, or other irregular occurrences at intervals in quartzite, without ore connections between the same, is not a lode, ledge, or vein, within this section. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787.

Where mineral deposits are separated into three well-defined parts, traceable for a great distance in their length and depth, and having distinct foot and hanging walls, each part is a separate vein, though there are many ore-bearing cracks and seams running out from each vein, and sometimes extending from one to the other. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935.

Fissure veins and lodes exist and are continuous without having any filling at certain points or places of mineral matter. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 544.

A fissure vein or lode may have, in addition to the clear fissure filling of mineral, a considerable amount of decomposed wall rock, clay, etc. Id.

When the mineral-bearing ledge consists of a mineralized zone or belt without distinct walls, rather than a well-defined ledge, the practical mode of determining its legal width is by the lines beyond which ore is not found, or beyond which such indications of it do not exist as would encourage the miner to continue his explorations with expectation of compensation. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1903) 134 Fed. 268.

6. Evidence of existence of vein or lode.—A continuous body of mineral or mineral-bearing rock extending through loose and disjointed rocks is a lode as fully and certainly as those found in more regular formation; but if it is not continuous or if not found in a fissure or crevice which is itself continuous, it cannot then be called by that name, as it lacks the individuality and extension which are essential qualities of a vein or lode. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 537, 29 L. Ed. 481; Mammoth Min. Co. v. Grand Central Min. Co. (1909) 29 Sup. Ct. 413, 213 U. S. 72, 77, 53 L. Ed. 702. And see Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

Where the "contact" of a lode existing in one claim comes to the surface in an adjoining claim, the question whether the apex is in the latter is to be determined by finding whether there is something of value there; not for purposes of treatment, but something more than a mere trace, something positively verifiable as existing in the ore. In the case of silver, the value must be reckoned by ounces, one or more to the ton of ore. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,398.

Whether or not "the contact" is to be regarded as a lode or vein is to be determined by its value whatever may be the rule in regard to true fissures. Id.

Whenever it appears that a fissure has existed at any time within a continuous body of ore therein which may have been interrupted by some subsequent convulsion the character of the deposit remains the same as if no interruption had occurred; but if there is an intervening space in the "contact" so barren in its continuity as to show a separate and distinct body of ore which has always been such, then it could not be followed beyond the side lines of a location. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

With well-defined boundaries, very slight evidence of ore within such boundaries will prove the existence of a lode. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347. See, also, Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co. (C. C. 1902) 117 Fed. 509.

On the question of whether two veins unite in disputed ground it may be shown that their directions outside of, as well as within, the disputed ground, are such that, if continuous, they would meet. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

The working levels in a mine may not

be conclusive of the course of the vein or ledge where there are large "horses" in the mine and the upper and lower surfaces of the workings have been conformed to these "horses." Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 601.

To defeat a location upon a valuable part of a lode, in any of the elements which attach to a proper location, by reason of the connection of the lode with adjacent parts which are barren and worthless, the evidence should clearly establish the connection and unity of the several parts. Iron Silver Min. Co. v. Murphy (D. C. 1880) 3 Fed. 368.

7. Discovery essential.—See, also, notes to § 4615, ante.

Locations are made on the surface, and there must be a discovery of a vein or lode having its top or apex within the limits of the surface lines. Gwillim v. Donnellan (1885) 115 U. S. 45, 47, 50, 5 Sup. Ct. 1110, 29 L. Ed. 348.

The lode or vein must lie within the limits of the location which is made by reason of its discovery. Id.

The top or apex of a vein must be within the boundary of a claim to enable the locator to perfect his location, but any portion of the apex or course or strike of the vein found within the limits of the claim is a sufficient discovery to entitle the locator to obtain title. Larkin v. Upton (1892) 12 Sup. Ct. 614, 144 U. S. 19, 21-23, 36 L. Ed. 330.

Any portion of the apex on the course or strike of a vein found within the limits of a claim is a sufficient discovery. Id.

This section gives the exclusive right of possession only to one who has made a valid location, one of the essentials of which is a discovery of mineral, and prior to that time all mineral land is in law vacant and open to location, subject, however, to the rule that no prospector is authorized by any form of forcible, fraudulent, or surreptitious conduct to enter on or intrude upon the actual possession of another prospector. Hanson v. Craig (1909) 170 Fed. 62, 64, 95 C. C. A. 338, reversing judgment on rehearing (1908) 161 Fed. 861, 89 C. C. A. 55.

A miner who discovers a lead, lode, or ledge with a vein or crevice of quartz, with one well defined wall, containing a valuable mineral deposit, is entitled to locate, record, and hold the same upon compliance with the provisions of the law. Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 333.

It is sufficient if the lode or vein contain such indications of minerals that the locator is willing to spend his time and money in expectation of finding ore sufficiently valuable to work. Id.

This section preserves to the miner the full benefit of his discovery. Butte & Boston Min. Co. v. Société Anonyme des Mines de Lexington (1899) 58 Pac. 111, 23 Mont. 177, 193, 75 Am. St. Rep. 505.

III. POSSESSORY RIGHTS

8. Construction of statute.—The interpretation placed upon this section by the Government officers, who have to act thereunder and the practice thereunder for many years, is entitled to great weight in its construction by the courts. Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 629. See U. S. v. Moore (1877) 95 U. S. 760, 24 L. Ed. 588; Northern Pacific R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 623.

All property rights to any vein or lode found within the surface boundaries of a claim are derived from this section, but the section confers no right if such ground has been previously patented to another. Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co. (1904) 75 Pac. 1070, 32 Colo. 176, 186, 64 L. R. A. 925.

9. —— Protection of prior rights.—This section confirms prior locations under the act of 1866, as to all lodes which have their apexes within the surface lines of the mining claims. Mt. Diablo Mill & Mining Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886. See, also, East Central Eureka Min. Co. v. Central Eureka Min. Co. (1907) 27 Sup. Ct. 258, 204 U. S. 266, 51 L. Ed. 476 (affirming decree Central Eureka Min. Co. v. East Central Eureka Min. Co. [1905] 79 Pac. 834, 146 Cal. 147, 152, 9 L. R. A. [N. S.] 940); New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

Rights in mining property entitled to protection, as previously acquired under existing laws, exist where a lode mining location had been made at the time of the passage of this act, and the proceedings under the former law had then so far advanced as to exclude adverse claims. East Central Eureka Min. Co. v. Central Eureka Min. Co. (1907) 27 Sup. Ct. 258, 259, 204 U. S. 266, 51 L. Ed. 476, affirming decree Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 Pac. 834, 146 Cal. 147, 9 L. R. A. (N. S.) 940.

This section preserves to the locator or miner all rights acquired under the act of 1866, and confers upon him additional rights and grants to him the exclusive right of possession to the quantity specified of surface ground, and to all veins, lodes, and ledges the tops or apexes of which lie within the surface lines of his location, with the right to follow these veins or lodes to any depth, but confines him in this respect within the vertical planes drawn

downward through the end lines of his location, and this applies to claims previously located. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1878) Fed. Cas. No. 4,548. See Blake v. Butte Silver Min. Co. (1877) 2 Utah, 54, 62.

10. Object of location statute.—The object of location statutes is not only to fix the amount of surface territory allowed the locator for working purposes, but they are intended to protect him in the exclusive possession and enjoyment of his lode, and all other veins, lodes, or ledges, the tops or apexes of which are within his surface boundaries. Armstrong v. Lower (1882) 6 Colo. 393. See Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 121.

The possessory title and the exclusive right of possession and enjoyment of the surface of a mining claim and of all veins or lodes apexing therein, granted by this section, is not in anywise affected by the provisions of section 2326, R. S. Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 135, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

11. Effect of location as grant and bar to subsequent location.—A valid and subsisting location of mineral lands has the effect of a grant by the United States of the right of present and exclusive possession, and a prior location operates as a bar to any subsequent location. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 49, 29 L. Ed. 348; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 78, 43 L. Ed. 72; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 226, 48 L. Ed. 944; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392; Chilberg v. Consolidated Min. Co. (1907) 3 Alaska, 235, 238; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 225; McFeters v. Pierson (1890) 24 Pac. 1076, 15 Colo. 201, 204, 22 Am. St. Rep. 388; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474, 479; Lalande v. McDonald (1887) 13 Pac. 347, 2 Idaho (Hasb.) 307; Gropper v. King (1882) 4 Mont. 367, 1 Pac. 755; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 290; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 413; Butte City Smoke-House Lode Cases (1887) 6 Mont. 397, 12 Pac. 858; Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 132, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Wills v. Blain (1889) 4 N. M. (Johns.) 378, 383, 20 Pac. 798; Wills v. Blain (1889) 20 Pac. 798, 5 N. M. 238; Duffy v. Mix (1893) 33 Pac. 807, 24 Or. 265, 268; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 564; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234.

A valid location of a mining claim segregates the area from the public domain, and it becomes the property of the locator, and he may sell it, mortgage it, or part with the whole or any portion as he sees fit. Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 32 L. Ed. 168; Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 510, 38 L. Ed. 532; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 449, 41 L. Ed. 221; St. Louis Min., etc., Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 231, 48 L. Ed. 944; Gillis v. Downey (1898) 85 Fed. 483, 486, 29 C. C. A. 286; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321, 331; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 133, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 62; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 271.

A location to be effective must be good at the time when made, and when perfected it has the effect of a grant by the United States of the right of present and exclusive possession. Belk v. Meagher (1881) 104 U. S. 279, 285, 26 L. Ed. 735; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 99, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392; Montana Min. Co. v. St. Louis Min., etc, Co. (1892) 51 Pac. 824, 20 Mont. 394. 405; Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46, 64; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 132, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 564; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 273.

A valid location of a mining claim segregates or cuts out the ground located from the public lands, and it becomes the property of the locator, and the same ground cannot be located or possessed by another until the original locator either abandons the claim or forfeits it under the statute. St. Louis Min. Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 227, 48 L. Ed. 944; Reed v. Munn (1906) 148 Fed. 737, 757, 80 C. C. A. 215; Stenfjeld v. Espe (1909) 171 Fed. 825, 828, 96 C. C. A. 497; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392; Meydenbauer v. Stevens (D. C. 1897) 78

Fed. 787, 793. See Omar v. Soper (1888) 18 Pac. 443, 11 Colo. 380, 7 Am. St. Rep. 246; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 270.

A valid location appropriates the surface and the rights given by such location cannot be disturbed by the acts of third persons. The rights on or beneath the surface passing to the first locator cannot be diminished or affected by a subsequent location. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 79, 43 L. Ed. 72; Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 601, 66 C. C. A. 99; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474, 480.

A mining location upon the surface is not made with the view of getting benefits from the use of the surface but its purpose is to reach the vein which is hidden below and the location is made to measure rights beneath the surface. Each locator should be entitled to make his location so as to reach as much of the unappropriated and previously discovered vein as is possible. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 S. Ct. 895, 171 U. S. 55, 75, 43 L. Ed. 72; Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 543, 48 C. C. A. 665; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 602, 66 C. C. A. 99; Stenfjeld v. Espe (1909) 171 Fed. 825, 828, 96 C. C. A. 497.

A location can create no right superior to a previous valid location, though disputes may arise when locations overlap each other and include the same ground, and the right of possession must then be settled by the courts. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 74, 77, 43 L. Ed. 72.

Mere marking on the surface of a location does not necessarily make the location valid and subsisting, and the ground may be entirely free for another location. The second locator is not required to wait until by judicial proceedings it is established that the prior location is invalid or has failed before he may make a location. He is at liberty to make his location at once, and he may then, in the manner provided by statute, test the validity of the other as well as that of his own location. Id. See Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

The locator of a mining claim can acquire no rights under this section where the offer and permission of the United States under this section, as the foundation of his right, were wanting at the time he did the acts under which he attempts to assert the right. Swanson v. Sears (1912) 32 Sup. Ct. 455, 224 U. S. 180, 181, 56 L. Ed. 721.

The locator of a mining claim is given a higher estate than is given to the settler or locator under any other of the land laws in that he has the right to extract and convert to his own use all the ores and precious metals which may be found within his surface lines without purchasing or paying for the land. O'Connell v. Pinnacle Gold Mines Co. (1905) 140 Fed. 854, 855, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919.

The location of mineral ground gives to the locator before discovery, and while he complies with the statutes of the United States and of the State and with local rules and regulations of miners, the valuable right of possession against all intruders to all the surface within the lines of his location, and during such time the ground so segregated is not open to location by another, and this right he can convey to another. Rooney v. Barnette (1912) 200 Fed. 700, 710, 119 C. C. A. 116. See Swanson v. Sears (1912) 32 Sup. Ct. 455, 224 U. S. 180, 56 L. Ed. 721; Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 450, 98 Am. St. Rep. 63; Swanson v. Ketler (1910) 105 Pac. 1059, 17 Idaho, 321.

This section is a congressional grant of portions of the public lands, including veins and lodes, containing valuable mineral deposits in the same sense that other acts of Congress are grants of portions of the public domain to settlers who establish homes thereon and cultivate and improve their claims, as a grant in each case is conditional, and no title passes from the Government until the conditions are performed. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 107, 110.

The words of a grant under this section are comprehensive and technical, and are the words habitually used in conveyancing to convey to the grantee immediately all the rights intended to be conveyed. Where the term "heirs" is used in such a grant it is construed as a limitation of the estate granted and not as a word of purchase, and the locator would take to himself the entire estate granted. This is the effect of a grant in general terms to a locator, his heirs, and assigns. Id.

In a lode location the land located is segregated from the public mineral domain, and the grant confers upon the locator the exclusive right of possession and enjoyment of the surface and any lode having its top or apex within his surface boundaries. Mount Rosa Min., etc., Co. v. Palmer (1899) 56 Pac. 176, 26 Colo. 56, 59, 50 L. R. A. 289, 77 Am. St. Rep. 245.

Ownership of a mine is proved by location and possession. Donahue v.

Johnson (1894) 9 Wash. 187, 37 Pac. 322.

12. Locations on existing claims.—Land in the possession of one who has made a valid discovery and location is not subject to location by another until after abandonment or forfeiture. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 51, 29 L. Ed. 348; Swanson v. Sears (1912) 32 Sup. Ct. 455, 224 U. S. 180, 56 L. Ed. 721; Erwin v. Perego (1899) 93 Fed. 608, 612, 35 C. C. A. 482; Crown Point Min. Co. v. Buck (1899) 97 Fed. 462, 465, 38 C. C. A. 278; Thallmann v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317 (affirming decree [C. C. 1900] 102 Fed. 935); Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299 (writ of certiorari denied [1906] 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622); Biglow v. Conradt (1908) 159 Fed. 868, 87 C. C. A. 48; Rooney v. Barnette (1912) 200 Fed. 700, 708, 119 C. C. A. 116; Faxon v. Barnard (C. C. 1880) 4 Fed. 702; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Bevis v. Markland (C. C. 1904) 130 Fed. 226; Porter v. Tonopah North Star Tunnel & Development Co. (C. C. 1904) 133 Fed. 756 (decree affirmed [1906] 146 Fed. 385, 76 C. C. A. 657, and writ of certiorari denied [1907] 28 Sup. Ct. 254, 207 U. S. 586, 52 L. Ed. 352); Willitt v. Baker (C. C. 1904) 133 Fed. 937, 947; Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748, 749; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Price v. McIntosh (1901) 1 Alaska, 286; Russell v. Dufresne (1902) 1 Alaska, 486; Bulette v. Dodge (1905) 2 Alaska, 427; Charlton v. Kelly (1906) 2 Alaska, 532; Montague v. Labay (1905) 2 Alaska, 575, 576; Biglow v. Conradt (1906) 3 Alaska, 134; Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska, 496; Jordan v. Duke (1904) 36 Pac. 896, 4 Ariz. 278; Shattuck v. Costello (1902) 68 Pac. 529, 8 Ariz. 22; Molina v. Luce (1904) 76 Pac. 602, 9 Ariz. 29; Neal v. Kayser (1909) 100 Pac. 439, 12 Ariz. 118; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 539, 91 Am. St. Rep. 87; Garthe v. Hart (1887) 73 Cal. 541, 15 Pac. 93; Souter v. Maguire (1889) 78 Cal. 543, 21 Pac. 183; Tuolumne Consol. Min. Co. v. Maier (1901) 66 Pac. 863, 134 Cal. 583, 585; Anderson v. Caughey (1906) 84 Pac. 223, 3 Cal. App. 22; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440, 444; Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371; Michael v. Mills (1896) 45 Pac. 429, 22 Colo. 439; Niles v. Kennan (1900) 62 Pac. 360, 27 Colo. 502; Kirk v. Meldrum (1901) 65 Pac. 633, 28 Colo. 453; Conn v. Oberto (1904) 76 Pac. 369, 32 Colo. 313; Moffatt v. Blue River Gold Excavating Co. (1905) 80 Pac. 139, 33 Colo. 142; Sullivan v. Sharp (1905) 80 Pac. 1054, 33 Colo. 346, 348; Sierra Blanca Mining & Reduction Co. v. Winchell (1905) 83 Pac. 628, 35 Colo. 13; Hoban v. Boyer (1906) 85 Pac. 837, 37 Colo. 185; Moyle v. Bullene (1896) 44 Pac. 69, 7 Colo. App. 308; Peoria & C. Mill. & Min. Co. v. Turner (1905) 79 P. 915, 20 Colo. App. 474, 479; Lockhart v. Rollins (1889) 2 Idaho, 503, 21 Pac. 413; Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321; Flynn Group Mining Co. v. Murphy (1910) 109 Pac. 851, 18 Idaho, 266, 138 Am. St. Rep. 201; Batterton v. Douglas Min. Co. (1911) 120 Pac. 827, 20 Idaho, 760, 765, 38 L. R. A. (N. S.) 1121; Belk v. Meagher (1878) 3 Mont. 65; Renshaw v. Switzer (1887) 6 Mont. 464, 13 Pac. 127; Street v. Delta Mining Co. (1910) 112 Pac. 701, 42 Mont. 371; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129 Pac. 308; Lockhart v. Leeds (1900) 63 Pac. 48, 10 N. M. 568, 597; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 128; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791; Strickland v. Commercial Mining Co. (1909) 104 Pac. 965, 55 Or. 48; Jackson v. Prior Hill Min. Co. (1905) 104 N. W. 207, 19 S. D. 453, 457; Argentine Min. Co. v. Benedict (1898) 55 Pac. 559, 18 Utah, 183; Reynolds v. Pascoe (1901) 66 Pac. 1064, 24 Utah, 219; Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155; Slothower v. Hunter (Wyo. 1906) 88 Pac. 36; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234.

A location of a mining claim cannot be made by a discovery shaft upon another claim which has been previously located and which is a valid location. Little Pittsburgh Consol. Min. Co. v. Amie Min. Co. (C. C. 1883) 17 Fed. 57, 59; Behrends v. Goldsteen (1902) 1 Alaska, 518, 525. See Armstrong v. Lower (1882) 6 Colo. 393; Moyle v. Bullene (1896) 44 Pac. 69, 7 Colo. App. 308; Upton v. Larkin (1885) 6 Pac. 66, 5 Mont. 600; Golden Terra Min. Co. v. Smith (Mahler) (1881) 11 N. W. 98, 2 Dak. 377.

One person cannot locate ground for a mining claim of which another is in actual possession under claim or color of right. Eilers v. Boatman (1884) 111 U. S. 356, 357, 4 Sup. Ct. 432, 28 L. Ed. 454; McIntosh v. Price (1903) 121 Fed. 716, 58 C. C. A. 136; Price v. McIntosh (1901) 1 Alaska, 286; Bulette v. Dodge (1905) 2 Alaska, 427; McFarland v. Alaska Perseverance Min. Co. (1907) 3 Alaska, 308.

As a proceeding to locate a mining claim is one in which the United States is not directly an actual party, but is

done by the locator alone, so that he may take what the United States has by statute offered to give, it is clear that there can be nothing to take until there is an offer to give. Belk v. Meagher (1881) 104 U. S. 279, 285, 26 L. Ed. 735; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

The effect of a valid location is to segregate from the public lands the ground located, and the prior location gives the prior and better right. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Cook v. Johnson (1908) 3 Alaska, 506. See, also, Charlton v. Kelly (1906) 2 Alaska, 532.

A party can not locate a valid claim to a lode already located and legally possessed by others. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 615; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 57.

A location void at the time it is made because made on a claim valid and subsisting continues and remains void and is not cured or made effectual by subsequent discovery. Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 99, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

A change or extension of boundaries of a placer claim to obtain possession of adjoining grounds located in good faith by another is invalid. Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440.

However regular in form a junior location may be it is of no effect as against the rights conferred upon a prior locator so long as the prior location is subsisting. Porter v. Tonopah North Star Tunnel, etc., Co. (C. C. 1904) 133 Fed. 756, 758.

Possession and improvement give no value to a mining claim, but raise a prima facie presumption that the possession is rightful, and prevent the land being subject to original location as wild and unimproved land. Ware v. White (1907) 108 S. W. 831, 81 Ark. 220.

13. —— Forcible or fraudulent entries.—A mining location, to be valid, must be good when made, and a right cannot be initiated by a trespass. Clipper Min. Co. v. Eli Min. & Land Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 231, 48 L. Ed. 944; Swanson v. Sears (1912) 32 Sup. Ct. 455, 456, 224 U. S. 180, 56 L. Ed. 721; Fee v. Durham (1903) 121 Fed. 468, 57 C. C. A. 584 (dissenting opinion); Jones v. Wild Goose Mining & Trading Co. (1910) 177 Fed. 95, 100 C. C. A. 349, 29 L. R. A. (N. S.) 392; Cowell v. Lammers (C. C. 1884) 21 Fed. 200; Duffield v. San Francisco Chemical Co. (D. C. 1912) 198 Fed. 942 (decree reversed [C. C. A. 1913] 205 Fed. 480); Bulette v. Dodge (1905) 2 Alaska, 427; Cook v. Johnson (1908) 3 Alaska, 506; Gobert v. Butterfield (Cal. App. 1913) 136 Pac. 516; Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371; Weese v. Barker (1883) 7 Colo. 178, 2 Pac. 919; Traphaagen v. Kirk (1904) 77 Pac. 58, 30 Mont. 562; Lockhart v. Wills (1897) 50 Pac. 318, 9 N. M. 263; Same v. Leeds (1900) 63 Pac. 48, 10 N. M. 568, 597; Phillips v. Brill (Wyo. 1908) 95 Pac. 856; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234. And see Oberto v. Smith (1906) 86 Pac. 86, 37 Colo. 21.

No right can be initiated upon government lands which are in the actual possession of another by a forcible, fraudulent, or clandestine entry thereon. Mower v. Fletcher (1886) 5 Sup. Ct. 799, 116 U. S. 380, 385, 29 L. Ed. 117; Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 317, 40 L. Ed. 436; Thallmann v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317 (affirming decree [C. C. 1900] 102 Fed. 935); Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. A. 1901) 112 Fed. 4, 17; Cowell v. Lammers (C. C. 1884) 21 Fed. 200, 202; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 674, 680; Ritter v. Lynch (C. C. 1903) 123 Fed. 930; McBrown v. Morris (1881) 59 Cal. 64, 72; Goodwin v. McCabe (1888) 17 Pac. 705, 75 Cal. 584, 588; Rourke v. McNally (1893) 33 Pac. 62, 98 Cal. 291; Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439; McLemore v. Express Oil Co. (1910) 112 Pac. 59, 158 Cal. 559, 562, 139 Am. St. Rep. 147; Little Sespe Consol. Oil Co. v. Bacigalupi (1914) 139 Pac. 802, 167 Cal. 381; Nickals v. Winn (1882) 30 Pac. 435, 17 Nev. 188, 193; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 134, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694. See Big Three, etc., Co. v. Hamilton (1910) 107 Pac. 301, 157 Cal. 130, 143, 137 Am. St. Rep. 118.

Where there is no valid existing location upon mineral lands of the United States any competent locator may enter even if it is in the actual possession of another, provided he can do so peaceably and in good faith, in order to initiate a location for himself; but no such right upon any such land, whether mineral or agricultural, which is in the actual possession of another, can be initiated by a forcible, fraudulent, surreptitious, or clandestine entry thereon. Atherton v. Fowler (1877) 96 U. S. 513, 24 L. Ed. 732; Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 680; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 46; Phillips v. Smith (1908) 95 Pac. 91, 11 Ariz. 309, 314; Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 446, 98 Am. St. Rep. 63; McLemore v. Express Oil Co. (1910) 112 Pac. 59, 158 Cal. 559, 562, 139 Am. St. Rep. 147; Nash v. Mc-

Namara (1908) 93 Pac. 405, 30 Nev. 114, 127, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Whiting v. Straup (1908) 95 Pac. 849, 17 Wyo. 1, 23, 129 Am. St. Rep. 1093. See McGuire v. Brown (1895) 39 Pac. 1060, 106 Cal. 660, 670, 30 L. R. A. 384; Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439.

A forcible, fraudulent, or clandestine entry for the purpose of laying or establishing the lines of a junior location upon a senior location will not confer any extralateral rights whatever. Hosmer v. Wallace (1878) 97 U. S. 575, 579, 24 L. Ed. 1130; Mower v. Fletcher (1886) 6 Sup. Ct. 409, 116 U. S. 380, 29 L. Ed. 593; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 419, 52 C. C. A. 219; McBrown v. Morris (1881) 59 Cal. 64, 72; Nickals v. Winn (1882) 30 Pac. 435, 17 Nev. 188. See Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 604, 66 C. C. A. 99.

A valid claim to mineral lands or to a mining claim on unappropriated public lands can not be instituted while it is in the possession of another who has the right to such possession under an earlier valid location. Thallmann v. Thomas (1901) 111 Fed. 277, 278, 49 C. C. A. 317; San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 834, 120 C. C. A. 160; Seymour v. Fisher (1891) 16 Colo. 188, 27 Pac. 240; Risch v. Wiseman (1900) 36 Or. 484, 59 Pac. 1111, 78 Am. St. Rep. 783. See Heine v. Roth (1905) 2 Alaska, 416, 424.

A tortious entry is unavailing for the purpose of initiating a valid location of a mining claim. Belk v. Meagher (1881) 104 U. S. 279, 285, 26 L. Ed. 735; Kendall v. San Juan Gold Min. Co. (1886) 12 Pac. 198, 9 Colo. 349, 358. See U. S. v. Carpenter (1884) 111 U. S. 347, 4 Sup. Ct. 435, 28 L. Ed. 451.

A valid locator cannot be deprived of his inchoate right by the tortious acts of others, and intruders and trespassers cannot initiate rights to defeat those of a prior locator. Erhardt v. Boaro (1885) 113 U. S. 527, 534, 5 Sup. Ct. 560, 28 L. Ed. 1113. See Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 142, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Lockhart v. Wills (1898) 54 Pac. 336, 9 N. M. 344, 361; Garvey v. Elder (1906) 109 N. W. 508, 21 S. D. 77, 79, 130 Am. St. Rep. 704.

A valid location of a mining claim cannot be located upon a senior claim by forcible or fraudulent entry thereon, though such senior locator has no right either to the possession or title. Thallmann v. Thomas (1901) 111 Fed. 277, 279, 49 C. C. A. 317.

A person who has made peaceable entry upon a placer mining claim not exceeding 20 acres in an effort to discover mineral thereon will be protected from intrusion and trespass for a reasonable length of time and so long as he continues his search for minerals. Redden v. Harlan (1905) 2 Alaska, 402, 405. See Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Crossman v. Pendery (C. C. 1881) 8 Fed. 693; Field v. Grey (1881) 25 Pac. 793, 1 Ariz. 404.

14. —— **Overlapping claims.**—While a locator of a mining claim is in possession it is not competent for others upon a discovery made upon adjoining ground to project the location over the first occupied premises. Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439; Phillips v. Brill (1908) 95 Pac. 856, 17 Wyo. 26, 39.

The fact that a mining location included an original discovery shaft of another claim would not destroy its validity where long prior to such location the owner of the senior location had located a new shaft and developed its mine in that shaft. Lowry v. Silver City Gold, etc., Min. Co. (1900) 21 Sup. Ct. 104, 179 U. S. 196, 45 L. Ed. 151. See Silver City Gold, etc., Min. Co. v. Lowry (1899) 57 Pac. 11, 19 Utah, 334.

Where two locators are in possession of overlapping claims before discovery, it becomes a race of diligence between them to discover mineral, and the one first making such discovery obtains the prior right, but such discovery does not relate back, but any prior or pretended location is made valid by the discovery and takes effect as a valid mining location from that date, and gives him the full right in the claim to the exclusion of the other as to any overlapping ground occasioned by the mere prior surface marking. Johanson v. White (1908) 160 Fed. 901, 903, 88 C. C. A. 83. See Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Crossman v. Pendery (C. C. 1881) 8 Fed. 693; Horswell v. Ruiz (1885) 7 Pac. 197, 67 Cal. 111; Gemmell v. Swain (1903) 72 Pac. 662, 28 Mont. 331, 98 Am. St. Rep. 570.

The location or extension of a mining claim upon ground within the marked boundaries of another valid and subsisting location is absolutely void for the purpose of founding a contradictory right, and it is immaterial that the overlapping locator was the first to make a discovery either within or without the overlapping area. Becker v. Long (1912) 196 Fed. 721, 117 C. C. A. 296.

15. —— **Relocation of claims.**—See, also, notes to § 4620, post.

A relocator of a mining claim during

the existence of a valid location can make no such location as prevents the land being in law vacant, and others have the right to enter for the purpose of taking it up, if it can be done peaceably and without force. Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735; Malone v. Jackson (1905) 137 Fed. 878, 881, 70 C. C. A. 216; Patchen v. Keeley (1887) 14 Pac. 347, 19 Nev. 404, 410; Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

A relocation of lands actually covered by a valid location at the time is void not only as against the prior locator but as against all the world. Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 98, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

A relocation of a mining claim by a third person can not be made after the original entry thereof in the land office, and so long as such entry stands the relocator acquires no rights under such location. Neilson v. Champagne, etc., Co. (C. C. 1901) 111 Fed. 655, 657. See Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 12 Sup. Ct. 877, 145 U. S. 428, 36 L. Ed. 762; Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119; Neilson v. Champagne Min. & Mill. Co. (1902) 119 Fed. 123, 55 C. C. A. 576.

Mining claims are not open to relocation until the rights of former locators have been abandoned, forfeited, or otherwise come to an end, and however regular in form a junior location may be, it is of no effect as against the rights conferred upon a prior locator so long as such prior location is subsisting. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 615. See Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 57.

Where locators attempted to avoid the effect of a cancellation of a part of their claim, and, failing, abandoned their application for a patent, and elected to rely on their grant under their location, and complied with the law as to annual labor, for several years, such conduct negatived any intention to abandon their claim, subjecting it to relocation. Peoria & C. Mill. & Min. Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474.

16. —— Invalidity of prior location or claim.—Mere possession of a claim not based upon a valid location will not avail to prevent a valid location. The right to the possession comes only from location. Horswell v. Ruiz (1885) 67 Cal. 111, 7 Pac. 197; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550; Noyes v. Black (1883) 2 Pac. 769, 4 Mont. 527. And see Dwinnell v. Dyer (1904) 78 Pac. 247, 145 Cal. 12, 7 L. R. A. (N. S.) 763; Walsh v. Henry (Colo. 1907) 88 Pac. 449.

A person may make an original location of a mining claim upon land marked and occupied under an attempted prior location where such prior location is void by reason of failure to comply with the law as to location notice or recording the same, as such land, if mineral, is unappropriated public land subject to location notwithstanding the prior proceedings. Zerres v. Vanina (1907) 150 Fed. 564, 565, 80 C. C. A. 366; Cook v. Johnson (1908) 3 Alaska, 506, 527. See Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

A prospector has no right to enter upon the surface of a valid placer claim for the purpose of making a lode location; but if an attempted placer location is void because the mineral attempted to be located was in veins or lodes and not subject to placer location, then a prospector may, upon peaceable entry, make a valid location of the same mineral as a lode claim on the theory that the attempted placer location being void the ground was unappropriated mineral land within the meaning of the law and subject to lode location. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 835, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 486, 123 C. C. A. 548. See Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Thallmann v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673; Duffield v. San Francisco Chemical Co. (D. C. 1912) 198 Fed. 942 (overruled).

Every competent locator has the right to initiate a lawful claim to unappropriated public land by a peaceable adverse entry and location thereof while it is in the possession of those who have no superior right to acquire the title or to retain the possession. Thallmann v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317, affirming decree (C. C. 1900) 102 Fed. 935.

A second locator cannot enter within the boundaries of a placer claim as staked by a prior locator, and make a valid location of ground of which the first locator is in actual possession, and which he is engaged in working, on the ground that the first claim as staked exceeded the width prescribed by the local rules and regulations. McIntosh v. Price (1903) 121 Fed. 716, 58 C. C. A. 136.

While a valid claim to unappropriated mining ground cannot be initiated while it is in the rightful possession of another under an earlier lawful location, nor by a forcible or fraudulent entry, yet a competent locator may initiate a lawful claim to unappropriated ground by a peaceable adverse entry while the land is in the possession of one having no superior right

to it. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160.

A lode claim peaceably located within the boundaries of a void placer claim which was at the time actually unoccupied held valid. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548, reversing decree (D. C. 1912) 198 Fed. 942.

Since the grant of the exclusive right to possession of the ground included within the lines of a location is a present grant, taking effect from the date of the location, a locator, having established his side lines in good faith, is protected against subsequent locators on the land included within the lines as originally located, though it may be subsequently determined by reason of an inaccuracy in the location of the vein or lode when the claim was located that the side lines at the end were more than 300 feet distant from the center thereof. Harper v. Hill (Cal. 1911) 113 Pac. 162.

17. Ownership acquired by location. —The ownership and possession of a vein at the surface carries with it the ownership and possession of all that pertains to the location, as the mining right under the statute is an underground one and is secured by a single location the title to which may be conveyed by one patent. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 194 U. S. 235, 48 L. Ed. 953; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1903) 121 Fed. 973, 58 C. C. A. 311; Last Chance Min. Co. v. Same (1904) 131 Fed. 579, 583, 66 C. C. A. 299; Work Min. & Mill. Co. v. Doctor Jack Pot Min. Co. (1912) 194 Fed. 620, 628, 114 C. C. A. 392.

The locator of a mining claim under existing mining laws is not a trespasser, but is, in effect, as to the right of possession and to the appropriation of the minerals, the assignee of the United States so long as he complies with the conditions of the statute; but he is not required to take any steps to purchase the land or to obtain a patent therefor. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; U. S. v. Nelson (D. C. 1878) Fed. Cas. No. 15,864; Shafer v. Constans (1879) 3 Mont. 369, 371.

A possession or possessory right under a claim established according to law is fully recognized according to acts of Congress. Chambers v. Harrington (1884) 111 U. S. 350, 353, 4 Sup. Ct. 428, 28 L. Ed. 452.

The rights of a locator under this section are superior to any right granted by the following sections. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 501, 45 L. Ed. 1200.

The possession of the ore body at the surface carries with it the possession of all that belongs to the location, as the mining right is an integral one secured by a single location and the title thereto is conveyed by one patent. Empire State, etc., Co. v. Bunker Hill, etc., Co. (1903) 121 Fed. 973, 977, 58 C. C. A. 311. See Last Chance Min. Co. v. Same (1904) 131 Fed. 579, 583, 66 C. C. A. 299; Empire State, etc., Co. v. Same (1904) 131 Fed. 591, 66 C. C. A. 99.

The right given by the location of a lode mining claim in that portion of the vein lying within its surface boundaries and that portion lying beyond them in which the statute gives the owner extralateral rights is integral, and no adverse right can be acquired by the locator of another claim in respect to the latter portion that could not in respect to the former. Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299, writ of certiorari denied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622. See, also, Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1903) 121 Fed. 973, 58 C. C. A. 311.

While the United States under this section retains the naked legal title in the land, it has in fact parted with all that is valuable in the mines. Forbes v. Gracey (C. C. 1877) Fed. Cas. No. 4,924.

There is a presumption of ownership in favor of every locator as to the territory covered by his location. Leadville Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158. And see Southern California Ry. Co. v. O'Donnell (1906) 85 Pac. 932, 3 Cal. App. 382.

The doctrine that the owner of the surface owns all beneath until it is shown to belong to another applies in mining claims only when there is doubt as to what apex an underground body of ore may belong. Bunker Hill, etc. Co. v. Empire State, etc., Co. (C. C. 1901) 106 Fed. 471, 474.

A locator who has done nothing more than locate a mining claim upon the public domain has a qualified property right only, which may be abandoned at any time or forfeited, and in such case the paramount ownership is in the government; and upon abandonment or on his failure to comply with the conditions upon which his continued right of possession depends, his entire estate reverts to the government, as it has retained the title with a valuable residuary and reversionary interest, and this interest it has the right to protect, and as against this interest and title of the government this section grants to the locator the exclusive right of possession and enjoyment of the surface of the location. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 681.

The right of a prospector of mineral land under the provisions of the statute is complete when he has discovered

mineral and made a location in accordance with regulations prescribed by law and according to the local customs or rules of miners. Miller v. Hamley (1903) 74 Pac. 980, 31 Colo. 495, 501.

The property rights conferred by a lode location are both intralimital and extralateral, the first embracing all within the boundaries of the claim, and the second, while depending for existence for something within such boundaries, may, under certain conditions, extend beyond such boundaries. Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co. (1904) 75 Pac. 1070, 32 Colo. 176, 185, 64 L. R. R. 925.

This section standing alone might restrict the rights of a locator of a mining claim to the use and enjoyment of the surface only for the purpose of following the vein upon its strike and dip under the prescribed limitations as to adjoining lands; but read in connection with other sections it is the "lands" in which mineral deposits are found which are open to occupation and purchase and for which patent may be obtained, and it is by virtue of the title secured to such land that the purchaser obtains any right whatever with reference to mineral deposits therein, and upon a valid location of a mining claim of a different portion of land is founded the right of possession. Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 146, 53 L. R. A. 491, 87 Am. St. Rep. 386.

18. Locator not required to purchase or obtain patent.—Locating upon the land and performing the required annual service gives the locator the right of possession without any written instrument. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Poncia v. Eagle (1915) 152 Pac. 208, 28 Idaho, 60.

The validity of a placer mining location is not affected by the lapse of many years since its original location without the issue of a patent therefor. Clipper Min. Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 48 L. Ed. 944, affirming judgment (1902) 68 Pac. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89.

The right given to possess, explore, and extract minerals from a located mining claim is not dependent upon an application to purchase the property. Black v. Elkhorn Min. Co. (1892) 52 Fed. 859, 860, 3 C. C. A. 312.

The locator need not take any steps to purchase unless he thinks proper. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610.

If a locator applies for a patent and is met with obstacles not anticipated he may relinquish his attempt to secure such patent and hold his claim by right of possession. Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 482, 83 Am. St. Rep. 92.

A locator, by applying for and obtaining patent for only part of the location, including the discovery shaft, does not thereby abandon the portion not included in the patent; but, continuing to retain the possession thereof and to perform the requisite annual labor thereon, his right of possession thereof remains as before. Miller v. Hamley (1903) 74 Pac. 980, 31 Colo. 495, 501.

The right of possession given by this section is as complete as if the locator had a government patent, provided he continues to put each year the required amount of labor or improvement thereon; and in lieu of this he may apply for a patent, and having complied with the conditions he receives a title and is thus absolved from doing further work on the claim. Id.

The cancellation of a mineral application and entry for a patent does not operate to restore the land to the public domain and render it subject to relocation, but merely terminates the patent proceedings. Peoria & C. Mill. & Min. Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474.

19. Extent and effect of surface ownership and possession.—A valid location of a mining claim entitles the locator to the exclusive right of possession and enjoyment of all the surface ground included within the lines of his location, and this right does not mean the right to use it for mining purposes only, but means an absolute sale when the terms and conditions are complied with. Tyee Consol. Min. Co. v. Langstedt (1902) 1 Alaska, 439, 450; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 290; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 413; Talbott v. King (1886) 9 Pac. 434, 6 Mont. 76.

Possession of the surface of a mining claim is possession of a vein or lode having its apex within such surface lines, although the vein in its downward extension may pass beyond the verticle side lines of the claim, and will enable the person in possession to maintain trespass for the removal of ore from such vein beneath the surface of an adjoining claim. Montana Min. Co. v. St. Louis Min. & Mill. Co. (1900) 102 Fed. 430, 435, 42 C. C. A. 415; Id. (1906) 147 Fed. 897, 913, 78 C. C. A. 33; Pardee v. Murray (1882) 2 Pac. 16, 4 Mont. 234.

The purpose of Congress was to secure the fullest working of the mines and the complete development of the mineral property by securing to the locator the undisturbed possession of not less than a specified amount of surface, and this surface is as much the property of the locator as the vein or lode discovered and located by him. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 226, 48 L. Ed. 944; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97,

101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

This grant of present possession is for the purpose of carrying on mining operations as long as the locator performs the required conditions. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230; U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 683.

The location of a tunnel site for mining purposes must be made in subordination to prior lode claims, and the tunnel has no right of way through them. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 890, 182 U. S. 499, 45 L. Ed. 1200.

Of the two titles to public lands valuable chiefly for minerals, the first confers the right to the possession for the purpose of carrying on mining operations on certain conditions, and the second is an absolute title which may or may not be acquired by the locator by other and a different consideration, and this title depends on no conditions. Teller v. U. S. (1901) 113 Fed. 273, 281, 51 C. C. A. 230.

Possession of a mining claim in accordance with the provisions of the statute confers the right on a locator to work such claim for precious metal, but confers no right to take timber or otherwise make use of the surface except as may be necessary for mining purposes. Teller v. U. S. (1901) 113 Fed. 273, 280, 51 C. C. A. 230. See Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 12 Sup. Ct. 877, 145 U. S. 428, 36 L. Ed. 762; U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 681.

The person in actual possession and occupation of a mining claim of no greater extent than the law allows him to hold, and who is actually engaged in working the same, has sufficient title to maintain an action against a trespasser, although he may not have taken up and held the claim in all particulars in the mode required by law. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 11 Fed. 125.

The locator of a mining claim is not confined as to the question of the discovery of ore to the point where the alleged openings or workings were made, as the statute expressly gives him the exclusive right of possession and enjoyment of all the surface included within the limits of his location, and of any veins or lodes having their tops or apices within his surface lines. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 791.

Locators own everything lying perpendicularly under the surface, excepting veins apexing without the same. Baillie v. Larson (C. C. 1905) 138 Fed. 177, 178.

The locator is entitled to hold and enjoy the profits of the surface included within the boundary lines of his claim, and, if in possession in person or by agent, any one who enters upon and takes therefrom mineral or other valuable substances is a trespasser. Fuller v. Harris (D. C. 1887) 29 Fed. 814.

The right of a locator of a mining claim to the enjoyment of the surface is limited to uses incident to mining operations, and the lands in a forest reserve embraced in a mining claim continue to constitute a part of the reserve notwithstanding the mineral location, subject to all the legal rights and privileges of the locator. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 684.

The actual prior possession of a part of a mining claim gives the legal possession to the whole. Bulette v. Dodge (1905) 2 Alaska, 427.

Merely placing a tent and a few tools and a small supply of provisions upon a placer mining claim do not alone and of themselves constitute actual possession thereof. Charlton v. Kelly (1906) 2 Alaska, 532.

It is not essential that the owners of a placer claim should be in the actual possession of the ground to enable them to hold it against the entry by others. Evidences of their possession, such as stakes, notice, brush-out lines and cabin, are sufficient. Cook v. Johnson (1908) 3 Alaska, 506.

Possession of the surface of a claim is possession of all veins apexing within the surface lines, though, as they go downward, such veins extend outside the vertical line of the surface location. No adverse possession, therefore, can be initiated by going outside the boundaries, and striking the vein of the first location on its dip, without the knowledge of the owners of the first location. Pardee v. Murray (1882) 4 Mont. 234, 2 Pac. 16.

Under this section one who has ownership and possession of a surface containing apices of veins which extend downward beyond his side lines must be deemed the owner and in possession of all parts of such veins, notwithstanding the presumption in favor of the adjoining owner's title to everything beneath his surface. Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1903) 71 Pac. 1005, 27 Mont. 536, modifying decree on rehearing (1902) 70 Pac. 1114, 27 Mont. 288.

20. Exclusive right to possession of surface.—This section gives the exclusive right of possession and enjoyment of all the surface included within the location lines on compliance with all the laws. Belk v. Meagher (1881) 104 U. S. 279, 281, 26 L. Ed. 735; Noyes v. Mantle (1888) 127 U. S. 348, 351, 8 Sup. Ct. 1132, 32 L. Ed. 168; King v. Amy & Silversmith Min. Co. (1894) 152 U. S. 222, 227, 14 Sup. Ct. 510, 38 L. Ed. 419; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 194 U. S. 220, 225, 24 Sup. Ct. 632, 48 L. Ed. 944; Butte City Water Co. v. Baker (1905)

25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409; Teller v. U. S. (1901) 113 Fed. 273, 281, 51 C. C. A. 230; Malone v. Jackson (1905) 137 Fed. 878, 70 C. C. A. 216; Reed v. Munn (1906) 148 Fed. 737, 757, 80 C. C. A. 215; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392; Tyee Consol. Min. Co. v. Langstedt (1902) 1 Alaska, 439, 449; Du Prat v. James (1884) 4 Pac. 562, 65 Cal. 555, 557; Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358, 359; Quigley v. Gillett (1894) 35 Pac. 1040, 101 Cal. 462, 469; Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250, 253; Keller v. Trueman (1890) 25 Pac. 311, 15 Colo. 143, 145; Suessenbach v. First Nat. Bank (1889) 41 N. W. 662, 5 Dak. 477, 498; Burke v. McDonald (1888) 13 Pac. 351, 2 Idaho (Hasb.) 339; Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 290; U. S. v. Ringeling (1889) 20 Pac. 643, 8 Mont. 353, 359; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 122, 30 L. R. A. 803, 52 Am. St. Rep. 665; Bramlett v. Flick (1899) 57 Pac. 869, 23 Mont. 95; Mullins v. Butte Hardware Co. (1901) 65 Pac. 1004, 25 Mont. 525, 87 Am. St. Rep. 430; Ferris v. McNally (1912) 121 Pac. 889, 45 Mont. 20, 24; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 455; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 33; Nash v. McNamara (1878) 93 Pac. 405, 30 Nev. 114, 132, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694; Wright v. Lyons (1904) 77 Pac. 81, 45 Or. 167, 172.

Congress has made the possession of that part of the public lands which is valuable for minerals separable from the fee, and provided for the existence of an exclusive right to the possession, while the paramount title to the land remains in the United States. Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 551; Burke v. McDonald (1888) 13 Pac. 351, 2 Idaho, 339; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 268. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 62.

A locator or a purchaser of a mining claim that has been properly located and marked out on the ground, and who is personally or by agents present upon the claim, working and developing it and keeping up the boundary stakes and marks thereon, is in the actual possession of the entire claim and such possession extends to the boundary lines of the claim so marked. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 539; Id., 11 Fed. 125, 128; Dwinnell v. Dyer (1904) 78 Pac. 247, 145 Cal. 12, 20, 7 L. R. A. (N. S.) 763.

Prior to the payment of any money the interest in a mining claim is a mere right to the exclusive possession of the land based upon the performance of certain conditions, a failure to fulfill which forfeits the locator's interest in the claim. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Helena Gold & Iron Co. v. Baggaley (1906) 87 Pac. 455, 34 Mont. 464, 475.

This section provides both affirmatively and negatively that the locator shall have exclusive possession of the surface and that no one has the right to disturb him in such possession. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 70, 43 L. Ed. 72.

The exclusive right of possession given the locator by the statute continues during the entire life of the location. St. Louis Min. Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320; Clipper Min. Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 634, 194 U. S. 220, 227, 48 L. Ed. 944.

The owner of a mining claim has the exclusive enjoyment of all the surface within the lines of his location without regard to the width or extent of the vein or lode. Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

In many particulars the right of a locator of a mining claim is similar to the right of profit à prendre, but the owner of this right of profit à prendre has no such right as the exclusive possession and enjoyment of the mine from which he takes the ore. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 552.

While the government retains the legal title and authority to make other disposition of the property, it permits discoverers of mines to locate claims and grants to such locators and their heirs and assigns the right to have exclusive possession of the surface within the boundaries of their claims, and to retain possession so long as work in developing the mine and making improvements thereon to the statutory amount shall be done annually upon each claim. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 110.

The rights of a locator of a mining claim within the boundaries of a forest reservation are substantially those of one who locates such a claim upon the public domain and gives the locator the right of exclusive possession. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 680.

The phrase "exclusive enjoyment" in this section is not self-explanatory or unequivocal, and must be interpreted in the light of the general purpose of the law and in harmony with its other provisions; and the reasonable construction of this section, considering the other sections of the mining laws and other laws granting rights to the public do-

main, must necessarily limit such exclusive enjoyment for mining purposes only. Id.

A locator only acquires exclusive right to the possession when all of the necessary requirements of a location are observed; and, if he neglects to perform any necessary requirement within the time prescribed, his attempted location is of no avail as against an intervening location peaceably and regularly made and covering the same ground, though he shall have performed the neglected requirements after the inception of the second location. Copper Globe Min. Co. v. Allman (1901) 64 Pac. 1019, 23 Utah, 410.

21. Ownership of surface and veins.—The locator of a mining claim on compliance with the United States statutes, the local statutes, and the rules and regulations of the mining district is entitled not only to the exclusive right of possession of all the surface included within the lines of his location but also of all veins, lodes, and ledges throughout their entire depth the top or apex of which lies inside of his surface lines extended downward vertically. Gwillim v. Donnellan (1885) 115 U. S. 45, 47, 5 Sup. Ct. 1110, 29 L. Ed. 348; Iron Silver Min. Co. v. Elgin Min. Co. (1886) 118 U. S. 196, 206, 6 Sup. Ct. 1177, 30 L. Ed. 98; Noyes v. Mantle (1888) 127 U. S. 348, 351, 8 Sup. Ct. 1132, 32 L. Ed. 168; King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 227. 38 L. Ed. 419; Bradford v. Morrison (1909) 29 Sup. Ct. 349, 212 U. S. 389, 394, 53 L. Ed. 564; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 291, 4 C. C. A. 329; Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286; Crown Point Min. Co. v. Buck (1899) 97 Fed. 462. 38 C. C. A. 278; St. Louis Min., etc., Co. v. Montana Min. Co. (1902) 113 Fed. 900, 901, 51 C. C. A. 530, 64 L. R. A. 207; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 590, 66 C. C. A. 299; O'Connell v. Pinnacle Gold Mines Co. (1905) 140 Fed. 854, 855, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 676; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 551; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 128; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 546; Original Consol. Min. Co. v. Abbott (C. C. 1908) 167 Fed. 681, 683; Iron Silver Min. Co. v. Murphy (D. C. 1880) 3 Fed. 368, 371; Fuller v. Harris (D. C. 1887) 29 Fed. 814, 819; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 793; Dwinnell v. Dyer (1904) 78 Pac. 247, 145 Cal. 12, 20, 7 L. R. A. (N. S.) 763; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474, 478; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110; Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321, 331; King v. Amy & Silversmith Consol. Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 572. See Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119; Leadville Min. Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25; Brown v. Killabrew (1893) 33 Pac. 865, 21 Nev. 437, 438; Bullion, Beck & Champion, etc., Min. Co. v. Eureka Min. Co. (1886) 11 Pac. 515, 5 Utah, 8, 55.

The owner of a lode claim has the right to the ore beneath the surface of his claim in a vein not having its apex there, subject only to the right of the owner of the claim where the vein apexes to follow it downward on its dip. Mammoth Min. Co. v. Grand Central Min. Co. (1909) 29 Sup. Ct. 413, 414, 213 U. S. 72, 53 L. Ed. 702; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935.

As this section gives the exclusive right of possession and enjoyment of all the surface within the lines of the location, and of all veins and lodes the tops or apices of which are inside of such lines, it therefore gives to a locator something more than the right to the vein, which is the occasion of the location. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 508, 45 L. Ed. 1200; Id. (1899) 59 Pac. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17. See Clipper Min. Co. v. Eli Min., etc., Co. (1902) 68 Pac. 286, 29 Colo. 377, 385, 64 L. R. A. 209, 93 Am. St. Rep. 89.

Where the owner of a mining claim is in possession of its surface and is asserting title to the entire claim, his possession, as a matter of law, extends to every part of the claim, whether vertically beneath its surface or within the extralateral rights conferred by the mining statutes, that is not in the actual possession of an adverse holder. Golden Cycle Min. Co. v. Christmas Gold Min. Co. (1913) 204 Fed. 939, 940, 123 C. C. A. 261. See U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587.

A locator is not confined to the vein upon which he bases his location and upon which the discovery was made; but all veins or lodes having their apices within the planes of his surface lines extended downward are his, and the possession of the surface is possession of all such veins or lodes. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 766, 167 U. S. 116, 42 L. Ed. 101; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 508, 45 L. Ed. 1200.

Blind veins underneath prior lode claims belong to the surface location, and their discovery by running a tunnel does not give the owner of the tunnel any right to them. Calhoun Gold

Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 890, 182 U. S. 499, 45 L. Ed. 1200.

This section gives the exclusive right of possession and enjoyment to the first locator of all veins and lodes having their apices within the lines of his surface location. In such case there is but one grant, and it is in nowise separable into parts and apportioned between different locators, whether there are one or several such tops or apices. Bushnell v. Crooke Min., etc., Co. (1893) 13 Sup. Ct. 771, 148 U. S. 682, 687, 37 L. Ed. 610.

The mining law provides no means of locating a vein except by defining a surface claim including the croppings or point at which the vein is exposed, and the part of the vein located is determined by reference to the lines of the surface claim. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 329. See Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 456.

This section is the only part of the mining law which grants the right to possess any vein, lode, or ledge, and the vein originally discovered, and for the sake of which the location is made, is lumped in with other mineral deposits that may happen to exist within the limits of the surface claim, and no part of it is granted except that part the top or apex of which lies inside of the surface lines extended downward vertically. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 457.

This section says in effect that if a miner complies with the requirements the United States will grant him absolutely a piece of earth bounded at the surface by straight lines distinctly marked, and by planes extending through such lines to the center of the earth, and that he should have all lodes of mineral-bearing rock whose apexes or lodes are within such boundaries. Watervale Min. Co. v. Leach (1893) 33 Pac. 418, 4 Ariz. 34, 59.

The mining statutes contain no authority for the patent of lodes or veins independently of the surface ground connected with and containing or overlying them. Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1897) 51 Pac. 159, 20 Mont. 336.

The surface ground is an incident to the vein or lode. Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112, 116.

22. Locator's possessory title and rights as against intruders.—Possessory actions in federal courts, see notes to § 1533, ante.

The actual possession of a mining claim is sufficient evidence of title as against a mere intruder. Campbell v. Rankin (1878) 99 U. S. 261, 25 L. Ed. 435; North Noonday, etc., Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 525; Crossman v. Pendery (C. C. 1881) 8 Fed. 693; Grover v. Hawley (1855) 5 Cal. 425; English v. Johnson (1860) 17 Cal. 108, 76 Am. Dec. 574; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 123.

Actual possession of a mining claim is not essential to the validity of a title obtained by a valid location, and until such location is terminated by abandonment or forfeiture no right or claim can be acquired by adverse entry. Belk v. Meagher (1881) 104 U. S. 279, 283, 284, 26 L. Ed. 735; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 150; McLemore v. Express Oil Co. (1910) 112 Pac. 59, 158 Cal. 559, 561, 139 Am. St. Rep. 147; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440, 444; Burke v. McDonald (1888) 13 Pac. 351, 2 Idaho (Hasb.) 339. See Harris v. Kellogg (1897) 49 Pac. 708, 117 Cal. 484, 488; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 Pac. 915, 20 Colo. App. 474, 479.

A locator in the actual possession of a valid mining location may maintain such possession and exclude every other person from trespassing thereon, and no one has the right to forcibly disturb his possession or forcibly enter upon his premises. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 83, 43 L. Ed. 72; Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1903) 134 Fed. 268, 271. See Aurora Hill Min. Co. v. Eighty-five Min. Co. (C. C. 1888) 34 Fed. 515; Rader v. Allen (1895) 41 Pac. 154, 27 Or. 344.

The possessor of a mining claim or a purchaser holding a certificate is an owner in the sense that he may resist an unlawful possessor or a stranger to the paramount source of title from following the dip of a vein into his claim. Doe v. Waterloo Min. Co. (1893) 54 Fed. 935, 937, 17 C. C. A. 190; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110 (disapproving Montana Co. v. Clark [C. C. 1890] 42 Fed. 626).

Parties can not enter upon the public domain and acquire the right of possession to a mining claim by the mere performance of the acts prescribed for a location. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 346, 49 L. Ed. 501; Cook v. Klonos (1908) 164 Fed. 529, 536, 90 C. C. A. 403. See Johanson v. White (1908) 160 Fed. 901, 88 C. C. A. 83.

A locator is entitled to the present possession of his mining claim as against all the world, and the United States only retains the legal ownership. Seymour v. Fisher (1891) 27 Pac. 240, 16 Colo. 188; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 33.

Proof of possession is not sufficient to hold a mining claim against a valid location, but it is sufficient in trespass or ejectment as against a stranger. Noyes v. Black (1883) 2 Pac. 769, 4

Mont. 527, 534; Patchen v. Keeley (1887) 14 Pac. 347, 19 Nev. 404, 414. See, also, Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

In a contest as to the right of possession of a vein having its apex in a particular mining location, the defendant may show any fact which disproves the allegation of ownership and the right of possession. Colorado Central, etc., Min. Co. v. Turck (1892) 50 Fed. 888, 892, 2 C. C. A. 67.

The possession of the surface ground of a mining claim is sufficient evidence of title as against any one not showing any higher or better right thereto. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 668, 28 C. C. A. 333.

A person who first makes a valid location of a mining claim and takes possession thereof acquires such a title as the laws of the United States recognize, and will protect as against intruders. Fulkerson v. Chisna Min., etc., Co. (1903) 122 Fed. 782, 785, 58 C. C. A. 582. See Parley's Park Silver Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 130 U. S. 256, 32 L. Ed. 906.

The rights which a valid location of a mining claim secures to the locator and his grantees or successors are clearly defined by law and are wholly unaffected by any subsequent conflicting locations, as in all such matters the first in time is the first in right. Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 583, 66 C. C. A. 299.

The possessory title of a locator as the equitable owner, if prior in time, is superior in title to that of any other claimant. Reed v. Munn (1906) 148 Fed. 737, 757, 80 C. C. A. 215.

Without a patent, for the purpose of attack and defense, the locator is the owner, and his assignee or grantee is protected by the registration statutes of a state against any equitable interest not of record and unknown at the time of the transfer. Id. See Forbes v. Gracey (1876) 94 U. S. 762, 24 L. Ed. 313; Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Manuel v. Wulff (1894) 152 U. S. 505, 511, 14 Sup. Ct. 651, 38 L. Ed. 532; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Bakersfield, etc., Oil Co. v. Kern County (1904) 77 Pac. 892, 144 Cal. 148; Kendall v. San Juan Min., etc., Co. (1886) 12 Pac. 198, 9 Colo. 349, 357; Roseville Alta Min. Co. v. Iowa Gulch Min. Co. (1890) 24 P. 920, 15 Colo. 29, 22 Am. St. Rep. 373; McFeters v. Pierson (1890) 24 Pac. 1076, 15 Colo. 201, 22 Am. St. Rep. 388; Butte Hardware Co. v. Frank (1901) 65 Pac. 1, 25 Mont. 344.

The possession of a mining claim by a locator who has complied with the statutes is sufficient to prevent an intruder from acquiring any rights, even upon a peaceable entry. Biglow v. Conradt (1908) 159 Fed. 868, 870, 87 C. C. A. 48. See Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 316, 40 L. Ed. 436; McIntosh v. Price (1903) 121 Fed. 716, 718, 58 C. C. A. 136; Eilers v. Boatman (1883) 2 Pac. 66, 3 Utah, 159.

Evidence which is competent and sufficient for a patent for a mining claim as against the government is competent and sufficient to maintain the party complying with the statute in his possession and claim against a stranger trespassing upon his possession and claim. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 11 Fed. 125, 127.

Valuable mining grounds may be held for an indefinite time under a mere possessory right, and this right will be protected as against intrusion of strangers. Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 699. See Forbes v. Gracey (1876) 94 U. S. 762, 767, 24 L. Ed. 313; Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286.

The actual possession of a tract of public land is valid as against a mere intruder or one having no higher or better right than the prior occupant, and no mining right or title can be initiated by a violent or forcible invasion of another's actual occupancy. Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 932.

When a valid location of a mining claim is once made it vests in the locator and his grantees the right of possession thereto, and this right can not be divested by the obliteration or removal without the fault of the locator or his grantees of the stakes and monuments marking its boundaries or the obliteration or removal from the claim of the location notice posted thereon. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 392, 400, 408.

A mining locator acquires a present vested estate in his claim, good against the world, which he may defend by ejectment or a suit in equity to quiet title. Tyee Consol. Min. Co. v. Langstedt (1902) 1 Alaska, 439. And see Columbia Copper Min. Co. v. Duchess Min., Milling & Smelting Co. (1904) 79 Pac. 385, 13 Wyo. 244.

Mere trespassers, making no claim under the public land laws, cannot oust a locator from possession by showing that the land is more valuable for some purpose other than mining. Veronda & Ricoletto v. Dowdy (1910) 108 Pac. 482, 13 Ariz. 265.

As against a mere trespasser, one in possession of public mineral land will be presumed to be the owner. Brandt v. Wheaton (1877) 52 Cal. 430.

A locator has the right of possession against all intruders and the right to protect his possession and to work the land for valuable minerals. Garthe v. Hart (1887) 15 Pac. 93, 73 Cal. 541; Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 450, 98 Am. St. Rep. 63. And see Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207;

Bramlett v. Flick (1899) 57 Pac. 869, 23 Mont. 95.

A mineral claimant in actual possession of land is entitled to hold it as against every other one except the United States. Harris v. Kellogg (1897) 49 Pac. 708, 117 Cal. 484; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180.

A mineral claimant not in actual possession of a claim before location has no superior rights to that of a third person entering peaceably. New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211, 213.

A locator who has in good faith made a discovery and marked the boundaries with regard to the position of the apex, as he then finds and believes it to be, is protected in the possession of the surface thus ascertained, and the monuments he then sets control the location of the claim, and only in this way can certainty of location and security of titles to mining claims be obtained. Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250, 255. See Dwinnell v. Dyer (1904) 78 Pac. 247, 145 Cal. 12, 20, 7 L. R. A. (N. S.) 763; Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 456.

A locator of a lode mining claim can not be deprived of his possessory or inchoate rights by the tortious acts of another, nor can an intruder and trespasser initiate any rights that will defeat those of a prior discoverer. Gobert v. Butterfield (1913) 136 Pac. 516, 517, 23 Cal. App. 1.

A person in possession of a portion of the public domain and claiming title thereto under a placer location on oil lands may maintain ejectment against a mere intruder or trespasser entering upon such possession without right or color of title, though the plaintiff's location may be invalid. Little Sespe Consolidated Oil Co. v. Bacigalupi (1914) 139 Pac. 802, 803, 167 Cal. 381.

A wrongful intrusion upon a portion of the public land held by another as a mining claim, and after discovery of oil thereon, gives no right whatever to the intruder and constitutes him a naked trespasser, and he is in no position to raise any issue whatever upon the question of title under which the oil claimant holds the possession of his claim; an entry on such a claim in order to initiate any rights must be peaceable and in good faith. Id.

Under the provisions of this section, as well as the provisions of sections 2324 and 2325, R. S., sections 4620, 4622, post, a party to a suit involving title or the right of possession to a mining claim can not recover unless he shows compliance with the statutes, both state and federal, and also the miners' rules and regulations in force relating to the location of mining claims. Becker v. Pugh (1886) 3 Pac. 906, 9 Colo. 589, 590; Hunt v. Eureka Gulch Min. Co. (1890) 24 Pac. 550, 14 Colo. 451, 456.

The owner of a valid mining location is entitled to its exclusive possession and use as against all the world. A stranger, going thereon for the purpose of discovering veins, of cutting and removing timber, or of otherwise interfering with the locator's possession and use, is a trespasser. Seymour v. Fisher (1891) 16 Colo. 188, 27 Pac. 240; Iron Silver Min. Co. v. Campbell (1892) 17 Colo. 267, 29 Pac. 513.

A lode location perfected according to law and recorded in the proper county, and not abandoned or forfeited in any way, is a title that a locator or his grantees may hold and defend against any person or claimant by a subsequently acquired title. Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 292.

There is a presumption of a license from the government to those engaged in mining on public lands sufficient to give them a standing in court against all except the government. Gold Hill Quartz Min. Co. v. Ish (1873) 5 Or. 104.

A locator of a quartz mine prior to the time he is entitled to a patent has a valid possessory title which will be protected by law, but it is not real estate or an interest in land, and will pass by verbal sale if accompanied by actual transfer and possession. Herron v. Eagle Min. Co. (1900) 61 Pac. 417, 37 Or. 155, 157. See Table Mountain Tunnel Co. v. Stranahan (1862) 20 Cal. 198; Patterson v. Keystone Min. Co. (1866) 30 Cal. 360; Allen v. Dunlap (1893) 33 Pac. 675, 24 Or. 229; Duffy v. Mix (1893) 33 Pac. 807, 24 Or. 265.

23. Possessio pedis. — A person who in good faith makes a mining location, remains in possession, and with due diligence proceeds to make a discovery is fully protected against all forms of forcible, fraudulent, surreptitious, or clandestine entry or intrusion upon his possession. Johanson v. White (1908) 160 Fed. 901, 902, 88 C. C. A. 83; Hanson v. Craig (1908) 161 Fed. 861, 89 C. C. A. 55 (judgment reversed on rehearing [1909] 170 Fed. 62, 95 C. C. A. 338); Redden v. Harlan (1905) 2 Alaska, 402; Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439; Borgwardt v. McKittrick Oil Co. (1913) 130 Pac. 417, 164 Cal. 650; Smith v. Union Oil Co. (Cal. 1913) 135 Pac. 966; Phillips v. Brill (1908) 95 Pac. 856. See Cook v. Johnson (1908) 3 Alaska, 506, 541.

Every miner upon the public domain is entitled to hold the place in which he may be working against all others having no better right, and the actual possession of the first arrival will be protected to the extent needed to give him room to work and to prevent probable breaches of the peace; but while his pedis possessio is thus protected, it must yield to an actual location or

a valid discovery made by one who has located peaceably and neither clandestinely nor with a fraudulent purpose. Hanson v. Craig (1909) 170 Fed. 62, 95 C. C. A. 338; Zollars v. Evans (C. C. 1880) 5 Fed. 172, 173; Erhardt v. Boaro (C. C. 1881) 8 Fed. 692; Erhardt v. Boaro (D. C. 1881) 8 Fed. 860 (judgment reversed [1885] 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113, and decree reversed [1885] 5 Sup. Ct. 565, 113 U. S. 537, 28 L. Ed. 1116); Omar v. Soper (1888) 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246.

See, also, Dower v. Richards (1894) 14 Sup. Ct. 452, 151 U. S. 658, 38 L. Ed. 305; Thallman v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317; Malone v. Jackson (1905) 137 Fed. 878, 70 C. C. A. 216; Johanson v. White (1908) 160 Fed. 901, 88 C. C. A. 83; Cook v. Klonos (1908) 164 Fed. 529, 90 C. C. A. 403; Crossman v. Pendery (C. C. 1881) 8 Fed. 693; Van Zandt v. Argentine Min. Co., Id. 725; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Bulette v. Dodge (1905) 2 Alaska, 427; Charlton v. Kelly (1906) 2 Alaska, 532; Field v. Grey (1881) 25 Pac. 793, 1 Ariz. 404; Hess v. Winder (1866) 30 Cal. 349, 358; Brandt v. Wheaton (1877) 52 Cal. 430; Du Prat v. James (1884) 4 Pac. 562, 65 Cal. 555; Horswell v. Ruiz (1885) 7 Pac. 197, 67 Cal. 111; New England, etc., Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211; Armstrong v. Lower (1883) 6 Colo. 581; Weese v. Barker (1883) 2 Pac. 919, 7 Colo. 178; Becker v. Pugh (1886) 13 Pac. 906, 9 Colo. 589; Belk v. Meagher (1878) 3 Mont. 65; Noyes v. Black (1883) 2 Pac. 769, 4 Mont. 527; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 121; Gemmell v. Swain (1903) 72 Pac. 662, 28 Mont. 331, 98 Am. St. Rep. 570; Roberts v. Wilson (1876) 1 Utah, 292, 296; Copper Globe Min. Co. v. Allman (1901) 64 Pac. 1019, 23 Utah, 410; Whiting v. Straup (Wyo. 1908) 95 Pac. 849; Phillips v. Brill, Id. 856.

In the absence of physical markings on the surface of a mining claim, and in the absence of proof of mining rules or customs, the right of a mineral claimant does not extend beyond the possessio pedis. Hess v. Winder (1866) 30 Cal. 349, 358; Roberts v. Wilson (1876) 1 Utah, 292, 296.

A prospector can show a right to the possession of a mining claim before patent only by showing the actual possessio pedis. Funk v. Sterrett (1881) 59 Cal. 613; Patchen v. Keeley (1887) 14 Pac. 347, 19 Nev. 404, 413.

Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and development can be made, so as to disclose whether a vein of deposit of such richness exists as to justify work to extract the metal. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113, reversing judgment (D. C. 1881) 8 Fed. 860.

A temporary suspension of work for a few days for the purpose of procuring tools and necessary supplies to continue the work in good faith does not constitute a break in the locator's actual possession, and he is entitled to protection against an intruder. Hanson v. Craig (1908) 161 Fed. 861, 863, 89 C. C. A. 55. See Id. (1909) 170 Fed. 62, 95 C. C. A. 338.

One who has purchased a mining claim properly located and marked out on the ground, and who is, personally or by agents, upon the claim, working and developing it, and keeping up the boundary stakes and marks thereof, is not merely in the constructive possession, by virtue of mining laws, but is in the actual possession of the whole claim. Such possession is a possessio pedis, extending to the boundary lines of the claim. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 539.

A placer mining claim is possessed by marking the boundaries, recording the location notice, the discovery of gold, by sinking holes to discover the pay streak, by hoisting pay dirt, sluicing, and cleaning up. Charlton v. Kelly (1906) 2 Alaska, 532.

The character of the possession necessary to work mining claims will vary with the nature of the mines, the mode adopted in working them, and, perhaps, with the character of the country. Correa v. Frietas (1871) 42 Cal. 339.

Upon discovering a lode, the locator is entitled to a reasonable length of time in which to perfect the development which the local law requires. While holding possession for this purpose, his right to the lode is complete. Murley v. Ennis (1874) 2 Colo. 300; Patterson v. Hitchcock (1877) 3 Colo. 533.

24. Mining location as property.—A perfected mining location held by mere possessory title is property, and may be sold, transferred, mortgaged, inherited, and taxed. Forbes v. Gracey (1876) 94 U. S. 762, 763, 767, 24 L. Ed. 313; Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 49, 29 L. Ed. 348; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 353, 32 L. Ed. 168; Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 36 L. Ed. 214; Manuel v. Wulff (1894) 14 Sup. Ct. 651, 653, 152 U. S. 505, 38 L. Ed. 532; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 449, 41 L. Ed. 221; St. Louis Min., etc., Co. v.

Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320; Clipper Min. Co. v. Eli Min. & Land Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 226, 48 L. Ed. 944; Elder v. Horseshoe Min., etc., Co. (1904) 24 Sup. Ct. 643, 194 U. S. 248, 256, 48 L. Ed. 960; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 342, 49 L. Ed. 501; Elder v. Wood (1908) 28 Sup. Ct. 263, 208 U. S. 226, 232, 52 L. Ed. 464; Bradford v. Morrison (1909) 29 Sup. Ct. 349, 350, 212 U. S. 389, 395, 53 L. Ed. 564; Black v. Elkhorn Min. Co. (1892) 52 Fed. 859, 860, 3 C. C. A. 312; Migeon v. Montana Cent. R. Co. (1896) 77 Fed. 249, 254, 23 C. C. A. 156; O'Connell v. Pinnacle Gold Mines Co. (1905) 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919 (affirming judgment [C. C. 1904] 131 Fed. 106); Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392; Trinity Gold Dredging & Hydraulic Co. v. Beaudry (1915) 223 Fed. 739, 139 C. C. A. 269; Forbes v. Gracey (C. C. 1877) Fed. Cas. No. 4,924; Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 551; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 699; U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 682; Moore v. Steelsmith (1901) 1 Alaska, 121; Windmuller v. Clarkson (1904) 2 Alaska, 298; Elliott v. Elliott (1907) 3 Alaska, 352; Alexander v. Sherman (1887) 16 Pac. 45, 2 Ariz. 326, 329; Bradford v. Morrison (1906) 86 Pac. 6, 10 Ariz. 214, 215; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 225; Goller v. Fett (1866) 30 Cal. 481; Garthe v. Hart (1887) 15 Pac. 93, 73 Cal. 541; Quigley v. Gillett (1894) 101 Cal. 462, 35 Pac. 1040; Moore v. Hammerstag (1895) 41 Pac. 805, 109 Cal. 122; Van Ness v. Rooney (Cal. 1911) 116 Pac. 392; Keeler v. Trueman (1890) 15 Colo. 143, 25 Pac. 311; Suessenbach v. First Nat. Bank (1889) 5 Dak. 477, 497, 41 N. W. 662; Ah Kle v. McLean (1893) 32 Pac. 200, 3 Idaho (Hasb.) 538, 544; Tibbitts v. Ah Tong (1883) 2 Pac. 759, 4 Mont. 536, 546; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 292; Butte Hardware Co. v. Frank (1901) 65 Pac. 1, 25 Mont. 344, 349; Cobban v. Meagher (1911) 113 Pac. 290, 42 Mont. 399, 408; Poore v. Kaufman (1911) 119 Pac. 785, 44 Mont. 248, 257; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 33; Golden v. Murphy (1909) 103 Pac. 394, 105 Pac. 99, 31 Nev. 395, 418; Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 Pac. 741, 3 N. M. (Johns.) 179, 183; Bishop v. Baisley (1895) 28 Or. 119, 41 Pac. 936; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 563; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362. 370, 50 L. R. A. 184; Id. (1899) 80 N. W. 135, 12 S. D. 7, 9, 50 L. R. A. 184. See, also, Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 127 U. S. 471, 32 L. Ed. 172; McQuillan v. Tanana Electric Co. (1906) 3 Alaska, 110, 120; Merced Min. Co. v. Fremont (1857) 7 Cal. 317, 68 Am. Dec. 262; Mary v. Brodt (1898) 53 Pac. 818, 121 Cal. 332; Roseville Alta Min. Co. v. Iowa Gulch Min. Co. (1890) 24 Pac. 920, 15 Colo. 29, 22 Am. St. Rep. 373; Mount Rosa Min., etc., Co. v. Palmer (1899) 56 Pac. 176, 26 Colo. 56, 62, 50 L. R. A. 289, 77 Am. St. Rep. 245; Phœnix Min., etc., Co. v. Scott (1898) 54 Pac. 777, 20 Wash. 48, 50.

The locator of a mine, without obtaining patent, acquires the possessory title thereto against all the world and the government, so long as he performs the annual amount of work thereon, and this title passes to the purchaser under him, who, as the apparent owner, holds it against an unrecorded equitable claim or interest therein without notice. Reed v. Munn (1906) 148 Fed. 737, 80 C. C. A. 215, writ of certiorari denied Munn v. Reed (1907) 28 Sup. Ct. 255, 207 U. S. 588, 52 L. Ed. 353.

The location gives to the locator before discovery, and while he complies with the statutes of the United States and the state and local rules and regulations, the valuable right of possession against all intruders, and this right he can convey to another. Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116.

The possession or the possessory title of a mining claim given under this section is as valuable as the estate granted by the patent, as under either the locator may lawfuly take out and appropriate all the valuable ores and mineral therein—all there is of value in the estate. Forbes v. Gracey (C. C. 1876) Fed. Cas. No. 4,924.

Generally the rules of law applicable to real estate apply to mines in the public lands, and a mining claim may be conveyed by deed, is subject to sale on execution, and descends to the heirs of the claimant. Harris v. Equator Min., etc., Co. (C. C. 1881) 8 Fed. 863, 866. See Attwood v. Fricot (1860) 17 Cal. 38, 76 Am. Dec. 567; Hess v. Winder (1866) 30 Cal. 349.

If a mining claim has been properly located the owner may sell any part without prejudice to his right to hold the remainder, and he may dispose of it by gift or grant in any way that seems proper to him. Little Pittsburgh Consol. Min. Co. v. Amie Min. Co. (C. C. 1883) 17 Fed. 57; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 414.

The exclusive right of possession and enjoyment given to the holder of a mining claim by this section is property. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 550, affirmed (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 41 L. Ed. 221.

The simple right to dig and carry away ores is an entire thing and cannot be divided so as to have the same shared by several under the original claimant or proprietor. Id.

The locator of a mining claim can give any number of men the right to separately dig or carry away ores generally, or to a specific amount. Id.

A miner owning and operating a mining claim does not own the soil embraced within the lines of his claim. Id.

A bona fide resident, though not a citizen, nor having declared an intention to become such, may by conveyance acquire title of locators of an unpatented mining claim, and has the right to convey the same. Ferguson v. Neville (1882) 61 Cal. 356.

Where public land was located as a placer oil mining claim, the rights of the locator were subject to conveyance or lease either before or after discovery. Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439.

The rights of a locator are of as high order as those of a settler, each of whom is in possession under rights initiated which may by the observation of precedent conditions ripen into the right to a final patent. Southern California Ry. Co. v. O'Donnell (1906) 85 Pac. 932, 3 Cal. App. 382.

A mining claim located on the public domain is real property, and the subject of complete ownership as a claim; and the locator thereof, or his successor in interest, having fully complied with the terms prescribed by congress for acquiring title thereto, is, so long as he continues such compliance, the owner of the claim for all practical purposes. McFeters v. Pierson (1890) 15 Colo. 201, 24 Pac. 1076, 22 Am. St. Rep. 388.

The possessory right to a mining claim is property which may be sold on execution and may be the subject of sale, mortgage, and lease, but it is not community property. Phœnix Min., etc., Co. v. Scott (1898) 54 Pac. 777, 20 Wash. 48, 51. See Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 41 L. Ed. 221. CONTRA, Jacobson v. Bunker Hill, Min., etc., Co. (1891) 28 Pac. 396, 3 Idaho, 126.

25. Mining location as real property.—A mining claim is real property. Bradford v. Morrison (1909) 29 Sup. Ct. 349, 350, 212 U. S. 389, 53 L. Ed. 564; Arnold v. Goldfield Third Chance Mining Co. (Nev. 1910) 109 Pac. 718.

While a mining claim cannot be classified under any of the heads used to describe real or personal property, yet in the western region, where mining for precious metal exists, a mining claim is considered as real property, as an interest in land, and is sold and conveyed by deed, and actions for the recovery of possession of real estate, to quiet title, and for trespass apply to it. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 552. See Harris v. Equator Min., etc., Co. (C. C. 1881) 8 Fed. 863; Merritt v. Judd (1859) 14 Cal. 59; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550; Houtz v. Gisborn (1874) 1 Utah, 173; Lavagnino v. Uhlig (1903) 71 Pac. 1046, 26 Utah, 1, 99 Am. St. Rep. 808.

The locator's interest is an interest in realty, and as such subject to conveyance by deed. Roseville Alta Min. Co. v. Iowa Gulch Min. Co. (1890) 15 Colo. 29, 24 Pac. 920, 22 Am. St. Rep. 373.

A tenant in common of a mining claim who reserves on partition a portion of the claim on which the original discovery was located will not lose his interest in the claim if the vein or lode exists and has been developed and worked through the whole length of the claim. Silver City Gold, etc., Min. Co. v. Lowry (1899) 57 Pac. 11, 19 Utah, 334, 349.

26. Dower in mining claim.—The locator's interest prior to payment for the patent is not such an estate that dower attaches thereto, and a conveyance by him of his interest constitutes an abandonment thereof which bars all possible claims to dower. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 1102, 163 U. S. 445, 41 L. Ed. 221, affirming judgment (1892) 52 Fed. 859, 3 C. C. A. 312, and disapproving (C. C. 1892) 49 Fed. 549.

27. Mode of sale or transfer of claims.—The exclusive right of possession and enjoyment conferred by this section upon the locator of a mining claim is in the nature of a legislative grant of an interest in land, and this interest cannot be transferred by parol or otherwise than in accordance with the statute of frauds. Moore v. Hamerstag (1895) 41 Pac. 805, 109 Cal. 122, 123; Reagan v. McKibben (1898) 76 N. W. 943, 11 S. D. 270, 277. But see, Union Consol. Silver Mining Co. v. Taylor (1879) 100 U. S. 37, 42, 25 L. Ed. 541; Table Mountain Tunnel Co. v. Stranahan (1862) 20 Cal. 198; Hardenbergh v. Bacon (1867) 33 Cal. 356; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550, 559. See, also, Patterson v. Keystone Min. Co. (1866) 30 Cal. 360; Goller v. Fett (1866) 30 Cal. 482; Omar v. Soper (1888) 18 Pac. 443, 11 Colo. 380, 389, 7 Am. St. Rep. 246.

The discoverer of a mineral lode may transfer, by parol, an interest in his right to locate a claim. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 54 Fed. 935.

The purchaser at a judicial sale acquires only the then interest of the locator, and the title afterwards acquired by him, by paying the price and receiving his certificate, does not pass by such sale. Hamilton v. Southern Nev. Gold

& Silver Min. Co. (C. C. 1887) 33 Fed. 562.

An oral agreement to locate a mine for the benefit of another or others is not within the statute of frauds. Eberle v. Carmichael (1873) 42 Pac. 95, 8 N. M. 169, 177. See Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Gore v. McBrayer (1861) 18 Cal. 582; Moritz v. Lavelle (1888) 18 Pac. 803, 77 Cal. 10, 11 Am. St. Rep. 229; Murley v. Ennis (1874) 2 Colo. 300; Hirbour v. Reeding (1877) 3 Mont. 15; Welland v. Huber (1873) 8 Nev. 203; Reagan v. McKibben (1898) 76 N. W. 943, 11 S. D. 270, 277.

28. Taxation of mining claims.—If a state tax is in point of fact levied on the property right of the United States, it must be held void; but if it is levied on the property or the recognized possessory right of the locator, and can be collected without affecting or embarrassing the title of the United States and property which belongs to the government, then there is no ground for interference with the process of a state in its collection of the tax. Forbes v. Gracey (1876) 94 U. S. 762, 763, 24 L. Ed. 313, affirming (C. C. 1877) Fed. Cas. No. 4,924.

When mineral ores become detached from the soil in which they are embedded they become personal property of the mine owners and are free from any lien, claim, or title of the United States, though taken from the public lands, and may be subject to taxation by a state, and the collection of the taxes may be enforced by sale the same as other species of property. Id.

A state has no power to make its lien for taxes levied on mineral ores a lien on a mining claim if it interferes in any manner with the right or title of the United States; but it may make such tax a lien on the possessory right of the miner, held and owned by him as a separate and distinct property right from that of the government in the public land. Id.

A valid subsisting mining location or an interest therein is subject to taxation by a State, though the title to the land on which such mining claim is located is in the United States and a part of the public lands. Elder v. Wood (1908) 28 Sup. Ct. 263, 208 U. S. 226, 231, 52 L. Ed. 464. See Arizona v. Copper Queen, etc., Min. Co. (1914) 34 Sup. Ct. 546, 233 U. S. 87, 58 L. Ed 863; Earhart v. Powers (Ariz. 1915) 148 Pac. 286.

29. Title acquired by possession under statute of limitations.—This section is applicable to lode mining claims, and where possession of such claim has continued for the statutory period it is equivalent to a location under the laws of Congress. Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735; Harris v. Equator Min., etc., Co. (C. C. 1881) 8 Fed. 863; Altoona Min. Co. v. Integral Min. Co. (1896) 45 Pac. 1047, 114 Cal. 100; Lavagnino v. Uhlig (1903) 71 Pac. 1046, 26 Utah, 1, 25, 99 Am. St. Rep. 808. See Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 Pac. 736, 29 Utah, 159.

A locator in actual occupancy of a mining claim who has been evicted by a wrongdoer is not required to give evidence of every fact necessary to a valid location in an action to recover possession, as under long possession a presumption of a valid location arises. Harris v. Equator Mining & Smelting Co. (C. C. 1881) 8 Fed. 863, 865.

A purchaser in possession of a mining claim under color of title, may, in time, under the statute of limitations, obtain a perfect title thereto as against all other persons. Id. See, also, Hamilton v. Southern Nevada Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562, 566; Omaha & Grant Smelting & Refining Co. v. Tabor (1889) 13 Colo. 41, 21 Pac. 925, 16 Am. St. Rep. 185, 5 L. R. A. 236.

The statute of limitations will not run in favor of one in adverse possession of an overlap between two mining claims on the public lands, prior to the issuance of the patent. Pioneer Mining Co. v. Pacific Coal Co. (1912) 4 Alaska, 463, following Tyee Mining Co. v. Langstedt (1905) 136 Fed. 124, 69 C. C. A. 548, and Same v. Jennings (1905) 137 Fed. 864, 70 C. C. A. 393.

A mining claim is a possessory right and is real estate under the statute of limitations. Lavagnino v. Uhlig (1903) 71 P. 1046, 26 Utah, 1, 24, 25, 99 Am. St. Rep. 808. See Harris v. Equator Mining & Smelting Co. (C. C. 1881) 8 Fed. 863; Aspen Mining & Smelting Co. v. Rucker (C. C. 1886) 28 Fed. 220; Hughes v. Devlin (1863) 23 Cal. 501, 506; Roseville Alta Min. Co. v. Iowa Gulch Min. Co. (1890) 24 Pac. 920, 15 Colo. 29, 22 Am. St. Rep. 373; McFeters v. Pierson (1890) 24 P. 1076, 15 Colo. 201, 22 Am. St. Rep. 388.

30. Rights of heirs and assigns.—By the express provision of the statute the locator, his heirs, and assigns have certain rights in a claim, and it provides for a conveyance thereof to the grantee to the same extent that such rights were possessed by the grantor. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 452, 41 L. Ed. 221; O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106.

The locator of a mining claim acquires under it an exclusive right of possession which he can transmit to his heirs and assigns, and which possession continues so long as the laws are complied with. Forbes v. Gracey (C. C. 1877) Fed. Cas. No. 4,924; Keeler v. Trueman (1890) 15 Colo. 143, 25 Pac. 311.

The question whether an alien can inherit an interest in a mining claim is determined, not by the federal law, but by laws of the state in which the mine

is situated. Billings v. Aspen Mining & Smelting Co. (1892) 51 Fed. 338, 2 C. C. A. 252, rehearing denied (1892) 52 Fed. 250, 3 C. C. A. 69.

The possessory right of a locator of an unpatented mining claim is property, and on his death passes to his heirs by descent, and not directly as the designated donees or beneficiaries of the United States, and hence such rights may be administered upon and sold as other property by his executor or administrator. O'Connell v. Pinnacle Gold Mines Co. (1905) 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919, affirming judgment (C. C. 1904) 131 Fed. 106.

Where an exclusive right to dig and appropriate ores is given it passes to the heirs and assigns of the grantee, and this right extends throughout the entire depth of the mine or vein; it then resembles a case where a grantee receives the title to coal in place. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 551.

The possessory right of a mining claim held by a person at the time of his death descends to his lawful heirs, but the legal title to the property remains vested in the United States. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 107, affirmed (1905) 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. (N. S.) 919.

This section does not purport to grant a fee simple estate or any title whatever, but relates to the right of possession only, and it grants nothing to the heirs except the right to inherit; they can inherit only the identical interests and rights which were vested in the deceased ancestor during his lifetime, and his heirs are not designated as a class entitled to a vested exclusive right to acquire the title to mining property from the government, as such a right would be incompatible with the locator's right of alienation and incompatible with the rights of the several states to tax mining claims and enforce payment by sale. Id.

This and other sections of the mining law which provide for the acquisition of the title to mining claim by patents contain no provisions similar to the provisions of other laws giving to widows and children of deceased discoverers and locators preferred rights to obtain patents. Id.

By this section locators or their heirs or assigns are given the exclusive right of possession and enjoyment of the surface within their location lines so long as they comply with the statutory requirements. Bay v. Oklahoma Southern Gas, Oil & Mining Co. (1903) 73 Pac. 936, 13 Okl. 425, 430.

One who discovers mineral signs on public lands may assign his prospective discovery to another, who may follow it up and make such a discovery as will entitle him to a valid location and finally a patent. Id. And see Merced Oil Mining Co. v. Patterson (Cal. 1912) 122 Pac. 950.

31. **Locations not subject to reservation or disposal by government.**—Where a right to mineral land has once attached, the land is not subject to reservation by the President during the existence of such rights; and if it be subsequently reserved, the locator may nevertheless perfect his title. Reservation of Lands. (1881) 17 Op. Atty. Gen. 230.

The United States has no power to deprive the locator of the exclusive right to possession and enjoyment of the located claim. Van Ness v. Rooney (Cal. 1911) 116 Pac. 392.

IV. OWNERSHIP OF VEINS

32. **Application of section to veins.**—A lode, vein, or ledge containing a valuable mineral deposit is by this section distinguished from the ground in which it is found. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 49, 27 C. C. A. 50.

The property given by this section in all lodes having their tops or apices in the territory described in the patent, whether the same lie transversely or collateral to the principal lode on which the location was made, is limited by other sections of the act. Hall v. Equator Mining & Smelting Co. (C. C.) Fed. Cas. No. 5,931.

33. **Extent and limitations on ownership.**—The exclusive right of possession given to the locator by the statute is not limited to the surface nor even to the single vein whose discovery is the basis of the location; but it extends to all veins and lodes throughout their entire depth the top or apex of which lies inside of the surface lines of the location extended downward vertically. St. Louis Min. Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 665, 43 L. Ed. 320; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200; Clipper Min. Co. v. Eli Min. Co. (1904) 24 S. Ct. 632, 194 U. S. 220, 227, 48 L. Ed. 944; St. Louis Min. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 194 U. S. 235, 237, 48 L. Ed. 953; Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, 557; Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358; Bullion, Beck, etc., Min. Co. v. Eureka Min. Co. (1886) 11 Pac. 515, 5 Utah, 55. See Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 49, 27 C. C. A. 50; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25.

A locator is not only entitled to the vein or lode discovered by him, but every other vein or lode throughout its entire depth, the top or apex of which lies within the surface lines of his claim extended downward vertically, to which no right had attached in favor of other parties at the time his location was made. Crown Point Min. Co. v. Buck (1899) 97 Fed. 462, 38 C. C. A. 278; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Iron

between planes drawn vertically downward through the end lines of his location and a certain parallel line the vein from its apex on its dip is continuous, and that the continuity extended to and through the adjoining claim in controversy, and that the ore bodies, the subject of the controversy, form a part of such vein. Grand Central Min. Co. v. Mammoth (1905) 83 Pac. 648, 29 Utah, 490, 551. See Leadville Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935; Consolidated Wyoming Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540; Pennsylvania Consol. Min. Co. v. Grass Valley Exp. Co. (C. C. 1902) 117 Fed. 509; Iron Silver Min. Co. v. Campbell (1892) 29 Pac. 513, 17 Colo. 267.

36. Ownership of intersecting veins and right of way.—See, also, notes to § 4644, post.

The title to minerals at the point of intersection must be determined by this and section 4644, post. Gillis v. Stinchfield (1895) 16 Sup. Ct. 131, 159 U. S. 658, 659, 40 L. Ed. 295.

The right of possession and the priority in location granted by this section give to the locator all minerals contained within the space of intersection, where any vein apexing within his surface lines, crosses, in its downward course, any vein apexing in any other subsequent location; and in case of a union of the veins at such point, then he is entitled to the vein below such point of union. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 501, 45 L. Ed. 1200. The section relating to ownership of intersecting veins does not conflict with this section, but supplements it. Id. See, also, Watervale Min. Co. v. Leach (1893) 33 Pac. 418, 4 Ariz. 34; Wilhelm v. Silvester (1894) 35 Pac. 999, 101 Cal. 358.

There are cases where the owners of ledges which intersect may each have rights entirely distinct from, and which do not conflict at all with, the clear and positive language of this section. Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358, 361.

The owner of a prior location is entitled to all veins or minerals within the lines of his location, whether they be side veins, cross veins or spurs, or whether they lie transversely to the main vein or are collateral thereto, provided that the tops or apices thereof are found within the surface lines of the senior location. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

Under this section and R. S. § 2336, post, § 4644, when a junior locator's lines laid along his vein cross a senior location, the junior locator is entitled only to a right of way across the senior location for the purpose of convenient working of his ores outside the limits of the senior location, and has no title to the ores of his vein within the lines of the senior location; such ores belonging to the senior locator. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200, affirming Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209, which overruled Branagan v. Dulaney (1885) 8 Colo. 408, 8 Pac. 669, Lee v. Stahl (1886) 9 Colo. 208, 11 Pac. 77, Morgenson v. Middlesex Mining & Milling Co. (1887) 11 Colo. 176, 17 Pac. 513, and Lee v. Stahl (1889) 13 Colo. 174, 22 Pac. 436. These decisions so overruled held that the owner of the junior location was entitled to all the ore on his cross-vein within the side lines of the senior location except at the intersection of the veins on the ground that this section was inconsistent with the later section R. S. § 2336, post, § 4644.

The supreme courts of California and Arizona refused to follow these early decisions of the supreme court of Colorado, and held that the junior lolator had no title to ores within the lines of the senior location. Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358, 363. See Hall v. Equator Mining & Smelting Co. (C. C. ——) Fed. Cas. No. 5,931; Watervale Min. Co. v. Leach (1893) 33 Pac. 418, 4 Ariz. 34. Compare Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 7 C. C. A. 233.

V. EXTRALATERAL RIGHTS

37. Nature and extent of right.—The extralateral right conferred by the statute is an incident of a valid lode location, and the right is expressly given by statute to locators of all mining locations. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 663, 28 C. C. A. 333; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 937.

Whether the lines of a mining claim were properly laid with respect to a vein or lode outcropping within them, so as to entitle the locator to the extralateral rights defined by the statute, depends upon the probative facts of each particular case. Last Chance Min. Co. v. Bunker Hill & S. Mining & Concentrating Co. (1904) 131 Fed. 579, 583, 66 C. C. A. 299. See Argonaut Consol. Min. Co. v. Turner (1897) 48 Pac. 685, 23 Colo. 400, 58 Am. St. Rep. 245.

The extralateral rights given by virtue of possession to the owner of the surface of the mining claim is constructive and outside the downward vertical planes of the surface lines and must give way to the actual adverse possession of the third person. Golden Cycle Min. Co. v. Christmas Gold Min. Co. (1913) 204 Fed. 939, 941, 123 C. C. A. 261.

As to all veins that come to the surface and have anything like a vertical position in the earth, the ownership of the outcrop will carry anything that may be found below in the same vein or lode however much it may depart from the territory described in the location. Hall v. Equator Mining & Smelting Co. (C. C. ——) Fed. Cas. No. 5,931.

Where the owner of a vein follows it into an adjoining claim he does so by permission of a positive law, without which he would have no more right to go upon his neighbor's claim below than upon the surface, and this right is in the nature of an easement or servitude laid upon the adjoining mining claim. Mount Diablo Mill & Mining Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

One who locates and acquires title to a vein may follow it to any depth within the end lines of his location, though in its downward course it may enter the land adjoining, and this rule applies to all other veins having their tops within the surface lines of his location extended downward vertically. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,398; Same v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

The right granted to a locator of a ledge is to follow it downward wherever it may go, regardless of the vertical planes of his side lines and for a length along its course equal to the length of apex within his surface limits restricted only by the vertical, extended planes of his end lines. Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1894) 71 Fed. 848, 851.

The provision defining the lateral rights of a claim is a declaration that all of the surface of a lode claim which is within 300 feet of either side of the apex of the vein at its surface, and which is included within the exterior boundaries of the location, is the property of the locator. McElligott v. Krogh (1907) 90 Pac. 823, 151 Cal. 126, 132.

The doctrine of extralateral rights granted by this section can not be applied to intralimital rights. Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co. (1904) 75 Pac. 1070, 32 Colo. 176, 190, 64 L. R. A. 925.

It is only a locator or his successor who has the right to follow a vein into the boundaries of an adjoining owner, and such adjoining owner, holding under a location or patent is prima facie entitled to everything beneath his surface, and he may assert such prima facie title to prevent intrusion by any one who can not show that he comes with the right acquired by compliance with this statute. Parrot Silver, etc., Min. Co. v. Heinze (1901) 64 P. 326, 25 Mont. 139, 148, 53 L. R. A. 491, 87 Am. St. Rep. 386; Denying Montana Co. v. Clark (C. C. 1890) 42 Fed. 626.

This section gives the locator of a mining claim extralateral rights. South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 43 (dissenting opinion).

38. Construction of statute.—Where a location is properly made along the course of a vein or lode in the form of a parallelogram and the vein extends within the side lines from one end line to the other, the statute expressly determines the rights of the locator, and there is nothing left for the courts to construe. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 290, 4 C. C. A. 329; King v. Amy & Silversmith Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 564; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 115, 30 L. R. A. 803, 52 Am. St. Rep. 665. See Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 469, 25 L. Ed. 253; Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 205, 30 L. Ed. 98; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 472, 485, 30 L. Ed. 1140.

The construction by the Land Department of the right of the locator of a mining claim to follow a vein or lode on its dip beyond the side lines of his claim is indicated by the stipulations inserted in the grants to the effect "that the premises hereby conveyed, without exception of the surface, may be entered by the proprietor of any other vein, lode, ledge, or deposit the top or apex of which lies outside the exterior limits of said survey, should the same in its downward course be found to penetrate, intersect, extend into, or underlie the premises hereby granted, for the purpose of extracting or removing the ore from such other vein, lode, ledge or deposit." Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 629.

The extralateral rights given under this section should neither be extended nor restricted by the courts. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 549.

39. —— Purpose and effect of statute.—The design of this state is to grant to the original locator a section of the lode within vertical planes drawn downward through the lines marked on the surface; but as the vein might deviate from a perpendicular and pass out of the side lines, the statute confers the right to follow it outside of such side lines, but within planes through the end lines drawn vertically downward and continued in their own direction. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 205, 30 L. Ed. 98; King v. Amy & Silversmith Consol. Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 567; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 116, 30 L. R. A. 803, 52 Am. St. Rep. 665; Butte & Boston Min. Co. v. Société, etc., de Lexington (1899) 58 P. 111, 23 Mont. 177, 193, 75 Am. St. Rep. 505. See Harper v. Hill (1911) 113 Pac. 162,

159 Cal. 250, 257; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, p. 77 (dissenting opinion).

The difficulty arising from this section grows out of its application to the claims where the course of a vein is so variant from a straight line that the end lines of a surface location are not parallel, or, if so, they are not at right angles to the course of the vein, and this question will often occur where the lines of the surface location are made to control the direction of the vertical planes. The remedy must be found in carefully making the location and in postponing the marking of its boundaries until explorations can be made to ascertain the course of the vein. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 206, 30 L. Ed. 98; Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 469, 25 L. Ed. 253; Argentine Min. Co. v. Terrible, etc., Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 485, 30 L. Ed. 1140; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 115, 30 L. R. A. 803, 52 Am. St. Rep. 665. See King v. Amy & Silversmith Consol. Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 563.

The right of lateral pursuit is a right conferred by statute and does not depend on circumstances, and is as absolute as the ownership of a vein apexing within the surface lines, ceasing only when it interferes with the statutory rights of another, but the right is not limited to cases where the entire vein is within the claim. St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 668, 44 C. C. A. 120, 56 L. R. A. 725.

Extralateral rights apply only to what may be found beneath the surface within the limits fixed by these statutes and never operate to increase or diminish surface rights. Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 420, 52 C. C. A. 219. See Id. (1904) 131 Fed. 591, 605, 66 C. C. A. 99.

A general principle should pervade and control the various conditions found to exist in different locations, and its guiding star should be the preservation of the essential right given by the statute to follow the lode upon its dip as well as upon the strike to so much thereof as its apex is found within the surface lines of the location. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 549.

The intent of the law is that the locator of a mining claim shall have the right to the vein throughout its entire depth if the apex lies within his surface lines, although the vein on its dip downward departs from the perpendicular so as to extend outside the side lines; but if such side line is called an end line then the whole intent of the statute is destroyed. Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 129, 30 L. R. A. 803, 52 Am. St. Rep. 665.

40. Possessory rights affected by grant.—The limitation of this section operates indirectly and by virtue of the grant to another locator to pursue a vein apexing within his surface line on its dip downward through some side line into the ground embraced within the patent. It, in effect, withdraws from the location only such veins as others own and have a right to pursue. St. Louis Min. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 194 U. S. 235, 238, 48 L. Ed. 953.

This statutory grant to the locator includes the surface and veins apexing within his location; but until by entry and patent the equitable title to the ground passes to him he cannot question any rights of exploration which are granted by other provisions of the law; as the fee remains in the government until a patent is issued. Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co. (1905) 25 Sup. Ct. 266, 269, 196 U. S. 337, 49 L. Ed. 501.

A person entering a mining claim of another held by a certificate of purchase from the government must show a valid location of another claim, as the law entitles him to follow any vein or lode having its apex within his surface lines outside of his side lines extended vertically downward, and that any acts of mining committed by him were upon such vein or lode, and which lies between vertical planes drawn through the end lines continued in their own direction. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 939.

The purchaser of a lode claim takes it subject to the provisions of the statute reserving to locators of other mining claims the right to follow, and take ore under its surface, any vein, lode, or ledge having its top or apex within the surface lines of such other location. Id.

In an action to quiet title to a mining claim the fact that a vein or lode having its apex in a separate and distinct claim owned by the defendant may, on its downward course, pass through the vertical side lines of plaintiff's claim has no relation to surface rights, as such vein or lode would be the property of the defendant under this section without regard to the plaintiff's surface ownership. Bulwer Consol. Min. Co. v. Standard Consol. Min. Co. (1890) 23 Pac. 1102, 83 Cal. 589, 598.

One claimant holds his possession subject to the same rights in others and is therefore liable to have his land entered by an adjoining proprietor pursuing his vein in its course beyond his own side lines, otherwise he may challenge the right of any intruder within the lines of his claim. Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 119, 122.

41. Dip or downward course of vein as limit of rights.—On the discovery of a vein of ore of sufficient value to justify the expenditure of time, labor, and money to open and develop the same the prospector is legally entitled to the fruits of his labor, but he will be limited in the length of his lode upon its strike to such portion as is within the surface lines of his location, but he will not be deprived of his extralateral rights as to the depth of such vein upon its dip the apex of which is within the surface lines of his location. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 549; Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250, 257.

The right to follow the dip outside of the side lines is based on the hypothesis that the direction of these lines corresponds substantially with the course of the lode or vein at its apex at the surface. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 467, 25 L. Ed. 253; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 485, 30 L. Ed. 1140. See Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 143; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 115, 30 L. R. A. 803, 52 Am. St. Rep. 665.

By the Spanish mining law the owner of a mine was confined to perpendicular lines on every side, but it gave him greater or less width according to the dip of the vein. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 468, 25 L. Ed. 253.

This section does not limit the right of a locator to follow a vein or lode having its apex within his surface boundary lines in its dip through his side lines into the adjoining claim of a junior locator. Colorado Central Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 894, 2 C. C. A. 67. See Collins v. Bailey (1912) 125 Pac. 543, 22 Colo. App. 149, 164; Heinze v. Boston & Montana Min. Co. (1904) 77 Pac. 421, 30 Mont. 484, 485.

It is not essential to the right of the locator to follow the vein in its dip downward that the vein or lode should extend in its length the entire distance from one end to the other of the location. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 292, 4 C. C. A. 329.

A vein or lode somewhat below the plane of the horizon is within the meaning of this section, and may be pursued beyond the side lines of the claim in which it has its outcrop. Leadville Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158; Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

A mistake of the locator in the length of his location will not defeat his right to follow a vein on its dip outside of his location. Del Monte Min. & Mill. Co. v. New York, etc., Min. Co. (C. C. 1895) 66 Fed. 212, 214.

The purpose of this statute is that the ends of locations shall be bounded by vertical planes, but at the sides they may follow the dip of the vein even though they extend under the surface of other locations. Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. (C. C. 1900) 100 Fed. 910, 913.

Ledges may be followed between the end-line planes of a claim without any limitation as to their dip or course. Bunker Hill & S. Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1900) 108 Fed. 189, judgment affirmed (1901) 109 Fed. 538, 48 C. C. A. 665.

A ledge may be followed between the perpendicular planes of its end lines, regardless of the fact that this may be more upon the course than upon the dip of the ledge. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1903) 134 Fed. 268.

The owner of a mining claim is entitled to extralateral rights where his vein on its dip and downward course passes entirely through one or two or more adjoining claims, if its identity is not destroyed; and in determining the identity and continuity of a vein under such circumstances a fault and a vein may be parts of one and the same fissure. National Mines Co. v. Charleston Hill National Min. Syndicate (D. C. 1912) 205 Fed. 787, 791.

To pursue a mineral vein in the direction of its strike at an angle of less than 45 degrees to its course is not following the vein on its "downward course." Stewart Mining Co. v. Ontario Mining Co. (1913) 132 P. 787, 23 Idaho, 724, judgment affirmed (1915) 35 Sup. Ct. 610, 613, 237 U. S. 350, 59 L. Ed. 989.

The extralateral rights awarded by this section must in all cases be pursued upon the dip rather than the strike of the vein that is more upon the downward than upon the onward course of the vein. Id. See Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 48 C. C. A. 665; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 66 C. C. A. 299.

The intent of the statutory grant of this section is that the miner may follow his vein on the dip, but not on the strike, if it departs beyond the sides of his location. King v. Amy & Silversmith Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 567. See Catron v. Old (1897) 48 Pac. 687, 23 Colo. 433, 437, 58 Am. St. Rep. 256.

42. Dip and downward course of vein defined.—The words "downward course," and "course downward" signify the course of the vein from the surface toward the center of the earth, whether in a perpendicular course or on a dip; and by "downward course" is meant a course more in the direction of the dip of the vein than of the strike or onward course of the vein.

Stewart Mining Co. v. Ontario Mining Co. (1913) 132 Pac. 787, 23 Idaho, 724, judgment affirmed Stewart Min. Co. v. Ontario Min. Co. (1915) 35 Sup. Ct. 610, 613, 237 U. S. 350, 59 L. Ed. 989.

The downward course of a vein is that direction which it takes underneath the surface on its downward course between vertical planes drawn through the end lines, and this gives a segment in length, throughout the depth, within vertical planes drawn through the parallel cross lines, equal to the length of apex covered by the surface boundaries, measured on lines on the plane of the vein. Id. See Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110; Gilpin v. Sierra Nevada Consol. Min. Co. (1890) 23 Pac. 547, 1014, 2 Idaho (Hasb.) 696.

43. **Right to follow vein on strike.**—There can be no extralateral rights on the strike of a vein. Tombstone Mill & Mining Co. v. Way Up Min. Co. (1883) 1 Ariz. 426, 25 Pac. 794; Davis v. Shepherd (1903) 72 Pac. 57, 31 Colo. 141; Stewart Min. Co. v. Ontario Min. Co. (1913) 132 Pac. 787, 23 Idaho, 724, 789; Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co. (1903) 73 Pac. 759, 27 Nev. 107, 103 Am. St. Rep. 759. See Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; Colorado Central Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67; Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344; McCormick v. Varnes (1877) 2 Utah, 355.

The extralateral rights to which a complainant is entitled does not permit it to follow the vein more upon its strike than upon its dip. Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 66 C. C. A. 299; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 596, 66 C. C. A. 99.

Under this section a locator can not go outside of any of his lines on the strike or course of any vein or lode, except under rights acquired by him prior to May 10, 1872, and saved to him under the provisions of the act of May 10, 1872 (17 Stat. 91). Watervale Min. Co. v. Leach (1893) 33 Pac. 418, 4 Ariz. 34, 65. See Mining Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250, 257.

Where a lode departs from the apex into another claim and then bends and comes back to the claim from which it started, the first locator has no right to that part of the lode which passes on the apex into the other claim. Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah. 3, 71 (dissenting opinion). See Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112, 117; Johnson v. Buell (1879) 4 Colo. 557; Lebanon Min. Co. v. Rogers (1884) 5 Pac. 661, 8 Colo. 34; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25.

In determining the location and strike of a vein, the geological features of the adjacent country, so far as in evidence, will be considered by the court. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

The course of the vein longitudinally, as it passes through the country, is its strike; and where the dip of the vein is vertical, or practically vertical, the line of its ore bodies may mark the line of its strike. Id.

44. **Surface location determines rights.**—The surface side lines extended downward vertically determine the extent of the claim of the locator, except where the vein passes outside of such surface lines; but it must lie between vertical planes drawn downward through the end lines of the surface location. King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 228, 38 L. Ed. 419.

The cases establish the following propositions under this section: First, the surface location determines the extent of the rights of the locator below the surface; second, the end lines place the limits beyond which the locator may not go in the appropriation of any vein along its course or strike; third, every vein the top or apex of which lies inside the surface lines extended downward vertically is the property of the locator, and he may pursue it to any depth beyond his vertical side lines; fourth, the end lines of the location do not establish the limits beyond which the locator may not go in following a vein, where it subsequently develops that the location has, in fact, been placed not lengthwise, but crosswise, of the vein, as the side lines then become the end lines, and those which he calls end lines are in fact side lines. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 89, 43 L. Ed. 72; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 307, 43 L. Ed. 170.

Ownership and possession of the surface of a lode mining claim is the possession of such lode to the full extent of the extralateral right of the owner of the claim. Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 42 C. C. A. 415. And see Del Monte Mining & Milling Co. v. New York & L. C. Min. Co. (C. C. 1895) 66 Fed. 212.

Where the true owner of a mining claim is in possession of its surface asserting title to the entire claim, his possession in legal comtemplation extends to everything which is part of such claim, whether vertically beneath its surface or within the extralateral right granted by the statute in the actual possession of another holding ad-

versely. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1903) 121 Fed. 973, 58 C. C. A. 311; United States Min. Co. v. Lawson (1904) 134 Fed. 769, 772, 67 C. C. A. 587. See Montana Min. Co. v. St. Louis Min. & Mill. Co. (1900) 102 Fed. 430, 42 C. C. A. 415; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 583, 66 C. C. A. 299; Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 Pac. 834, 146 Cal. 147. 9 L. R. A. (N. S.) 940.

The doctrine that the owner of the surface owns all beneath until it is shown to belong to another applies to mining claims only when there is doubt as to what apex an underground body of ore may belong. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1901) 106 Fed. 471, 474.

45. Location on apex of vein essential.—Where the apex of a vein is of such width as to be partly in one location and partly in another, the rights of the locators or owners will be determined by priority of location. St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 667, 668, 44 C. C. A. 120, 56 L. R. A. 725; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 588, 66 C. C. A. 299; Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1901) 106 Fed. 471.

Slight deviations of the outcropping lode from the location of a claim will probably not affect the right of the locator to appropriate the continuous vein; but if it makes a material departure from his location, and runs off in a different direction without returning, the location cannot be said to be on that lode or vein farther than it continues substantially to correspond with it. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 469, 25 L. Ed. 253; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 54.

There is a difference between a lode sufficient to validate a location and an apex giving extralateral rights. Golden v. Murphy (1909) 103 Pac. 394, 31 Nev. 395 (rehearing denied [1909] 105 Pac. 99, 31 Nev. 395); Grand Central Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648. 29 Utah, 490 (approved Mammoth Min. Co. v. Grand Central Min. Co. [1909] 29 Sup. Ct. 413, 213 U. S. 72, 77, 53 L. Ed. 702). See Lawson v. U. S. Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

Where a location has been made upon the top or apex of a lode, the miner may follow it to any depth, although in its downward course it may enter adjoining land. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414; Iron Silver Min. Co. v. Murphy (D. C. 1880) 3 Fed. 368.

The top or apex of a lode is the end or edge or terminal point of the lode nearest the surface of the earth. It is not required that it shall be on or near or within any given distance of the surface. If found at any depth, and the locator can define on the surface the area which will inclose it, the lode may be held by such location. Id. See, also, Larkin v. Upton (1892) 12 Sup. Ct. 614, 144 U. S. 19, 36 L. Ed. 330, affirming Upton v. Larkin (Mont. 1888) 17 Pac. 728.

A mere swell in the mineral matter which shows itself at or near the surface and then turns over and goes on down at a declination is not a true apex within the meaning of the statute, as this term does not mean merely the highest point in a continuous succession of rolls or waves in the elevation and depression of mineral nearly horizontal. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

The term "outcrop" used in connection with a vein or lode, and as it concerns a vein, is an essential part of the definition of the apex or top of a vein, but it does not imply the presentation of the mineral to the naked eye on the surface of the earth, but means that it comes so near to the surface that it is found easily by digging, or it is the point at which the vein is nearest to the surface of the earth. Id. See Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 469, 25 L. Ed. 253.

This section was framed upon the hypothesis that all lodes or veins occupy a position more or less vertical in the earth, and stand upon their edge in the body of the mountain, and the words "top" and "apex" in this connection refer to the parts which come nearest to the surface; and may in some instances refer to the floe of the lode, or that part of the lode which has been detached from the body of the mineral in the crevice and floe downward on the surface, or may mean that part which stands in the solid rock though below a considerable body of the surface mass, but in any event as being the part of the lode which comes nearest the surface. Stevens v. Williams (C. C. 1879) Fed. Cas. Nos. 13,413, 13,414.

A controversy as to what is the top or apex of a vein or lode is a question of fact to be determined by evidence, and not one of law, as these are not scientific expressions but words in common use. Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 291.

No location can be made on the middle part of a lode, or otherwise than at the top or apex, which will enable the locator to go beyond his line. Iron Silver Min. Co. v. Murphy (D. C. 1880) 3 Fed. 368. And see Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

The words "top or apex" mean the highest point in the vein. Stewart Min-

ing Co. v. Ontario Mining Co. (1913) 132 Pac. 787, 23 Idaho, 724. See Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 469, 25 L. Ed. 253; Del Monte, etc., Min. Co. v. Last Chance Min. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110.

The "apex" of a vein must be the top or terminal edge of the vein on the surface or the nearest point to the surface, and must be the top of the vein proper rather than of a spur, and must be a point from which the vein has a dip as well as a strike. Stewart Mining Co. v. Ontario Mining Co. (1913) 132 Pac. 787, 23 Idaho, 724. See Gilpin v. Sierra Nevada Consol. Min. Co. (1890) 23 Pac. 547, 1014, 2 Idaho (Hasb.) 696.

46. Subsurface vein as basis of location.—A valid location may be properly laid upon a vein though it does not crop out upon the surface. If it lies entirely beneath the surface, and the course of its apex can be ascertained by sinking shafts at different points, such shafts may be adopted as indicating the position and course of the vein. In such case locations may be properly made on the surface, so as to secure a right to the vein beneath; but the act of Congress must be followed in laying claims and locations, where the vein does crop out along the surface, or it is so slightly covered by foreign matter that the course of its apex can be ascertained by ordinary surface exploration. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 469, 25 L. Ed. 253; Last Chance Min. Co. v. Bunker Hill Min., etc., Co. (1904) 131 Fed. 579, 589, 66 C. C. A. 299.

47. Position of apex determines possession and ownership of veins or lodes.—If a vein has its top or apex within his surface lines, then a locator has the right to follow its dip in its course downward outside of the vertical side lines of his location until it comes to a vertical plane drawn downward through the end lines of his location extended in their own direction. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 47, 29 L. Ed. 348; Colorado Central Consol. Min. Co. v. Turck (1893) 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030; Walrath v. Champion Min. Co. (1896) 72 Fed. 978, 19 C. C. A. 323; Montana Ore Purchasing Co. v. Boston, etc., Silver Min. Co. (1898) 85 Fed. 867, 868, 29 C. C. A. 462; Hall v. Equator Mining & Smelting Co. (C. C.) Fed. Cas. No. 5,931; Elgin Min., etc., Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 378; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 940; Watervale Min. Co. v. Leach (1893) 33 Pac. 418, 4 Ariz. 34, 55; Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 Pac. 834, 146 Cal. 147, 9 L. R. A. (N. S.) 940; Davis v. Shepherd (1903) 72 Pac. 57, 31 Colo. 141, 145.

The exclusive right of possession and enjoyment to a vein or lode under this section is one whose apex is found inside of the surface lines extended vertically; and this right follows such vein or lode downward even though it may depart from a perpendicular and extend laterally outside of the vertical side lines of such surface location. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 533, 29 L. Ed. 712; King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 227, 38 L. Ed. 419; Black v. Elkhorn Min. Co. (1894) 16 Sup. Ct. 1101, 163 U. S. 445, 448, 41 L. Ed. 221; Argonaut Consol. Min., etc., Co. v. Turner (1897) 48 Pac. 685, 23 Colo. 400, 405, 58 Am. St. Rep. 245; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 12, 50 L. R. A. 209, 83 Am. St. Rep. 17; Gilpin v. Sierra Nevada, etc., Min. Co. (1890) 2 Idaho (Hasb.) 696, 23 Pac. 547, 1014; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 122, 30 L. R. A. 803, 52 Am. St. Rep. 665. See Parrot Silver, etc., Min. Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 148, 53 L. R. A. 491, 87 Am. St. Rep. 386; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 74 (dissenting opinion). And see Bulwer Consol. Min. Co. v. Standard Consol. Min. Co. (1890) 83 Cal. 589, 23 Pac. 1102.

The locator of a mining claim is entitled to every vein whose apex lies within his surface lines, and he is entitled to them throughout their entire depth though they depart from a perpendicular in their course downward so as to extend outside his vertical side lines. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 88, 43 L. Ed. 72; Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 434, 42 C. C. A. 415; Iron Silver Min. Co. v. Cheesman (C. C. 1881) 8 Fed. 297, 300.

While proof of ownership of the apex may be proof of the ownership of a vein descending on its dip below the surface of property belonging to another, yet such ownership of the apex must first be established before any extralateral title to a vein can be recognized. Lawson v. U. S. Min. Co. (1907) 28 S. Ct. 15, 207 U. S. 1, 8, 52 L. Ed. 65; Keely v. Ophir Hill Consol. Min. Co. (1909) 169 Fed. 601, 604, 95 C. C. A. 99.

A patent, though expressed as conveying a specified length of a vein, carries only so much thereof as has its apex within the boundaries of the actual location, though this includes less than the length mentioned in the patent. Walrath v. Champion Min. Co.

(1898) 18 Sup. Ct. 909, 913, 171 U. S. 293, 43 L. Ed. 170.

Right to follow a vein on its dip beyond the surface lines of lode location exists only where the apex lies inside of such lines. Stewart Mining Co. v. Ontario Mining Co. (1915) 35 Sup. Ct. 610, 237 U. S. 350, 59 L. Ed. 989, affirming judgment (1913) 132 Pac. 787, 23 Idaho, 724.

Where a vein upon which a location rests, after being followed for a considerable distance, forks and passes out through the side line of the location, so that the outcrop of one fork is on the adjoining claim, this whole fork belongs to the owner of the latter claim. Colorado Cent. Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67, rehearing denied (1893) 54 Fed. 262, 4 C. C. A. 313, and writ of error dismissed (1893) 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030. And see Id. (1895) 70 Fed. 294, 17 C. C. A. 128, denying petition for rehearing (1893) 54 Fed. 262, 4 C. C. A. 313.

The question of ownership and right of possession of a vein or lode depends upon its location and the width of the apex, and in no sense upon the depth at which it passes outside of the side lines of the surface location. Colorado Central Consol. Min. Co. v. Turck (1893) 54 Fed. 262, 265, 4 C. C. A. 313.

In no case is the extralateral right of the locator of a mining claim bounded by either side line of his surface location, extended downward or otherwise, as to any vein, lode, or ledge having its top or apex within the surface lines of his location. Walrath v. Champion Min. Co. (1896) 72 Fed. 978, 980, 19 C. C. A. 323.

The patent conveys all veins or lodes whose apex is within the exterior lines of the claim extended downward vertically. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116.

The owner of a claim patented under the act of 1866, and made up by the consolidation of several claims acquired by purchase, is entitled to extralateral rights in respect of any lode or vein whose apex is found within its exterior boundaries, without regard to the location of the interior lines which formed the boundaries of the original claims. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 28 C. C. A. 333, affirming judgment (C. C. 1896) 73 Fed. 597, and certiorari denied (1898) 18 Sup. Ct. 940, 171 U. S. 687.

Possession of the surface of a mining claim is possession of a vein or lode having its apex within the surface lines of the claim, although, in extending downward, such vein may pass beyond the vertical side lines of the claim, and will support an action of trespass for the removal of ore from such vein, beneath the surface of an adjoining claim. Montana Min. Co. v. St. Louis Min. & Mill. Co. of Montana (1900) 102 Fed. 430, 42 C. C. A. 415, writ of error dismissed (1902) 22 Sup. Ct. 744, 186 U. S. 24, 46 L. Ed. 1039.

The ownership and possession of the surface of a lode mining claim carries with it the ownership and possession of the lode which has its apex therein to the full extent of the extralateral right given by the statute to the owner of the claim. Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299, writ of certiorari denied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622.

The question of the ownership of a vein or lode depends upon whether the top and apex of such vein is in one place or another. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,398. See Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

Where veins or lodes having their apex in a claim are in place, the claimant is entitled to the same, not only within the lines of the location, but as far as they may pass beyond those lines in their descent into the earth. Iron Silver-Min. Co. v. Cheesman (C. C. 1881) 8 Fed. 297, judgment affirmed (1886) 6 Sup. Ct. 481, 116 U. S. 529, 29 L. Ed. 712.

A vein or lode having its apex within the side lines of a location is the property of the person locating the claim, though it is a vein or lode independent of the vein or lode originally located within the surface lines of the claim. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 670.

One asserting a right to follow a vein or lode on its dip without his own location must show the outcrop or apex of such vein or lode to be in his own location. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347.

A person entering beneath the surface of the side lines of the mining location of another must justify under this section of the statute and show that he is the owner of a vein or lode the top or apex of which lies within the surface lines of his own claim. Cheesman v. Shreve (C. C. 1888) 37 Fed. 36.

The owner of a mining claim has no title to any part of a vein or lode which has its top or apex within the surface lines of another location, and cannot enjoin the owner of such location from working such vein on its dip within the side lines of his claim. Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 630.

Extralateral rights of a locator are determined by the actual location of a vein. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

When a locator owns an apex, whether it extends through the entire or through but a part of his location, he necessarily owns an equal length of such vein to its utmost depth. Tyler Min. Co.

v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 851.

The underground rights of a locator are based upon the fact that the apex of the vein is within his surface limits. Id.

The statute does not say that the vein must run from end to end of the location, but the locator has the right to follow all veins throughout their entire depth the top or apex of which lies inside of his surface lines, and on this fact all his underground rights are based. Id.

Where two veins, having apexes in different claims, unite in their dip, within the perpendicular extension of the side lines of another claim, the owners of the last claim cannot contest as to the rights in the vein beyond the point of union, since they have no interest in either vein. Roxanna Gold Mining & Tunneling Co. v. Cone (C. C. 1899) 100 Fed. 168.

Where a location has been made upon the top or apex of a lode, the miner may follow it to any depth, although in its downward course it may enter adjoining land. Iron Silver Min. Co. v. Murphy (D. C. 1880) 3 Fed. 368.

This section treats of veins, lodes, and ledges the top or apex of which lies inside of the surface lines extended vertically downward. Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 114.

Where the apex of a vein between two points is outside a mining claim and entirely within another, no extralateral rights in favor of the owners of the former claim can apply as to the segment of the vein between such points. McElligott v. Krogh (Cal. 1907) 90 Pac. 823.

By this section Congress intended to give the locator of a mining claim, to which no adverse rights had attached, every vein apexing within the surface boundaries of his location. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 15, 50 L. R. A. 209, 83 Am. St. Rep. 17.

A vein, though having an extralateral extension, is a part of the location within which it apexes. Davis v. Shepherd (1903) 72 Pac. 57, 31 Colo. 141.

A miner having an apex in his location is entitled to as much length of the vein on the strike, no matter how deep he may go in the dip, as he has length of apex within his surface lines, whether the apex reaches the surface or is found beneath the same, within the planes of his exterior boundary lines extending downward perpendicularly. Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 116, 30 L. R. A. 803, 52 Am. St. Rep. 665.

The intent of the mining law is that the locator is to have the vein or lode when he has the apex. Id.

Adverse possession of a mining claim would give the possessor all ledges or claims apexing within the claim, and the right to follow them within his side lines extended vertically downward. Golden v. Murphy (Nev. 1909) 103 Pac. 394, rehearing denied (1909) 105 Pac. 99.

The locator on the apex of a vein is entitled to the vein, and it is no defense to claim that other persons had actual possession of an underground portion of the vein, and that that constituted the locator a trespasser and made his location invalid. Eilers v. Boatman (1881) 3 Utah, 159, 2 Pac. 66.

The discoverer of any part of the apex of a mineral lode gets the right to its entire width, despite the fact that a portion of the width may be outside of the surface side lines of his claim extended downward vertically. Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 5 Utah, 3, 11 Pac. 510.

48. Location lengthwise of vein essential.—See, also, notes to § 4615, ante.

In the location of a mining claim the presumption is that the vein runs lengthwise and not crosswise of the claim as located. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 115, 42 L. Ed. 96; Work Min. & Mill. Co. v. Doctor Jack Pot Min. Co. (1912) 194 Fed. 620, 114 C. C. A. 392.

The intent of the statute of 1866, and of 1872 alike, is that mining locations on lodes or veins shall be made lengthwise on the surface of the earth where they are discoverable, and the end lines are to cross the lode and to extend perpendicularly downward, and gives the right to follow the dip outside of the side lines; but it was not the intent of the law to permit a person to make the location crosswise of a vein so that the side lines should cross it, and thereby give him the right to follow the strike of the vein outside of his side lines. A failure to make such location subordinates the rights of the locator to that of others who have property located on the lode. Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 303, 43 L. Ed. 170; Argonaut Min. Co. v. Kennedy Min., etc., Co. (1900) 63 Pac. 148, 131 Cal. 15, 24, 82 Am. St. Rep. 317.

Mining locations on lodes or veins must be made lengthwise and in the general direction of the vein or lode on the surface where they are discoverable, and the end lines are to cross the lode and extend vertically downward, and the right to follow the dip outside of the side lines is based upon the hypothesis that the direction of such lines corresponds substantially with the course of the vein or lode at its apex. Flagstaff Silver Min. Co. v. Tarbet (1878) 98 U. S. 463, 467, 25 L. Ed. 253.

This section establishes a rule by which each claim shall be so many feet of the vein lengthwise of its course to any depth below the surface, though laterally its inclination shall carry it ever so far from the perpendicular. The Spanish mining law confined the lo-

cator to perpendicular lines on every side, but gave him greater or less width according to the dip of the vein. Id.; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 90, 43 L. Ed. 72; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 308, 43 L. Ed. 170.

The right of a location is in no respect made dependent upon the course of a vein beyond the limits fixed by the statute, and a location so made and marked as required by statute or by the valid local rules and regulations of the mining districts confers upon the locator and his assigns and successors the rights defined by this section. Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 583, 66 C. C. A. 299.

The extralateral right to a vein or lode outcropping at the surface where it exists is fixed by the course of the vein or lode at the surface and not by its course on a level. Id.

If a locator fails to locate his claim parallel with the apex, so that the latter passes out through a side line, he can take nothing except what lies within its boundaries. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

The statute gives to the locator of any lode claim the length of 1,500 feet along the vein, and it has been the custom to obtain this extent by locating across and over an intersecting claim; but in asserting the right of length the intersecting claim, of course, is excluded. Cheesman v. Hart (C. C. 1890) 42 Fed. 98, 101.

49. Irregular or cross locations.—The law does not permit a claimant to make his location crosswise of a vein, and follow the strike of the vein outside of his side lines. A claimant's rights on a claim so located are subordinate to the rights of those who have properly located on the lode, and he can not interfere with their right to follow the dip outside of their side lines, as his right to the lode only extends to so much thereof as his claim covers. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 467, 468, 25 L. Ed. 253; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 293, 4 C. C. A. 329; Empire, etc., Min. Co. v. Tombstone, etc., Min. Co. (C. C. 1900) 100 Fed. 910, 913; Cosmopolitan Min. Co. v. Foote (C. C. 1900) 101 Fed. 518, 521. See Iron Silver Min. Co. v. Elgin Min., etc., Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; King v. Amy & Silversmith, etc., Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 228, 38 L. Ed. 419; Del Monte Min. Co. v. Last Chance Min. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 303, 43 L. Ed. 170; Consolidated Wyoming, etc., Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 548, 552, 557; Catron v. Old (1897) 48 Pac. 687, 23 Colo. 433, 436, 58 Am. St. Rep. 256; Parrot Silver & Copper Min. Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 144, 53 L. R. A. 491, 87 Am. St. Rep. 386; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 354.

A person locating a mining claim in the form of a triangle has no right under this section to follow the lode or vein on its downward dip through the side lines of his location into another's claim. Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 628; Price v. McIntosh (1901) 1 Alaska, 286, 291; Catron v. Old (1897) 48 Pac. 687, 23 Colo. 433, 439, 58 Am. St. Rep. 256. See Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Doe v. Sanger (1890) 23 Pac. 365, 83 Cal. 203.

Neither this section nor section 2336, R. S., section 4644, post, authorizes cross-locations on the surface of mining claims. Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358, 367.

Where subsequent developments show that a mining claim as located contains little of the apex of the vein claimed, and such vein does not cross either end line and does not run parallel to the side lines of the location, but enters a side line and departs from the location at the same side, the locator is not entitled to any extralateral rights based on the ownership of the apex vein of such vein. Catron v. Old (1897) 48 Pac. 687, 23 Colo. 433, 441, 58 Am. St. Rep. 256.

50. Veins crossing side line before reaching end line.—If the side lines of a mining claim are substantially parallel with the vein or lode the locator is not deprived of the right to follow the vein on its downward dip because it crosses the side line before reaching an end line, but in such case his extralateral right will extend from the end at which the vein enters to the point at which it crosses the side line. Republican Min. Co. v. Tyler Min. Co. (1897) 79 Fed. 733, 735, 25 C. C. A. 178 (certiorari denied [1897] 17 Sup. Ct. 998, 166 U. S. 720, 41 L. Ed. 1187); Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540; Del Monte Min., etc., Co. v. New York, etc., Min. Co. (C. C. 1895) 66 Fed. 212, 215; Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 850; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 30 L. R. A. 803, 52 Am. St. Rep. 665; Parrot Silver & Copper Min. Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 144, 53 L. R. A. 491, 87 Am. St. Rep. 386; State v. District Court, etc. (1901) 65 Pac. 1020, 25 Mont. 504, 514.

See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 696, 39 L. Ed. 859; Id. (1894) 61 Fed. 557, 9 C. C. A. 613.

If the apex of a vein crosses one end line and one side line of the claim, the locator may still follow the vein on its dip beyond the vertical side line of its location. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Clark v. Fitzgerald (1898) 18 Sup. Ct. 941, 171 U. S. 92, 93, 43 L. Ed. 87; Del Monte Mining & Milling Co. v. New York & L. C. Min. Co. (C. C. 1895) 66 Fed. 212; Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 144, 53 L. R. A. 491, 87 Am. St. Rep. 386; State v. District Court (1901) 65 Pac. 1020, 25 Mont. 504.

Where a vein or lode crosses the side line of a location without reaching the end line, as marked on the surface, the strike is terminated by the plane of such line line and the right to follow a vein on its dip is then terminated by a vertical plane parallel to the end lines drawn downward and which takes effect at the point where the apex intersects such side lines. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 292, 4 C. C. A. 329; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613; Republican Min. Co. v. Same (1897) 79 Fed. 733, 735, 25 C. C. A. 178; King v. Amy & Silversmith Min. Co. (1890) 24 Pac. 200, 9 Mont. 543; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 119, 30 L. R. A. 803, 52 Am. St. Rep. 665; see Montana Min. Co. v. St. Louis Min., etc., Co. (1906) 147 Fed. 897, 905, 78 C. C. A. 33; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540; Del Monte Min., etc., Co. v. New York Min., etc., Co. (C. C. 1895) 66 Fed. 212; Patterson v. Hitchcock (1877) 3 Colo. 533; Armstrong v. Lower (1882) 6 Colo. 393, 399; Armstrong v. Lower (1883) 6 Colo. 581, 585; Catron v. Old (1897) 48 P. 687, 23 Colo. 433, 437, 58 Am. St. Rep. 256; Doe v. Sanger (1890) 23 P. 365, 83 Cal. 203; Golden Fleece, etc., Min. Co. v. Cable Consol., etc., Min. Co. (1877) 12 Nev. 312; Bullion, Beck & Champion Min. Co. v. Eureka Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 70 (dissenting opinion).

While a court cannot make new end lines, nor can it make a new location or in any way change the one made by the parties, yet a court can keep within the end lines fixed by the locator in respect to any extralateral rights without drawing any line, and may give the locator such extralateral rights with reference to the point where the vein or lode passes out through a side line. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Republican Min. Co. v. Tyler Min. Co. (1897) 79 Fed. 733, 736, 25 C. C. A. 178; Del Monte Min., etc., Co. v. New York Min., etc., Co. (C. C. 1895) 66 Fed. 212; Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250, 257. See King v. Amy & Silversmith Min. Co. (1890) 24 Pac. 200, 9 Mont. 543, 573; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 63.

This section places a limit on the length of the vein beyond which the locator must not go, but it does not say that he shall not go outside the vertical side lines unless the vein in its course reaches the vertical planes of the end lines. The statute does not require that the vein either on or below the surface shall extend from end line to end line in order to give him the right to pursue it in its dip outside the vertical side lines, as the mere naming of the limits beyond which a grant can not go is not equivalent to saying that nothing which does not extend to such limits is granted. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 89, 91, 43 L. Ed. 72; Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 434, 42 C. C. A. 415; Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 851; Southern Nevada Gold & Silver Min. Co. v. Holmes Min. Co. (1903) 73 Pac. 759, 27 Nev. 107, 103 Am. St. Rep. 759.

When the outcrop of a vein passes through one end line and one side line of a location, the locator may draw in the other end line to the point of intersection of the vein with the side line, and abandon what lies beyond; and he will then have the same extralateral rights as if the claim had been so located in the first instance. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 4 C. C. A. 329; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613 (judgment reversed [1895] 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859); Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848.

A locator has a right to follow a vein on its dip beyond the vertical side lines if it enters at an end line but terminates halfway across the end of his location. In such case it is a vein the apex of which lies inside of his surface lines extended vertically downward. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 89, 43 L. Ed. 72; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 18, 50 L. R. A. 209, 83 Am. St. Rep. 17.

When a vein or lode passes out of a mining claim across a side line, such vein may be followed on its dip between the perpendicular plane drawn through the intersecting end line and another similar parallel plane passing through the point where the vein crosses such

side line. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 560, 9 C. C. A. 613; Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 602. See Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 292, 4 C. C. A. 329; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540; Del Monte Min., etc., Co. v. New York, etc., Min. Co. (C. C. 1895) 66 Fed. 212; Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848; Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 30 L. R. A. 803, 52 Am. St. Rep. 665.

The owner of a mining claim has the right to follow a vein or lode, the top or apex of which is within his surface lines, on its dip, not upon its strike, upon a vertical plane drawn downward parallel to the end line, at the point where the strike of the vein or lode ends —where the lode, in its lengthwise course, intersects the side lines of the claims. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 564, 9 C. C. A. 613. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859.

If the apex of a vein, or part of it, crosses the end line of a claim, and then passes out through a side line, but curves back again into the claim and crosses its other end line, this gives the owners of the claim no right to any part of the apex which is outside of their lines. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 27 C. C. A. 50. See Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3.

The owner of a claim may follow the dip beyond his vertical side lines at any point where the apex is within his boundaries, though his location is not for its entire length along the apex. He may follow the vein in its departure in any degree from the perpendicular until it reaches the horizontal. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

The rule permitting the locator to follow the ledge along its course underground is limited by the vertical planes of the end lines, but this rule cannot be followed when the apex of the ledge passes out of a side line before reaching the other end line, as this would give the locator more of the ledge underground that he has of the apex. Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 851.

To permit a locator to establish at the point where the apex crosses the side line a vertical plane parallel to the plane of the end line cut by such apex and permit him to follow the vein on its dip between these two planes is not in violation of any provisions of the statute and gives the locator the rights which the statute intends he should have. Id.

51. End lines of location—Establishment and direction.—See, also, notes to § 4615, ante.

Whatever inconvenience or hardship may happen from the fact that the end lines as marked on the surface may vary from a right angle to the true course of the vein, it is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to subterranean developments by subsequent operations, as such readjustments would create uncertainty in titles to mining claims. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 207, 30 L. Ed. 98.

It is the end lines alone, and not in connection with any other lines, which define the extralateral rights; and they must be straight lines, not broken or curved ones. Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 43 L. Ed. 170, affirming decree (1896) 72 Fed. 978, 19 C. C. A. 323. And see Flagstaff Silver Min. Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253.

Where end lines are not established as required by statute, the location may be valid for all that can be found within the surface lines, but beyond those lines an essential element of the right to follow the lode is wanting, and therefore the right cannot exist. Elgin Mining & Smelting Co. v. Iron Silver-Min. Co. (C. C. 1882) 14 Fed. 377, judgment affirmed Iron Silver Min. Co. v. Elgin Mining & Smelting Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98.

When a vein or ledge enters an end line of a claim a parallel line will be supposed to exist or be judicially constructed at the point where such vein or ledge passes out of the claim whether it be a side or an end line. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1901) 106 Fed. 471, 472.

52. —— End lines adjustable.—The end line may be drawn at the point where the lode terminates within the surface lines, or at the point where the apex of the lode crosses the side line of the surface location. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 292, 4 C. C. A. 329; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 560, 9 C. C. A. 613; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 547; King v. Amy & Silversmith Min. Co. (1890) 24 Pac. 200, 9 Mont. 543; Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312; Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 688, 690,

39 L. Ed. 859; Tyler Min. Co. v. Last Chance Min. Co. (1898) 90 Fed. 15, 17, 32 C. C. A. 498; Doe v. Sanger (1890) 23 Pac. 365, 83 Cal. 203.

Parties may by agreement settle and determine the location of their end lines. Richmond Min. Co. v. Eureka Min. Co. (1880) 103 U. S. 839, 846, 26 L. Ed. 557; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293; 309, 43 L. Ed. 170. And see Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 400.

A boundary line agreed on by conflicting claimants may determine their rights in the length on the lode as well as their extralateral rights. Kennedy Mining & Milling Co. v. Argonaut Mining Co. (1903) 23 Sup. Ct. 501, 504, 189 U. S. 1, 47 L. Ed. 685. And see Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, decree modified (1896) 72 Fed. 978, 19 C. C. A. 323.

The end lines of a claim may be changed to comply with the United States statutes requiring the end lines to be parallel. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 560, 9 C. C. A. 613. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859.

Judge Hallett says that "as the law requires that a location shall be made along the course or strike of a vein at the surface of the earth, the end lines must of necessity be at right angles to the course, and whenever the course or strike can be ascertained, at the points where it passes from the location, end lines should be fixed at right angles thereto, without reference to the end lines laid in the location." Elgin Min. & S. Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 380.

Where part of the end of a location is adjudged to be in conflict with a prior claim, and thereupon the owners of the prior claim quitclaim the land in conflict to the owners of said location, whose possession thereof is not interrupted, the location will continue to include the land in conflict. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

When two claims adjoin one another end to end, the end lines being identical for part of their length, but diverging from one another for the rest of their length, and the vein passes out of one claim into the other at a spot where the end lines are identical, the two claims together own all the vein on its dip from this point, and the fact that there is a triangular piece of ground partially separating the ends of their claims does not prevent them, as against a third claim, from following the dip of the vein under such triangle. Champion Min. Co. v. Consolidated Wyoming Gold Min. Co. (1888) 75 Cal. 78, 16 Pac. 513. See, also, Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46.

53. —— **Vertical planes of end lines.** —The statute provides that the right of a locator to the possession of the outside part of any vein or lode having its apex within his surface location shall be confined to such portions thereof as lie between vertical planes drawn downward through the end lines of his location so continued in their own direction that such claim will intersect such exterior parts of such vein. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 207, 30 L. Ed. 98; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 70, 43 L. Ed. 72; Stewart Mining Co. v. Ontario Mining Co. (1915) 35 Sup. Ct. 610, 237 U. S. 350, 59 L. Ed. 989 (affirming judgment [1913] 132 P. 787, 23 Idaho, 724); Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 291, 4 C. C. A. 329; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 565, 9 C. C. A. 613; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 792; Same v. Hart (C. C. 1890) 42 Fed. 98, 100; Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 291; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 546; Bunker Hill & S. Min., etc., Co. v. Empire State-Idaho Min. etc., Co. (C. C. 1903) 134 Fed. 268, 272. See Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50.

Where the end lines of a mining claim are once fixed they bound the extralateral right to all the lodes that are thereafter found within the surface lines of the location, and the act of 1872 in granting all other veins within the surface lines of the claim as located did not create any new lines for such veins or authorize the courts to make any. Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 434, 42 C. C. A. 415; Walrath v. Champion Min. Co. (1896) 72 Fed. 978, 19 C. C. A. 323; Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, 557.

The right to follow the dip of the vein is bounded by the end lines of the claim, properly so called, and which lines are those which are cross-wise of the general course of the vein on the surface. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 468, 25 L. Ed. 253; Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 208, 30 L. Ed. 98. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63.

While the discoverer or owner may follow his vein in its descent into another's territory beyond his own side lines, he cannot do this beyond his end lines, and the vein beyond such end lines is subject to further discovery and appropriation. Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 486, 30 L. Ed. 1140; Larkin v. Upton (1892) 12 Sup.

Ct. 614, 144 U. S. 19, 21-23, 36 L. Ed. 330.

The end lines as marked on the surface by the locator, save when the end lines become side lines in contemplation of law, place the limits beyond which such locator may not go in the appropriation of any veins along their course or strike. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72. See Fitzgerald v. Clark (1895) 42 Pac. 273, 17 Mont. 100, 124, 30 L. R. A. 803, 52 Am. St. Rep. 665.

The locator of a mining claim may follow any vein apexing within his surface lines outside of his side lines into an adjacent location, but he must keep within the vertical planes of his end lines extended downward. Wheeler v. Billings (1895) 72 Fed. 301, 307, 18 C. C. A. 573.

Under the provision giving to persons who had previously procured a patent to a surface location, as incident to one vein only, a right to all other veins, throughout their depth, which have their apexes within the surface lines, the extralateral rights of the patentee in respect to any such additional veins extend to the vertical plane of the end lines, prolonged in their own direction, and cannot be limited by the vertical plané of any side line. Walrath v. Champion Min. Co. (1896) 72 Fed. 978, 19 C. C. A. 323, modifying (C. C. 1894) 63 Fed. 552.

A patentee, under the acts of 1866 and 1872, cannot follow the vein outside of the end lines of the claim vertically drawn down through the lode, but he may follow the vein with its dips, angles, and variations to any depth beyond the side lines. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

Beyond the end lines of a location the vein or mineral can not be followed into adjoining ground, but beyond a side line it can be followed. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1893) 62 Fed. 945, 947.

This section, to meet the geologic conditions in the tendency of veins to depart from a perpendicular on the downward course, authorizes a miner to follow the vein on its dip to an indefinite length outside of his side lines, if the apex is within his location, but does not permit him to cross the vertical planes of his end lines. Butte & Boston Min. Co. v. Société Anonyme des Mines de Lexington (1899) 58 Pac. 111, 23 Mont. 177, 193, 75 Am. St. Rep. 505.

It is not believed to be the intention of Congress to prohibit a locator of a quartz lode from following his vein with all its dips, angles, and variations along its course, not exceeding 1,500 feet and not beyond the end lines of his location, in whatever direction it runs, irrespective of the vertical side lines of the surface boundaries. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 331.

54. —— **End lines of all veins within location.**—Where more than one vein apexes within the surface lines of a mining location it would be physically impossible for the end lines to be drawn at right angles to the courses of all such veins, and the extralateral rights conferred by the statute exist without regard to the angle at which the end line crosses the general course of the vein. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 52 C. C. A. 219; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 590, 66 C. C. A. 299. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63.

Where the top or apex of more than one vein lies within the surface lines of a location, and the veins have different courses or dips, then the right to follow them outside of the side lines must be bounded by planes drawn vertically through the same end lines, as the plane of the end lines can not be drawn at right angles to the courses of all the veins. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 208, 30 L. Ed. 98; Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co. (1904) 131 Fed. 579, 590, 66 C. C. A. 299; Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, 558. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63.

Where the end lines of a mining claim have been established, they remain the end lines as to all veins found within its surface boundaries. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1900) 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725 (writ of error dismissed Montana Min. Co. v. St. Louis Min. & Mill. Co. of Montana [1902] 22 Sup. Ct. 744, 186 U. S. 24, 46 L. Ed. 1039); St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 667, 44 C. C. A. 120, 56 L. R. A. 725; Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. (1904) 75 Pac. 1070, 32 Colo. 176, 64 L. R. A. 925. See Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 207, 30 L. Ed. 98; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 307, 43 L. Ed. 170.

The statutory provision giving the original locator all the veins and lodes throughout their entire depth, the top or apex of which lies inside the surface lines, shows that the end lines marked on the ground must control. The right to follow such veins or lodes having their apex within his surface lines,

outside of the side lines of the location, must be bounded by planes drawn vertically through the end lines. The planes of the end lines can not be drawn at a right angle to the course of all the veins if they are not identical. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 207, 30 L. Ed. 98; Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 291.

While the top or apex of more than one vein may lie within the surface lines of the location, and the veins may have different courses and dips, yet the right of the locator to follow them outside of the side lines of his location is bounded by the planes drawn vertically through the same end lines. The planes of the end lines cannot be drawn at right angles to the courses of all the veins if they are not identical. In such case the end lines must be those which are crosswise of the general course of the vein on the surface. Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 198, 30 L. Ed. 98; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 307, 43 L. Ed. 170. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63.

Under this section the end lines of the claim, for the purpose of determining extralateral rights in additional veins, are the end lines of the original location and lode, and are not to be determined, irrespective thereof, by the direction of the newly discovered lodes. Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 914, 171 U. S. 293, 43 L. Ed. 170, affirming decree (1896) 72 Fed. 978, 19 C. C. A. 323.

The end lines of the original veins must be the end lines of all the veins found within the surface boundaries. Id.

The end lines of a surface location must be considered by a court as the end lines of any and all other veins or lodes which lie inside of such surface lines, otherwise end lines would have to be constructed in different directions if the separate veins or lodes did not run parallel with each other, and the result would be that these lines extended might give to the owner of the claim a greater length along the lode as it extended downward than they have upon the surface. Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, 557; Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co. (1867) 75 Pac. 1070, 32 Colo. 176, 187, 64 L. R. A. 925.

Where the end lines of a lode claim cross the surface outcropping of a vein, they determine the extralateral right of the claim, without regard to the angle at which they cross the general course of the vein; its course for that purpose being fixed by the course of the apex on the surface of the claim. Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299, writ of certiorari denied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622.

The provision, giving one who had theretofore located a vein and received a patent therefor, by which he obtained a right only to that particular vein, and to the surface ground as surveyed as incident merely to the vein, all other veins throughout their entire depth, the apices of which lay within such surface lines extended downward, his extralateral rights as to such other veins are determined by the original end lines of the location. Walrath v. Champion Min. Co. (C. C. 1894) 63 Fed. 552, decree modified (1896) 72 Fed. 978, 19 C. C. A. 323.

The law contains nothing granting, under any circumstances, to a claim owner, a greater length of the discovered ledge underground than he owns of its apex; hence where two claims overlap along the apex of a ledge, although the end lines of the senior location converge, and meet within the other claim, so as to terminate the rights of its owner at that point, the owner of the junior claim cannot take up the ledge in its downward course beyond such point, and continue to follow it within the limits of his own end lines, but his underground ownership of the ledge is bounded by the extension of the plane passing through the line of the senior claim, which bounds his rights along the apex, where such line and his own end line, which marks his other boundary, converge in the direction of the dip of the vein. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1900) 108 Fed. 189, judgment affirmed (1901) 109 Fed. 538, 48 C. C. A. 665.

A locator may take more of a ledge underground than he owns of his apex, but this rule applies to secondary veins unknown at the time the location was made and constitutes no function in following the location lines on the surface, but in such case the end lines of all the original veins shall be the end lines of all veins found within the surface boundaries. Id. See Walrath v. Champion Min. Co. (1898) 18 S. Ct. 909, 171 U. S. 293, 43 L. Ed. 170.

This section, among other things, gives the locator of a mining claim the right to follow all veins or lodes throughout their entire depth, the top or apex of which lies within his surface lines, limited by the vertical planes drawn downward through the end lines. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 7, 50 L. R. A. 209, 83 Am. St. Rep. 17.

A locator has extralateral rights to secondary veins, apexing within the surface lines of his location, although such secondary veins do not apex within the same segment of the claim in which the apex of the discovery vein exists; and, while the end lines of the location must constitute the end lines of all

veins apexing within the surface boundaries, and may be the bounding planes for such extralateral rights, yet the bounding planes of these veins, though they must be drawn parallel to the end lines, need not be coincident. Ajax Gold Min. Co. v. Hilkey (1903) 72 Pac. 447, 31 Colo. 131, 62 L. R. A. 555, 102 Am. St. Rep. 23.

The course of the primary or discovery vein definitely determines the end lines and side lines for all veins having their apices within the exterior boundaries of the location. Stewart Min. Co. v. Ontario Min. Co. (1913) 132 Pac. 787, 23 Idaho, 724, 740. See Cosmopolitan Min. Co. v. Foote (C. C. 1900) 101 Fed. 518.

55. —— **Parallelism of end lines.**—See, also, notes to § 4615, ante.

The parallel lines of a location crossing a vein are the end lines of the claim whether so intended by the locator at the time of its location or not. Flagstaff Silver Min. Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Argentine Mine Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 38 L. Ed. 419; Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 541, 48 C. C. A. 665.

Where the end lines of a mining location are not parallel the owner of the claim has no extralateral rights. Elgin Min. & S. Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 379; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626; Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 145, 53 L. R. A. 491, 87 Am. St. Rep. 386.

Prior to the act of 1872 the end lines were not required to be parallel; and when it was decided that the requirements of that act made it a condition to the right of the locator to follow his vein outside of the vertical planes drawn through his side lines, the decision was limited in terms to cases where the location was made after the enactment of 1872. East Central Eureka Min. Co. v. Central Eureka Min. Co. (1907) 27 Sup. Ct. 258, 204 U. S. 266, 269, 51 L. Ed. 476. See Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 208, 30 L. Ed. 98.

Where the end lines of the location of a mining claim are not parallel the location may be valid for all that can be found within the surface lines, but in such case the locator can not claim the right to follow the vein or lode if it extends on its dip outside of the lines of his location. Elgin Min. & S. Co. v. Iron Silver Min. Co. (C. C. 1882) 14 Fed. 377, 381.

The statute requires the end lines of a claim to be parallel, and a locator, in asserting a right to follow a vein on its dip without the side lines of his location and into the location of another, must show the outcrop or apex of such vein to be in his own location throughout the ground in controversy, being the extent of the location of the first locator, and of the location of that in which he attempts to follow such vein, parallel to each other. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 791; Cheesman v. Hart (C. C. 1890) 42 Fed. 98, 101. See Bergquist v. West Virginia-Wyoming Copper Co. (1909) 106 Pac. 673, 18 Wyo. 234, 277.

The fact that a location is cut by another valid claim crossing it obliquely does not make the line of such intersection the end line of the location when the location extends beyond the intersecting claim. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

Where a mining claim as located does not have parallel end lines, but the United States surveyor draws in one end line so as to make them parallel, the rejection of such survey by the locator will not deprive his assignee, upon accepting the survey, and obtaining a patent in accordance therewith, (abandoning the portion of his claim not included in the survey), of the right to follow the dip beyond his side lines within the vertical planes drawn through the parallel end lines. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935.

A locator is bound by the lines of his surface location and under the present statute it is essential to the existence of the right of the locator to follow his vein outside of the vertical planes drawn through the side lines that the end lines of his surface location be parallel. Id. See Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Iron Silver Min. Co. v. Elgin Min. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98.

A locator has the right to follow his vein down on the dip beyond his side lines, even if his end lines were not parallel, but only substantially so. It is sufficient if, within a year, or other reasonable time, after location, the end lines are corrected, so as to be parallel, without including any new ground. Doe v. Sanger (1890) 83 Cal. 203, 23 Pac. 365.

56. —— **Side lines as end lines.**—See, also, notes to § 4615, ante.

Where the course of a vein or lode is across the claim, instead of in the direction of its length, the side lines of the location become the end lines, and the end lines the side lines, for the purpose of determining extralateral rights. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 468, 25 L. Ed. 253; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140 (affirming judgment Van Zandt v. Argentine

Min. Co. [C. C. 1881] 8 Fed. 725); King v. Amy & Silversmith Consol. Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 38 L. Ed. 419 (reversing [1890] 24 P. 200, 9 Mont. 543); Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859 (reversing judgment [1894] 61 Fed. 557, 9 C. C. A. 613); Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 89, 43 L. Ed. 72; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 292, 293, 4 C. C. A. 329; Id. (1897) 79 Fed. 277, 24 C. C. A. 578; New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 434, 42 C. C. A. 415; Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 589, 66 C. C. A. 299 (writ of certiorari denied [1906] 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622); Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1904) 131 Fed. 591, 66 C. C. A. 99 (appeal dismissed [1906] 26 Sup. Ct. 754, 200 U. S. 613, 50 L. Ed. 620); Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co. (1912) 194 Fed. 620, 114 C. C. A. 392; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 546; Walrath v. Champion Min. Co., Id. 552, 556; Del Monte Mining & Milling Co. v. New York & L. C. Min. Co. (C. C. 1895) 66 Fed. 212; Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 705; Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. (C. C. 1900) 100 Fed. 910; Cosmopolitan Min. Co. v. Foote (C. C. 1900) 101 Fed. 518; Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. (C. C. 1904) 131 Fed. 339; Tombstone Mill & Mining Co. v. Way Up Min. Co. (1883) 25 Pac. 794, 1 Ariz. 426; Watervale Min. Co. v. Leach (Ariz. 1893) 33 Pac. 418; Southern California R. Co. v. O'Donnell (1906) 85 Pac. 932, 3 Cal. App. 382, 386; Argonaut Consol. Mining & Milling Co. v. Turner (1897) 48 Pac. 685, 23 Colo. 400, 58 Am. St. Rep. 245; Catron v. Old (1897) 48 Pac. 687, 23 Colo. 433, 58 Am. St. Rep. 256; Stewart Min. Co. v. Ontario Min. Co. (1913) 132 Pac. 787, 23 Idaho, 724, 740; Fitzgerald v. Clark (1895) 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803; Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129 Pac. 308; Eilers v. Boatman (1881) 2 Pac. 66, 3 Utah, 159, 167. See Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449, 462; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 62.

The effect of the decisions where a mistake has been made in a mining location and where by legal effect side lines become end lines and the end lines side lines, is that the locator can not extend his boundaries beyond the new end lines, and this is regarded as a sufficient punishment on the party making the mistake. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Iron Silver Min. Co. v. Elgin Min., etc., Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 38 L. Ed. 419; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 43 L. Ed. 170; Empire, etc., Min. Co. v. Tombstone, etc., Min. Co. (C. C. 1900) 100 Fed. 910, 914; Cosmopolitan Min. Co. v. Foote (C. C. 1900) 101 Fed. 518, 521.

Where a vein passes through both side lines of a lode claim into the ground of another claimant on its course or strike, then the side lines of such claim, with reference to the particular vein, become the end lines, and the rights of adjoining mining claimants are determined accordingly. King v. Amy & Silversmith Min. Co. (1894) 14 Sup. Ct. 510, 152 U. S. 222, 228, 38 L. Ed. 419; Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 696, 39 L. Ed. 859; Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1898) 85 Fed. 867, 868, 29 C. C. A. 462; Argonaut Consol. Min. Co. v. Turner (1897) 48 Pac. 685, 23 Colo. 400, 406, 58 Am. St. Rep. 245. See Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac. 326, 25 Mont. 139, 144, 53 L. R. A. 491, 87 Am. St. Rep. 386.

If the vein runs more nearly parallel with the end lines than with the side lines, as marked upon the ground, then the courts must consider the end lines of the location as the side lines and the extralateral rights are preserved and maintained. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 549; Catron v. Old (1897) 48 Pac. 687, 23 Colo. 433, 438, 58 Am. St. Rep. 256.

Coincidence of lines between different claims does not necessarily make them side lines or end lines, but whether they shall be so regarded depends upon legal considerations. Walrath v. Champion Min. Co. (1898) 18 Sup. Ct. 909, 171 U. S. 293, 309, 43 L. Ed. 170.

A locator is not bound to lay his side lines perfectly parallel with the course or strike of the lode or vein so as to cover it exactly, and his location may so run that it crosses the vein; but in such event his end lines become his side lines, and he can only pursue his vein to his side lines vertically extended as though they were his end lines. Ste-

vens v. Williams (C. C. 1879) Fed. Cas. No. 13,413.

Under this section the vein on its dip can not be followed outside of the vertical planes of the original side lines into an adjoining claim, where the claim is located across instead of along the vein or lode, as in such case the side lines must be treated as the end lines. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 547.

Under the rule that where a claim is located across, instead of along, the vein, the original side lines become end lines, and the end lines side lines, the owner is entitled to all the rights with reference to the new side lines that he would have had if they had originally been located as such, including the right to follow the dip of a vein having its apex within the surface boundaries of his claim beyond the vertical plane passing through such lines. Empire Mill. & Min. Co. v. Tombstone Mill. & Min. Co. (C. C. 1900) 100 Fed. 910.

Where the apex of a vein crosses the east end line of a location, and extends to and crosses its south side line, and thence passes into another location, and the dip is from the apex of the vein in the former location southward crossing the vertical plane of the south side line, such south side line will not be considered as an end line, but the owners of the former location have the right to all ore found on the dip south of their south side line, between the intersection of the vein with the vertical plane of their east end line and a parallel plane dropped from the point where the apex crosses their south side line. Fitzgerald v. Clark (1895) 17 Mont. 100, 42 Pac. 273, 52 Am. St. Rep. 665, 30 L. R. A. 803.

Where two opposite side lines of a claim are crossed by the vein on its course, they thereby become in fact end lines, and hence the locator has no extralateral rights without the vertical planes extended downward in the direction of the original side lines. Parrot Silver & Copper Co. v. Heinze (1901) 64 Pac. 326, 53 L. R. A. 491, 25 Mont. 139, 87 Am. St. Rep. 386.

57. —— **Presumptions as to lines after patent.**—The extralateral right given by the statute can not be defeated by showing the surface end lines of the original location of the claim were not parallel, where a patent has been issued showing the surface location and the parallelism of the end lines. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 940.

The legal presumption arises from the issuance of a patent that the end lines, as established on the ground, are the true lines for all the purposes of the case. Stewart Min. Co. v. Ontario Min. Co. (1913) 132 Pac. 787, 23 Idaho, 724, 741.

58. **Identity and continuity of vein—Identity.**—In determining the identity of ore bodies or the continuity of a vein or lode found on different levels, or where it is broken by the interjection of country rock, a wide latitude is permissible in order to ascertain the reasoning on which the conclusions of witnesses are based. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 111, 120, 126; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 544; Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554; Overman Silver Min. Co. v. Corcoran (1880) 15 Nev. 147, 153. And see National Mines Co. v. Charleston Hill Nat. Mining Syndicate (D. C. 1912) 205 Fed. 787.

A locator is entitled to recover, in a case of controverted right to mineral, either where such mineral is within the surface lines of his location and patent, or is without such lines, by showing that it was a part of the same vein which his location and patent covered, and which, passing from his side lines, was a continuation of the vein within the lines of his location at the surface. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 531, 29 L. Ed. 712; Collins v. Bailey (1912) 125 Pac. 543, 22 Colo. App. 149, 163; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63. See Butte & B. Min. Co. v. Société Anonyme Des Mines De Lexington (1899) 58 Pac. 111, 23 Mont. 177, 192, 75 Am. St. Rep. 505.

The identity of a vein or lode is essential to the right of a locator to follow it outside of his surface lines extended downward vertically. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 483, 116 U. S. 529, 534, 29 L. Ed. 712; Collins v. Bailey (1912) 125 P. 543, 22 Colo. App. 149, 163. See Butte & Boston Min. Co. v. Société Anonyme des Mines de Lexington (1899) 58 Pac. 111, 23 Mont. 177, 192, 75 Am. St. Rep. 505; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63.

The owner of mining property is not only entitled to all the mineral in the vein or lode included within the surface lines of his claim extended vertically, but may follow that vein or lode beyond the vertical side lines of the claim, as far as it extends in a more or less continuous body of mineral lying within a well-defined boundary of other rock, as long as it can be traced as distinguishable from the general mass of the mountain, and even though the mineral may diminish or be totally suspended for a short distance, if found again in the same course, with the same mineral. Iron Silver-Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 29 L. Ed. 712, affirming judgment (C. C. 1881) 8 Fed. 297.

If the mineral disappears, or the fissure with its walls of the same rock

disappears, so that its identity can no longer be traced, the right to pursue it outside of the perpendicular lines of claimants' survey is gone. Id.

A vein is by no means always a straight line, or of uniform dip or thickness, or richness of mineral matter, throughout its course. The cleft or fissure in which a vein is found may be narrowed or widened in its course, and even closed for a few feet and then found further on, and the mineral deposit may be diminished or totally suspended for a short distance, but if found again in the same course with the same mineral within that distance its identity may be presumed. Id.

In determining whether a lode extends from one claim to another location, and has its apex therein, the persistence of the ore through these and the intervening claims is of little weight, unless there is evidence tending to show a crevice, or continuous ore or mineralized rock. With such evidence it is of considerable weight. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347.

Where both mineral and fissure close, come to an end, and are not found again in that direction, or, if found at all, are so far off from the tracing of the vein, or so diverted from its original trend or line, or appear under different geological conditions and surroundings, the continuity is broken, and the lode is not the same. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787.

A locator cannot pursue a vein or lode outside of the side lines of his location, unless it is the same vein or lode which has its outcrop within his surface location; but such vein need not be a straight line of uniform dip or thickness or richness of mineral matter throughout its course and length. Id.

The vein must be continuous only in the sense that it can be traced by the minor through the surrounding rocks. Slight interruptions of the mineral bearing rock are not alone sufficient to destroy the identity of the vein, nor would a short partial closure of the fissure have the effect to destroy the continuity of the vein, if, a little further on, it appeared or recurred again, with mineral bearing rock in it. Id. See, also, Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co. (C. C. 1902) 117 Fed. 509.

On the question of whether two veins unite in disputed ground it may be shown that their directions outside of, as well as within, the disputed ground, are such that, if continuous, they would meet. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

Where a vein, located in sedimentary beds of rock, is formed by replacement, and the mineralization ceases within a short distance of the ore body or ore channel, the limits of the deposition of ore are the limits of the vein; and this is so whether the vein be considered laterally or with reference to the apex. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

59. —— **Continuity of vein essential.** —The owner of a mining claim may follow a vein or lode having its top or apex within his surface lines on its dip into an adjoining claim, though such lode is not a true fissure, but consists of a line of contact between the porphyry and lime rock, if in its descent it contains some valuable ore, not necessarily of economical value for treatment, but something ascertainable, and the form in which it appears, if of no importance; but it will be sufficient, whether it be iron or manganese, carbonate of lead, or anything else yielding silver or showing the precious metals for which the location was made. Stevens v. Gill (C. C. 1879) Fed. Cas. No. 13,398; Collins v. Bailey (1912) 125 Pac. 543, 22 Colo. App. 149, 162. See Stevens v. Williams (C. C. 1879) Fed. Cas. Nos. 13,413, 13,414.

If ore is found in a vein within boundaries of porphyry and lime, though some fragments of each may occur with it, the lode is well defined, but if the ore occurs in prophyry or lime, or in both, in such confused and irregular ways as shows no line of demarcation for the ore body, then the lode is not so well defined as that it may be followed beyond the lines of the plaintiff's location and the physical structure of the earth and within the location is to be considered. Leadville Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158.

To give a locator the right to follow a vein or lode beyond the side lines of his claim he must show that the lode is continuous and in place throughout its whole course from its origin in his own location to the place in which he claims it. Id.

If, in following the vein, the contact should be found barren of ore for a considerable distance because the two kinds of rock come together, then the deposit ceases to be a vein, and cannot be followed until another body of ore some distance beyond is reached. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,414.

The fact that a mineral vein is strong or weak has no bearing on the question of the right of the prior locator to follow it beyond the side lines of his location. Iron Silver Min. Co. v. Cheesman (C. C. 1881) 8 Fed. 297, 302. See South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 63.

Proof that ore is found in the form of a brecciated vein in a fissure between walls may be sufficient to entitle a prior locator to follow such vein beyond the lines of his location. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 354.

When the apex of a vein crosses one end line of the claim and runs in the

direction of its length, but is cut off, before reaching the other end, by a "crossing," so that it terminates at that point, the right to follow the dip will be confined between the vertical planes of the one end line and a new end line parallel therewith, drawn at the point where the vein disappears. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597.

The fact that the strike of a vein below the surface is in many places almost at right angles to its strike at the surface does not necessarily break the continuity of the vein, as such twisting or turning is accounted for by the folding of the rock under pressure and contraction as revealed by geological investigations. Id.; Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co. (C. C. 1902) 117 Fed. 509, 525.

The presence of transverse veins or seams or spurs does not necessarily destroy the continuity of the main vein or defeat the right of the locator to follow such main vein where its apex is within the surface boundaries of his location. Pennsylvania Consol. Min. Co. v. Grass Valley Exploration Co. (C. C. 1902) 117 Fed. 509, 518.

The fact that before the location of plaintiff's claim a part of a vein apexing therein, and also in defendant's claim, had been stoped out by defendant at a point beyond the surface lines of plaintiff's claim, did not destroy plaintiff's extralateral rights to the vein below the point of removal. Davis v. Shepherd (1903) 72 Pac. 57, 31 Colo. 141.

60. —— Effect of want of identity and continuity.—In an action by the owner of a mining claim to determine the right to follow his apexing vein or lode through his side lines into another claim, the owner of the latter may show that such vein is not a separate and independent one, but is simply one of numerous ore channels which together form one broad lode having its apex within the surface lines of each claim, and which descending become united within the side lines of the latter claim. Colorado Central Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 892, 2 C. C. A. 67. See Id. (1893) 54 Fed. 262, 265, 4 C. C. A. 313; Id. (1895) 70 Fed. 294, 17 C. C. A. 128.

If the owner of one claim is seeking to follow a vein or lode into another location the owner of the latter location may show that the vein or thing which is called a vein, and which such first locator is attempting to follow, is not in fact a mineral vein within the meaning of this statute, though marked and designated as such in the patent granting such claim to such first locator. Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413; Consolidated Wyoming Gold. Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 552.

A locator cannot on the ground of priority of location follow mineral-bearing rock outside of the boundary lines of his claim, on the theory that it is a vein or lode, where the ore of the entire mountain in which his claim is located is distributed throughout the blue and brown limestones unequally, but nevertheless generally, and where the entire body of such blue and brown limestone is ore-bearing rock. Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 354; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 942. See Mammoth Min. Co. v. Grand Central Min. Co. (1909) 29 Sup. Ct. 413, 213 U. S. 72, 74, 53 L. Ed. 702; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Grand Central Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

The absolute truth as to identity of ore bodies found on different levels at various depths is difficult to obtain, except where absolute continuity of vein matter is found, until expensive explorations are made, for the continuity of ore may be broken by the injection of country rock into the vein, or a "horse" is found, which is not always easily distinguished from the actual walls of country rock. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 556.

61. Vein extending into placer claim.—See, also, notes, § 4632, post.

A placer claim may be entered by the proprietor of a lode claim for the purpose of removing ore found in veins within the surface lines of the placer claim. Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 601, 124 U. S. 374, 31 L. Ed. 466.

A patent for a placer claim does not pass title to a lode within its boundaries when at the time of the application for the patent such lode was held by others under a valid location. Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 1133, 127 U. S. 348, 32 L. Ed. 168.

The rights conferred by a patent for a lode claim and a patent for placer claim and the conditions upon which they are held are different. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

62. Vein extending into agricultural lands.—A patentee of lands, including a vein or lode having its apex within the boundaries of his claim, is not entitled to follow such vein or lode on the dip, across his exterior boundaries, into the lands of an adjacent proprietor, holding an elder title under a patent for agricultural lands. Amador Medean Gold-Min. Co. v. South Spring Hill Gold Min. Co. (C. C. 1888) 36 Fed. 668, 670, judgment reversed South Spring Hill Gold Min. Co. v. Amador Medean Gold Min. Co. (1892) 12 Sup. Ct. 921, 145 U. S. 300, 36 L. Ed. 712.

63. Burden of proof in asserting extralateral rights.—The burden of proof is upon the owner of a mining claim

where he seeks to follow a vein or lode on its downward dip outside of the side lines of his location to show that such vein or lode has its apex within the surface lines of his location. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 663, 28 C. C. A. 333; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 937; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 550. See Leadville Min. Co. v. Fitzgerald (C. C. 1879) Fed. Cas. No. 8,158; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110.

The burden of proof is upon a plaintiff to show affirmatively that he is entitled to a vein or lode claimed by him and the apex of which is within his surface lines. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 55, 27 C. C. A. 50; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 672. See, also, Daggett v. Yreka Min. & Mill. Co. (1906) 86 Pac. 968, 149 Cal. 357.

To justify the subversion of the territory underlying the surface location of one claim by the owner of an adjoining claim, the burden is upon the latter to prove that a vein or lode of mineral ore has its outcrop or apex inside of the surface lines of his location, and that he reached the point of the alleged subversion by pursuing such vein from its outcrop or apex. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 791.

The prima facie presumption that a lode whose course and strike are substantially parallel with, and run in the same direction as, the side lines, continues in the same direction throughout the length of the claim, obtains not only in contests over surface rights, but also where extralateral rights are involved. Wakeman v. Norton (1897) 49 Pac. 283, 24 Colo. 192.

A person claiming extralateral rights and seeking to take ore bodies from beneath the surface boundaries of another location must prove clearly and satisfactorily that he has the apex of the vein or lode within the surface boundaries of his location, and that he is pursuing the vein on its downward course. Stewart Min. Co. v. Ontario Min. Co. (1913) 132 Pac. 787, 23 Idaho, 724, 743. See St. Louis Min. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 194 U. S. 235, 48 L. Ed. 953. See, also, Keely v. Ophir Hill Consol. Mining Co. (1909) 169 Fed. 601, 95 C. C. A. 99; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787; Maloney v. King (1901) 64 Pac. 351, 25 Mont. 188; Bell v. Skillicorn (1892) 6 N. M. 399, 28 Pac. 768; Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490; Red Wing Gold Min. Co. v. Clays (1906) 83 Pac. 841, 30 Utah, 242.

The owner of a claim who asserts the right to take ore underlying an adjoining claim by virtue of extralateral rights is bound to show, not only that the apex and strike of the vein were within the boundaries of his claim, but that between planes drawn vertically downward through the end line of the adjoining claim and a certain parallel line the vein from its apex on its dip was continuous, that the continuity extended to and through the adjoining owner's ground, and that the ore bodies claimed formed a part of such vein. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 Pac. 648, 29 Utah, 490.

It is the policy of the law to encourage miners in their efforts to discover mineral, and therefore, as between conflicting lode claimants, the law is liberally construed in favor of the senior location; but where one claims what, prima facie, belongs to another, because of the apex in the claimant's location, a more rigid rule of construction against the claimant prevails, and he has the burden to show that the vein on its dip includes ore bodies in adjoining ground. Id.

64. Conflicting rights and priorities.—Where two or more mining claims longitudinally bisect or divide the apex of a vein, the senior location takes the entire width of the vein on its dip, if it is in other respects so located as to give a right to pursue the vein downward outside of the side lines, as it has been the custom among miners to treat the vein as a unit and indivisible in point of width as respects the right to pursue it extralaterally beneath the surface, and because the width of a vein is so irregular and its strike and dip depart so far from right lines that it is impracticable to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course, and because it conforms to the spirit of the mining laws that priority of discovery and location gives the better right. Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 484, 30 L. Ed. 1140; St. Louis Min. & Mill. Co. of Montana v. Montana Min. Co. (1900) 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725 (writ of error dismissed Montana Min. Co. v. St. Louis Min. & Mill. Co. of Montana [1902] 22 Sup. Ct. 744, 186 U. S. 24, 46 L. Ed. 1039); Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 52 C. C. A. 219; Last Chance Min. Co. v. Same (1904) 131 Fed. 579, 588, 66 C. C. A. 299; Empire State, etc., Co. v. Same (1904) 131 Fed. 591, 66 C. C. A. 99; United States Min. Co. v. Lawson (1904) 134 Fed. 760, 67 C. C. A. 587 (judgment affirmed Lawson v. United States Min. Co. [1904] 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65); Montana Min. Co. v. St. Louis Min., etc., Co. (1910) 183 Fed. 51, 69, 105 C. C. A. 343; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3.

In a controversy as to extralateral

rights the older location is entitled to the entire width of the vein underground within its bounding planes. Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140; Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 295, 4 C. C. A. 329; St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Empire State Min., etc., Co. v. Bunker Hill Min., etc., Co. (1902) 114 Fed. 417, 419, 52 C. C. A. 222; Last Chance Min. Co. v. Same (1904) 131 Fed. 579, 588, 66 C. C. A. 299; Montana Min. Co. v. St. Louis Min., etc., Co. (1910) 183 Fed. 51, 69, 105 C. C. A. 343; Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848, 852. And see Anaconda Copper Mining Co. v. Pilot-Butte Mining Co. (Mont. 1915) 153 Pac. 1006.

The custom of miners has been to treat a vein as a unit and indivisible in point of width and as belonging to the discoverer. Lawson v. U. S. Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 14, 52 L. Ed. 65; Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 484, 30 L. Ed. 1140; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 5 Utah, 3. See U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 774, 67 C. C. A. 587.

In view of the purpose and effect of the parallel end lines it is immaterial to a prior locator where the end lines of a junior location are made, as they cannot, in any event, disturb in the slightest either his surface or underground rights. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 85, 43 L. Ed. 72.

The senior location takes the entire width of the vein on its dip, where the apex of such vein is partly within two or more adjacent lode mining claims. Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65, affirming judgment U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 774, 67 C. C. A. 587.

The priority of right to a single broad vein or lode vested in the locator is not determined by the dates of the entries or patents of the respective claims, and priority of discovery may be shown by proof other than the entries and patents. Id.

When, in following the dip of a vein, the owners of two claims come in conflict, priority of right is determined by priority of location; and, where a patent issued to one of the parties is silent as to the date of location, the same may be proved by testimony aliunde. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613, judgment reversed (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859.

When a vein of mineral-bearing rock, in its course lengthwise, after passing under the surface limits of one location, on which it outcrops, crosses nearly at right angles the side lines of another, prior location, on which it also outcrops, the side lines of such prior location becoming, by reason of the course of the vein, its end lines, the right to follow the lode in its downward course, between the vertical planes drawn through such side end lines, belongs to such prior location, and the extralateral rights of the other location cease when the vertical plane so drawn between the two locations is reached. Tyler Min. Co. v. Sweeney (1897) 79 Fed. 277, 24 C. C. A. 578.

The statute does not permit a division of the crossing portion of a vein, hence an entire vein must be considered as apexing upon the senior location until it has wholly passed beyond its side lines. St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 669, 44 C. C. A. 120, 56 L. R. A. 725; Montana Min. Co. v. St. Louis Min., etc., Co. (1910) 183 Fed. 51, 68, 105 C. C. A. 343.

A location along the line or apex of an outcrop or vein cannot prevail as against a senior location on the dip of such vein. Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725, 728.

The owner of a location having extralateral rights cannot follow the dip within the side lines of a prior location, which has the vein passing through both of its side lines, so that they are to be considered as end lines. Tyler Min. Co. v. Last Chance Min. Co. (C. C. 1895) 71 Fed. 848.

The law permits a senior locator to hold all the underground conflict between his extralateral rights and those of a junior locator, even where the older claim may be so irregularly located as to follow the ledge downward upon an oblique angle to its dip, and the junior location is so regularly made as to go down upon its true dip. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1903) 134 Fed. 268, 273.

The person who holds the prior valid location is entitled to the ground comprised within his claim against all the world except the United States. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 793.

Where there are two conflicting lode locations, each having a portion of the apex of the same vein, and there is a conflict with reference to the dip rights within the surface rights of the two locations, the senior location must prevail, and the junior locator cannot claim rights in the lap under the doctrine of extralateral rights. Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. (1904) 75 Pac. 1070, 32 Colo. 176, 64 L. R. A. 925.

65. Priority of location as affecting right.—The rights of the first locator either on or beneath the surface can in no manner be diminished or affected by

a subsequent location. Del Monte Min., etc., Co. v. Last Chance Min. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 79, 43 L. Ed. 72; Bunker Hill Min., etc., Co. v. Empire State, etc., Min., etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665; Empire State Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co. (1904) 131 Fed. 591, 601, 66 C. C. A. 99.

The right of a mine owner to follow a vein whose apex lies within the boundaries of his claim beyond the vertical side lines thereof and within the lines of other claims is not confined to cases in which the claim thus entered is held under a junior patent or certificate, and the relative dates of the patents or certificates are immaterial. Colorado Cent. Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67 (rehearing denied [1893] 54 Fed. 262, 4 C. C. A. 313, and writ of error dismissed [1893] 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030); Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co. (1904) 75 Pac. 1070, 32 Colo. 176, 189, 64 L. R. A. 925.

When the apex of a vein passes out of the side line of a claim into an adjoining claim, the latter, though junior in date, gives to its owner the right to follow the vein in its dip underneath the senior claim. Colorado Cent. Consolidated Min. Co. v. Turck (1893) 54 Fed. 262, 4 C. C. A. 313, denying rehearing (1892) 50 Fed. 888, 2 C. C. A. 67, and writ of error dismissed (1893) 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030. See, also, Colorado Cent. Consol. Min. Co. v. Turck (1895) 70 Fed. 294, 17 C. C. A. 128, denying petition for rehearing (1893) 54 Fed. 262, 4 C. C. A. 313.

The question of priority of location is of no practical importance as to the right of a locator to follow a vein or lode on its dip and is only important where the lines of one patent overlap those of another. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

66. Junior locator's rights.—In the case of overlapping locations, a patent for the junior location, which first describes the entire rectangular claim by metes and bounds, and then excepts therefrom the premises previously granted to the senior claim, conveys to the patentee greater rights than would a patent specifically describing only the irregular tract lying outside the senior location. In the former case, an end line lying within the senior location is still to be considered the end line of the claim for the purpose of securing extralateral rights. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

The rights of a junior locator below the surface are limited to the length of the vein within the surface of the territory patented to him. Id.; Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1903) 134 Fed. 268, 271.

Extralateral rights apply only to what is beneath the surface, and never operate to enlarge surface rights which are limited to 300 feet in which on each side of the center of the ledge or lode; and where the ledge or lode is of greater width, so that the outcroppings extend beyond a side line, another claim may be located thereon which will carry all surface rights within its boundaries, and underground extralateral rights, subject to those of the older claim; and where the end line planes of the two claims are not parallel, or do not coincide, the second locator may follow the vein in its dip between the planes of his own end lines wherever not included between the end line planes of the senior location, as against any subsequent locator along the lode beyond an end line of the first claim. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1902) 114 Fed. 417, 52 C. C. A. 219 (reversing judgment Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. [C. C. 1901] 106 Fed. 471, and writ of certiorari denied [1902] 22 Sup. Ct. 941, 186 U. S. 482, 46 L. Ed. 1260); Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1904) 131 Fed. 591, 66 C. C. A. 99 (appeal dismissed [1906] 26 Sup. Ct. 754, 200 U. S. 613, 50 L. Ed. 620). See St. Louis Min., etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 44 C. C. A. 120, 56 L. R. A. 725; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 66 C. C. A. 299; Bunker Hill, etc., Min., etc., Co. v. Empire State, etc., Co. (C. C. 1903) 134 Fed. 268, 273.

The extralateral right of the owner of a lode mining claim extends to a portion of the lode between his end-line planes produced, although it is completely severed from that portion lying within the boundaries of the claim by the extralateral right of the owner of an older claim located on the same lode, whose end-line planes extended intersect both those of the newer claims and his possession of the surface of his claim is possession of such detached portion of the lode. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1903) 121 Fed. 973, 58 C. C. A. 311, affirmed (1904) 131 Fed. 591, 596, 66 C. C. A. 99.

The fact that a vein or lode is of such width on the surface as to extend beyond the side line of a claim located thereon does not affect the extralateral rights of such claim as against a junior location. Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299, writ of certiorari de-

nied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622.

Where the apex of a vein is of such width as to extend beyond the side line of a claim onto a junior claim, the extralateral rights therein belong to the senior claim, within its extended end-line planes. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & S. Mining & Concentrating Co. (1904) 131 Fed. 591, 66 C. C. A. 99, appeal dismissed (1906) 26 Sup. Ct. 754, 200 U. S. 613, 50 L. Ed. 620.

The owner of a ledge may follow it continuously and indefinitely, except where intersected or crossed by the ledge or underground rights of a prior locator, and beyond such intervening right the junior owner may follow his ledge. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1903) 134 Fed. 268.

Where there are interlacing extralateral rights the more equitable rule is to permit each owner of a ledge to pursue it underground indefinitely and continuously, except such portion thereof as may be crossed by the ledge of a prior claimant. Id.

67. Location lines laid on existing claims.—A junior locator may, for the purpose of acquiring extralateral rights, extend his surface location over prior locations, where the owners do not object. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1903) 134 Fed. 268; Davis v. Shepherd (1903) 72 Pac. 57, 31 Colo. 141.

Lines of a junior lode location may be laid within, upon, or across the surface of a valid senior location for the purpose of defining for or securing to such junior location underground extralateral rights not in conflict with any rights of the senior location. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 75, 43 L. Ed. 72. See, also, Clark v. Mitchell (1913) 134 Pac. 449, 35 Nev. 464.

While overlapping of locations are frequent, yet the second location in such case is invalid so far as it affects the rights vested in the prior locator. Del Monte Min. etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 80, 43 L. Ed. 72. See Faxon v. Barnard (1869) 1 Colo. 145, 147; Lebanon Min. Co. v. Consolidated Rep. Min. Co. (1882) 6 Colo. 371, 380.

As against the government and all subsequent locators, a location with its lines laid upon or over a prior location carries precisely the same rights, surface as well as extralateral, that it would carry if none of the lines had been so laid upon or over such prior location. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (1901) 109 Fed. 538, 547, 48 C. C. A. 665, affirming judgment (C. C. 1900) 108 Fed. 189. See Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

The extralateral rights of a junior locator cannot be decreased because laid on or over a senior location by a court arbitrarily changing an end line of such junior location, where such extralateral rights of the junior locator, as measured by his original end line, did not conflict with any extralateral rights of such senior location. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1900) 108 Fed. 189, affirmed Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 48 C. C. A. 665, and reversed Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 420, 52 C. C. A. 219. See Empire State, etc., Co. v. Bunker Hill, etc., Co. (1903) 121 Fed. 973, 977, 58 C. C. A. 311; Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 593, 66 C. C. A. 99.

68. Entry upon surface or ground of adjoining claims.—This section expressly prohibits any locator or possessor of a vein or lode, which extends in its downward course within the vertical lines of a placer location, from entering upon the surface of such placer location, or disturbing the placer locator in any of his rights to the surface; and on the same theory it forbids all other persons from entering upon the surface of such placer locator for the purpose of exploring for veins or lodes. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 70, 43 L. Ed. 72; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 230, 48 L. Ed. 944; Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 434, 42 C. C. A. 415.

The statutory right of a locator to pursue a vein apexing within the surface boundaries of his claim on its dip downward outside the vertical side lines of such claim cannot be deemed to include the right to run a horizontal tunnel from his claim into an adjoining patented lode claim, for the purpose of reaching the vein in its descent through such adjoining claim. St. Louis Min. & Mill. Co. v. Montana Min. Co. (1904) 24 Sup. Ct. 654, 655, 194 U. S. 235, 48 L. Ed. 953, affirming judgment (1902) 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207.

This section does not authorize the locator of a mining claim to enter upon the surface of a claim owned or possessed by another, in claiming the right to follow a vein or ledge outside of his side lines, for any purpose whatever. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50; St. Louis Min., etc., Co. v. Montana Min. Co. (1902) 113 Fed. 900, 901, 51 C. C. A. 530, 64 L. R. A. 207.

The statute gives the locator of a

mining claim the right of possession of the surface and of everything within his claim except the veins or lodes therein which may have their apices within the surface of another claim, and the owners of such other veins or lodes have the right to follow them into the claim of another, but this is the extent of their right, and there is no warrant for saying that they have any general right of exploration within land of an adjoining patented claim, whether above or below the surface, and the statute only gives them the right to follow such veins and confers upon them no right to approach it from any point other than the vein or lode itself. St. Louis Min., etc., Co. v. Montana Min. Co. (1902) 113 Fed. 900, 902, 51 C. C. A. 530, 64 L. R. A. 207.

The right of a junior locator to follow his vein underground is an entirely different thing from a right asserted by a junior locator to enter upon the surface of a prior location and locate a claim, the top or apex of which is within the surface of such prior location. Wilhelm v. Silvester (1894) 35 Pac. 997, 101 Cal. 358, 362.

VI. TRESPASS

69. Presumptions and justification.—Parties who attempt to enter, beneath the surface, within the side lines of the lands of another, and to mine and take ore therefrom, are prima facie trespassers. Cheesman v. Shreve (C. C. 1888) 37 Fed. 36; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 630; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 939; Blue Bird Min. Co. v. Murray (1890) 9 Mont. 468, 23 Pac. 1022. And see Colorado Cent. Consol. Min. Co. v. Turck (1895) 70 Fed. 294, 17 C. C. A. 128 (denying petition for rehearing [1893] 54 Fed. 262, 4 C. C. A. 313); Durant Min. Co. v. Percy Consol. Min. Co. (1899) 93 Fed. 166, 35 C. C. A. 252; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787.

A person working underneath the surface of a vein belonging to another who is in the possession of his location is a trespasser and liable for the value of ore taken therefrom. Flagstaff Silver Mining Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253.

A person entering upon a valid location of another is a trespasser, and it will not be presumed that Congress intended that any rights should be created by trespass. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 74, 43 L. Ed. 72.

The owner of a mining claim charged with trespass may justify such trespass by showing he brought himself within the provisions of the statute and reached the point of the alleged trespass by pursuing and excavating a vein or lode which had its apex within the side lines of his location, and that his location was made pursuant to the statutory provisions. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 790.

An unlawful possessor or a stranger to the paramount source of title of a mining claim has no right to follow the dip of a vein into the adjoining mining claim having a valid location. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 937.

In an action for trespass on the extralateral dip of that part of a vein having its apex within a valid location, it is better for plaintiff to allege the existence of a vein having its apex within the surface boundaries, but departing from side lines on its downward course, and that the end lines are parallel. Daggett v. Yreka Min. & Mill. Co. (1906) 86 Pac. 968, 149 Cal. 357. See Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 Pac. 834, 146 Cal. 147, 9 L. R. A. (N. S.) 940.

The right given by this section to follow a vein or lode outside the side lines of a location can not authorize or justify a trespass. Bluebird Min. Co. v. Murray (1890) 23 Pac. 1022, 9 Mont. 468, 475.

There can be no distinction between an ouster upon the surface and an ouster beneath the surface except in cases arising under the mining laws by virtue of this section. Lincoln-Lucky & Lee Min. Co. v. Hendry (1897) 50 Pac. 330, 9 N. M. 149, 155.

VII. PATENT

70. Effect.—See, also, notes to § 4622, post.

Where a patent is issued upon application, any question subsequently arising as to the right of the patentee to follow the vein or lode, as given by this section, would be a matter for the courts to settle and cannot be determined by the Land Department upon an adverse claim where there is no surface conflict alleged. Lawson v. U. S. Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 14, 52 L. Ed. 65. See U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 776, 67 C. C. A. 587.

The statutory right to follow the dip of the vein beyond the side lines of the location is not cut off by the issue of a patent for the land into which such vein in its dip extends. Cheesman v. Hart (C. C. 1890) 42 Fed. 98.

A patent to a mining claim is in effect a grant of the vein or lode throughout its entire depth extended downward vertically, though it may so far depart from the perpendicular in its downward course as to extend outside of the vertical side lines of the location. Bluebird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 292.

The patentee's right to follow the dip exists whether the expres grant of such right is contained in the patent or not. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935. See, also, Last Chance Mining Co. v. Tyler Mining Co.

(1894) 61 Fed. 557, 565, 9 C. C. A. 613, reversed (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859.

Extralateral rights of a locator are determined by the actual location of a vein, and not its location as marked on the patent of a claim. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540.

The grantee of a part of a mining claim has the same right to follow veins upon which he commences to work within his surface lines as was possessed by the original patentee before the conveyance was made. Boston & Montana, etc., Min. Co. v. Montana Ore Purchasing Co. (C. C. 1898) 89 Fed. 529, 532. See Richmond Min. Co. v. Eureka Consol. Min. Co. (1880) 103 U. S. 839, 26 L. Ed. 557; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Stinchfield v. Gillis (1895) 40 Pac. 98, 107 Cal. 84, 86.

The owner in fee of a patented lode mining claim is presumed to be in possession of the surface included within the lines of the location, and the burden of proof rests on one claiming any part thereof by adverse possession. Original Consol. Mining Co. v. Abbott (C. C. 1908) 167 Fed. 681.

This section gives to a locator of a mining claim the exclusive right of possession and enjoyment of his surface location, and it cannot be contended that the patent for his claim would give him rights less extensive than those held by mere location and occupation. Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 29.

A patentee is entitled to challenge the right of any intruder within the lines of his claim, and to require him to justify such intrusion by proprietorship of a vein having its top or apex in some other claim, and the pursuit of which on its downward course has brought him to the ground in controversy. Duggan v. Davey (1886) 4 Dak. 110, 26 N. W. 887.

A patent for a mining claim is a grant of the mining premises described, together with the statutory rights defined in this section. Id.

VIII. RULES AND REGULATIONS OF MINERS

71. Validity and effect.—See, also, notes to § 4620, post.

The first enactment by Congress simply recognized the obligatory force of local rules and regulations in each mining locality as to obtaining, transferring, and identifying the possession of the various locators. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 352, 28 L. Ed. 452.

The local rules and regulations of the miners require every person who asserts an exclusive right of possession to his claim to expend something of labor or of value thereon as evidence of his good faith. Id.

The locator should substantially comply with the mining rules and customs; otherwise he will be considered as having forfeited his claim. Oreamuno v. Uncle Sam Gold & Silver Min. Co. (1865) 1 Nev. 215; Mallett v. Same, Id. 188, 90 Am. Dec. 484.

IX. STATE REGULATIONS

72. Extent and validity.—See, also, notes to § 4620, post.

The laws of a state constitute a part of the laws by which a mining right is determined. Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 Pac. 1047, 114 Cal. 100, 105; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240.

State regulations held not invalid as being enacted in the exercise of an unlawful delegation by Congress of legislative powers. Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409.

The title held by the government to real estate upon which a mining claim has been located cannot be affected or incumbered in any way by state legislation. Black v. Elkhorn Min. Co. (1892) 52 Fed. 859, 861, 3 C. C. A. 312.

The right of an alien to inherit a mining location, as against all persons except the government, is determined by state laws. Lohmann v. Helmer (C. C. 1900) 104 Fed. 178.

The authority of the state to add to the general location requirements when such provisions do not conflict with federal laws is granted by inference. Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263. See, also, Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 67, 43 L. Ed. 72; Sweet v. Webber (1884) 4 Pac. 752, 7 Colo. 443; Van Buren v. McKinley (1901) 66 Pac. 936, 8 Idaho, 93; Copper Globe Min. Co. v. Allman (1901) 64 Pac. 1019, 23 Utah, 410.

This section expressly recognizes the validity of territorial laws and makes the enjoyment of the right by a locator to the exclusive possession of his claim depend on his compliance with such laws, if not in conflict with the United States statutes. O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 258.

X. JURISDICTION OF COURTS

73. Federal questions.—The rights of the parties where one mining claim is located within the limits of another valid mining claim involves the construction of the United States mining laws and gives jurisdiction to a federal court where the identical question has not been previously determined. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 29 L. Ed. 348;

Inez. Min. Co. v. Kinney (C. C. 1891) 46 Fed. 832, 834.

A controversy depending on a question of fact under this statute as construed by the Supreme Court does not involve a federal question. Montana Ore-Purchasing Co. v. Boston & M. Consol. Copper & Silver Min. Co. (1898) 85 Fed. 867, 29 C. C. A. 462; Dewey Min. Co. v. Miller (C. C. 1899) 96 Fed. 1. Unless the court proceeds to determine the correct interpretation and application of the rule of law applicable to the facts found. Stewart Mining Co. v. Ontario Mining Co. (1915) 35 Sup. Ct. 610, 237 U. S. 350, 59 L. Ed. 989, affirming judgment (1913) 132 P. 787, 23 Idaho, 724.

A controversy between different claimants concerning the dip and apex of lodes or veins does not necessarily confer jurisdiction on a federal court, because it may involve a construction of this section of the statute. Bushnell v. Crooke Mining & Smelting Co. (1893) 13 Sup. Ct. 771, 773, 148 U. S. 682, 37 L. Ed. 610; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 227, 175 U. S. 571, 585, 44 L. Ed. 276; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864 (reversing judgment [1898] 87 Fed. 801, 802, 31 C. C. A. 223). And see, also, Ayres v. Polsdorfer (1903) 23 Sup. Ct. 196, 197, 187 U. S. 585, 47 L. Ed. 314.

The effect of a deed by the holder of a mining claim on his right to mineral at the intersection of two veins does not involve a federal question. Gillis v. Stinchfield (1895) 16 Sup. Ct. 131, 132, 159 U. S. 658, 40 L. Ed. 295.

A controversy as to the title to minerals, depending upon whether the mine was patented under the act of 1866 or under the act of 1872, depending also upon the parallelism or want of parallelism of the end lines of the location, presents a federal question, and confers jurisdiction on the federal courts. Kennedy Min., etc., Co. v. Argonaut Min. Co. (1903) 23 Sup. Ct. 501, 189 U. S. 1, 5, 47 L. Ed. 685.

The right of a person attempting to enter beneath the surface of the mining claim of another, and mine or take the ore, involves the question as to whether there is a vein or lode having its top or apex within the surface lines of his own location, and the question as to the right of entrance as affected by priority of location and the dip of the vein, and when these questions arise the case is within the jurisdiction of the United States court. Cheesman v. Shreeve (C. C. 1888) 37 Fed. 36, 37. See Frank Gold & S. Min. Co. v. Larimer Min. & S. Co. (C. C. 1881) 8 Fed. 724.

As to whether a federal question is presented when the right arises of the holder of a lode claim to follow a vein or lode whose apex lies within the boundaries of his claim into an adjoining claim held by another and under the surface of the same. Murray v. Mining Co. (C. C. 1891) 45 Fed. 385.

A controversy as to what is a vein, lode, or ledge, or as to what is the top or apex of a vein, or a dispute as to boundaries involves no federal question. Blue Bird Mining Co. v. Largey (C. C. 1892) 49 Fed. 289; Largey v. Blue Bird Mining Co., Id. 292.

See, also, notes under §§ 991, 1214, 1533.

§ 4619. (R. S. § 2323.) Owners of tunnels, rights of.

Where a tunnel is run for the development of a vein or lode, or for the discovery of mines, the owners of such tunnel shall have the right of possession of all veins or lodes within three thousand feet from the face of such tunnel on the line thereof, not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; and locations on the line of such tunnel of veins or lodes not appearing on the surface, made by other parties after the commencement of the tunnel, and while the same is being prosecuted with reasonable diligence, shall be invalid; but failure to prosecute the work on the tunnel for six months shall be considered as an abandonment of the right to all undiscovered veins on the line of such tunnel.

Act May 10, 1872, c. 152, § 4, 17 Stat. 92.

Notes of Decisions

1. Purpose and application of statute.
2. Construction of particular terms.
3. Nature and extent of tunnel rights.
4. Effect of local laws and customs.
5. Extent and form of tunnel location.
6. Line of tunnel.
7. Discovery as affecting rights.
8. Protection pending prosecution of work.
9. Prior surface locations.
10. Subsequent surface locations.
11. Extralateral rights.
12. Failure to adverse application for surface patent.
13. Patent for tunnel.
14. Necessity of location.

1. Purpose and application of statute.—This section was designed to encourage the running of tunnels for the discovery and development of veins or lodes of the precious metals not ap-

pearing on the surface and not previously known to exist. Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510, 519.

This section was enacted for the encouragement and protection of persons engaged in exploring for precious metals by means of tunnels. Hope Min. Co. v. Brown (1888) 7 Mont. 550, 19 Pac. 218.

In the construction of this statute the courts will assume that Congress considered the hazard and expense of constructing a tunnel, and gave to the tunnel owner the advantage of all veins or lodes discovered therein as against a person locating the vein on the surface after the commencement of the tunnel, and where neither hazard nor expense is involved. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 207, 13 C. C. A. 390.

This section commonly called the tunnel-site act is applicable to veins and lodes discovered in tunnel locations. Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510, 517.

It was the intention of Congress, as shown by this section, to secure rights to all such as should run tunnels for the development of a vein or lode pursuant to its provisions, and to withdraw from exploration for lodes not appearing on the surface so much of the public domain as lay upon the line of the tunnel, and to reserve such for the benefit of the tunnel owner so long as he prosecuted the work with reasonable diligence. Back v. Sierra Nevada Consol. Min. Co. (1889) 17 Pac. 83, 2 Idaho (Hasb.) 420.

2. Construction of particular terms. The words "to the same extent" used in this section refer to the length along the line of the vein or lode, as this is the natural and ordinary meaning of the words, and there is nothing in the context or in the substance to justify a different meaning. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 119, 42 L. Ed. 101; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 204, 13 C. C. A. 390; Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510, 526.

The words "not previously known to exist" refer to the time of the location and commencement of the tunnel and not the respective times of the discoveries of the various veins in the tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 205, 13 C. C. A. 390.

The word "mines" in this section, the phrase "lands valuable for minerals" in section 2318, R. S., section 4613, ante, the phrase "valuable mineral deposits" in section 2319, R. S., section 4614, ante, and the expression "valuable deposits" in section 2325, R. S., section 4622, post, as well as the term "mines of gold" in section 2392, R. S., section 4798, post, all refer to substantially the same thing and embrace both lodes and veins and placers. Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 33.

The words "vein," "lode," and "ledge," occurring in this section are used as being synonymous. Synnott v. Shaughnessy (1885) 7 Pac. 82, 2 Idaho (Hasb.) 122.

3. Nature and extent of tunnel rights. It gives a right to locate a tunnel 3,000 feet from the face and includes the right to lodes discovered in such tunnel the same as if discovered from the surface; that is, 300 feet on each side of the tunnel. Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 127 U. S. 471, 481, 32 L. Ed. 172. See Corning Tunnel Co. v. Pell (1878) 4 Colo. 507; Ellet v. Campbell (1893) 18 Colo. 510, 33 Pac. 521; Back v. Sierra Nevada Consol. Min. Co. (1889) 17 Pac. 83, 2 Idaho, 420; Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550; Id. (1891) 28 Pac. 732; 11 Mont. 370.

While this section offers some inducements for running a tunnel, yet it places specific limitations on the rights which the tunnel owner can acquire. Thus his rights reach only to blind veins, such as are not known to exist and not discovered from the surface, but he can acquire no vein which has previously been discovered from the surface. It also limits the length of the tunnel to 3,000 feet, beyond which he can acquire no rights under his tunnel location, and the veins to which he can acquire any right are those which the tunnel itself crosses. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 113, 42 L. Ed. 96. See Butte Consol. Min. Co. v. Barker (1907) 89 Pac. 302, 90 Pac. 177, 35 Mont. 327, 341.

The right to a vein discovered in a tunnel dates by relation back to the time of the location of the tunnel site. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 113, 42 L. Ed. 96.

The subsurface is as free and open to exploration as the surface, and a tunnel is only a means of exploration. A citizen is no more required to have a permit for exploration by tunnel beneath the surface than to explore on the surface for mineral. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 340, 355, 357, 49 L. Ed. 501.

A tunnel is not a mining claim, though sometimes inaccurately called so; but it is only a means of exploration or discovery. Id.

It is the right to the possession of veins not known to exist before the owner of a tunnel located and commenced to excavate it that is secured to him by this section, if he subsequently finds them in his tunnel, and not the right to those only that were not

known to exist when he reached them in the tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 204, 205, 13 C. C. A. 390.

It is the measure of the right and title to a vein which the owner of a tunnel acquires by its discovery, and it gives him a greater and more valuable right than is granted to a prospector upon the surface. Id.

The owner of a tunnel, by locating it and diligently prosecuting the work, has the right of possession of all veins or lodes within 3,000 feet from its face on the line thereof, not previously known to exist, discovered in such tunnel, the same as if discovered from the surface. Id.

This section provides what rights may be acquired to blind veins discovered in a tunnel run for the development of the vein, or for the discovery of mines, and provides how inchoate rights to blind veins may be initiated and become absolute, but does not declare that a tunnel may be projected into or across prior valid locations, nor does it grant a tunnel owner the right to search for minerals in lands belonging to another, or that thereby a location for such purposes can be carved out of appropriated public domain; but it does provide that locations on the line of the tunnel as contemplated of veins not appearing on the surface made by others after the commencement of tunnel work, and while it is being diligently prosecuted, shall be invalid. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 8, 23-25, 50 L. R. A. 209, 83 Am. St. 17.

A tunnel located pursuant to this section is a mining claim, and the owner may file an adverse claim, the same as owners of lode claims, and thus protect his tunnel location. Back v. Sierra Nevada Consol. Min. Co. (1889) 2 Idaho (Hasb.) 420, 17 Pac. 83.

And see Back v. Sierra Nevada Consolidated Min. Co. (C. C. 1891) 46 Fed. 673.

A tunnel located and run for the development of veins, pursuant to this section, becomes a mining claim, and is entitled to protection the same as a lode claim. Back v. Sierra Nevada Consol. Min. Co. (1880) 2 Idaho, 386, 17 Pac. 83.

This section, construed in connection with section 2320, R. S., section 4615, ante, gives a tunnel claimant no right to any claim except for such veins or lodes as may be discovered within 3,000 feet from the face of his tunnel and in the tunnel itself. Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550, 555.

The privilege granted by this section applies to one who locates a tunnel for discovery purposes as well as for development purposes. Fissure Min. Co. v. Old Susan Min. Co. (1900) 63 Pac. 587, 22 Utah, 438, 444, 445.

4. Effect of local laws and customs.—Although this section gives the right to locate a tunnel 3,000 feet only from the face thereof, the location of a tunnel 5,000 feet in length, made prior to its enactment, in accordance with local rules and customs, is valid. Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 1217, 127 U. S. 471, 32 L. Ed. 172.

When a tunnel right is secured according to local statutes or customs and regulations of miners, then this section permits a tunnel 3,000 feet in length and a right to appropriate the veins discovered therein to the same extent as if discovered from the surface. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501.

This section makes no provision as to what is necessary in order to secure a tunnel right, but this is left to the customs and regulations of miners and the statutes of the several states. Id.

5. Extent and form of tunnel location.—The location of a tunnel 5,000 feet in length, made prior to the enactment of the statute, in accordance with local rules and customs, is valid. Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 127 U. S. 471, 32 L. Ed. 172.

A tunnel constructed prior to the statute of July 26, 1866, is valid, although more than 3,000 feet in length, where it was constructed according to local rules and customs of miners in force at the time; and such location is protected by the general mining laws. Id.

The present statute limits the tunnel to 3,000 feet, but a tunnel 5,000 feet in length does not render the entire claim void, but the location would be good to the extent of 3,000 feet in length at least. Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 127 U. S. 471, 481, 32 L. Ed. 172. See Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Gohres v. Illinois, etc., Min. Co. (1902) 67 Pac. 666, 40 Or. 516, 519.

The right of locating a claim to a vein arises upon its discovery in a tunnel and may be exercised by locating such claim in full length of 1,500 feet on either side of the tunnel or in such proportion thereof on either side as the locator may desire. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 113, 42 L. Ed. 96.

When a vein is discovered for the first time by running a tunnel, the owner of the tunnel has the option of recording his claim of 1,500 feet all on one side of the point of discovery or intersection or partly on one and partly on the other side of it. Id.

The statute does not authorize a tunnel site survey and location 1,500 feet

in width. Corning Tunnel Co. v. Pell (1878) 4 Colo. 507.

This section does not state what shall be the limits of a tunnel right, and there is no authority for extending it to 300 feet on each side of the tunnel, but the rights of the tunnel owner are limited to discoveries on the line of the tunnel and on the line of a vein or lode discovered in the tunnel. Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550, 555, 556.

A tunnel claimant is entitled to a vein or lode in his tunnel for 1,500 feet in length along such vein or lode and to the extent of 300 feet on each side thereof from the middle of such vein or lode. Id.

6. Line of tunnel.—The line of a tunnel, within the meaning of this section, is a "width marked by the exterior lines or sides of the tunnel," and a lode outside of such exterior lines is not on the line of the tunnel. Corning Tunnel Co. v. Pell (1853) 4 Colo. 507; Hope Min. Co. v. Brown (1888) 7 Mont. 550, 19 Pac. 218; Hope Min. Co. v. Brown (1891) 11 Mont. 370, 379, 28 Pac. 732. See Back v. Sierra Nevada Consol. Min. Co. (1889) 17 Pac. 83, 2 Idaho (Hasb.) 420.

7. Discovery as affecting rights.—Where one duly locates a tunnel claim under this section and discovers a mineral lode in the tunnel, he is not bound to make another discovery of the lode from the surface. Rico-Aspen Consol. Min. Co. v. Enterprise Min. Co. (C. C. 1892) 53 Fed. 321; Ellet v. Campbell (1893) 18 Colo. 510, 33 Pac. 521.

Until a discovery is made in a tunnel there is no right to locate a claim as to any vein, and the method of determining when and how it may be located can arise only upon discovery, whether such discovery be made upon the surface or in the tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 112, 42 L. Ed. 96; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 699.

This section seems to give the right to the possession of certain veins or lodes to the owner of a tunnel before his discovery or location to any lode or vein whatever, depending only upon his subsequent discovery of such veins in his tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 113, 42 L. Ed. 96; Id. (1895) 66 Fed. 200, 13 C. C. A. 390.

This section provides that the owner of a tunnel by locating and diligently prosecuting it, without the discovery of any vein or lode, shall have the right of possession of all veins or lodes within 3,000 feet from the face of such tunnel on the line thereof not previously known to exist. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 114, 42 L. Ed. 96; Id. (1895) 66 Fed. 200, 13 C. C. A. 390.

This section gives to the tunnel discoverer the right to possession of the veins and prescribes no condition to the discovery. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 119, 42 L. Ed. 101.

A discovery of mineral is not essential to create a tunnel right or to maintain possession thereof. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501; Uinta Tunnel Min., etc., Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 567, 73 C. C. A. 35.

The discovery of a vein in a tunnel, worked according to this section, gives a right to the possession of the vein to the same length as if discovered from the surface, and a location on the surface is not essential to a continuance of that right. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 766, 167 U. S. 116, 42 L. Ed. 101, affirming Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510. And see Brewster v. Shoemaker (1900) 63 Pac. 309, 28 Colo. 176, 53 L. R. A. 793, 89 Am. St. Rep. 188.

The owner of a tunnel mining claim, upon the discovery of a vein in his tunnel while prosecuting it with reasonable diligence, is entitled to the possession of such vein to the same extent along such vein as if discovered from the surface, and is entitled to the possession of any 1,500 feet in continuous length along such vein, which includes the point of discovery in his tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 211, 13 C. C. A. 390 (reversing Harris v. Equator Min., etc., Co. [C. C. 1881] 8 Fed. 863, 865); Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510.

The statute gives the party running a tunnel for any purpose, whether for prospecting or developing, the right to pre-empt and locate any and all lodes not previously known to exist, discovered in such tunnel, to the same extent as if discovered from the surface; but it is absolutely essential that the vein be discovered in the tunnel, and not to one side of it. Corning Tunnel Co. v. Pell (1878) 4 Colo. 507.

On the discovery of a vein or lode in a tunnel the rights of the tunnel claimant are exactly in extent what they would be if the discovery had been made from the surface. Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550, 555.

8. Protection pending prosecution of work.—The owner of the tunnel is impliedly given an inchoate right in any veins or lodes which may be found within, or within a certain distance of his tunnel, and this right is kept alive by his diligent prosecution of the work, and a failure to work on his tunnel for six months is considered an aban-

donment of the right to all undiscovered veins on the line of the tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 114, 42 L. Ed. 96; Back v. Sierra Nevada Consol. Min. Co. (1888) 17 Pac. 83, 2 Idaho (Hasb.) 420; Hope Min. Co. v. Brown (1891) 28 Pac. 732, 11 Mont. 370, 378, 383. And see Fissure Min. Co. v. Old Susan Min. Co. (1900) 63 Pac. 587, 22 Utah, 438.

From the time of the location of a tunnel under this section the owner has the inchoate right to the possession of every vein or lode within 3,000 feet from the face of such tunnel on the line thereof that was not known to exist when the tunnel was located and its excavation commenced, depending only upon the diligent prosecution of the work and the subsequent discovery of the vein therein. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 207, 13 C. C. A. 390.

The owner of a tunnel in process of construction has a right not accorded to a surface discoverer in that he is protected pending the progress of the tunnel construction against all locations made on the surface of the line of the tunnel. Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550, 555. See Hope Min. Co. v. Brown (1891) 28 Pac. 732, 11 Mont. 370, 379.

9. Prior surface locations.—A tunnel can only be run in subordination to the rights of the prior surface locator. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 508, 45 L. Ed. 1200. See Baillie v. Larson (C. C. 1905) 138 Fed. 177, 178.

The right of way of tunnels given in this section are subject to the rights conferred upon surface locators of mining locations under the preceding section. Calhoun Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 501, 45 L. Ed. 1200.

A tunnel owner has no right of way for his tunnel through the ground of a prior surface location so far as it is based on the statutes of the United States, and such right must attach if at all under local statutes. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 509, 45 L. Ed. 1200; Baillie v. Larson (C. C. 1905) 138 Fed. 177, 178.

In a controversy over the ownership of minerals between the owner of a tunnel and the surface locator, the tunnel owner is not permitted to prove that at the time of the location of his tunnel no mineral had in fact been discovered on the surface location where a patent has been regularly issued to the surface locator. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501.

Blind veins underneath prior lode claims belong to the surface location, under the preceding section, and their discovery by running a tunnel, under this section does not give the owner of the tunnel any right to them. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 890, 182 U. S. 499, 45 L. Ed. 1200, affirming judgment (1899) 59 Pac. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

There is no statutory warrant for placing in a patent to the owner of a lode claim any limitation of his title by a reservation of tunnel rights. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 358, 49 L. Ed. 501; Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 406, 29 L. Ed. 423.

The locator of a surface mining claim is not required to adverse an application for patent for a lode claim made by a tunnel owner whose tunnel was located and constructed subsequent to such surface location, and such failure to adverse does not preclude the surface locator from asserting his rights as against the tunnel owner, and such tunnel owner is not entitled to the ore in a blind vein discovered in his tunnel at a point beneath the surface and is in the vertical side lines of such prior surface location. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 340, 357, 358, 49 L. Ed. 501.

A tunnel owner may have the right to continue his tunnel through a lode claim either before or after patent. Id.

There is no implication that the location of a tunnel is a displacement of any valid surface location made before the commencement of the tunnel; but on the contrary it is a necessary implication of the preservation of any such surface rights. There is no implication of any conflict with the rights given by this section and those given by the preceding section. Id.

A claim under a right of possession may be asserted by virtue of a prior discovery to a vein or lode discovered in running a tunnel. Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510, 517.

A tunnel site can only embrace unappropriated public domain, and under this section no rights are conferred to extend a tunnel through previous valid subsisting locations, and a tunnel locator has no right to invade an existing surface lode location and take therefrom any ore or mineral. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 28, 50 L. R. A. 209, 83 Am. St. Rep. 17. See Wakeman v. Norton (1897) 49 Pac. 283, 24 Colo. 192.

A tunnel locator can take no rights which conflict with a prior valid location, and priority determines the rights between conflicting locations, and the

rights of a locator to a valid existing location cannot be affected by a subsequent tunnel location. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 24, 50 L. R. A. 209, 83 Am. St. Rep. 17. See Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 42 L. Ed. 101; Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510.

10. Subsequent surface locations.—The right given by this section to a vein discovered in a tunnel, dates, by relation, back to the time of the location of the tunnel site, and the right of locating the claim to the vein arises upon its discovery in the tunnel, and may be exercised by locating the full length of 1,500 feet on either side of the tunnel, or in such proportion thereof on either side as the locator may desire. Such a location therefore gives superior right as against a surface location made after location of the tunnel, but before discovery of the vein therein. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. (1897) 17 Sup. Ct. 762, 763, 167 U. S. 108, 42 L. Ed. 96, affirming (1895) 13 C. C. A. 390, 66 Fed. 200.

This section contemplates that a tunnel may be run for the development of veins or lodes or for the discovery of mines, and gives a right of possession of any such veins or lodes, if not previously known to exist, and makes location on the surface after the commencement of the tunnel invalid. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 340, 341, 355, 357, 49 L. Ed. 501.

Where a tunnel right is vested before a discovery of a surface lode claim, the tunnel owner's right is prior and superior to that of the locator of the lode claim. Id.

Surface mining claims located subsequent to the commencement of the construction of a tunnel are taken and held subject to any rights of the tunnel owner thereafter developed. Id.

An entry of a lode mining claim sustained by a patent, though conclusive evidence that at the time of entry there had been a valid location, does not preclude the owner of a tunnel site located across the lode who claims that his location was prior to any discovery in the lode claimed, from showing the order of the steps taken to perfect the lode location including the date of discovery. Id.

A miner who discovers a lode or vein while driving a tunnel, under this section, must mark the boundaries and file his certificate of location, but the discovery in the tunnel suffices for the usual work; and the date of such location on the surface will be carried back to the date of locating the tunnel, and will thus shut out intermediate surface locations by others. Rico-Aspen Consolidated Min. Co. v. Enterprise Min. Co. (C. C. 1892) 53 Fed. 321, judgment reversed Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. (1895) 6 Fed. 200, 13 C. C. A. 390; judgment of reversal affirmed (1897) 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96.

This section expressly declares that any subsequent discovery and location of a vein or lode shall not deprive the owner of a tunnel of his right to the possession of such vein guaranteed him by the statute if he afterwards finds it in the tunnel; neither can mere discovery without location have this effect. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 205, 13 C. C. A. 390.

No discovery or location of a vein or lode subsequent to the location and commencement of a tunnel can deprive the tunnel owner who diligently prosecutes his work to any vein discovered therein. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 207, 13 C. C. A. 390; Back v. Sierra Nevada Min. Co. (1889) 17 P. 83, 2 Idaho (Hash.) 420; Hope Min. Co. v. Brown (1888) 19 P. 218, 7 Mont. 550.

This section cannot be construed to mean that any discoveries and locations made by third persons, subsequent to the commencement of a tunnel and before it reaches the vein, will deprive the tunnel owner of such veins except the small segment within the bore of the tunnel, as such a construction would defeat the policy of the Government and the purpose in the enactment of this section. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 206, 13 C. C. A. 390. See Corning Tunnel, etc., Co. v. Pell (1878) 4 Colo. 507; Hope Min. Co. v. Brown (1888) 19 Pac. 218, 7 Mont. 550.

The owners of a tunnel mining claim are not estopped to maintain their right to a blind vein discovered in their tunnel after a junior lode mining claim discovered from the surface is patented, where such blind vein had not been discovered, and was not known to exist, and which lay more than 300 feet distant from the line of the tunnel and nearly parallel to it, though they failed to make any adverse claim. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 203, 13 C. C. A. 390, affirmed in Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96. See Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 301, 34 L. Ed. 155; Hall v. Equator Min., etc., Co. (C. C.) Fed. Cas. No. 5,931; Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408; Lee v. Stahl (1886) 11 Pac. 77, 9 Colo. 208; Morgenson v. Middlesex Min., etc., Co. (1887) 17 Pac. 513, 11 Colo. 176.

After the location of a tunnel claim, a person discovering, within the sur-

face boundaries thereof, a lode which crosses the line of the tunnel will be restrained from prosecuting proceedings for a patent while the tunnel is duly worked, and until it is demonstrated that the lode will not be discovered in the tunnel. Hope Min. Co. of St. Louis v. Brown (1891) 11 Mont. 370, 28 Pac. 732.

11. Extralateral rights.—It is plainly deducible from this and other sections, and the holdings of the courts, that a tunnel owner has the right, on the discovery of a vein or lode within his tunnel location, to follow such vein or lode, though it pass within the vertical planes of the lines of a prior surface location. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96; Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 42 L. Ed. 101; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501.

The owner of a tunnel has the right to follow any vein or lode discovered within his tunnel limits, and is entitled to the same as against a subsequent surface locator who discovers the same vein by means of a shaft. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 119, 42 L. Ed. 101.

The proprietor of a tunnel who is in the actual possession of a vein or lode having its top or apex in a subsequent locator's adjoining claim, the end lines of which are not parallel, may enjoin the proprietor of such adjoining claim from sinking a shaft or incline which will, if continued, cut the tunnel of the complainant. Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 631.

12. Failure to adverse application for surface patent.—The rights of a tunnel owner upon the discovery of a vein in his tunnel are not destroyed or impaired by his failure to adverse an application for surface patent, where such application was made before the discovery of his vein. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 115, 42 L. Ed. 96. See Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 417.

When a claim to a tunnel site has been located before the entry of conflicting lode claims, which subsequently pass to patents, the question of whether discoveries of mineral in place were made in such lode claims before or after the location of the claim to the tunnel site was perfected is open to determination by means of the testimony of witnesses, and on this question the patent is not conclusive. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 34 L. Ed. 155; Davis v. Weibbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 35 L. Ed. 238; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 565, 567, 9 C. C. A. 613; Uinta Tunnel Min., etc., Co. v. Cripple Creek Min., etc., Co. (1902) 119 Fed. 164, 170, 57 C. C. A. 200; Uinta Tunnel Min., etc., Co. v. Ajax Gold Min. Co. (1905) 141 Fed. 563, 73 C. C. A. 35; Champion Min. Co. v. Consol. Wyoming Gold Min. Co. (1888) 16 Pac. 513, 75 Cal. 78.

13. Patent for tunnel.—There is no provision of the statute for granting a patent to the owner of a tunnel, and none is, in fact, ever issued. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 358, 49 L. Ed. 501.

A tunnel owner takes no ground for which he is called upon to pay and consequently is entitled to no patent. Id.

14. Necessity of location.—The right of possession of a vein discovered in a tunnel cannot be maintained without compliance with the provisions of the local statutes in reference to a record of a claim, or without posting in some suitable place conveniently near to the place of discovery a proper notice of the extent of the claim; but a notice posted at the mouth of the tunnel and properly recorded is sufficient. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 120, 42 L. Ed. 96.

The discovery of a vein in a tunnel worked pursuant to statutory provisions gives the tunnel owner a right to the possession of such vein or lode to the same length as if discovered from the surface, and in such case a location on the surface is not essential to a continuation of his right, if the tunnel owner complies with all local statutory provisions or mining regulations. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 119, 42 L. Ed. 101.

The conditions surrounding a vein or lode discovered in a tunnel are such as naturally make against the idea or necessity of a surface location. Campbell v. Ellet (1897) 17 Sup. Ct. 765, 167 U. S. 116, 119, 42 L. Ed. 101. See Butte Consol. Min. Co. v. Barker (1907) 89 Pac. 302, 90 Pac. 177, 35 Mont. 327, 341.

When a tunnel is run or constructed and a mineral vein is discovered, the tunnel owner is called upon to make a location of the ground containing the vein and thus create a mining claim. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 357, 49 L. Ed. 501.

On discovery of a lode by means of a tunnel the proprietor must locate his ground and post notice as if the vein were discovered from the surface. Goldberg v. Bruschi (1905) 81 Pac. 23, 146 Cal. 708, 713.

This section does not provide that the discoverer of a vein in a tunnel shall

make a surface location, but it declares that locations made by others on the line of a tunnel shall, under certain circumstances, be invalid, and it was the purpose of Congress to protect the discoverer of veins or lodes in tunnels. Ellet v. Campbell (1893) 33 Pac. 521, 18 Colo. 510, 521.

When a tunnel owner has duly located his mining claim in compliance with the provisions of this section, he is not required to make another discovery and location of such vein or lode from the surface in order to be protected against a subsequent surface locator on the same vein or lode. Id.

§ 4620. (R. S. § 2324, as amended, Act Jan. 22, 1880, c. 9, § 2.) Regulations made by miners.

The miners of each mining-district may make regulations not in conflict with the laws of the United States, or with the laws of the State or Territory in which the district is situated, governing the location, manner of recording, amount of work necessary to hold possession of a mining-claim, subject to the following requirements: The location must be distinctly marked on the ground so that its boundaries can be readily traced. All records of mining-claims hereafter made shall contain the name or names of the locators, the date of the location, and such a description of the claim or claims located by reference to some natural object or permanent monument as will identify the claim. On each claim located after the tenth day of May, eighteen hundred and seventy-two, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year. On all claims located prior to the tenth day of May, eighteen hundred and seventy-two, ten dollars' worth of labor shall be performed or improvements made by the tenth day of June, eighteen hundred and seventy-four, and each year thereafter, for each one hundred feet in length along the vein until a patent has been issued therefor; but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location. Upon the failure of any one of several co-owners to contribute his proportion of the expenditures required hereby, the co-owners who have performed the labor or made the improvements may, at the expiration of the year, give such delinquent co-owner personal notice in writing or notice by publication in the newspaper published nearest the claim, for at least once a week for ninety days, and if at the expiration of ninety days after such notice in writing or by publication such delinquent should fail or refuse to contribute his proportion of the expenditure required by this section, his interest in the claim shall become the property of his co-owners who have made the required expenditures. Provided, That the period within which the work required to be done annually on all unpatented mineral claims shall commence on the first day of January succeeding the date of location of such claim, and this section shall apply to all claims located since the tenth day of May, anno Domini eighteen hundred and seventy-two.

Act May 10, 1872, c. 152, § 5, 17 Stat. 92. Act Jan. 22, 1880, c. 9, § 2, 21 Stat. 61.

This section was amended by Act Feb. 11, 1875, c. 41, post, § 4021, by providing that, where a tunnel is run for the purpose of developing a lode, the money so expended shall be considered as expended on the lode. It was further amended by Act Jan. 22, 1880, c. 9, § 2, cited above, by adding, at the end of the section as originally enacted, the proviso as set forth here.

The provisions of this section which require that on each claim located after May 10, 1872, and until patent has been issued therefor, not less than $100 worth of labor shall be performed or improvements made during each year, were not to apply to persons who enlist in the Army or Navy for

service in the war with Spain and no mining claim owned by such person was to be subject to forfeiture for non-performance of the annual assessments until six months after the owner was mustered out of the service, or if he should not survive the war, then six months after his death in the service, by Act July 2, 1898, c. 563, § 1, 30 Stat. 651. Section 2 of that act required those desiring to take advantage thereof to file a notice of his enlistment and his desire to hold the claim under the act; and section 3 provided that, if such enlisted person had a co-owner who failed to do the proportion of the assessment work represented by his interest, such interest should be open to relocation. The act is omitted, as temporary merely.

The provisions of this section, relating to the labor or improvements required on mining claims, were modified as to mining claims in Alaska by Act March 2, 1907, c. 2559, post, §§ 5051, 5052.

Notes of Decisions

I. Location, recording, and possession of claims

(A) Construction of section

1. General application and construction.

(B) Mining location and claim

2. Definition.
3. What constitutes location.
4. Discovery essential.
5. Time for completion of location.
6. Amended location.
7. Conflicting locations and priority.
8. Location on existing claim.
9. Possessory rights and title.
10. Conditions as to possession and ownership.
11. Mining claims as property.

(C) Local statutory regulations

12. State regulations authorized.
13. Statutory regulations as to location, record, and notice.

(D) Miners' rules and regulations

14. Miners permitted to make rules and regulations.
15. Mining district.
16. Customs—Proof and presumptions.
17. Regulations as to location, record, and notice.
18. Regulations as to assessment work.

(E) Marking location on ground

19. Boundaries must be traceable.
20. Purpose of requirement.
21. Application and construction of requirement.
22. Requirement mandatory.
23. Location and not boundaries required to be marked.
24. Time for marking location.
25. Methods of marking.
26. Sufficiency of markings.
27. Placing monuments on existing claims.
28. Insufficient markings.
29. Sufficiency of marking as question of fact.
30. Effect of failure to comply with requirement.
31. Change of boundaries.
32. Destruction of marks or boundaries.

(F) Location notice or certificate

33. Absence of requirement.
34. Object of location notice.
35. General requisites, construction, and effect of notice.
36. Particular requirements.
37. Sufficiency of notice—Instances.
38. Insufficiency of notice—Instances.
39. Errors in location notice.
40. Requirements as to location certificate.
41. Amended location notice or certificate.
42. Destruction of notice.
43. Declaratory statement—Nature and purpose.
44. —— Form and sufficiency.

(G) Record of location

45. Absence of requirement.
46. Purpose and effect of record.
47. Requisites of record.
48. Sufficiency of record.
49. Place of record.
50. Conclusiveness of record.

(H) Description of location or claim

51. Purpose of statute.
52. Sufficiency of description in notice or record.
53. Reference to natural objects or permanent monuments.
54. Natural objects or permanent monuments within requirement.
55. —— Question of fact.
56. Existing mining claims as permanent monuments.
57. Location of natural object or permanent monument.
58. Mistake or variance.

II. Expenditures on claims and termination of locator's rights

(A) Annual labor or improvement

59. Construction of statute.
60. Purpose of requirement.
61. Performance as condition of possession.
62. Lode and placer claims.
63. Effect of entry or application for patent.
64. Amount required.
65. Determination of amount or value.
66. Persons entitled to perform work or make improvements.
67. Time for performance of work or making improvements.
68. Character of work or improvements in general.
69. Labor or improvements for developing claim.
70. Services of watchman.
71. Traveling expenses.
72. Development work and improvements outside of claim.
73. Kind of work or improvement outside of claim.
74. Group claims.
75. —— System of development.
76. —— Claims held in common.
77. —— Amount or value of expenditure on group.
78. Tunnel construction work.
79. Effect of failure to perform work.
80. Proof of performance of work.
81. Land department's jurisdiction.

(B) Forfeiture of claim

82. Construction of section.
83. What constitutes forfeiture.

II. Expenditures on claims and termination of locator's rights—Cont'd

(B) Forfeiture of claim—Cont'd

84. Forfeiture by failure to perform work.
85. Forfeiture by abandonment.
86. Forfeiture and relocation.
87. Proof of forfeiture.

(C) Abandonment of claim

88. What constitutes.
89. Abandonment by failure to perform work.
90. Abandonment by conveyance.
91. Abandonment by absence.
92. Abandonment by lapse of time.
93. Proof of abandonment.
94. Effect of abandonment.
95. —— Loss of discovery.
96. Abandonment of part of interest.

(D) Relocation of claims

97. Claims subject to relocation.
98. Relocation on existing claim.
99. Failure to perform statutory requirements.
100. Effect of entry or application for patent.
101. Resumption of work.
102. Rights and relation of locator and relocator.
103. Rights of relocator.
104. Relocation by original locator.
105. Relocation by agent or trustee.

(E) Co-owners

106. Nature of estate and relation of co-tenants.
107. Who are co-owners.
108. Performance of assessment work by one co-owner.
109. Remedy against delinquent co-owner.
110. Delinquency of co-owner—Effect.
111. Notice to delinquent co-owner.
112. Publication against co-owner.
113. Conveyance by co-owners—Effect on right to forfeit.
114. Proof to establish forfeiture.
115. Rights and title acquired by forfeiture.
116. Title acquired by conveyance by co-owner.
117. Liability of co-owner as trustee.
118. Patent proceedings by co-owners.

(F) Jurisdiction of courts

119. Federal questions.

I. LOCATION, RECORDING, AND POSSESSION OF CLAIMS

(A) Construction of section

1. General application and construction.—Acquiescence by Congress in the construction placed upon this and the succeeding section amounts to legislative sanction, as otherwise they would have been amended so as to correct for the future any erroneous construction theretofore made. Aurora Hill, etc., Min. Co. v. Eighty Five Min. Co. (C. C. 1888) 34 Fed. 515, 519.

This section has no application to mining property situated in a foreign country. Gaines v. Chew (C. C. 1909) 167 Fed. 630.

The requirements of this statute are mandatory and must be strictly complied with. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 222.

Congress has the power to impose such conditions on the right of the possession of the public lands as it may see fit, and the conditions imposed must be complied with. Du Prat v. James (1884) 4 Pac. 562, 65 Cal. 555, 557; Russell v. Brosseau (1884) 4 Pac. 643, 65 Cal. 605, 608. See Carney v. Arizona Gold Min. Co. (1884) 2 Pac. 734, 65 Cal. 40.

The locator of a mining claim loses all rights to his claim by failure to comply with this section. Smith v. Hill (1891) 26 Pac. 644, 89 Cal. 122, 123.

The provisions of this section refer to both lode and placer claims. Sweet v. Webber (1884) 4 Pac. 752, 7 Colo. 443, 447. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 27 L. Ed. 990; Carney v. Arizona Min. Co. (1884) 2 Pac. 734, 65 Cal. 40.

This section regulates the manner of locating and recording and marking the boundaries of a mining claim and provides the amount of work necessary to hold its possession. Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 410.

The simple requirements of the mining statutes have led courts to regard the mining laws as beneficial and to be liberally, not technically, construed with as little differentiation as may be between former known actual customs of miners, and the formulated expressions of Congress based upon those customs is positive law. Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 117.

The provisions of this section as to marking on the ground the boundary lines and as to the performance of the required labor or improvements during each year are in no wise affected by the provisions of section 2326, R. S., section 4623, post. Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 135. 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

(B) Mining location and claim

2. Definition.—A mining claim is the name given to that portion of the public mineral lands which a miner for mining purposes takes up and holds in accordance with mining laws, local, and statutory. Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 1 C. C. A. 192; Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,-886; Argonaut Min. Co. v. Kennedy Min., etc., Co. (C. C. 1897) 84 Fed. 1, 2; Escott v. Crescent Coal, etc., Co. (1910) 106 Pac. 452, 56 Or. 190, 192. See Forbes v. Gracey (1876) 94 U. S. 762, 766, 24 L. Ed. 313; Williams v. Santa Clara Min. Ass'n (1884) 5 P. 85, 66 Cal. 193; Bewick v. Muir (1890) 23 Pac. 390, 83 Cal. 373; Morse v. De Ardo (1895) 40 Pac. 1018, 107 Cal. 622; Berentz v. Belmont Oil Co. (1906) 84 Pac. 47, 148 Cal. 577, 113 Am. St.

Rep. 308; Salisbury v. Lane (1900) 63 Pac. 383, 7 Idaho, 370.

A mining claim may include as many adjoining locations as the locator can purchase, and the ground covered by all, though constituting what he claims for mining purposes will constitute a mining claim and will be so designated. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 649, 28 L. Ed. 875; Carson City G., etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 664, 28 C. C. A. 333.

The terms "location" and "mining claim" are not always synonymous and may often mean different things, as a mining claim may refer to a parcel of land containing precious metal in its soil or rock, while location is the act of appropriating such land according to certain established rules. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 648, 28 L. Ed. 875; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 661; McFeters v. Pierson (1890) 24 Pac. 1076. 15 Colo. 201, 203, 22 Am. St. Rep. 373.

The two designations "mining claim" and "location" may be indiscriminately used to denote the same thing; but where two or more locations are combined it is then known as a claim. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 649, 28 L. Ed. 875; Territory v. Mackey (1888) 19 Pac. 395, 8 Mont. 168, 173.

3. What constitutes location.—See, also, notes to § 4615, ante.

A mining location to be good must be good when made, and each claimant must stand on his own location and can take only what it will give him under the law. Belk v. Meagher (1881) 104 U. S. 279, 285, 26 L. Ed. 735; Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155, 159.

A location is the act of taking or appropriating a parcel of mineral land. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 649, 28 L. Ed. 875.

A location consists in placing on the ground in some conspicuous position a notice giving the name of the locator, the fact that it is thus taken or located, with the requisite description of the extent and boundaries of the parcel of land. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636. 649, 28 L. Ed. 875; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 661.

No definite rules can be stated by which to distinguish a speculative location from one made in good faith with a purpose to make excavations and ascertain the character of the lode or vein, with a view of making the necessary expenditures required to extract the mineral. This question must be determined by the facts of each particular case. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 536, 28 L. Ed. 1113.

The following steps are prerequisite to the vesting of possessory title to a lode mining claim in a locator: Discovery of a mineral-bearing lode, and the distinct marking of the boundaries of the claim so that they can be readily traced. Erwin v. Perego (1899) 93 Fed. 608, 611, 35 C. C. A. 482; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 677; Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 216, 218, 60 C. C. A. 155.

"Location" includes the posting of notices, the recording thereof when required, and marking of the boundaries. Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791; Smith v. Union Oil Co. (1913) 135 Pac. 966, 166 Cal. 217.

A location which is sufficient to satisfy persons who are alone or adversely interested is sufficient to effect the full purpose contemplated by the statute. Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561, 563.

A location made in good faith and in substantial compliance with the provisions of this section will be upheld. McElligott v. Krogh (1907) 90 Pac. 823, 151 Cal. 126, 130.

A locator is not bound to absolute accuracy in laying out the boundaries of his claim, nor is he to lose, by way of penalty, any portion of the surface of the claim located for having included within his side boundaries more than the statute allows as lateral rights, as he is entitled, nevertheless, to hold to the limit which the law authorizes within the limits laid out and the excess is to be rejected. Id.

4. Discovery essential.—See, also, notes to § 4615, ante.

Where a discoverer has himself perfected a valid location on account of his discovery no one else can have the benefit of his discovery for the purposes of location adverse to him, except as a relocator after he has lost or abandoned his prior right. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348.

When a mining claim is properly located this location relates back to the date of the discovery. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 460, 17 C. C. A. 190; Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 100, 120.

This section requires that a certificate of the location of a mining claim shall contain the names of the locators, the date of location, and such a description of the claim by reference to some natural object or permanent monuments as will identify it, but such a certificate is not proof of discovery or the existence of a vein or lode that would justify exploitation, and especially so where there is no proof that the claim was ever developed. Thomas v. South Butte Min. Co. (1914) 211 Fed. 105, 108, 128 C. C. A. 33.

While a discovery of a vein of mineral ore and the performance of certain other statutory requirements is necessary to a valid location, yet the issuance of a certificate of location is presumptive evidence of such discovery, and that the locator has complied with the law in other respects, and after the lapse of time every reasonable presumption will be indulged in favor of the integrity of the location. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 791; Same v. Hart (C. C. 1890) 42 Fed. 98, 102.

Proof of a record of a prior location, and the marking of it on the ground, will not defeat a subsequent location, in the absence of proof of a discovery by the prior locators. The record and the marking are not sufficient to authorize the court to presume a discovery. Smith v. Newell (C. C. 1898) 86 Fed. 56.

The discovery of minerals within the limits of a location and the marking upon the ground so that its boundaries can be readily traced are two essential requirements to the validity of a location of a mining claim. Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 445, 98 Am. St. Rep. 63.

5. **Time for completion of location.**—While 20 days is not an unreasonable time to give a locator in which to locate his claim after the discovery of a vein, yet what would be a reasonable time for such completion may depend upon the circumstances affecting the ability of the locator to properly define his claim, and sickness may be classed as such a circumstance. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 460, 17 C. C. A. 190; Jones v. Anderson (1886) 2 So. 911, 82 Ala. 302; Bramlett v. Flick (1899) 57 Pac. 869, 23 Mont. 95, 110. See Omar v. Soper (1888) 18 Pac. 443, 11 Colo. 380, 7 Am. St. Rep. 246; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442.

The discoverer of a mineral lode is entitled to a reasonable time to complete his location, depending on the character of the ground, etc. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11; Doe v. Waterloo Min. Co. (C. C. 1893) 55 Fed. 11, 15.

Whenever preliminary work is required to define and describe the claim located, the original locator must be protected in the possession of his claim until sufficient excavations and development can be made so as to justify the necessary work to extract the metal. Otherwise the purpose of allowing free exploration would be defeated, and force and violence in the struggle for possession would determine the rights of the claimants. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 535, 28 L. Ed. 1113; Doe v. Waterloo Min. Co. (C. C. 1893) 55 Fed. 11, 15.

The rule that a discoverer has a reasonable time to verify discovery and complete location applies to persons relocating ground abandoned or forfeited by others. Murley v. Ennis (1874) 2 Colo. 300.

It seems to have been the intention of Congress to sanction some rules in force among miners on the Pacific Coast, under which the posting of a notice would hold a claim on a vein a reasonable time, during which the locator might make a survey with reference to natural objects or permanent monuments in order to obtain a sufficient description of the locus of his claim and to hold the claim until the vein was so far developed as to admit of an accurate establishment of the surface lines. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 329. See Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 460.

6. **Amended location.**—A locator may relocate his mining claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223, affirming decree Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37.

A mining location may be amended without the forfeiture of any rights acquired by the original location except such as are inconsistent with the amendment, but no new right can be had which is inconsistent with those acquired by other locations made between the dates of the original and such amended location, and an amended location is valid as against any locations made after its date. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1903) 134 Fed. 268, 270.

7. **Conflicting locations and priority.**—Mining locations are generally made upon lands open and uninclosed and are difficult of actual occupation. The limits of possessory rights are vague and uncertain and the validity of apparent locations uncertain and doubtful. Under such circumstances conflicting and overlapping locations are frequent, and while in controversies affecting such locations the rights of the first locator to the surface, as well as to the veins and lodes within his lines, are respected, there is no good reason why all subsequent locations should be held absolutely void for all purposes; and if the rights of the first locator are not infringed such second locator should be entitled to all the benefits which the statute gives to the making of such a claim, and he is not required to make a relocation for the purpose of obtaining the amount of surface to which he is entitled. Del Monte Min., etc., Co. v. Last Chance Min. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 83, 43 L. Ed.

72; Bunker Hill, etc., Min., etc., Co. v. Empire State, etc., Min., etc., Co. (1901) 109 Fed. 538, 541, 48 C. C. A. 665; Empire State, etc., Co. v. Bunker Hill, etc., Min. Co. (1904) 131 Fed. 591, 601, 66 C. C. A. 99.

A vein or lode is known to exist when the boundaries of the claim are specifically marked on the surface so as to be readily traced, and notice of location is recorded in the proper records, though personal knowledge of the fact may not be possessed by another. Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 32 L. Ed. 168; Van Ness v. Rooney (1911) 116 Pac. 392, 160 Cal. 131, 138.

The location of a vein or lode as running in a certain direction, but not marked on the surface for years, nor developed, but simply indicated by a notice, will not be allowed to prevail against a claim subsequently located by another party on ground different from that thus indicated, after the latter has been developed by years of labor and large expenditures without objection by the first locators, because subsequent explorations by them disclosed the fact that their vein runs in a different direction from what they supposed, and in its true course covers the subsequent claim. O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669. See Biglow v. Conradt (1906) 8 Alaska, 134, 140; Bullion, Beck & Champion Min. Co. v. Eureka Hill Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 80 (dissenting opinion).

Where both plaintiffs and defendants claim under separate placer mining locations, the plaintiffs, to recover in ejectment, must establish their location to have been a prior valid location. Cook v. Johnson (1908) 3 Alaska, 506. See, also, Overgaard v. Westerberg (1906) 3 Alaska, 168.

In a controversy as to the right of possession of a mining claim, the claimant who has complied with the requirements of the law and was prior in time is the question to be determined and not which, on the whole, had the better right. Funk v. Sterrett (1881) 59 Cal. 613, 614.

A locator, who spends a little time in developing his discovery before marking his boundaries, may have precedence over another locator who marks his boundaries on the same land first, but after the first locator commenced work; but, if neither locator has done any work, the first to mark boundaries on the surface has the prior right. Gregory v. Pershbaker (1887) 73 Cal. 109, 14 Pac. 401.

Where two parties claim to have made locations of mineral land in themselves valid, and the question is which of the two has made the prior location, the prior actual or constructive possession, by posting the notice and by marking the boundaries in the manner required by statute, must prevail. Id.

Where the locator of a mining claim failed, after posting a notice upon the ground, to comply with the statute in completing his location, and subsequently a conflicting location was made, the area in conflict did not revert to the public domain but inured to the benefit of a junior locator who, by the performance of the statutory assessment work, was entitled to the possession of such conflict ground. Helena Gold, etc., Co. v. Baggaley (1906) 87 Pac. 455, 34 Mont. 464, 473, following Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119. See Street v. Delta Min. Co. (1910) 112 Pac. 701, 42 Mont. 371, 381.

A subsequent locator has no right to conflicting ground as against a prior location made substantially in compliance with this section. Argentine Min. Co. v. Benedict (1898) 55 Pac. 559, 18 Utah, 183.

8. Location on existing claim.—See, also, notes to § 4618, ante.

The entry by a locator upon an existing claim then being worked for the purpose of setting stakes or erecting monuments, though without opposition, gives no rights to such locators as to the part or ground thus overlapped. Biglow v. Conradt (1908) 159 Fed. 868, 870, 87 C. C. A. 48.

A location cannot be extended over a senior discovery in the actual possession of another. Faxon v. Barnard (C. C. 1880) 4 Fed. 702.

9. Possessory rights and title.—See, also, notes to § 4618, ante.

By this section Congress has given the right of location upon the public mineral lands, but it can only be exercised within the statutory limits, and a location can only be made in the manner permitted by the statute. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 78, 43 L. Ed. 72; Malone v. Jackson (1905) 70 C. C. A. 216, 137 Fed. 878, 881, 70 C. C. A. 216; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

The right of possession of a mining claim comes only from a valid location, and if there is no location there can be no possession. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Zeiger v. Dowdy (1911) 114 Pac. 565, 13 Ariz. 331, 335; Hamilton v. Huson (1898) 53 Pac. 101, 21 Mont. 9, 11; Patterson v. Tarbell (1894) 37 Pac. 76, 26 Or. 29, 35. See Belk v. Meagher (1878) 3 Mont. 80; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550, 556; Garfield, etc., Min. Co. v. Hammer (1886) 8 Pac. 153, 6 Mont. 53.

In order to maintain a right to a mining claim after it is acquired, the locator must continue substantially to comply with the laws of Congress and with the valid laws of the state, and

the valid rules established by the miners in the district, and a failure to do either will work a forfeiture whether the laws and rules provide for forfeiture from noncompliance or not. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 617; Mallett v. Uncle Sam Min. Co. (1865) 1 Nev. 188, 90 Am. Dec. 484; Oreamuno v. Uncle Sam Min. Co. (1865) 1 Nev. 215; Sisson v. Sommers (1899) 55 Pac. 829, 24 Nev. 379, 387, 77 Am. St. Rep. 815.

This section makes the possession of that part of the public lands which is valuable for minerals separable from the fee, and provides for the existence of the exclusive right to the possession while the legal title remains in the United States. Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Teller v. U. S. (1901) 113 Fed. 273, 281, 51 C. C. A. 230; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339.

A person in the actual possession of a valid claim is entitled to maintain that possession and to exclude every other person from trespassing thereon and no one is at liberty to forcibly disturb his possession or enter upon the premises. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 83, 43 L. Ed. 72; Bunker Hill Min., etc., Co. v. Empire State, etc., Min., etc., Co. (1901) 109 Fed. 538, 541, 48 C. C. A. 665; Empire State Min., etc., Co. v. Bunker Hill, etc., Min., etc., Co. (1904) 131 Fed. 591, 601, 66 C. C. A. 99.

Before the enactment of the mining laws it was the rule that when a notice was posted and the boundaries marked possession extended to the entire limits, though the location was not made in strict compliance with the prescribed local rules, and the rule has been applied since the enactment of the mining laws by Congress. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 15, 50 C. C. A. 79, 61 L. R. A. 230; Attwood v. Fricot (1860) 17 Cal. 38, 76 Am. Dec. 567; English v. Johnson (1860) 50 Pac. 330, 17 Cal. 108, 76 Am. Dec. 574. See Field v. Grey (1881) 25 Pac. 793, 1 Ariz. 404; Lincoln Lucky & Lee Min. Co. v. Hendry (1897) 9 N. M. 149.

Under this section a mining claimant can show a right to the possession of a mining claim, prior to the issuance of a patent, only by showing an actual possession of the claim, as against a mere wrongdoer, or by showing compliance with the requisites of the statute. Russell v. Brosseau (1884) 65 Cal. 605, 609, 4 Pac. 643; Funk v. Sterrett (1881) 59 Cal. 613, 614; Patterson v. Tarbell (1894) 26 Or. 29, 36, 37 Pac. 76. See Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109; Garthe v. Hart (1887) 15 Pac. 93, 73 Cal. 541, 543; Patchen v. Keeley (1887) 14 Pac. 347, 19 Nev. 404, 413.

In an action for the possession of a mining claim where the defendant is in actual possession the burden is upon the plaintiff to show that the prior location was made and perfected in compliance not only with the United States statutes, but also with any provisions of the statutes of the state not inconsistent with the United States statutes. Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725; Copper Globe Min. Co. v. Allman (1901) 64 Pac. 1019, 23 Utah, 410, 417. See Sweet v. Webber (1884) 4 Pac. 752, 7 Colo. 443, 450; Bryan v. McCaig (1887) 15 Pac. 413, 10 Colo. 309; Hopkins v. Noyes (1883) 2 Pac. 280, 4 Mont. 550; McCowan v. Maclay (1895) 4 Pac. 602, 16 Mont. 234.

Possession of a part of a mining claim gives the right of possession to the whole. Bulette v. Dodge (1905) 2 Alaska, 427, 431; Roberts v. Wilson (1876) 1 Utah, 292, 295. See Campbell v. Rankin (1878) 99 U. S. 261, 262, 25 L. Ed. 435; Attwood v. Fricot (1860) 17 Cal. 38, 76 Am. Dec. 567; English v. Johnson (1860) 17 Cal. 108, 76 Am. Dec. 574.

Actual possession is unnecessary to protect the title acquired by a valid location. Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735.

Whenever preliminary work is required to define and describe the claim located, the first discoverer must be protected in the possession of the claim until sufficient excavations and developments can be made so as to disclose whether a vein of deposit of such richness exists as to justify work to extract the metal. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113.

In an action for possession of a mining claim the location is the plaintiff's title, and if it is good he can recover; if bad, he cannot. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348.

Proof of possession of a mining claim under a valid location, showing a sufficient marking of the boundaries upon the surface of the ground, with a prior discovery of a vein or lode of quartz or rock in place bearing mineral, makes a prima facie case which can only be defeated by proof of subsequent abandonment or forfeiture, or other prior right or title. Hammer v. Garfield Min., etc., Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 300, 32 L. Ed. 964.

This section does not provide for the acquisition of title to mineral lands; it merely prescribes certain methods by which a locator can gain and hold possession of a mining claim. This possessory title alone is the conditional one. Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 12 Sup. Ct. 877, 145 U. S. 428, 431, 36 L. Ed. 762.

So long as the locator complies with the statutory requirements and performs the assessment work he is entitled to hold and enjoy his possession

as against all the world, subject to the paramount sovereignty of the United States. Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286.

The possessory right under this section may continue for an indefinite time and can only be terminated by the failure of the locator or co-owner to comply with the statute and a relocation of the claim by another, but the mining laws do not require a person in possession to purchase the land from the Government, and if he complies with the law relating to possessory rights, his title is as good as if secured by patent. Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 35, 130 C. C. A. 426.

An action of ejectment will lie between rival claimants of mineral lands and an action may be brought before any attempt is made to procure a patent, and it may be maintained by an alien or by one who has declared his intention to become a citizen. Tyee Consol. Min. Co. v. Langstedt (1902) 1 Alaska, 439, 451. See McKinley Creek Min. Co. v. Alaska United States Min. Co. (1902) 22 Sup. Ct. 84, 183 U. S. 563, 572, 46 L. Ed. 331.

There can be no relocation where the claim is in the actual possession of persons who have done the requisite amount of assessment work under an insufficient location. Ware v. White (1907) 108 S. W. 831, 81 Ark. 220.

One who has possession of a mining claim and has done the actual physical work required, and such work is there as evidence of possession, and there are no intervening rights, he may amend his location, and thereby perfect his entry, and his right cannot be defeated by one who has made no peaceful entry and possession of the land, nor done any work thereon. Id.

After making a valid location the locators' right of possession continues till they have, in fact, abandoned the claim or forfeited it by failure to do work required within the prescribed time, and they need not keep actual possession. Gear v. Ford (Cal. App. 1906) 88 Pac. 600; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440.

One who has made a valid location of a mining claim and performed all assessment work required is the equitable owner; the title being held by the government in trust for him. Van Ness v. Rooney (1911) 116 Pac. 392, 160 Cal. 131.

This section provides generally and fully the method of marking a mining claim and prescribing the work and improvements necessary to be made to give a possessory right to a mining claimant. Wright v. Killian (1901) 64 Pac. 98, 132 Cal. 56, 58.

As no time is prescribed within which a mineral claimant shall make application for patent his possession may in time ripen into a perfect right. Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371, 381. See Harris v. Equator Min., etc., Co. (C. C. 1881) 8 Fed. 863; Armstrong v. Lower (1883) 6 Colo. 581, 583.

An interest claimed by an intestate in a mining claim at the time of his death is an interest in real estate, and descends to his heirs, who alone can maintain an action to quiet title thereto. Keeler v. Trueman (1890) 15 Colo. 143, 25 Pac. 311.

A person in possession of a mining claim in a mining district is presumed to be the owner until the contrary is shown, and possession of a mining claim under color of title in pursuance of law and the local rules and regulations of a mining district for more than 20 years segregates the land from the public domain and prevents it from being opened for or to location. Risch v. Wiseman (1900) 59 Pac. 1111, 36 Or. 484, 486, 78 Am. St. Rep. 783. See Cullacott v. Cash Gold, etc., Min. Co. (1884) 6 Pac. 211, 8 Colo. 179; Gropper v. King (1882) 1 Pac. 755, 4 Mont. 367.

The possession by which mining claims are held is regulated and defined by usage and local conventional rules, and the actual possession applied to agricultural lands cannot be required of mining claims. Roberts v. Wilson (1876) 1 Utah, 292, 295. See Attwood v. Fricot (1860) 17 Cal. 38, 76 Am. Dec. 567.

The mining statutes provide for an exclusive right of possession in a locator while the paramount title remains in the United States. Phœnix Min., etc., Co. v. Scott (1898) 54 Pac. 777, 20 Wash. 48, 50. See Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Mercedes Min. Co. v. Fremont (1857) 7 Cal. 317, 68 Am. Dec. 262; McKeon v. Bisbee (1858) 9 Cal. 137, 70 Am. Dec. 642.

Where possession alone is relied upon it must be actual and connected with active diligent work of exploration with a bona fide intention in case mineral is found to make a location. Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1, 23, 129 Am. St. Rep. 1093. See Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 98 Am. St. Rep. 63; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211.

10. Conditions as to possession and ownership.—A valid title or possessory right to a mining claim cannot be established without proof of compliance with the local rules and regulations of miners as well as with federal and state statutes. Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co. (1886) 9 Colo. 343, 12 Pac. 212; Becker v. Pugh (1886) 13 Pac. 906, 9 Colo. 589, 590; Garfield, M. & M. Co. v. Hammer (1886) 6 Mont. 53, 8 Pac. 153; Street v. Delta Mining Co. (1910) 112 Pac. 701, 42 Mont. 371. See Sullivan v. Hense (1874) 2 Colo. 424; Bryan v. McCaig (1887) 15 Pac. 413, 10 Colo. 309.

A locator is not required to sink a shaft on each location in a consolidated mining claim within the meaning of this section where one shaft will suffice for all the locations. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 28 L. Ed. 875.

The disconnected markings of a mining claim, unaccompanied by work and without actual possession, are insufficient to constitute a location. Ware v. White (1907) 108 S. W. 831, 81 Ark. 220.

11. Mining claims as property.—See, also, notes to § 4618, ante.

A person locating a mining claim in accordance with the provisions of this section is, after a sale and transfer of such claim to a third person, estopped from denying that he was the owner of and entitled to the possession of such claim when transferred to such third person, and is also estopped from denying that he had located the claim in accordance with the statute. Belcher Consol. Gold Min. Co. v. Defarrari (1882) 62 Cal. 160, 162; Stinchfield v. Gillis (1892) 30 Pac. 839, 96 Cal. 33, 36.

The provisions of this section are of themselves conclusive that the locator's interest in a mining grant is salable and transferable. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 651, 28 L. Ed. 875. See, also, Aspen Min., etc., Co. v. Rucker (C. C. 1886) 28 Fed. 220, 222.

(C) Local statutory regulations

12. State regulations authorized.—A state may add to the regulations made by Congress for the location of mining claims, if not inconsistent therewith. This section makes the manner of locating mining claims and recording them subject to such provisions of state and territorial law as are not inconsistent with the laws of the United States. Kendall v. San Juan Silver Min. Co. (1892) 12 Sup. Ct. 779, 781, 144 U. S. 658, 36 L. Ed. 583; Clason v. Matko (1912) 32 Sup. Ct. 392, 395, 223 U. S. 646, 56 L. Ed. 588, affirming judgment (1909) 100 Pac. 773, 12 Ariz. 213; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 678; Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117; Wright v. Lyons (1904) 77 Pac. 81, 45 Or. 167, 172; Copper Globe Min. Co. v. Allman (1901) 64 Pac. 1019, 23 Utah, 410; Knutson v. Fredlund (1910) 106 Pac. 200, 56 Wash. 634.

This section was not intended to interfere with the rights of the state or of local mining districts, but was intended to express the most liberal terms on which the United States would part with its right in mining claims, and no state or local mining regulation can grant more favorable terms than those demanded by this statute, but either may impose additional burdens. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Northmore v. Simmons (1899) 97 Fed. 386, 388, 38 C. C. A. 211.

This section makes the manner of locating mining claims and recording them subject to the local laws and the rules and regulations of each mining district. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 346, 49 L. Ed. 501.

A state legislature may impose additional burdens on the locator of a mining claim either as a requirement that the work shall be made as an incident to the location or as a condition to the subsistence of the same. Northmore v. Simmons (1899) 97 Fed. 386, 387, 38 C. C. A. 211.

In issuing a patent to a mining claim, the Land Department must take notice, not only of acts of Congress, but of local laws and regulations. Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co. (1912) 194 Fed. 620, 114 C. C. A. 392.

The legislature of a state or territory can add further requirements as to the record of notices of location. O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 254. See Hoyt v. Russell (1886) 6 Sup. Ct. 881, 117 U. S. 401, 405, 29 L. Ed. 914; Wenner v. McNulty (1887) 14 Pac. 643, 7 Mont. 30, 36.

Local statutory regulations supplemental to and not inconsistent with the federal mining laws are valid and must be complied with, and a failure to substantially comply with them renders the location void. Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 126. See Lockhart v. Johnson (1901) 21 Sup. Ct. 665, 181 U. S. 516, 45 L. Ed. 979; Lockhart v. Wills (1898) 54 Pac. 336, 9 N. M. 344; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279.

13. Statutory regulations as to location, record, and notice.—The statute of Colorado giving a locator 60 days for marking the boundaries of his claim until explorations can be made to ascertain the course and direction of the vein, and giving 30 days thereafter for the preparation of the proper certificate of location to be recorded is valid. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 536, 28 L. Ed. 1113; Iron Silver Min. Co. v. Elgin (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 206, 30 L. Ed. 98; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 125; Patterson v. Tarbell (1894) 37 Pac. 76, 26 Or. 29, 37; Marshall v. Harney Peak Tin Min., etc., Co. (1890) 47 N. W. 290, 1 S. D. 350, 360. See Omar v. Soper (1888) 18 Pac. 443, 11 Colo.

380, 7 Am. St. Rep. 246; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 444.

This section does not require that the notice of a mining claim shall be posted on the claim, but leaves such matters to the regulation of local laws; but the local laws generally require that a notice shall be posted, and in the absence of such a requirement it would be a very proper aid to the description of a claim. Carter v. Bacigalupi (1890) 23 Pac. 361, 83 Cal. 188; Maderia v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 731.

This section does not require that the notice of location of a mining claim shall be verified by oath, and some doubt is expressed by the Montana court as to whether or not a territorial legislature can impose this additional burden of verification on the locator of a mining claim. Wenner v. McNulty (1887) 14 Pac. 643, 7 Mont. 30, 36; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449, 454; O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 255. See Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Taylor v. Middleton (1885) 8 Pac. 594, 67 Cal. 656; Anderson v. Black (1886) 11 Pac. 700, 70 Cal. 226, 230; Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299, 307; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 462.

A local statute requiring a declaratory statement to be upon oath is not invalid as not being in conflict with the United States mining statutes. Metcalf v. Prescott (1891) 25 Pac. 1037, 10 Mont. 283; McCowan v. McLay (1895) 40 Pac. 602, 16 Mont. 234.

A state requirement that a declaratory statement must contain the dimensions and location of the discovery shaft, or its equivalent, sunk upon lode or placer claims and the location and description of each corner with the markings thereon, is not invalid as conflicting with congressional legislation. Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409, affirming judgment Baker v. Butte City Water Co. (1903) 72 Pac. 617, 28 Mont. 222, 104 Am. St. Rep. 683.

A state requirement that a discovery shaft shall be sunk or such a shaft to be known by any other name as a condition for the location of a mining claim or the continued right of possession of the same is not in conflict with this section. Northmore v. Simmons (1899) 97 Fed. 386, 387, 38 C. C. A. 211.

A state statute giving locators claims 90 days after posting of location notice in which to file certificate of location, and also permitting them to file an amended certificate, in which they may change the boundaries of the claim, "provided that such relocation does not interfere with the existing rights of others," is consistent with and supplementary to the federal statutes; and an amended location perfected thereunder becomes the completed location of the discoverer, and is valid as against others whose rights were subsequently initiated. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. of Nevada (C. C. 1903) 125 Fed. 389.

This section necessarily implies that provisions with reference to record of notice of location of such claims would be required either by the rules or regulations of miners or by the Legislature of the state. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, judgment affirmed (1907) 150 Fed. 564, 80 C. C. A. 366. See Slothower v. Hunter (1906) 88 Pac. 36, 15 Wyo. 189, 201.

A state requirement that before filing a location certificate the discoverer shall locate his claim by posting a notice on such claim is valid. Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263. And so is a requirement that, before filing a location certificate, the discoverer shall locate his claim by marking the surface boundaries with substantial posts at each angle of the claim.

The statutes of Idaho, so far as requiring the notice of location to contain the date of the location, the name of the locators, and the description of the claim located by reference to some natural object or permanent monument, as to render the situation of the claim reasonably certain, are substantially the same as this section. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 Pac. 14, 14 Idaho, 516, 522.

A local law requiring that the record of a lode location shall describe the claim in the manner provided by the laws of the United States does not add to the requirements of the acts of Congress. Flick v. Gold Hill & L. M. Min. Co. (1889) 8 Mont. 298, 20 Pac. 807; U. S. v. Ringeling (1889) 20 Pac. 643; 8 Mont. 353, 359; Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19.

A state law requiring that the discoverer shall within 20 days after the discovery record a verified declaratory statement describing his claim in the manner provided by the laws of the United States is valid. Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46.

The miner must have ample opportunity to perfect his location, so that he may be protected in the full enjoyment of the rights accorded him by the statute; and for this purpose state statutes were passed postponing the necessity for marking the boundaries of his claim until he could have full opportunity to ascertain the strike or course of the vein or lode which he has discovered, and the local statute of Montana gives him 90 days in which to do this. Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 135.

The object of the state statute permitting certain designated time in which to sink a shaft and make a discovery of mineral is for the purpose of permitting the locator to discover the course of the vein or lode in order to complete his location, and he is protected in his possession during the statutory period if he puts up a stake at the discovery point, giving the name of the lode, date of discovery, and notice of his intention to locate the claim; and this is equivalent to actual possession for the statutory period within which he must sink his discovery shaft to a depth of 10 feet, make a survey, mark the lines, and make formal location. Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 120. See Erhardt v. Boaro (1881) 8 Fed. 692; Armstrong v. Lower (1883) 6 Colo. 581.

A state law requiring the locator in order to hold his claim, to sink a discovery shaft, or make a cut of certain depth, within 90 days after location, is not in conflict with this section. Sissons v. Sommers (1899) 55 Pac. 829, 24 Nev. 379, 77 Am. St. Rep. 815.

A state law requiring the locator of a mining claim to post a location notice "in some conspicuous place on such location" is supplemental to, and not inconsistent with, the federal mining laws, and is consequently valid; and a failure to comply substantially therewith renders the location void. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 Pac. 275.

The statutory requirement of the state of New Mexico is similar to those of this section, with the addition that the notice shall contain a statement of the intention to locate, and while this section does not require record of a mining notice, yet when the same is required by local legislation or regulations of miners, then the requirements of this section become operative and imperative. Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 291. See Faxon v. Barnard (C. C. 1880) 4 Fed. 702; Mallett v. Uncle Sam Gold, etc., Min. Co. (1865) 1 Nev. 188, 90 Am. Dec. 484; Lockhart v. Wills (1898) 54 Pac. 336, 9 N. M. 344, 357.

State laws requiring locators of a lode claim to establish the center end posts or monuments in a particular manner, and to attach to the copy of notice of location filed with the county clerk an affidavit of proof of representation work as conditions precedent to the establishment of a valid claim, are not in conflict with this section. Wright v. Lyons (1904) 77 Pac. 81, 45 Or. 167. See Northmore v. Simmons (1899) 97 Fed. 386, 38 C. C. A. 211; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92; Metcalf v. Prescott (1891) 25 Pac. 1037, 10 Mont. 283; McCowan v. Maclay (1895) 40 Pac. 602, 16 Mont. 234; Sisson v. Sommers (1899) 55 Pac. 829, 24 Nev. 379, 77 Am. St. Rep. 815.

A state law providing that the records of claims should be made and kept by the county recorder at the county seat, and that records of such claims kept by the recorder in the respective mining districts should be delivered to the county recorder, does not conflict with this section. In re Monk (1897) 50 Pac. 810, 16 Utah, 100.

(D) Miners' rules and regulations

14. Miners permitted to make rules and regulations.—The miners in their respective districts are permitted to make rules and regulations not in conflict with the laws of the United States or of the local state or territory governing the location, manner of recording, and amount of work necessary to hold possession of the claim. Del Monte Mining & Milling Co. v. Last Chance Mining & Milling Co. (1898) 18 Sup. Ct. 895, 901, 171 U. S. 55, 43 L. Ed. 72; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 441, 27 L. Ed. 990; Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 535, 28 L. Ed. 1113; Ducie v. Ford (1891) 11 Sup. Ct. 417, 138 U. S. 587, 591, 34 L. Ed. 1091; Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 12 Sup. Ct. 877, 145 U. S. 428, 36 L. Ed. 762; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 587, 44 L. Ed. 276; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 122, 49 L. Ed. 409; Creede & Cripple Creek, etc., Min. Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 346, 49 L. Ed. 501; Yosemite Min. Co. v. Emerson (1908) 28 Sup. Ct. 196, 208 U. S. 25, 29, 52 L. Ed. 374; Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 459, 17 C. C. A. 190; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Woodruff v. North Bloomfield Gravel Min. Co. (C. C. 1884) 18 Fed. 753; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 534; County of Kern v. Lee (1900) 61 Pac. 1124, 129 Cal. 361, 362; O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 258.

This section authorizes the miners of each mining district to make rules and regulations not in conflict with the United States statutes governing the location, manner of recording, amount of work necessary to hold possession of a mining claim, and providing that the location must be marked on the ground so that its boundaries can be traced; and the record of a mining claim must contain the date of the location, the name of the locator, and a sufficient description as will identify the same, and the performance of one hundred dollars' worth of work, but where claims are held in common the expenditure may be made upon any one claim. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 532; Gillis v. Dow-

ney (1898) 85 Fed. 483, 487, 29 C. C. A. 286.

To be of any validity, a rule or custom of miners must not only be established or enacted, but must be in force at the time and place of the location. It ceases to be operative whenever it falls into disuse, or is generally disregarded. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666.

The statute simply recognizes and legalizes regulations by which miners' rights, as between themselves, upon public lands may be secured and protected. It has no relation to lands owned in fee by private parties, and does not authorize a nuisance. Woodruff v. North Bloomfield Gravel Min. Co. (C. C. 1884) 18 Fed. 753, 800.

This section recognizes the rules and regulations adopted by miners in a mining district, and a location within such district must comply with the requirements of the rules and regulations adopted by the miners. Smith v. Newell (C. C. 1898) 86 Fed. 56, 57.

It is not necessary in order to acquire title to mining claims that mining districts should be organized and local rules and regulations adopted, but in the absence of local rules compliance with the United States statutes is sufficient; but miners in their respective districts may adopt rules and regulations exacting from locators and owners of mining claims something more than is required by the United States statutes. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 323.

Under the authority of this section miners may make rules not in conflict with the United States statute prescribing the time to be allowed for tracing the course of his vein before defining his surface claim, and he may be allowed a reasonable time for such tracing. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 460. See Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 329.

15. Mining district.—The phrase "mining district" means a section of country usually designated by name and described or understood as being confined within certain natural boundaries in which gold or silver, or both are found in paying quantities. U. S. v. Smith (C. C. 1882) 11 Fed. 487, 491.

16. Customs—Proof and presumptions.—A regulation of miners in a mining district may be evidenced by a written rule or by a specific custom, though not in writing. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 459, 17 C. C. A. 190; Harvey v. Ryan (1872) 42 Cal. 626; Flaherty v. Gwinn (1877) 1 Dak. 509.

Where there is no local rule limiting or defining the size of mining claims the question of the reasonable size must be determined by a general custom, which may be proved. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 459, 17 C. C. A. 190; Table Mountain Tunnel Co. v. Stranahan (1862) 20 Cal. 198.

If a rule or custom of miners in a certain mining district requires mining claims to be recorded, then a claim located during the existence of such rule or regulation must be recorded in order to be valid. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 533; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 678.

It is a question of fact for the jury whether or not a mining law or custom is in force; but, when shown to have been in force, the presumption is that it continues in force until the contrary is proved, and parol evidence is admissible to show whether the rule or custom is in force or not. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666. See, also, Harvey v. Ryan (1872) 42 Cal. 626.

The right of possession may be determined by local customs and rules without involving any question under the United States statutes. Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 508, 44 L. Ed. 864.

A custom to record the notice of a mining location and the place of such record to be binding should be so well known, understood, and recognized in the district that locators should have no reasonable ground for doubt as to what is required to make and preserve a valid location. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 678.

While this section permits the miners of each mining district to make regulations governing the location, manner of recording, and amount of work necessary to hold possession of a mining claim, yet if such local rules and regulations are not produced and admitted in evidence they cannot be considered. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 791.

In the absence of proof of local rules and regulations adopted by miners a court will not presume that any such rules or regulations have been adopted. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 323.

Where no mining rules or customs are shown to exist under which a mining location was made and claimed, the party so claiming can, as against another locator not claiming under mining rules, hold his prior location, if his boundaries were distinctly defined by physical marks, without proving local customs or rules. Roberts v. Wilson (1876) 1 Utah, 292, 296. See English v. Johnson (1860) 17 Cal. 108, 76 Am. Dec. 574.

17. Regulations as to location, record, and notice.—If the local laws or regulations of miners do not provide for records of mining claims, then no such record is necessary; but if they so provide, then such record under this statute must contain an accurate description of the locus of the claim by reference to natural or permanent monuments. Fuller v. Harris (D. C. 1887) 29 Fed. 814, 818; Golden-Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312.

Under a rule of the miners giving each locator of a vein 200 feet, together with the dips, spurs, angles, and all the minerals contained therein, a locator, by putting up his stake with the proper notice of the number of feet claimed on the lode and with his name, becomes by virtue of such location invested with the right to hold 100 feet on each side of the vein or lode thus located. Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

The language of the statute authorizing miners to make regulations governing the location and manner of recording mining claims implies that the act of location is distinct and different from the act of recording, except in districts where the rules and regulations of the miners make the recording one of the acts of location. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 679.

Under the rules and regulations of well-known mining districts a person may acquire the exclusive right of possession of a mining claim, at least as against other persons having actual notice of the claim, its position, and extent, before recording such location. Id.

A notice of a mining claim must, in the matter of substance and the matter of execution and attestation, comply with the valid rules and regulations of a mining district. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 538.

The local rules or regulations requiring the locator of a mining claim to post a notice on the claim and to show it, together with the corners of the claim, to a witness who is himself a claim owner within the district, and who must sign the notice as such witness and require a copy to be given to the recorder for record, are not in conflict with any of the provisions of the United States statutes, but any such location is subject to the requirement that the location must be distinctly marked upon the ground so that its boundaries can be readily traced. Id.

The act of Congress does not in express terms require the posting or registration of a notice, but recognizes the power of miners to require registration by providing that all records of mining claims shall contain certain stated matters. Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 118.

The mining law permits miners to provide for the recording of claims and a record, in order to permit a locator to hold his claim for a reasonable time until the vein could be developed, must fix the locus of the claim by reference to natural objects or permanent monuments. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 324.

Where local regulations of a mining district have made the posting and recording of location notice essential, the courts are not at liberty to dispense with them. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 464.

The federal statute makes no provision for a recorder in mining districts, but the authority to provide for recorders and the recording of all papers to be recorded in locating and holding mining claims is left to the states in which such locations are made; and if the State does not exercise this power then the miners of a mining district may. Monk, In re (1897) 50 Pac. 810, 16 Utah, 100, 104.

The disposition of mining ground itself is wholly in control of the federal government; state statutes providing for location notices being merely statutes of peace and repose intended to prevent disorder. Florence-Rae Copper Co. v. Kimbel (1915) 147 Pac. 881, 85 Wash. 162.

18. Regulations as to assessment work.—A rule or custom of miners can not authorize a less annual expenditure on a mining claim than is required by this section of the statute. Sweet v. Webber (1884) 7 Colo. 443, 4 Pac. 752; Penn v. Oldhauber (1900) 61 Pac. 649, 24 Mont. 287, 290. See Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 27 L. Ed. 990; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 28 L. Ed. 452.

The amount of work required by local rules and regulations of miners to be done on a mining claim can only be regulated by increasing the amount over that named in the statute, as the diminution of it is expressly prohibited; hence miners may regulate such amount by increasing it only, and the time may be abridged within which a portion of it may be done, and other regulations may be required to be complied with within a shorter time than the year. Northmore v. Simmons (1899) 97 Fed. 386, 387, 38 C. C. A. 211.

The requirements of local rules and regulations of miners as to the amount of work necessary to be done on mining claims are always subject to the provisions of the United States statute that at least the expressed yearly amount or improvement must be expended on the claim, and that at most the time for expending the same shall not be extended beyond the designated year. Id.

This section was intended to prescribe the minimum amount of expend-

iture in labor or improvements which was exacted by the United States within a maximum period, and to leave to State legislatures or local mining districts the power to make such reasonable regulations as they might deem advisable within the prescribed limits. Northmore v. Simmons (1899) 97 Fed. 386, 387, 38 C. C. A. 211. See Sissons v. Sommers (1899) 55 Pac. 829, 24 Nev. 379, 77 Am. St. Rep. 815.

The performance of 20 days' work, which, according to an arbitrary rate allowed therefor by a regulation of a local mining association, would amount to $100, is insufficient to hold a mining claim for one year, unless such work is really worth $100. Woody v. Barnard (1901) 65 S. W. 100, 69 Ark. 579. See, also, Bradley v. Lee (1869) 38 Cal. 362; Penn v. Oldhauber (1900) 61 Pac. 649, 24 Mont. 287, 290.

This act requires the owner of a mining claim located prior to May 10, 1872, to perform $10 worth of labor or improvements for each 100 feet in length along the vein, and local regulations requiring performance of such work every 60 days are invalid as being in conflict with this section. Original Co., etc., v. Winthrop Min. Co. (1882) 60 Cal. 631, 632.

Compliance with a local regulation providing that an improvement of a certain description shall be sufficient will not prevent an abandonment, when the value of the work is less than $100. Wright v. Killian (1901) 64 Pac. 98, 132 Cal. 56.

(E) Marking location on ground

19. Boundaries must be traceable.— The location of a mining claim must be distinctly marked on the ground, so that its boundaries can be readily traced. Iron Silver Min. Co. v. Eligin Min. & S. Co. (1886) 6 Sup. Ct. 1177, 118 U. S. 196, 30 L. Ed. 98; King v. Amy & Silversmith Consol. Min. Co. (1894) 14 Sup. Ct. 510, 512, 152 U. S. 222, 38 L. Ed. 419; Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 434; McKinley Creek Min. Co. v. Alaska United Min. Co. (1901) 22 Sup. Ct. 84, 86, 183 U. S. 563, 46 L. Ed. 331; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 443, 39 L. Ed. 1046; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 122, 49 L. Ed. 409; Last Chance Min. Co. v. Bunker Hill, etc., Min. Co. (1904) 131 Fed. 579, 590, 66 C. C. A. 299; Smith v. Cascaden (1906) 148 Fed. 792, 794, 78 C. C. A. 458; Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Crœsus M., M. & S. Co. v. Colorado Land & Mineral Co. (C. C. 1884) 19 Fed. 78; Chèesman v. Shreeve (C. C. 1889) 40 Fed. 787; Doe v. Waterloo Min. Co. (C. C. 1893) 55 Fed. 11, decree affirmed (1895) 70 Fed. 455, 17 C. C. A. 190; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 113; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Moore v. Steelsmith (1901) 1 Alaska, 121; Redden v. Harlan (1905) 2 Alaska, 402; Charlton v. Kelly (1906) Id. 532; Overgaard v. Westerberg (1906) 3 Alaska, 168; Cascaden v. Bortolis, Id. 200; Myers v. Lloyd (1910) 4 Alaska, 263; Anvil Hydraulic Co. v. Scandia Mining Syndicate (1912) Id. 479; Rielly v. Blackmore (1887) 15 Pac. 26, 2 Ariz. 272, approved in Blackmore v. Rielly (1888) 17 Pac. 72, 2 Ariz. 442; Phillips v. Smith (Ariz. 1908) 95 P. 91; Malececk v. Tinsley (1905) 85 S. W. 81, 73 Ark. 610; Anderson v. Black (1886) 70 Cal. 226, 11 Pac. 700; Neuebaumer v. Woodman (1891) 89 Cal. 310, 26 Pac. 900; Adams v. Crawford (1897) 48 Pac. 488, 116 Cal. 495; Willeford v. Bell (1897) 49 Pac. 6, 117 Cal. xvii; Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561; Yreka Min. & Mill. Co. v. Knight (1901) 65 Pac. 1091, 133 Cal. 544; Temescal Oil Mining & Development Co. v. Salcido (1902) 69 Pac. 1010, 137 Cal. 211; Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 116; Daggett v. Yreka Min. & Mill. Co. (1906) 86 Pac. 968, 149 Cal. 357; McElligott v. Krogh (Cal. 1907) 90 Pac. 823; McCleary v. Broaddus (Cal. 1910) 111 Pac. 125; Harper v. Hill (Cal. 1911) 113 Pac. 162; Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719; Smith v. Union Oil Co. (1913) 135 Pac. 966, 166 Cal. 217; Pollard v. Shively (1880) 5 Colo. 309; Gilpin County Min. Co. v. Drake (1885) 9 Pac. 787, 8 Colo. 586, 589; Treasury Tunnel, Mining & Reduction Co. v. Boss (1903) 74 Pac. 888, 32 Colo. 27, 105 Am. St. Rep. 60; Burke v. McDonald (1890) 2 Idaho, 646, 33 P. 49; Nicholls v. Lewis & Clark Mining Co. (1910) 109 Pac. 846, 18 Idaho, 224; Flynn Group Mining Co. v. Murphy (1910) 18 Idaho, 266, 851; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110; Childers v. Laham (N. M. 1914) 142 Pac. 924; Sharkey v. Candiani (1906) 85 Pac. 219. 48 Or. 112, 7 L. R. A. (N. S.) 791; Regan v. Whittaker (1901) 85 N. W. 863, 14 S. Dak. 373; Protective Min. Co. v. Forest City Min. Co. (1909) 99 P. 1033, 51 Wash. 643; Sherlock v. Leighton (1901) 63 Pac. 580, 9 Wyo. 297, rehearing denied (1901) 63 Pac. 934, 9 Wyo. 297; Berquist v. West Virginia-Wyoming Cooper Co. (1910) 106 Pac. 673, 18 Wyo. 234. See Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 125; Patchen v. Keeley (1887) 14 Pac. 347, 19 Nev. 404, 413.

This section requires a mining location to be distinctly marked on the ground so that its boundaries can be readily traced and requires the rec-

ords of mining claims to contain the date of location and the description of the claim by reference to some natural object or permanent monument. Harper v. Hill (1911) 113 Pac. 162, 159 Cal. 250, 253; Sweet v. Webber (1884) 4 Pac. 752, 7 Colo. 443, 445.

The only requirement imposed by Congress in the locating of mining claims by means of which the exclusive possession of mineral veins and the surface of mineral lands may be vested in the locator is the marking of the boundaries of the claim on the surface. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel, Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 346, 49 L. Ed. 501.

The law does not require a marking of the vein or lode, but it is the surface land which is to be marked and described, and a notice of location must be interpreted with reference to this requirement. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 116.

While the vein located is the principal thing and the surface only an incident thereto yet the mining law has provided no means of locating a vein except by defining a surface claim. Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 728.

20. Purpose of requirement.—The object of the law in requiring the location to be marked on the ground is to fix the claim and to prevent floating or swinging, so that other persons who in good faith are looking for unoccupied ground may ascertain exactly what has been appropriated and make their locations with reference thereto. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 536; Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 728; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 135; Flynn Group Mining Co. v. Murphy (Idaho, 1910) 109 Pac. 851; Swanson v. Koeninger (1913) 137 Pac. 891, 25 Idaho, 361. See Treasury Tunnel Min. Co. v. Boss (1903) 74 Pac. 888, 32 Colo. 27, 105 Am. St. Rep. 60; Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299; Golden Fleece Mine Co. v. Cable Consol. Min., etc., Co. (1877) 12 Nev. 312; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 278.

A location is required to be so certain that miners may know the extent of the claim and be able to locate unoccupied ground without being embraced in the prior location. Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299, 309.

The purposes of requiring the marking of the boundaries of the surface of the claim is to determine the right of the claimant as between himself and the government, and to notify third persons of his rights. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 536; Pollard v. Shively (1880) 5 Colo. 309. See, also, McElligott v. Krogh (1907) 90 Pac. 823, 151 Cal. 126.

One who has actual notice of a mining location cannot complain because of the absence of marks on the ground. Overgaard v. Westerberg (1906) 3 Alaska, 168, 187. See Haws v. Victoria Copper Min. Co. (1895) 160 U. S. 303, 16 Sup. Ct. 282, 40 L. Ed. 436; McKinley Min. Co. v. Alaska, etc., Min. Co. (1902) 183 U. S. 563, 22 Sup. Ct. 84, 46 L. Ed. 331.

The statute is designed to secure a definite description, so that the claim can be readily traced and ascertained, by reference to some natural object or permanent monument, and in the absence of permanent monuments or natural objects stakes driven into the ground are certain and sufficient means of identification. Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 Pac. 736, 29 Utah, 159, 168. See Hammer v. Garfield Min., etc., Co. (1888) 9 S. Ct. 548, 130 U. S. 291, 32 L. Ed. 964; Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561.

21. Application and construction of requirement.—Courts are inclined to be liberal as to the manner in which mining locations may be marked upon the ground and be sufficient to comply with the statute. Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 215, 60 C. C. A. 155; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 392; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 411; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442.

The provision of this section requiring the location of a mining claim to be distinctly marked on the ground, so that its boundaries may be readily traced, is applicable to placer claims. Bulette v. Dodge (1905) 2 Alaska, 427; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215; White v. Lee (1889) 21 Pac. 363, 78 Cal. 593, 12 Am. St. Rep. 115; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296; Sweet v. Webber (1884) 4 Pac. 752, 7 Colo. 443. See, also, Maleceek v. Tinsley (1905) 85 S. W. 81, 73 Ark. 610; Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263; McDonald v. Montana Wood Co. (1894) 35 Pac. 668, 14 Mont. 88, 43 Am. St. Rep. 616. But see Kern Oil Co. v. Crawford (1903) 76 Pac. 1111, 143 Cal. 298, 3 L. R. A. (N. S.) 993.

Under this section a location may be open to relocation, although the locator has distinctly marked the location; it does not follow that a valid claim ex-

ists from the mere marking on the surface. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 77, 43 L. Ed. 72.

22. Requirement mandatory.—The provisions of this section requiring the location to be distinctly marked on the ground so that its boundaries can be readily traced, and the location notice to contain a description of the claim with reference to some natural object by which it can be identified, are mandatory and must be complied with. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215; Ware v. White (1907) 108 S. W. 831, 81 Ark. 220.

To make the location of a mining claim valid where the boundaries are not marked as required would be to disregard this section of the statute. Crœsus Min., etc., Co. v. Colorado Land & Min. Co. (C. C. 1884) 19 Fed. 78, 80. See Taylor v. Parenteau (1897) 48 Pac. 505, 23 Colo. 368, 372.

The provisions of the statute requiring the marking of the claim so that its boundaries may be located are most important and beneficent, and are not to be frittered away by construction. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114.

The fact or circumstance that the ground on which a mining claim is located is extremely rough and mountainous does not relieve the locator of the obligation of so marking the claim that its boundaries can be readily traced. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 538.

The marking of the boundaries is a necessary part of the location of a mining claim. Pharis v. Muldoon (1888) 17 Pac. 70, 75 Cal. 284, 287.

The marking of the boundaries is the main act of original location, and the ultimate fact in determining the validity of a location is the placing of such marks on the ground so as to identify the claim. McCleary v. Broaddus (1910) 111 Pac. 125, 14 Cal. App. 60. See Donahue v. Meister (1891) 25 Pac. 1096, 88 Cal. 121, 22 Am. St. Rep. 283; Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561, 563.

A mining location will be defective if its boundaries are not staked out on the surface as required by this section. Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371, 379. See Holland v. Mt. Auburn Gold Quartz Min. Co. (1878) 53 Cal. 149; Gelcich v. Moriarity (1878) 53 Cal. 217; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 469.

23. Location and not boundaries required to be marked.—The law does not, in express terms, require the boundaries of a mining claim to be marked, but it requires the location to be so marked that its boundaries can be readily traced. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 536.

This section only requires that a mining claim should be so marked on the ground that its boundaries can be readily traced, but it does not mean that the marks shall be upon the actual ground included within the mining claim, but they may be upon any ground adjoining or near enough to readily designate the boundaries, and a slight mistake in the setting of stakes can not invalidate a mining location. West Granite Mountain Min. Co. v. Granite Mountain Min. Co. (1887) 17 Pac. 547, 7 Mont. 356, 358; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. Mex. 96, 129. See Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299, 307.

This section only requires a mining location to be so marked upon the ground that its boundaries can be easily traced, but it does not require that the lines themselves be indicated by physical marks or monuments so that a person unfamiliar with surveying, and without the aid of measuring instruments or a compass, can readily see by the marks themselves just what is claimed. Oregon King Min. Co. v. Brown (1902) 119 Fed. 48, 54, 55 C. C. A. 626, reversing Brown v. Oregon King Min. Co. (C. C. 1901) 110 Fed. 728.

The ultimate fact in determining the validity of a location is the placing of such marks on the ground as to identify the claim, or marks of such a character that the boundaries can be readily traced. Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 562, 563. See Taylor v. Middleton (1885) 8 Pac. 594, 67 Cal. 656; Anderson v. Black (1886) 11 Pac. 700, 70 Cal. 230.

Where there are no local rules as to the location of claims, there must be boundaries indicated by physical marks and monuments sufficient to distinctly show the extent of the claim; otherwise, the locator will only have the ground actually occupied. Roberts v. Wilson (1876) 1 Utah, 292. See English v. Johnson (1860) 17 Cal. 108, 76 Am. Dec. 574; Eilers v. Boatman (1881) 2 Pac. 66, 3 Utah, 159, 166.

This section does not require the boundaries of a mining claim to be marked, but only requires the location to be marked so that its boundaries can be readily traced, and accordingly where a notice of location gives the length and breadth of a claim from the discovery monument and the three corners and the centers of both end lines are properly marked, there should be no difficulty in tracing the entire boundary. Warnock v. De Witt (1895) 40 Pac. 205, 11 Utah, 324, 330.

24. Time for marking location.—The markings of the boundaries may precede the discovery, or the discovery may precede the marking, and if both are completed before the rights of third persons intervene then the earlier

act will enure to the benefit of the locator as of the date of the later, and a complete possessory title to the premises will vest in him as of the later date. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 536, 28 L. Ed. 1113; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 352, 49 L. Ed. 501; Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230; Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 217, 60 C. C. A. 155; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 531; Zollers v. Evans (C. C. 1880) 5 Fed. 172, 175; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 676; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 579; Thompson v. Spray (1887) 14 Pac. 182, 72 Cal. 528, 533; Strepey v. Stark (1884) 5 Pac. 111, 7 Colo. 614; Treasury Tunnel Min., etc., Co. v. Boss (1903) 74 Pac. 888, 32 Colo. 27, 29, 105 Am. St. Rep. 60; Cedar Canyon Min. Co. v. Yarwood (1902) 67 Pac. 749, 27 Wash. 271, 91 Am. St. Rep. 841.

The location must be distinctly marked on the ground so that its boundaries can be readily traced, and within one month thereafter, or within three months of the discovery a certificate of the location must be filed for record in the county in which the lode is situated. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 533, 28 L. Ed. 1113; Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 590, 66 C. C. A. 299; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 122; Marshall v. Harney Peak Tin Min., etc., Co. (1890) 47 N. W. 290, 1 S. D. 350, 360.

A subsequent locator has no right to object that the first location was not sufficiently marked on the ground at the time of the location, or before recording, provided that such first location was sufficiently marked on the ground before any valid subsequent location of the same claim. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Sharkey v. Candiani (1906) 85 Pac. 219, 48 Or. 112, 122, 7 L. R. A. (N. S.) 791; Crown Point Gold-Min. Co. v. Crismon (1901) 65 Pac. 87, 39 Or. 364. See McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41; Crown Point Gold Min. Co. v. Crismon (1901) 65 Pac. 87, 39 Or. 364.

Upon discovering the vein, the locator is allowed a reasonable time to define the extent of his claim on the ground. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11; Madeira v. Sonoma Magnesite Co. (Cal. App. 1912) 130 P. 175; Burke v. McDonald (1892) 2 Idaho, 1022, 29 P. 98; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442. See, also, Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Newbill v. Thurston (1884) 4 Pac. 409, 65 Cal. 419; Patterson v. Tarbell (1894) 37 Pac. 76, 26 Or. 29; Murley v. Ennis (1874) 2 Colo. 300; Patterson v. Hitchcock (1877) 3 Colo. 533; Marshall v. Harney Peak Tin Min. Co. (1890) 47 N. W. 290, 1 S. D. 350.

It is not necessary for a claimant to finally mark the location on the ground until after the record is made. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 535.

A mining claim invalid because of the lack of sufficient marking of its boundaries in the original location may become valid from the time that the markings are properly made. Croesus Min., etc., Co. v. Colorado Land & Min. Co. (C. C. 1884) 19 Fed. 78, 80. See Taylor v. Parenteau (1897) 48 Pac. 505, 23 Colo. 368, 372.

In the absence of state statutes or mining rules fixing the time within which the exterior boundaries of a claim should be marked, 20 days is a reasonable time. Doe v. Waterloo Min. Co. (C. C. 1893) 55 Fed. 11, decree affirmed (1895) 70 Fed. 455, 17 C. C. A. 190.

No time is fixed within which the location must be distinctly marked on the ground so that its boundaries can be readily traced; but until it is so marked the location is not complete and the law not complied with. Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 728. See Golden Fleece Min. Co. v. Cable Consol. Min. Co. (1877) 12 Nev. 312.

A claim may be marked at any time before an intervening right is acquired, irrespective of whether the time of marking is reasonable. Gobert v. Butterfield (1913) 136 Pac. 516, 23 Cal. App. 1. See, also, Ware v. White (1907) 108 S. W. 831, 81 Ark. 220.

This section does not provide how soon after the discovery of a vein the location must be distinctly marked on the ground so that its boundaries can be readily traced, but until it is so marked the location is not complete and the law has not been complied with. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 461.

The discoverer is not entitled to any time before marking out his claim for exploring his find, in the absence of local custom or statute. Patterson v. Tarbell (1894) 26 Or. 29, 37 Pac. 76.

Location held completed and validated by repairing the old monuments and boundaries prior to the intervention of adverse rights by others. Brockbank v. Albion Min. Co. (1905) 81 Pac. 863, 29 Utah, 367.

A locator who has filed his notice, but fails to mark his boundaries on

the ground, assumes the risk of the accrual of intervening rights of third parties. Brockbank v. Albion Min. Co. (1905) 81 Pac. 863, 29 Utah, 367. See Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666.

A locator is not required to mark out the boundaries of his claim immediately on locating the same, but the posting of a preliminary notice is sufficient to protect his rights for a reasonable time. Union Min. & Mill. Co. v. Leitch (1901) 64 Pac. 829, 24 Wash. 585, 85 Am. St. Rep. 961.

25. Methods of marking. — Markings may consist of blazing trees along the boundaries or at the corners of a claim, or cutting away undergrowth, or making a trail through the timber along the sides or ends of a claim, or putting up stakes or posts, or piles of stone at the point of discovery, or blazing stumps, or posting a notice on the ground. Oregon King Min. Co. v. Brown (1902) 119 Fed. 48, 55 C. C. A. 626; Ledoux v. Forester (C. C. 1899) 94 Fed. 600, 602; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 532; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 791. See, also, Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440; Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 727; Allen v. Dunlap (1893) 33 Pac. 675, 24 Or. 229, 236.

Stakes or monuments placed at the corners of a mining claim do not mark its boundaries, but they are only a means by which the boundaries may be traced and are sufficient for such purpose. Hammer v. Garfield Min., etc., Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 299, 32 L. Ed. 964; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 536; Butler v. Good Enough Min. Co. (1901) 1 Alaska, 246, 251; Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 502.

In marking a claim upon the ground so that its boundaries can be traced regard must be had to the nature of the ground and the markings must be so placed that a person accustomed to tracing the lines of mining claims can readily find all the stakes or monuments. Ledoux v. Forester (C. C. 1899) 94 Fed. 600, 602.

Where the location is made on a barren hillside, the posting of stakes at each of the four corners of the location, either by driving the stakes into the ground, or building of stone monuments so as to keep the stakes in place, is sufficient. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106. See Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19, 23.

26. Sufficiency of markings.—The law does not define or describe the kind of marks that shall be made on the surface or upon what part of the ground or claim they shall be placed, hence any marking on the ground claimed, by stakes and mounds and written notices, whereby the boundaries of the claim located can be readily traced is sufficient. McKinley Creek Min. Co. v. Alaska United Min. Co. (1902) 22 Sup. Ct. 84, 183 U. S. 563, 46 L. Ed. 331; Oregon King Min. Co. v. Brown (C. C. A. 1902) 119 Fed. 48, 55; Walton v. Wild Goose Min., etc., Co. (C. C. A. 1903) 123 Fed. 209, 217; Charlton v. Kelly (1907) 156 Fed. 433, 84 C. C. A. 295, 13 Ann. Cas. 518; Sturtevant v. Vogel (1909) 167 Fed. 448, 93 C. C. A. 84; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 113; Smith v. Newell (C. C. 1898) 86 Fed. 56, 57; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 532; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 791; Moore v. Steelsmith (1901) 1 Alaska, 121; Charlton v. Kelly (1906) 2 Alaska, 532; Thompson v. Pelton (1912) 4 Alaska, 510; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 223; Green v. Gavin (1909) 101 P. 931, 10 Cal. App. 330, 334; Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 731; Du Prat v. James (1884) 4 P. 562, 65 Cal. 555; Taylor v. Middleton (1885) 8 Pac. 594, 67 Cal. 656; Pollard v. Shively (1880) 5 Colo. 309; Bismarck Mtn. Gold Min. Co. v. North Sunbeam, etc., Min. Co. (1908) 95 Pac. 14, 14 Idaho, 516, 525; Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299, 308; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 462; Southern Cross, etc., Min. Co. v. Europa Min. Co. (1880) 15 Nev. 383; Eilers v. Boatman (1881) 2 Pac. 66, 3 Utah, 159; Warnock v. De Witt (1876) 40 Pac. 205, 11 Utah, 324. See Haws v. Victoria Copper Min. Co. (1895) 16 S. Ct. 282, 160 U. S. 303, 318, 10 L. Ed. 436; McKinley Creek Min. Co. v. Alaska United Min. Co. (1902) 22 Sup. Ct. 84, 183 U. S. 563, 46 L. Ed. 331; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 11 Fed. 125; Kern Oil Co. v. Crawford (1903) 76 Pac. 1111, 143 Cal. 298, 302, 3 L. R. A. (N. S.) 993; Saxton v. Perry (1910) 107 P. 281, 47 Colo. 263, 273; West Granite Mtn. Min. Co. v. Granite Min., etc., Co. (1888) 17 Pac. 547, 7 Mont. 356; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 464.

It is a sufficient compliance with the statute where stakes and monuments are so placed upon the ground that the boundaries of the location can be traced with reasonable certainty and without any practical difficulty. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Smith v. Newell (C. C. 1898) 86 Fed. 56, 57; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 536; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151. See

Southern Cross, etc., Min. Co. v. Europa Min. Co. (1880) 15 Nev. 383; Warnock v. De Witt (1895) 40 Pac. 205, 11 Utah, 324.

Setting permanent stakes or stones at the four corners of a mining claim is a sufficient marking. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440, 444; Du Prat v. James (1884) 65 Cal. 555, 4 Pac. 562; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547, 550. See Oregon King Min. Co. v. Brown (1902) 119 Fed. 48, 55 C. C. A. 626; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 223; Green v. Gavin (1909) 101 Pac. 931, 10 Cal. App. 330; Conway v. Hart (1900) 62 Pac. 44, 129 Cal. 480; Golden Fleece, etc., Min. Co. v. Cable Consol., etc., Min. Co. (1877) 12 Nev. 312; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Southern Cross, etc., Min. Co. v. Europa Min. Co. (1880) 15 Nev. 383; Seidler v. La Fave (1889) 20 Pac. 789, 5 N. M. 44; Brockbank v. Albion Min. Co. (1905) 81 Pac. 863, 29 Utah, 367; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 262.

If the center line of a location lengthwise be marked by a prominent stake or monument at each end thereof, upon one of which is placed a notice showing that the locator claims the length of said line upon the lode, from stake to stake, and a specified number of feet in width on each side of said line, such location is so marked that the boundaries may be readily traced. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Moore v. Steelsmith (1901) 1 Alaska, 121; Loeser v. Gardiner (1902) Id. 641.

The law does not in express terms require the boundaries to be marked, but it requires the location to be marked so that its boundaries can be readily traced; and, while it is safer to place stakes or monuments at the corners of the claim, the object of the law may be attained by marking a center line. Golden Fleece Min. Co. v. Cable Consol. Min. Co. (1877) 12 Nev. 312; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442 (doubted in Maderia v. Sonoma Magnesite Co. [1912] 130 Pac. 175, 20 Cal. App. 719, 728).

If a third person intending to locate a claim can readily ascertain from what has been done by the prior locator, the extent and boundaries of his claim located, then the object of the statute has been accomplished. Maderia v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 731; Kern Oil Co. v. Crawford (1904) 76 Pac. 1111, 143 Cal. 298, 3 L. R. A. (N. S.) 993.

The locator sufficiently complies with the law as to markings where he designates the boundaries by reference to the corner of a prior claim, where he places a substantial stake or monument, and by placing at each of the other corners and in the center of each end line substantial stakes, so that the boundaries can be readily traced. McIntosh v. Price (1903) 121 Fed. 716, 58 C. C. A. 136. See Hammer v. Garfield Min. Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 32 L. Ed. 964; Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19, 23.

The lines and corners of a mining claim may be sufficiently located on proper notice, though it is physically impossible to establish a monument at one corner of the claim. Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685, 688. See Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19, 23.

Where stakes were set to mark the boundaries of a mining claim and proper notices posted, it was a sufficient marking upon the ground, even though the corner stakes were not inscribed with the name of the claim. Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748.

Where, by a general custom among miners, the boundaries of the location are marked by only one center stake at each end of the claim, the boundaries are formed by end lines at right angles to a center line drawn from center stake to center stake, and by side lines parallel to and equidistant from the center line, and far enough therefrom to embrace 20 acres within the parallelogram. Loeser v. Gardiner (1902) 1 Alaska, 641.

Where two mining claims were each marked at the four corners by substantial stakes planted on two sides, two of such stakes being at the ends of the dividing line and common to both claims, and the blazing of an oak tree on two sides, on which the location notices were posted describing the two claims by courses and distances, and upon each side of which tree the ledge was uncovered, and deep cuts were subsequently made in the ledge, and a house built near the dividing line in which the locators' working men lived, these were sufficient markings of the claim upon the ground. Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561, 564. See Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547; Southern Cross Min. Co. v. Europa, etc., Min. Co. (1880) 15 Nev. 383; Seidler v. Lafave (1889) 20 Pac. 789, 4 N. M. (John) 369, 371.

Setting stakes and stone monuments at each corner of a claim and at the center of each of the end lines is a sufficient marking. Southern Cross Gold & Silver Min. Co. v. Europa Min. Co. (1880) 15 Nev. 383.

A location is valid, though the survey for a patent discloses that the distances were a few feet out and the courses a point or two wrong. Eilers

v. Boatman (1881) 3 Utah, 159, 2 Pac. 66.

Setting a stake at each of three of the corners of a claim, and a monument at the center of each end line, leaving one corner unmarked, is sufficient. Warnock v. De Witt (1895) 11 Utah, 324, 40 Pac. 205.

Where a mining claim is a relocation of a previous claim, the locator may refer to the boundary monuments of the previous location. Brockbank v. Albion Min. Co. (1905) 81 Pac. 863, 29 Utah, 367. See, also, Conway v. Hart (1900) 62 Pac. 44, 129 Cal. 480; Riverside Sand & Cement Mfg. Co. v. Hardwick (N. M. 1911) 120 Pac. 323.

27. Placing monuments on existing claims.—If one who discovers a vein on land subject to location unwittingly places one or more of his stakes on land already claimed, this does not avoid his own location as to land not included in such adjoining claim. Perigo v. Erwin (C. C. 1898) 85 Fed. 904 (decree affirmed Erwin v. Perego [1899] 93 Fed. 608, 35 C. C. A. 482); Doe v. Tyler (1887) 73 Cal. 21, 14 Pac. 375; West Granite Mountain Min. Co. v. Granite Mountain Min. Co. (1888) 7 Mont. 356, 17 Pac. 547; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 130. See, also, McElligott v. Krogh (Cal. 1907) 90 Pac. 823.

28. Insufficient markings.—Merely posting a notice, claiming a certain number of feet on a lode, is not a sufficient location of a claim and marking of boundaries. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11; Gelcich v. Moriarty (1878) 53 Cal. 217; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Golden Fleece, etc., Min. Co. v. Cable Consol., etc. (1877) 12 Nev. 312; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442. See Newbill v. Thurston (1884) 4 Pac. 409, 65 Cal. 419; Carter v. Bacigalupi (1890) 23 Pac. 361, 83 Cal. 187; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547.

The requirement is not complied with by a mere reference in the location notice to the legal subdivisions of the public survey. White v. Lee (1889) 21 Pac. 363, 78 Cal. 593, 595, 12 Am. St. Rep. 115; Saxton v. Perry (1910) 107 Pac. 281, 47 Colo. 263, 273. See Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296, 299; Temescal Oil & Dev. Co. v. Salcido (1878) 69 Pac. 1010, 137 Cal. 211, 212.

A mineral location marked at one corner by building a monument of rock and placing a stake in it, the stake not driven into the ground, and marking another corner by breaking off the top of a small dead tree 3 or 4 inches in diameter and making a mound of earth, piling some small bowlders about the base of the tree, in an extremely broken and rough country densely covered with brush, and at points far away from where the real corners should have been placed, and where there are other monuments of like character, with nothing to identify them as corners of a particular claim, and the posting of a notice on a picket fence and tacking a notice on a board nailed on a tree nearly 300 feet beyond the proper point, are not such markings on the ground so that the boundaries of a mining claim can be readily traced within the meaning of this section. Madeira v. Sonoma Magnesite Co. (1912) 130 Pac. 175, 20 Cal. App. 719, 731.

The requirement is not complied with by merely posting a notice on a tree at each end of the claim. Holland v. Mt. Auburn Gold Quartz Min. Co. (1878) 53 Cal. 149.

Under some circumstances the marking of a mining claim by substantial stakes at the four corners may not of itself be sufficient. Eaton v. Norris (1901) 63 P. 856, 131 Cal. 561, 565. See Taylor v. Middleton (1885) 8 Pac. 594, 67 Cal. 656.

29. Sufficiency of marking as question of fact.—Whether or not the location of a mining claim has been distinctly marked on the ground so that its boundaries can be readily traced is a question of fact to be determined by the court or jury upon the evidence presented upon that issue. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Hammer v. Garfield Min. Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 32 L. Ed. 964; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 39 L. Ed. 1046; Charlton v. Kelly (1907) 156 Fed. 433, 84 C. C. A. 295, 13 Ann. Cas. 518; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Overgaard v. Westerberg (1906) 3 Alaska, 168; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547; Eaton v. Norris (1901) 63 P. 856, 131 Cal. 561, 564; McCarthy v. Phelan (1901) 64 P. 570, 132 Cal. 404, 406; Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Farmington Gold Min. Co. v. Rhymney Gold & Copper Co. (1899) 58 Pac. 832, 20 Utah, 363, 77 Am. St. Rep. 913. See Eilers v. Boatman (1884) 4 Sup. Ct. 432, 111 U. S. 356, 28 L. Ed. 454; Bismark Mtn., etc., Min. Co. v. North Sunbeam, etc., Min. Co. (1908) 95 Pac. 14, 14 Idaho, 516, 524; Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co. (1910) 107 Pac. 60, 17 Idaho, 630, 641; Dillon v. Bayliss (1891) 27 Pac. 725, 11 Mont. 171.

Whether or not a mining claim is so marked on the ground as required by this section is a question of proof, and

the manner of marking is not required to be stated in the notice. Farmington Gold Min. Co. v. Rhymney Gold, etc., Co. (1899) 58 Pac. 832, 20 Utah, 363, 367, 77 Am. St. Rep. 913; Wells v. Davis (1900) 62 Pac. 3, 22 Utah, 322, 327.

30. Effect of failure to comply with requirement.—A mining claimant cannot defeat the rights of a subsequent locator if he has failed to comply with the statute and has not distinctly marked his claim on the ground so that its boundaries can be readily traced. Holland v. Mt. Auburn Gold Quartz Min. Co. (1878) 53 Cal. 149, 151; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 469.

A locator who does not comply with the requirement as to marking his claim, but actually possesses and works the claim, has no superior right to one who subsequently locates in compliance with the statutes. Funk v. Sterrett (1881) 59 Cal. 613.

31. Change of boundaries.—It is the policy of the government to encourage its citizens in searching for and developing the mineral resources of the country, and this policy can be best subserved by permitting a discoverer to correct and readjust his lines whenever he desires to do so, provided he does not interfere with or impair the intervening rights of others. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 396; Id. 400. And see Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110; Bramlett v. Flick (1899) 57 Pac. 869, 23 Mont. 95; Helena Gold & Iron Co. v. Baggaley (1906) 87 Pac. 455, 34 Mont. 464, 473; Street v. Delta Mining Co. (1910) 112 Pac. 701, 42 Mont. 371; Ferris v. McNally (1912) 121 Pac. 889, 45 Mont. 20, 27. See, also, Mining Co. v. Tarbet (1878) 98 U. S. 463, 25 L. Ed. 253; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Marshall v. Harney Peak Tin Min., etc., Co. (1890) 47 N. W. 290, 1 S. Dak. 350; Bullion, Beck & Champion Min. Co. v. Eureka Hill, etc., Min. Co. (1886) 11 Pac. 515, 5 Utah, 3, 70 (dissenting opinion).

The locator's rights are to be determined by the lines of his surface location and these lines cannot be subsequently changed so as to interfere with the rights of other persons. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 291, 4 C. C. A. 329. See, also, Reilly v. Blackmore (1887) 15 Pac. 26, 2 Ariz. 272; Blackmore v. Reilly (1888) 17 Pac. 72, 2 Ariz. 442.

It is better that the boundary planes should be definitely determined by the lines of the surface location than that they should be subject to perpetual readjustment according to subterranean developments made by mine workings, as these would create great uncertainty in titles. Last Chance Min. Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 579, 590, 66 C. C. A. 299.

A locator cannot change or extend the boundaries of a mining claim for the fraudulent purpose of obtaining possession of an adjoining mining claim located in good faith, and the entry upon ground by a locator without a superior right for the purpose of appropriating by an overlapping location makes him an intruder upon the existing claim. Hall v. McKinnon (1911) 193 Fed. 572, 580, 113 C. C. A. 440. See Biglow v. Conradt (1908) 159 Fed. 868, 87 C. C. A. 48.

The locator cannot, after the location, change the lines of his claim so as to take in other ground, when such change will interfere with the previously accrued rights of others. Crœsus M. M. & S. Co. v. Colorado Land & Mineral Co. (C. C. 1884) 19 Fed. 78.

The locator of a mining claim may amend his location if it can be done without prejudice to the rights of others. Gobert v. Butterfield (1913) 136 Pac. 516, 517, 23 Cal. App. 1.

When the lines of a claim have been laid out and marked, they cannot be changed to take in other ground, since located on, because it is found that the direction of the vein was misjudged. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312. See Nicholls v. Lewis & Clark Min. Co. (1910) 109 Pac. 846, 18 Idaho, 224, 236; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 139; Bullion, Beck & Champion Min. Co. v. Eureka Min. Co. (1886) 13 Pac. 174, 5 Utah, 3, 70 (dissenting opinion).

Before patent a lode locator may shift his lines or float his location on the public domain if he does not interfere with the rights of others. Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1913) 138 Pac. 71, 79, 36 Nev. 543.

32. Destruction of marks or boundaries.—When a location is once sufficiently marked on the surface so that its boundaries can be readily traced, and all other acts of location are performed as required by law, the right of possession is fully vested in the locator, and he can not be divested of this right by the removal or obliteration or destruction of the monuments, stakes, marks, or notices done without his fault, while he continues to perform the necessary work upon the claim. Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 217, 218, 60 C. C. A. 155; Sturtevant v. Vogel (1909) 167 Fed. 448, 93 C. C. A. 84; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; McEvoy v. Hyman (C. C. 1885) 25 Fed. 596; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 561; Perigo v. Erwin (C. C. 1898) 85 Fed.

904, 907; Smith v. Newell (C. C. 1898) 86 Fed. 56; Credo Min., etc., Co. v. Highland Min., etc., Co. (C. C. 1899) 95 Fed. 911, 915; Walsh v. Erwin (C. C. 1902) 115 Fed. 531; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151; Tonopah & S. L. Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389; Moore v. Steelsmith (1901) 1 Alaska, 121; Gobert v. Butterfield (1913) 136 Pac. 516, 23 Cal. App. 1; Indiana Nevada Mining Co. v. Gold Hills Min. & Mill. Co. (1912) 126 P. 965, 35 Nev. 158. See Gillis v. Downey (1898) 85 Fed. 483, 486, 29 C. C. A. 286.

Whatever may be the duty of a locator of a mining claim as to maintaining his stakes where he has once set them up in the autumn, he can not be expected or required to renew them in the January following. McEvoy v. Hyman (C. C. 1885) 25 Fed. 596, 598.

The rights of a locator of a mining claim can not be affected or defeated by a change of the monuments or posts by a stranger, and a subsequent locator is bound to inquire or to take notice at his peril of any existing posts or monuments duly marked, lettered, and showing the name of a mining location. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 418. See Eilers v. Boatman (1881) 2 Pac. 66, 3 Utah, 159, 164.

(F) Location notice or certificate

33. **Absence of requirement.**—This section does not require any notice of location to be posted or recorded, and, in the absence of any local rule or state law requiring it, a location, the boundaries of which are properly marked upon the ground, is valid without posting or recording such notice. Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 217, 218, 60 C. C. A. 155; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Perigo v. Erwin (C. C. 1898) 85 Fed. 904, decree affirmed Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151; Souter v. Maguire (1889) 78 Cal. 543, 21 Pac. 183; Anthony v. Jillison (1890) 83 Cal. 296, 23 Pac. 419; Anderson v. Caughey (1906) 84 Pac. 223, 3 Cal. App. 22; McCleary v. Broaddus (Cal. App. 1910) 111 Pac. 125. See, also, Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 436; Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11; Willeford v. Bell (1897) 49 Pac. 6, 117 Cal. xvii; Carter v. Bacigalupi (1890) 83 Cal. 187, 23 Pac. 361; Dwinnell v. Dyer (1904) 78 Pac. 247, 145 Cal. 12; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 291; Childers v. Laham (N. M. 1914) 142 Pac. 924.

No notice of location is required by the statute, but when the same is posted on the ground it may be considered as a marking to aid in tracing the boundaries of the location. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

Where a local regulation required a notice of a mining claim to be posted at each end thereof, and notice was posted at only one end, all other regulations being complied with, the failure to post at both ends did not work a forfeiture, in the absence of a rule so providing. Emerson v. McWhirter (1901) 65 Pac. 1036, 133 Cal. 510.

This section does not require a description of a mining claim to be included in the notice of location, nor demand more than that the claim shall be distinctly marked on the ground so that its boundaries can be readily traced. Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 116.

This section does not require that a notice or declaratory statement shall be verified nor does it require that any notice or declaratory statement shall be filed for record. Hickey v. Anaconda Copper Co. (1905) 81 Pac. 806, 33 Mont. 46, 62.

This section does not require notice of a mining claim to be either posted or recorded, but intrusts that matter to local regulation subject to the condition that when notice is required to be recorded it shall contain among other things a description of the property. Allen v. Dunlap (1893) 33 P. 675, 24 Or. 229, 238. See Carter v. Bacigalupi (1890) 23 Pac. 361, 83 Cal. 187; County of Kern v. Lee (1900) 61 Pac. 1124, 129 Cal. 361, 362.

34. **Object of location notice.**—The provisions of this section are designed to secure a definite description in the location notice, so plain that the claim can be easily ascertained. Hammer v. Garfield Min., etc., Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 298, 32 L. Ed. 964; Overgaard v. Westerberg (1906) 3 Alaska, 168, 179; Cascaden v. Bortolis (1906) 3 Alaska, 200; San Miguel, etc., Min. Co. v. Bonner (1905) 79 Pac. 1025, 33 Colo. 207, 213; Tiggeman v. Mrzlak (1909) 105 Pac. 77, 40 Mont. 19, 30. See Morrison v. Regan (1902) 67 Pac. 955, 8 Idaho, 291; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449; Flavin v. Mattingly (1888) 19 Pac. 384, 8 Mont. 242; Gamer v. Glenn (1889) 20 P. 654, 8 Mont. 371; Riste v. Morton (1897) 49 P. 656, 20 Mont. 139; Bramlett v. Flick (1899) 57 Pac. 869, 23 Mont. 95; Farmington Gold Min. Co. v. Rhymney (1899) 58 Pac. 832, 20 Utah, 363, 77 Am. St. Rep. 913.

The object of a notice of location is to guide a subsequent locator and afford him information as to the extent of the claim located, by such notice, and whatever does this fairly and reasonably should be held a good and sufficient notice, and if a miner has located

a claim, taken possession, and worked it in good faith for a considerable length of time, his location notice is not to be defeated by technical criticism. Mt. Diablo, Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Talmadge v. St. John (1900) 62 Pac. 79, 129 Cal. 430, 435; Hauswirth v. Butcher (1882) 1 Pac. 714, 4 Mont. 299, 309.

The object of the location notice is to advise the public with reasonable certainty of the location and extent of the claim, and if the notice possesses within its terms information from which the location and boundaries may be found and identified by reference to some natural object or monument which is in fact permanent, it is sufficient, although it fails to designate the natural object or permanent monument as such in the precise language of the statute. Seidler v. Lafave (1889) 20 P. 789, 4 N. Mex. (Johns.) 369, 373; Seidler v. Lafave (1889) 20 Pac. 789, 5 N. Mex. 44, overruling Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 Pac. 741, 3 N. Mex. (Johns.) 179. See Seidler v. Maxfield (1889) 20 Pac. 794, 4 N. Mex. (Johns.) 374.

The object of notice of the location of a mining claim is to impart information to the public. Preston v. Hunter (1895) 67 Fed. 996, 998, 15 C. C. A. 148. See Columbia Copper Min. Co. v. Dutchess Min., etc., Co. (1904) 39 Pac. 385, 13 Wyo. 244, 255.

A location notice is a necessary paper in the patent proceedings, and there cannot be a valid notice without a date, and accordingly the date appears in the proceedings, and it is generally placed on the posted notice, but if not it can be known by an examination in the Land Office. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1900) 108 Fed. 189, 192. A location notice generally describes the ground located, and not what it is proposed to locate. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 458, 17 C. C. A. 190.

Posted notices may constitute a part of the marking and may aid in determining the situs of the monuments marking the claim, and they constitute a part of the marking, and while on account of the temporary nature may be of minor significance, yet this is not so where the location is followed by the actual and continued working of a claim. Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561, 565. See Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C.) 11 Fed. 666.

35. **General requisites, construction, and effect of notice.**—Notices of location of mining claims are to be liberally construed. Walton v. Wild Goose Mining & Trading Co. (1903) 123 Fed. 209, 60 C. C. A. 155 (writ of certiorari denied [1904] 24 Sup. Ct. 856, 194 U. S. 631, 48 L. Ed. 1158); Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 115; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 392; Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 616; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 137; Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 Pac. 736, 29 Utah, 159. See North Noonday Min. Co. v. Orient, etc., Min. Co. (C. C. 1880) 1 Fed. 522; Flynn Group Min. Co. v. Murphy (1910) 109 Pac. 851, 18 Idaho, 226; Wilson v. Triumph Min. Co. (1899) 56 P. 300, 19 Utah, 66, 75 Am. St. Rep. 718; Farmington Gold Min. Co. v. Rhymney Gold, etc., Co. (1899) 58 Pac. 832, 20 Utah, 363, 77 Am. St. Rep. 913; Wells v. Davis (1900) 62 Pac. 3, 22 Utah, 322.

A notice of the location of a mining claim which substantially complies with the statute is sufficient. McEvoy v. Hyman (C. C. 1885) 25 Fed. 596, 598; Steen v. Wild Goose Min. Co. (1901) 1 Alaska, 255, 263. See Strepey v. Stark (1884) 5 Pac. 111, 7 Colo. 614; Frisholm v. Fitzgerald (1898) 53 Pac. 1109, 25 Colo. 290; Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291; Bismark Mtn. Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 Pac. 14, 14 Idaho, 516, 528; Butte Consol. Min. Co. v. Barker (1907) 89 Pac. 302, 35 Mont. 327.

The notice or certificate of the location of a mining claim is not required to show the precise boundaries of the claim as marked on the ground, but it is sufficient if it contains directions that, taken in connection with the boundaries, will enable the claim to be found and the lines traced. Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 Pac. 736, 29 Utah, 159, 166; Carter v. Bacigalupi (1890) 23 Pac. 361, 83 Cal. 187.

Unnecessary words in the notice of the location of a mining claim may be rejected as surplusage. Preston v. Hunter (1895) 67 Fed. 996, 998, 15 C. C. A. 148.

A notice of location must describe the mining claim located in such a manner that it can be identified. Smith v. Cascaden (1906) 148 Fed. 792, 794, 78 C. C. A. 458.

A location notice controls where there is no discrepancy between the calls of the location notice and the stakes on the ground, where it is shown that the adverse claimant had actual knowledge of the contents of the notice. Cardoner v. Stanley Consol. Min., etc., Co. (C. C. 1911) 193 Fed. 517, 519. See Flynn Group Min. Co. v. Murphy (1910) 109 Pac. 851, 18 Idaho, 266, 138 Am. St. Rep. 201; Swanson v. Koeninger (1913) 137 Pac. 891, 25 Idaho, 361.

When a notice of location contains a description of the claim, and is recorded, it operates as constructive no-

tice that the locator claims the ground described. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

A location notice is sufficient when it does not mislead or confuse a person honestly desiring to ascertain the location or size of the claim. Cook v. Johnson (1908) 3 Alaska, 506, 527.

A notice of location is sufficient which particularly describes the claim and the boundaries thereof and gives the names of the locators and the date of the location, and where it is shown in connection with such notice that the boundaries of the claim were so marked that they could be readily determined. Holdt v. Hazard (1909) 102 Pac. 540, 10 Cal. App. 440, 442.

A mining location is sufficient if it conforms strictly with the provisions of this section with respect to the posting and registration of notices and their contents. Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 116.

A location notice is sufficient under this section if by any reasonable construction in view of the surrounding circumstances, the language used in the description will impart notice to subsequent locators. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 Pac. 14, 14 Idaho, 516, 523. See Morrison v. Regan (1902) 67 Pac. 955, 8 Idaho, 291; Snowy Peak Gold Min. Co. v. Tamarack & Chesapeake Min. Co. (1910) 107 Pac. 60, 17 Idaho, 630, 635; Farmington Gold Min. Co. v. Rhymney Gold, etc., Co. (1899) 58 Pac. 832, 20 Utah, 363, 77 Am. St. Rep. 913.

The locator of a mining claim cannot maintain ownership to a greater length in either direction along the ledge or lode than is called for in his notice of location. Swanson v. Koeninger (1913) 137 Pac. 891, 25 Idaho, 361.

36. Particular requirements.—From the time of the discovery of a lode or vein to the time of its excavation a general designation of the claim, by notice posted on a stake placed at the point of discovery, stating the date of the location, the extent of the ground claimed, the designation of the lode and the name of the locator is sufficient to entitle him to possession and to enable him to make the necessary excavations and to prepare the proper certificate for record. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 534, 28 L. Ed. 1113; Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 458, 17 C. C. A. 190; Marshall v. Harney Peak Tin Min., etc., Co. (1890) 47 N. W. 290, 1 S. Dak. 350. See Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 394; Donahue v. Meister (1891) 25 Pac. 1096, 88 Cal. 121, 22 Am. St. Rep. 283; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 122; Deeney v. Mineral Creek Min. Co. (1902) 67 Pac. 724, 11 N. M. 279; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 127.

The notice must contain a designation of the lode, the names of the locators, the date of the location and the number of feet claimed on each side of the center of the discovery shaft. It must also give the general course of the lode and such a description of the claim by reference to some natural object or permanent monument as will identify it with reasonable certainty. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 533, 534, 28 L. Ed. 1113; Marshall v. Harney Peak Tin Min., etc., Co. (1890) 47 N. W. 290, 1 S. Dak. 350, 360. See Wright v. Lyons (1904) 77 Pac. 81, 45 Or. 167, 173.

A location notice is not required to be placed on the vein located, but is sufficient if near by and indicates the vein sought to be located. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 461, 17 C. C. A. 190; Phillpotts v. Blasdell (1872) 8 Nev. 62.

The notice of the location of a mining claim must show among other things the date of the location specified in the notice. Preston v. Hunter (1895) 67 Fed. 996, 998, 15 C. C. A. 148.

A location notice of a mining claim is defective and insufficient where it has no proper reference to a natural object or a permanent monument as required by this section. Vogel v. Warsing (1906) 146 Fed. 949, 951, 77 C. C. A. 199.

In Colorado a location stake must be erected at the discovery of the claim, with a plain sign or notice thereon, containing the name of the lode, the name of the locator, and the date of the discovery. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787.

A notice of location of a lode claim must contain a description of the claim by reference to a natural object or permanent monument by which it could be identified. Mutchmor v. McCarty (1906) 87 P. 85, 149 Cal. 603.

A notice of a location of a mining claim may describe the claim as located a certain number of feet from another mine. Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291. But see Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 P. 741, 3 N. M. (Johns.) 179.

37. Sufficiency of notice—Instances.—The notice of the location of a mining claim, giving the length and breadth in feet, and describing it as beginning at the boundary of another patented claim, and as lying north of another patented claim, is sufficient. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 115; Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 215, 60 C. C. A. 155; Cook v. Johnson (1908) 3 Alaska 506, 527; Green v. Gavin (1909) 101 P. 931, 10 Cal. App. 330, 334; Londonderry Min. Co. v. United Gold Mines Co. (1907) 88 P. 455, 38 Colo. 480, 487. See Zerres v. Vanina (C. C. 1905) 134 Fed. 610; Kern Oil Co. v. Craw-

ford (1904) 76 P. 1111, 143 Cal. 298, 302, 3 L. R. A. (N. S.) 993; Bismark Mtn., etc., Min. Co. v. North Sunbeam, etc., Min. Co. (1908) 95 P. 14, 14 Idaho, 516, 525; Flynn Group Min. Co. v. Murphy (1910) 109 P. 851, 18 Idaho, 266, 278; West Granite Min. Co. v. Granite Mtn., etc., Co. (1888) 17 P. 547, 7 Mont. 356; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 464; Wells v. Davis (1900) 62 P. 3, 22 Utah, 322.

A notice posted on a stake at the point of discovery of a lode or vein declaring an intention to claim 1,500 feet on such lode, vein, or deposit, is sufficient, as it informs all persons that the locators claim the whole extent along its course which the law permits them to take. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Doe v. Waterloo Min. Co. (C. C. 1893) 55 Fed. 11, 13; Erhardt v. Boaro (D. C. 1881) 8 Fed. 860; Omar v. Soper (1888) 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; Sanders v. Noble (1899) 55 Pac. 1037, 22 Mont. 110, 122. See Marshall v. Harney Peak Tin Min., etc.. Co. (1890) 47 N. W. 290, 1 S. D. 350; Columbia Copper Min. Co. v. Dutchess Min., etc., Co. (1905) 79 Pac. 385, 13 Wyo. 244, 255; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 262, 270.

Where a notice is indefinite in stating the number of feet claimed on each side of the discovery point the locator's rights will be limited to an equal number of feet on each side of the course of the lode or vein. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 533, 28 L. Ed. 1113; Omar v. Soper (1888) 18 P. 443, 11 Colo. 380, 385, 7 Am. St. Rep. 246; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234, 262, 270.

A notice is sufficient which states the locator has located and claims 1,500 feet on the lode running 1,000 feet northwesterly and 500 feet southeasterly, with 300 feet on each side, for mining purposes. Doe v. Waterloo Min. Co. (C. C. 1893) 55 Fed. 11, 13; Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685, 687; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110, 129. See Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 535, 538; Smith v. Cascaden (1906) 148 Fed. 792, 794, 78 C. C. A. 458; Patterson v. Tarbell (1894) 37 P. 76, 26 Or. 29; Marshall v. Harney Peak Tin., etc., Min. Co. (1890) 47 N. W. 290, 1 S. D. 350.

A notice of location of a mining claim is sufficient in which only its extent along the lode was given, and the width of the claim in such case is to be determined by the boundaries marked upon the surface. McCarthy v. Phelan (1901) 64 P. 570, 132 Cal. 404, 406; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Fox v. Myers (1906) 86 P. 793, 29 Nev. 169, 186. See Phillpotts v. Blasdel (1872) 8 Nev. 62, 75.

A notice of location of a placer claim describing the ground by metes and bounds and referring to subdivisions of a United States survey for the boundaries of the claim. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 543; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 791. See Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345, 352.

A location notice and affidavit describing a mining claim as beginning at a stake and giving the various lines and distances, and returning "to place of beginning," is sufficient, as the stake is regarded as a monument and its permanency is a question of fact. O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 253; Wright v. Lyons (1904) 77 P. 81, 45 Or. 167, 173.

The notice is sufficient where it identifies natural objects which, combined with stated measurements, enable the boundaries of the claim to be readily traced. McKinley Creek Min. Co. v. Alaska United Min. Co. (1902) 22 Sup. Ct. 84, 183 U. S. 563, 570, 46 L. Ed. 331.

A notice of location of a placer claim, containing the name of the locators, date of location, and a sufficient description, as required by this section, is not invalidated by the fact that the date is preceded by the words "dated on the ground," such words being surplusage. Preston v. Hunter (1895) 67 Fed. 996, 15 C. C. A. 148.

A location notice describing the claim by metes and bounds and with reference to stakes set in the land, adding that the claim lies "about a mile" from a specified mountain in a southeasterly direction, is not defective for failure to point out a particular portion of the mountain as the beginning point. Vogel v. Warsing (1906) 146 Fed. 949, 77 C. C. A. 199. See Flavin v. Mattingly (1888) 19 P. 384, 8 Mont. 242; Brady v. Husby (1893) 33 P. 865, 21 Nev. 453.

A notice to the effect that the locator has "taken up and located 1,500 lineal feet on this vein of gold and silver quartz, and 300 feet on each side from the center thereof," and describing the claim with reference to other patented claims, is sufficient. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 114; Credo Min., etc., Co. v. Highland Min., etc., Co. (C. C. 1899) 95 Fed. 911, 913.

A location notice in the usual form, which gives the claim a particular name and continues: "Extending along said vein or lode 500 feet in a southerly direction and 1,000 feet in a northerly direction, from the center of the discovery shaft (at which shaft this notice and statement is posted), and 300 feet on each side from the middle or center of said lode or vein at the surface, comprising in all 1,500 feet in length along

said vein or lode, and 600 feet in width" —is a sufficient compliance with this section of the statute. Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110, 113, 116.

If the notice of a mining claim is indefinite in not stating the number of feet in width claimed on each side of the point of discovery or monuments of stone referred to, it must then be limited to an equal number of feet on each side, and this will constitute notice as to the number of feet claimed. Farmington Gold Min. Co. v. Rhymney Gold, etc., Co. (1899) 58 Pac. 832, 20 Utah, 363, 368, 77 Am. St. Rep. 913.

A location notice showing a discovery, the amount of ground claimed, the length of the claim, giving the distance in opposite directions from the discovery, and showing that the claim was properly staked, and containing the name of the claim, the signature of the locator, and the date of location and of record, and the county and mining district in which the claim was located, is sufficient. Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah, 159, 165.

38. Insufficiency of notice—Instances.—A mere posting of a notice on a ledge of rocks cropping out of the ground that the poster has located thereon a mining claim without any discovery or knowledge on his part of the existence of mineral might be justly treated as a mere speculative proceeding and not the foundation of any right. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 536, 28 L. Ed. 1113; Lange v. Robinson (1906) 148 Fed. 799, 802, 79 C. C. A. 1; Redden v. Harlan (1905) 2 Alaska, 402, 406; Bulette v. Dodge (1905) 2 Alaska, 427, 429.

Where a locator has not made a discovery and not retained possession for the purpose of prosecuting work looking to a discovery, the mere posting of a notice and marking of the boundaries will not exclude others from making a peaceable entry. New England & Coalinga Oil Co. v. Congdon (1907) 92 P. 180, 152 Cal. 211; Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1, 24.

A location notice which neither in itself nor in the affidavit shows the date of location is insufficient. O'Donnell v. Glenn (1888) 19 P. 302, 8 Mont. 248, 254; Wright v. Lyons (1904) 77 P. 81, 45 Or. 167, 173.

The mere notice of the location of a mining claim without a discovery is not sufficient to hold it as against a subsequent occupant of the same ground under the town-site act. Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 703.

The mere posting of a notice upon the ground is not sufficient to withdraw it from the public domain so as to render invalid another location as to conflicting areas where such location would otherwise be valid. Helena Gold, etc., Co. v. Baggaley (1906) 87 P. 455, 34 Mont. 464, 473. See Lavagnino v. Uhlig (1905) 25 S. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 381.

39. Errors in location notice.—Positive exactness is not required in notices posted on a mining claim when required by statute, and slight mistakes and inaccuracies as to the true course and direction of a vein or lode will not invalidate a notice, as it is the marking of the location by posts and monuments that determines the particular ground located. Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 215, 60 C. C. A. 155; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 115; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151; Strepey v. Stark (1884) 5 P. 111, 7 Colo. 614; Frisholm v. Fitzgerald (1898) 53 P. 1109, 25 Colo. 290; Morrison v. Regan (1902) 67 Pac. 955, 8 Idaho, 291, 308; Bismark Mtn. Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 P. 14, 14 Idaho, 516, 528; Bramlett v. Flick (1899) 57 P. 869, 23 Mont. 95, 105; Butte Consol Min. Co. v. Barker (1907) 89 P. 302, 90 P. 177, 35 Mont. 327; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234, 255. See McEvoy v. Hyman (1885) 25 Fed. 596; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110.

Any clerical errors as to the courses or distances occurring in the notice of a mining location are controlled by the monuments erected upon the ground or by references to other well-known objects or locations, and frivolous objections as to the difference of descriptions of a mining claim in the complaint and that in the notice of location will not be entertained. Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 214, 60 C. C. A. 155; Strickland v. Commercial Min. Co. (1909) 104 P. 965, 55 Or. 48, 52.

An error in the notice of the location of a mining claim stating it to be in a certain county, when in fact it was in a different county, will not vitiate a description and render a notice invalid which is otherwise sufficient. Metcalf v. Prescott (1891) 25 P. 1037, 10 Mont. 283. See Book v. Justice Min. Co. (1893) 58 Fed. 106, 116; Duryea v. Boucher (1885) 7 P. 421, 67 Cal. 141; Wheeler v. Smith (1893) 32 P. 784, 5 Wash. 704, 706.

40. Requirements as to location certificate.—A location certificate differs from ordinary documentary muniments of title in that it is not a title or proof of title, nor does it constitute, nor of itself establish, the possessory right to which it relates, but when duly recorded it becomes notice to the world of the description of the premises claimed, by whom and when located, and is constructive notice of the claimants' possession, and it may be made by statute one of the requisite steps to constitute

a perfected mining location. Strepey v. Stark (1884) 5 P. 111, 7 Colo. 614; Bismark Mtn. Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 P. 14, 14 Idaho, 516, 530.

The certificate of location if in due form may be deemed presumptive evidence of discovery and of a valid location. Thomas v. South Butte Mining Co. (1914) 211 Fed. 105, 128 C. C. A. 33.

The locators must make and file a location certificate containing the names of the locators, the date of location, and such a description of the claim by reference to some natural object or permanent monument as will identify the claim, and also the number of feet in length claimed on each side of the center of the discovery shaft, and the general course of the lode. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787.

A location certificate which locates a lode by reference to two mountain peaks, giving the course or bearing of each from the discovery shaft in degrees and minutes, is prima facie sufficient under this section, taken in connection with the other parts of the description. Craig v. Thompson (1887) 16 P. 24, 10 Colo. 517, 525.

This section requires a certificate of location to contain the name of the locators, the date of the location, and the description of the claim with reference to some natural object or permanent monument, and the statute of Idaho provides that the certificate must contain such a description of the locality, by reference to natural landmarks or fixed objects and contiguous claims, if any, as to render the situation reasonably certain from the letter of the notice itself. Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291, 305.

Failure to properly file a certificate or amended certificate of location does not affect the rights thereunder, but merely changes the burden of proof. Indiana Nevada Mining Co. v. Gold Hills Min. & Mill. Co. (1912) 126 P. 965, 35 Nev. 158.

41. Amended location notice or certificate.—An amended notice or certificate of location is valid to the full extent of the boundaries therein described as against any subsequent locator of any portion of the premises included, and the locator is not required to make a relocation of the new territory, or to claim a discovery of mineral therein, or to show the performance of the annual assessment work, or the actual possession thereof. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 399; Id. 400, 408; King Solomon Tunnel, etc., Co. v. Mary Verna Min. Co. (1912) 127 P. 129, 22 Colo. App. 528, 534.

If an original defective certificate is amended such certificate and the amendment are properly received in evidence as constituting a perfect certificate having effect from the date of the original, and the location of a mining claim established by such original and amended certificate is prior and superior to a location made between the date of such original certificate and its amendment. McEvoy v. Hyman (C. C. 1885) 25 Fed. 596, 600; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 394.

While a locator may have the right to amend his notice and location, yet he cannot do so to the detriment of an intervening locator. Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1900) 108 Fed. 189, 194; Gobert v. Butterfield (1913) 136 P. 516, 23 Cal. App. 1.

Where a second or amended notice or certificate of location contains names other than those set forth in the original, it may be treated as an original notice as to the persons whose names are not included in the first, and as a supplemental or amended notice as to those whose names appear in both, but third persons can take no advantage of such new or amended notice. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 396; Thompson v. Spray (1887) 14 P. 182, 72 Cal. 528, 529.

The law does not require an amended notice or certificate of location to state the object or purpose of making such amendment, but a general statement that it is made to cure errors or defects is sufficient, and the filing of such amended notice or certificate is effectual for all the purposes enumerated in the statute whether they are mentioned in the notice or certificate or not. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 397; Johnson v. Young (1893) 34 P. 173, 18 Colo. 625, 629.

The description of a mining claim in a location notice may be changed if other ground is not embraced, up to the date such location notice becomes a record. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 458, 17 C. C. A. 190.

The law makes a distinction between a relocation and an amended location certificate, though both may be designated as amendments in such location certificates. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787, 789.

An amended certificate of location, when made, becomes the completed location of the discoverer or locator, and has the same validity as if it had been made in the first instance, and third persons can acquire no rights subsequent to the presentation of such amended location certificate. Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 396. See Becker v. Pugh (1892) 29 P. 173, 17 Colo. 243.

Mining locations may be amended, without the loss of original rights, ex-

cept those inconsistent with the amendment; but new rights cannot be added, which are inconsistent with the acquired rights of others. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (C. C. 1903) 134 Fed. 268.

An amended notice of location relates back to the original notice, notwithstanding intervening locations, if made to cure obvious defects without including any new ground. Gobert v. Butterfield (1913) 136 P. 516, 23 Cal. App. 1.

A locator who after locations filed amended locations held not to lose the rights originally acquired. King Solomon Tunnel & Development Co. v. Mary Verna Mining Co. (1912) 127 P. 129, 22 Colo. App. 528.

The right of a locator to file an additional certificate can only avail him where there was an original location, valid though imperfect. Sullivan v. Sharp (1905) 80 P. 1054, 33 Colo. 346, 348. See Strepey v. Stark (1884) 5 P. 111, 7 Colo. 614; Johnson v. Young (1893) 34 P. 173, 18 Colo. 625.

The purpose and office of an amended declaratory statement is to cure defects in the original, and thereby put the locator, in case of no intervening rights, in the same position he would have occupied had no such defects occurred. Butte Consol. Min. Co. v. Barker (1907) 89 P. 302, 90 P. 177, 35 Mont. 327, 337. See Duncan v. Fulton (1900) 61 P. 244, 15 Colo. App. 140.

A defective original certificate of location is admissible in evidence in connection with an amended certificate. Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234, 254. See Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725; Strepey v. Stark (1884) 5 P. 111, 7 Colo. 614; Duncan v. Fulton (1900) 61 P. 244, 15 Colo. App. 140; Frisholm v. Fitzgerald (1898) 53 P. 1109, 25 Colo. 290, 294.

42. Destruction of notice.—A valid location is not lost by the temporary destruction of the notice posted or of the monuments established, where these occur without the fault of the owner, but it may be doubted whether a valid location may be maintained for a long series of years without actual possession unless the boundaries are kept so marked that they can be readily traced. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 539; Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96, 127. See Donahue v. Meister (1891) 25 P. 1096, 88 Cal. 121, 22 Am. St. Rep. 283; Deeney v. Mineral Creek Min. Co. (1902) 67 P. 724, 11 N. M. 279.

43. Declaratory statement—Nature and purpose.—A declaratory statement, in practical mining operations, is a term applied to the statutory certificate of location, and is a certificate or statement of the location, containing a description of the mining claim, verified by the oath of the locator, performing, when recorded, a permanent function, and is the beginning of the locator's paper title, is the first muniment of such title, and is constructive notice to all the world of its contents. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 536; Peters v. Tonopah Min. Co. (C. C. 1903) 120 Fed. 587, 589; Pollard v. Shively (1880) 5 Colo. 309, 312; Metcalf v. Prescott (1891) 25 Pac. 1037, 10 Mont. 283; McCowan v. McLay (1895) 40 P. 602, 16 Mont. 234; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110.

The filing and recording of a declaratory statement or a location certificate after the expiration of the statutory period will make the claim prior and superior to any attempted and subsequent location. Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234.

44. —— Form and sufficiency.—A declaratory statement must be made on oath, must describe the claim as required by the statute, and must describe the discovery or location, and it is not sufficient to say that the description of the vein as given in the notice "is true and correct." O'Donnell v. Glenn (1890) 23 P. 1018, 9 Mont. 452, 8 L. R. A. 403; Metcalf v. Prescott (1891) 25 P. 1037, 10 Mont. 283; McCowan v. McLay (1895) 40 P. 602, 16 Mont. 234; Hickey v. Anaconda Copper Min. Co. (1905) 81 P. 806, 33 Mont. 46, 62.

Where a local statute requires a locator to make and file a declaratory statement on oath, such a statement must not only be made on oath, but filed for record on oath, and the statute intends in such cases that the oath shall be a part of the record. Metcalf v. Prescott (1891) 25 P. 1037, 10 Mont. 283; McCowan v. McLay (1895) 40 P. 602, 16 Mont. 234; Power v. Sla (1900) 61 P. 468, 24 Mont. 243.

The United States mining statutes do not use the term "declaratory statement," but by usage among miners the term has reference to the recorded certificate required by local statutes or rules and regulations of miners, and when a record is required it must contain all the provisions enumerated in this section of the statute, and a clear distinction is made between a notice of location required to be posted on the claim and the certificate of location or declaratory statement to be entered of record. Peters v. Tonopah Min. Co. (C. C. 1903) 120 Fed. 587, 589; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110.

A defective declaratory statement is admissible in evidence in connection with an amended declaratory statement for the purpose of showing the identity of the ground in the two statements.

Butte Consol. Min. Co. v. Barker (1907) 89 P. 302, 90 P. 177, 35 Mont. 327, 337. See Strepey v. Stark (1884) 5 P. 111, 7 Colo. 614.

This section directs what a declaratory statement or certificate of location must contain, when such declaratory statement or certificate is required by a state statute, and when so required the provisions of this section then become mandatory, and strict compliance is essential to the validity of the declaratory statement. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 464. See Golden Fleece Gold, etc., Min. Co. v. Cable Consol., etc., Min. Co. (1877) 12 Nev. 312; Poujade v. Ryan (1893) 33 P. 659, 21 Nev. 449.

(G) Record of location

45. Absence of requirement.—This section does not require the notice of location of a lode mining claim to be recorded, and no such record is necessary unless the laws of the state or the rules of the mining district require it. Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 436; Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 217, 60 C. C. A. 155; Cook v. Klonos (1908) 164 Fed. 529, 535, 90 C. C. A. 403; Sturtevant v. Vogel (1909) 167 Fed. 448, 450, 93 C. C. A. 84; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 112; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 534; Smith v. Newell (C. C. 1898) 86 Fed. 56, 58; Peters v. Tonapah Min. Co. (C. C. 1903) 120 Fed. 587; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 792; Talmadge v. St. John (1900) 62 P. 79, 129 Cal. 430, 435; Conway v. Hart (1900) 62 P. 44, 129 Cal. 480, 483; Anderson v. Caughey (1906) 84 P. 223, 3 Cal. App. 22; Londonderry Min. Co. v. United Gold Mines Co. (1907) 88 P. 455, 38 Colo. 480, 482; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312. See Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 143; Southern Cross Gold & Silver Min. Co. v. Europa Min. Co. (1880) 15 Nev. 383; Poujade v. Ryan (1893) 21 Nev. 449, 33 Pac. 659; Brady v. Husby (1893) 21 Nev. 453, 33 Pac. 801; Ford v. Campbell (1907) 92 P. 206, 29 Nev. 578, 587; Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah, 159, 170.

Where there were no local rules of the mining district requiring a record of the location, and subsequently the claim was relocated by the owner so as to conform to the requirements of the act of Congress, his title dates back to the first location. Fuller v. Harris (D. C. 1887) 29 Fed. 814; Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207; County of Kern v. Lee (1900) 61 P. 1124, 129 Cal. 361, 369; Daggett v. Yreka Min. & Mill. Co. (1906) 86 P. 968, 149 Cal. 357; Jackson v. Dines (1889) 21 P. 918, 13 Colo. 90, 94; Freezer v. Sweeney (1889) 21 P. 20, 8 Mont. 508, 514. See Allen v. Dunlap (1893) 33 P. 675, 24 Or. 229; Payton v. Burns (1902) 69 P. 134, 41 Or. 430.

46. Purpose and effect of record.—An original locator of a mining claim is, after the location certificates are filed and recorded, estopped to deny the validity of the original location. Speed v. McCarthy (1901) 21 Sup. Ct. 613, 181 U. S. 269, 275, 45 L. Ed. 855.

The right to a mining claim will not be forfeited by a failure to record the same, in the absence of a miners' rule or regulation providing for a forfeiture on that ground. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666.

The record of a mining location under this section is the inception of the paper title, but does not of itself constitute title nor give the possessory right to the mining ground to which it relates; but the certificate is made one of the steps requisite to constitute a perfected mining location. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 619. See Strepey v. Stark (1884) 5 P. 111, 7 Colo. 614, 618; Ford v. Campbell (1907) 92 P. 206, 29 Nev. 578, 590.

The principal object of the record of the location is the identification of the claim; and if, considering everything it contains,—the name of the locator, the date of the location, and the description by reference to some natural object or permanent monument,—the claim can be identified, the record is sufficient. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

When a notice of location contains a description of the claim, and is recorded, it operates as constructive notice that the locator claims the ground described. Id.

The failure to file and record a notice of a mining location within the statutory period will not invalidate the claim, where the notice was recorded before any adverse rights were acquired. Buffalo Zinc, etc., Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 537, 91 Am. St. Rep. 87.

When location certificates are recorded they take the place of the location notices and render proof of posting notices unnecessary as against an adverse claimant. Treasury Tunnel, etc., Co. v. Boss (1903) 74 P. 888, 32 Colo. 27, 105 Am. St. Rep. 60; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234, 275-278.

The requirements of the law as to what the record of a mining claim shall show are evidently designed to fix the locus of the claim in order to prevent floating; but the monuments defining the claim on the ground answer this purpose better than the record and if

erected in the beginning there is little use for a record, and accordingly the United States statute does not require any record. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 330.

The provision that the record of a location notice was required to contain such a description of the claim by reference to some natural object or permanent monument as will identify it was intended to prevent the floating of claims. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 465; Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah, 159, 172.

This section requires all records of mining claims to contain the names of the locators, date of location, and the description of the claim by reference to some natural object or permanent monument, and is supplemented by the territorial law requiring a notice posted upon the claim containing the same matters, and the purpose of both is to require such notice and description of the claim as will enable any person going upon the ground to identify it by means of the references made to natural objects or permanent monuments, and the boundary lines of other adjoining claims are neither natural objects nor permanent monuments. Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 P. 741, 3 N. Mex. (Johns.) 179, 180.

47. Requisites of record.—To make a record valid it must contain the names of the locators, the date of the location, and such description of the claim, by reference to some natural or permanent monument, as will identify the claim. Hammer v. Garfield Min. Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 298, 32 L. Ed. 964; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 443, 39 L. Ed. 1046. See Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 436; Wright v. Lyons (1904) 77 P. 81, 45 Or. 167, 169; Smith v. Cascaden (1906) 148 Fed. 792, 78 C. C. A. 458; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531; Credo Mining & Smelting Co. v. Highland Min. & Mill. Co. (C. C. 1899) 95 Fed. 911; Fuller v. Harris (D. C. 1877) 29 Fed. 814, 817; Armstrong v. Lower (1882) 6 Colo. 393, 396; Sweet v. Webber (1884) 7 Colo. 443, 4 Pac. 752; McBurney v. Berry (1885) 5 P. 867, 5 Mont. 300, 302; U. S. v. Ringeling (1889) 20 P. 643, 8 Mont. 353, 359; Hoffman v. Beecher (1892) 31 P. 92, 12 Mont. 489, 497; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110, 136; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 465; Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96, 116; Muldoon v. Brown (1899) 59 P. 720, 21 Utah, 121.

48. Sufficiency of record.—The record of the notice of location of a mining claim is sufficient if it is substantial compliance with the provisions of this section. Preston v. Hunter (1895) 67 Fed. 996, 998, 15 C. C. A. 148.

The name of the location of a mining claim may be changed at any time before a record is made. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 458, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11.

The first record of a mining claim is usually, if not always, imperfect, and it is the policy of the law to give the locator an opportunity to correct his record when defects are found therein; and when it is so corrected the amendment takes effect with the original as of the date thereof. McEvoy v. Hyman (C. C. 1885) 25 Fed. 596. See Hyman v. Wheeler (C. C. 1886) 29 Fed. 347, 352; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 394.

When the record of the location of a mining claim is changed by the erasure of one of the names of the locators and the insertion of another, the record is still valid as to outsiders. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442.

49. Place of record.—The recording of notice as required by this section is dispensed with where there is no recorder in the mining district. Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 318, 40 L. Ed. 436; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 533.

It is only necessary to record the location of a mining claim at the place where the custom in force at the time of the location required the record to be made. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 677.

The record of a mining claim in a pocket memorandum book and without specifying a natural object or permanent monument or any designation or mark by which a placer claim can be identified, is insufficient. Fuller v. Harris (D. C. 1887) 29 Fed. 814, 816.

A location of a mining claim recorded, in compliance with the United States and territorial law, is valid, though not recorded with, nor examined by, the local district recorder, as required by the local regulations of a mining district. Johnson v. McLaughlin (1884) 1 Ariz. 493, 4 Pac. 130.

50. Conclusiveness of record.—Requiring recording of mining claims does not exclude proof of actual possession and the extent of that possession as prima facie evidence of title. Campbell v. Rankin (1878) 99 U. S. 261, 264, 25 L. Ed. 435; Webb v. Carlon (1906) 83 P. 998, 148 Cal. 555, 558.

The description of the location as shown by the record ordinarily will bind the locator as to the locus of the claim. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787.

The date recited in the notice of location of a claim properly marked is only prima facie evidence of the actual date of the location, and an error in the notice must give way to the proved facts. Webb v. Carlon (1906) 83 P. 998, 148 Cal. 555, 113 Am. St. Rep. 305.

(H) Description of location or claim

51. **Purpose of statute.**—The provisions of this section are designed to secure a definite description, one so plain that the claim can be readily ascertained, and a reference to some natural object or permanent monument is for that purpose. Hammer v. Garfield Min., etc., Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 299, 32 L. Ed. 964; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 865, 158 U. S. 441, 39 L. Ed. 1046; Smith v. Cascaden (1906) 148 Fed. 792, 793, 78 C. C. A. 458.

The object of the law in requiring the location of mining claims to be made with reference to some natural object or permanent monument is to direct attention in a general way to the locality in which the claim can be found. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (1908) 95 P. 14, 14 Idaho, 516; Humphreys v. Idaho Gold, etc., Co. (1912) 120 P. 823, 21 Idaho, 126, 136. See Flavin v. Mattingly (1888) 19 P. 384, 8 Mont. 242; Farmington Gold Min. Co. v. Rhymney (1899) 58 P. 832, 20 Utah, 363, 77 Am. St. Rep. 913.

A construction should not be given either to the acts of Congress or the rules and regulations of miners which would invalidate the location because of error in the call for a course. Smith v. Newell (C. C. 1898) 86 Fed. 56. See Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

The Land Department has always been liberal in its rulings as to the particular requirements of this section, as it is not to be supposed that pioneers and settlers upon the government lands and mineral prospectors following their vocations among the mountains are versed in the intricacies of the law, or with experience and knowledge sufficient to warrant their being charged with a rigid and technical compliance with all its requirements. Webb v. Carlon (1906) 83 P. 998, 148 Cal. 555, 557.

The purpose of the provision as to permanent monuments is to give something in the nature of an initial point, and that in following the course and distance given the claim may be located with reasonable certainty. Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah 159, 180. See Gilpin County Min. Co. v. Drake (1886) 9 P. 787, 8 Colo. 586; Drummond v. Long (1887) 13 P. 543, 9 Colo. 538.

52. **Sufficiency of description in notice or record.**—When the recorded notice of a mining claim gives such a description of the location that a person could find the claim as described on the ground with reasonable certainty by going to the natural objects of permanent monuments referred to, then such notice is sufficient. Smith v. Cascaden (1906) 148 Fed. 792, 794, 78 C. C. A. 458; Bramlett v. Flick (1899) 57 P. 869, 23 Mont. 95.

In the location of a mining claim the name of the claim need not be marked on the stakes unless the boundaries can not be readily traced without it, and especially where the location notice giving all the information that marks on corner stakes would give was nailed on the discovery stake. Smith v. Newell (C. C. 1898) 86 Fed. 56, 57; Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748, 749.

It is not necessary that the record shall show that the claim is marked on the ground. McCann v. McMillan (1900) 62 P. 31, 129 Cal. 350.

It is a sufficient compliance with this section if the description of the locus of a mining claim is appended to the location notice when it is recorded. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 466. See Seidler v. Lafave (1889) 20 P. 789, 4 N. Mex. (Johns.) 369, 372, 5 N. Mex. (Johns.) 44.

53. **Reference to natural objects or permanent monuments.**—The record of mining claims is required by this section to contain the name of the locator, the date of the location, and a description of the claim by reference to some natural object or permanent monument as will identify it. Hammer v. Garfield Min. & Mill. Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 32 L. Ed. 964; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 864, 158 U. S. 441, 39 L. Ed. 1046; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 122, 49 L. Ed. 409; Faxon v. Barnard (C. C. 1880) 4 Fed. 702; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787. Credo Min., etc., Co. v. Highland Min., etc., Co. (C. C. 1899) 95 Fed. 911, 914; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Carter v. Bacigalupi (1890) 83 Cal. 187, 23 Pac. 361; Pollard v. Shively (1880) 5 Colo. 309; Gilpin County Min. Co. v. Drake (1885) 8 Colo. 586, 9 Pac. 787; Drummond v. Leng (1887) 9 Colo. 538, 13 Pac. 543; Londonderry Min. Co. v. United Gold Mines Co. (1907) 88 P. 455, 38 Colo. 480, 482; Duncan v. Fulton (1900) 61 P. 244, 15 Colo. App. 140;

Brown v. Levan (1896) 46 P. 661, 4 Idaho, 794; Clearwater Short Line R. Co. v. San Garde (1900) 61 P. 137, 7 Idaho, 106; Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291; Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (1908) 95 P. 14, 14 Idaho, 516; Gamer v. Glenn (1889) 8 Mont. 371, 20 Pac. 654; Purdum v. Laddin (1899) 59 P. 153, 23 Mont. 386, 390; Southern Cross Gold & Silver Min. Co. v. Europa Min. Co. (1880) 15 Nev. 383; Brady v. Husby (1893) 21 Nev. 453, 33 Pac. 801; Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 P. 741, 3 N. Mex. (Johns.) 179, 3 N. M. (Gild.) 269; U. S. v. San Perdo & Canon del Agua Co. (1887) 17 P. 337, 4 N. Mex. (Gild.) 225; Seidler v. Lafave (1889) 20 P. 789, 5 N. M. 44; Same v. Maxfield (1890) 20 P. 794, 5 N. M. 374; Childers v. Laham (N. M. 1914) 142 P. 924; Farmington Gold Min. Co. v. Rhymney Gold, etc., Co. (1899) 58 P. 832, 20 Utah, 363, 368, 77 Am. St. Rep. 913; Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah, 159, 177; Hansen v. Fletcher (1894) 37 P. 480, 10 Utah, 266. See, also, Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442; Stakes driven into the ground are the most certain means of identification of mining claims when there are no permanent monuments or natural objects other than rocks or neighboring hills. The reference to such monuments or objects required by the statute applies only when such reference can be made. Hammer v. Garfield Min., etc., Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 299, 32 L. Ed. 964; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 444, 39 L. Ed. 1046; Ledoux v. Forester (C. C. 1899) 94 Fed. 600; Vogel v. Warsing (1906) 146 Fed. 949, 952, 77 C. C. A. 199; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 223; Eaton v. Norris (1901) 63 Pac. 856, 131 Cal. 561, 565; Hansen v. Fletcher (1894) 37 Pac. 480, 10 Utah, 266, 271. See McCarthy v. Phelan (1901) 64 P. 570, 132 Cal. 404, 405.

Describing a claim as being about 5 miles from a certain railroad is insufficient. Faxon v. Barnard (C. C. 1880) 4 Fed. 702; Darger v. Le Sieur (1892) 30 P. 363, 8 Utah, 160, 163; Id. (1893) 33 P. 701, 9 Utah, 192.

The reference required by this section to some natural object or permanent monument to identify the claim must be such as to furnish a reasonable certainty that the locus of the claim has not been and could not well be changed. Brown v. Levan (1896) 46 P. 661, 4 Idaho, 794, 806; Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291, 301; Humphreys v. Idaho Gold Min., etc., Co. (1912) 120 P. 823, 21 Idaho, 126, 136.

Parol evidence in case of uncertain and disputed boundaries is not admissible to show a stump as a monument where the mining certificate calls for a post. Pollard v. Shively (1880) 5 Colo. 309, 318; Duncan v. Eagle Rock Min. Co. (1910) 111 P. 588, 48 Colo. 569, 581.

The statute requires a reference in the record to a permanent monument, but it does not indicate what that monument shall be nor where it shall be located as to being on or off the claim, nor at the point of beginning in the description or any intermediate point, but it is essential that it be a monument permanent in its character and referred to in such manner as will identify the claim so persons looking for mineral deposits may, with the aid of the notice, find the monument, and from it and the description in the notice trace out the extent of the claim. Seidler v. Lafave (1889) 20 P. 789, 4 N. Mex. (Johns.) 369, 371, 5 N. Mex. 44. See North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min., etc., Co. (C. C. 1881) 11 Fed. 666; Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Quimby v. Boyd (1884) 6 P. 462, 8 Colo. 194.

54. Natural objects or permanent monuments within requirement.—Stone monuments, blazed trees, the confluence of streams, the point of intersection of well-known gulches, ravines, or lodes, permanent buttes, hills, as well as the names of adjoining mining claims, all come within the requirements of this section as to natural objects or permanent monuments. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Carter v. Bacigalupi (1890) 83 Cal. 187, 188; Howeth v. Sullenger (1896) 45 Pac. 841, 113 Cal. 547, 555; Conway v. Hart (1900) 62 Pac. 44, 129 Cal. 480, 484; Quimby v. Boyd (1884) 8 Colo. 194, 6 Pac. 462; Gilpin County Min. Co. v. Drake (1886) 9 Pac. 787, 8 Colo. 588; Drummond v. Long (1887) 13 Pac. 543, 9 Colo. 538, 540; Seidler v. Lafave (1889) 20 Pac. 789, 4 N. Mex. (Johns.) 369, 371; Id. (1889) 20 Pac. 789, 5 N. Mex. 44; Hansen v. Fletcher (1894) 10 Utah, 266, 37 P. 480.

Posts from five to seven inches in diameter, firmly planted in the ground at the corners and ends of a mining claim, and standing not less than five feet above ground, are "permanent monuments," and a recorded notice, which, in addition to a reference to such posts, also gives the general direction and distance of the claim from a lake and a river, is a sufficient compliance with the statute. Credo Mining & Smelting Co. v. Highland Min. & Mill. Co. (C. C. 1899) 95 Fed. 911.

The permanent monument required by this section may be a mountain, hill, ridge, hogsback, butte, canyon, gulch, river, stream, waterfall, cascade, lake,

inlet, bay, arm of the sea, stakes, posts, monuments of stone or boulders, shafts, drifts, tunnels, open cuts, or well-known adjoining patented claims. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787, 792.

The natural objects and permanent monuments required, must be such as will enable a person to locate the claim by means of the references to such natural objects and permanent monuments. Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 P. 741, 3 N. Mex. (Johns.) 179, 181. See Southern Cross Min., etc., Co. v. Europa Min. Co. (1880) 15 Nev. 383, 385.

Permanent monuments may exist before a mining location is made, or may be erected for the purpose of tying the claim to them, but courses and distances from such monuments of a discovery site, or to corner stakes, or some other object on the mining claim, must be stated with reasonable accuracy. Brown v. Levan (1896) 46 P. 661, 4 Idaho, 794, 806. See Clearwater Short Line R. Co. v. San Garde (1900) 61 Pac. 137, 7 Idaho, 106, 109; Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291, 300.

A prospect hole, rock, monument, or stakes are within the meaning of the law of permanent monuments. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 P. 14, 14 Idaho, 516, 525.

The natural objects or permanent monuments required by the statute mean substantial objects that can be seen by the eye and made the basis of a survey. Baxter Mountain Gold Min. Co. v. Patterson (1884) 3 Pac. 741, 3 N. M. (Johns.) 179.

Permanent posts or stakes may be permanent monuments. Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah, 159, 179. See Hammer v. Garfield Min., etc., Co. (1888) 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Eaton v. Norris (1901) 63 P. 856, 131 Cal. 561; Brockbank v. Albion Min. Co. (1905) 81 P. 863, 29 Utah, 367, 369.

55. —— **Question of fact.**—The statute should be construed with liberality, and the sufficiency of the location, with reference to natural objects or permanent monuments, is simply a question of fact. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 39 L. Ed. 1046; Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Russell v. Chumasero (1882) 4 Mont. 309, 1 Pac. 713; Flavin v. Mattingly (1888) 19 P. 384, 8 Mont. 242; O'Donnell v. Glenn (1888) 8 Mont. 248, 19 Pac. 302; Gamer v. Glenn (1889) 8 Mont. 371, 20 Pac. 654; Brady v. Husby (1893) 21 Nev. 453, 33 Pac. 801; Wilson v. Triumph Consol. Min. Co. (1899) 56 P. 300, 19 Utah, 66, 75 Am. St. Rep. 718; Farmington Gold Min. Co. v. Rhymney Gold & Copper Co. (1899) 58 P. 832, 20 Utah, 363, 77 Am. St. Rep. 913; Wells v. Davis (1900) 62 P. 3, 22 Utah, 322, 327; Bonanza Consol. Min. Co. v. Golden Head Min. Co. (1905) 80 P. 736, 29 Utah, 159.

Parol evidence is admissible to show that a natural object or monument referred to in the location, but not designated therein as a permanent monument, is in fact permanent. Metcalf v. Prescott (1891) 10 Mont. 283, 25 Pac. 1037; Seidler v. Lafave (1889) 4 N. M. (Johns.) 369, 20 Pac. 789; Same v. Maxfield (1889) 4 N. M. (Johns.) 374, 20 Pac. 794.

What are natural objects or permanent monuments within the meaning of this section are often questions of fact. Vogel v. Warsing (1906) 146 Fed. 949, 951, 77 C. C. A. 199. See Hammer v. Garfield Min., etc., Co. (1889) 130 U. S. 291, 9 Sup. Ct. 548, 32 L. Ed. 964; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; McEvoy v. Hyman (C. C. 1885) 25 Fed. 596.

The existence of natural or fixed objects and the sufficiency of the description of the mining claim are questions of fact to be determined as other questions of fact. Slothower v. Hunter (1906) 88 P. 36, 15 Wyo. 189, 200.

56. **Existing mining claims as permanent monuments.**—A reference to a known mining claim in the record of a notice is a sufficient compliance with the law requiring reference to be made to some natural object or permanent monument. Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 127 U. S. 471, 480, 32 L. Ed. 172; Hammer v. Garfield Min. & Mill. Co. (1889) 9 Sup. Ct. 548, 551, 130 U. S. 291, 32 L. Ed. 964; Smith v. Cascaden (1906) 148 Fed. 792, 794, 78 C. C. A. 458; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Smith v. Newell (C. C. 1898) 86 Fed. 56; Cosmopolitan Min. Co. v. Foote (C. C. 1900) 101 Fed. 518, 519; Walsh v. Erwin (C. C. 1902) 115 Fed. 531, 532, 536; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 400; Porter v. Tonopah North Star Tunnel, etc., Co. (C. C. 1904) 133 Fed. 756; Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207; Kinney v. Fleming (1899) 56 P. 723, 6 Ariz. 263; Shattuck v. Costello (1912) 68 P. 529, 8 Ariz. 22; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 537, 91 Am. St. Rep. 87; Carter v. Bacigalupi (1890) 23 P. 361, 83 Cal. 187, 188; Londonderry Gold Min. Co. v. United Gold Mines Co. (1906) 88 P. 455, 38 Colo. 480; Duncan v. Fulton (1900) 61 P. 244, 15 Colo. App. 140; Morrison v. Regan (1902) 67 P. 955,

8 Idaho, 291; Flynn Group Mining Co. v. Murphy (1910) 109 P. 851, 18 Idaho, 266; Russell v. Chumasero (1882) 4 Mont. 309, 1 Pac. 713; Garfield M. & M. Co. v. Hammer (1886) 6 Mont. 53, 8 Pac. 153; Upton v. Larkin (1888) 7 Mont. 449, 17 Pac. 728; Gamer v. Glenn (1889) 20 P. 654, 8 Mont. 371; Riste v. Morton (1897) 49 P. 656, 20 Mont. 139, 142; Wilson v. Triumph Consol. Min. Co. (1899) 56 P. 300, 19 Utah, 66, 75 Am. St. Rep. 718; Slothower v. Hunter (1906) 88 P. 36, 15 Wyo. 189, 200.

A discovery cut may be properly recognized as a monument so far as to include it within a claim in the notice of location. McEvoy v. Hyman (C. C. 1885) 25 Fed. 596, 599.

The requirement of a reference to some natural object or permanent monument is satisfied either by reference to certain kind of trees or to some existing lode claim. Upton v. Larkin (1888) 17 P. 728, 7 Mont. 449, 454. See Russell v. Chumasero (1882) 1 P. 713, 4 Mont. 309; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110, 117.

The description by reference to an adjacent existing mining claim is a sufficient reference to a permanent monument to allow a location notice to be introduced in evidence, and it then becomes a matter of proof as to whether such adjoining claim is a permanent monument. Dillon v. Bayliss (1891) 27 P. 725, 11 Mont. 171, 178.

57. Location of natural object or permanent monument.—The natural objects or permanent monuments to which reference may be made are not required to be on the ground located, although they may be, and the natural object may consist of any fixed natural object, and such permanent monument may consist of a prominent post or stake firmly planted in the ground, or of a shaft sunk in the ground. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Talmadge v. St. John (1900) 62 Pac. 79, 129 Cal. 430; Quimby v. Boyd (1884) 6 Pac. 462, 8 Colo. 194, 201; Craig v. Thompson (1887) 10 Colo. 517, 16 Pac. 24; Jackson v. Dines (1889) 13 Colo. 90, 21 Pac. 918; O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 254; Gamer v. Glenn (1889) 8 Mont. 371, 20 Pac. 654.

The natural objects or permanent monuments to which the location of a mining claim must refer may be on the ground located, or off, as the case may be. Bismark Mountain Gold Min. Co. v. North Sunbeam Gold Co. (1908) 95 P. 14, 14 Idaho, 516.

58. Mistake or variance.—The rule that in the location or description of a mining claim monuments shall control courses and distances is recognized only in cases where the monuments are clearly ascertained, but where there is doubt as to the monuments as well as to the courses or distances, then there can be no reason for saying that monuments shall prevail rather than the courses given in a patent. Thallman v. Thomas (C. C. 1900) 102 Fed. 935, 936; Thallman v. Thomas (1901) 111 Fed. 277, 283, 49 C. C. A. 317; Duncan v. Eagle, etc., Co. (1910) 111 Pac. 588, 48 Colo. 569, 580, 139 Am. St. Rep. 288; Swanson v. Koeninger (1913) 137 Pac. 891, 25 Idaho, 361.

The principle that courses and distances give away to fixed monuments applies to the description of a mining claim, and the record of such claim is sufficient when it contains directions which, taken in connection with the marking of the claim on the ground, will enable a person to distinguish the premises located from the public mineral lands open to exploration. McEvoy v. Hyman (C. C. 1885) 25 Fed. 596, 599; Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, 585; Smith v. Newell (C. C. 1898) 86 Fed. 56, 58; Pollard v. Shively (1880) 5 Colo. 309; Russell v. Chumasero (1882) 4 Mont. 309, 1 Pac. 713; Hoffman v. Beecher (1892) 12 Mont. 489, 31 Pac. 92. See Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 217, 218, 60 C. C. A. 155; Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 612; Pollard v. Shively (1880) 5 Colo. 309; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449; Gamer v. Glenn (1889) 20 Pac. 654, 8 Mont. 371; Brady v. Husby (1893) 33 Pac. 801, 21 Nev. 453.

Stakes and monuments set, from which the boundaries of a mining claim may be marked or traced, will control the courses specified in the notice of location. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 115. See McEvoy v. Hyman (C. C. 1885) 25 Fed. 596; Cullacott v. Cash Gold, etc., Min. Co. (1884) 8 Colo. 179; San Miguel Consol. Gold Min. Co. v. Bonner (1905) 79 Pac. 1025, 33 Colo. 207, 212.

A mistake in the notice required to be posted by mining regulations as to the direction and course, being "northerly" instead of "northeasterly," does not invalidate the location; but the stakes and monuments referred to in the notice, and posted upon the ground, will control the direction stated in the notice. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

In descriptions of mining claims courses and distances must yield to objects and monuments, and these can not be rejected as false and mistaken in favor of a mere course or distance, but a false or mistaken particular in a conveyance may be rejected where there are definite particulars sufficient to locate the grant. Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, 585. See Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 115.

The description of the location as

shown by the record is binding on the locator, but if the calls as to distances and courses set out vary from the markings on the ground, the latter will prevail. Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Price v. McIntosh (1901) 1 Alaska, 286, 289. See Bennett v. Harkrader (1895) 158 U. S. 441, 15 Sup. Ct. 863, 39 L. Ed. 1046.

In case of a failure or discrepancy between the stakes and monuments on the ground of a mining claim and the recorded location certificate, the former will prevail as superior evidence of the particular ground located and its boundaries. Sturtevant v. Vogel (1909) 167 Fed. 448, 452, 93 C. C. A. 84.

When a miner has stated, as the rules require, the number of feet he claims along the lode on which he sets his stake, and refers all persons concerned to the laws of the district by claiming all the privileges granted by such laws, and such laws entitle him to hold 100 feet on each side of his lode, then the length and breadth of his claim are fixed with reasonable certainty. Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886. See Gleeson v. Martin-White Min. Co. (1878) 13 Nev. 442.

Where there is a discrepancy between the boundaries of a mining claim as marked on the ground, and as described in the location notice, the locator may claim according to the marked boundaries, in the absence of fraud, unless a subsequent locator had knowledge of the recorded description, and acted thereon. Cardoner v. Stanley Consol. Min. & Mill. Co. (C. C. 1911) 193 Fed. 517. See, also, Sturtevant v. Vogel (1909) 167 Fed. 448, 93 C. C. A. 84.

A location notice of a mining claim is admissible in evidence, though the direction of the closing location line is indefinitely described, the location being sufficient in all other respects, and the proof showing that all the monuments were on the ground. Providence Gold-Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323.

A statement record defective in the description may be cured by monuments on the ground identifying the claim. Russell v. Chumasero (1882) 4 Mont. 309, 1 Pac. 713.

II. EXPENDITURES ON CLAIMS AND TERMINATION OF LOCATORS' RIGHTS

(A) Annual labor or improvement

59. Construction of statute.—The requirement that a certain amount of labor each year be done on a mining claim is imperative, and a failure to do so renders the claim subject to relocation. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452; McDonald v. McDonald (1914) 144 P. 950, 16 Ariz. 103; Morgan v. Tillottson (1887) 73 Cal. 520, 15 Pac. 88; Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296, 301; Dickens-West Mining Co. v. Crescent Min. & Mill. Co. (1914) 141 P. 566, 26 Idaho, 153; Richen v. Davis (Or. 1915) 148 P. 1130.

A locator failing to perform the annual labor required by law forfeits his claim when another enters and completes his location. Shank v. Holmes (1914) 137 Pac. 871; McDonald v. McDonald (1914) 144 Pac. 950, 16 Ariz. 103; Mutchmor v. McCarty (1906) 87 Pac. 85, 149 Cal. 603; Galbreath v. Simas (Cal. 1911) 119 Pac. 86. See, also, Field v. Tanner (1904) 75 Pac. 916, 32 Colo. 278; Dibble v. Castle Chief Gold-Min. Co. (1897) 70 N. W. 1055, 9 S. D. 618; Nevada Exploration & Mining Co. v. Spriggs (Utah, 1912) 124 P. 770; Spokane Portland Cement Co. v. Larson (Wash. 1912) 128 P. 641.

The federal and state authorities agree that unless a locator substantially complies with the law in regard to the labor to be expended on the claim, in the manner and form provided by statute, he forfeits his right therein, as this provision of the statute is mandatory. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, 617.

The conditions imposed by the statute for holding and working a mining claim are wise and salutary and by no means onerous and must be complied with. Wright v. Killian (1901) 64 P. 98, 132 Cal. 56, 61. See Russell v. Brosseau (1884) 4 Pac. 643, 65 Cal. 605, 609.

The fulfillment of the provisions of this section lies in the performance of the labor or the making of the improvements required. Coleman v. Curtis (1892) 30 P. 266, 12 Mont. 301, 305.

60. Purpose of requirement.—The purpose of requiring work to be done on a mining claim each year was to require every person who asserted an exclusive right to his discovery or claim to expend something of labor or value upon it as an evidence of his good faith. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452; Royston v. Miller (C. C. 1896) 76 Fed. 50, 52; Wailes v. Davies (C. C. 1907) 158 Fed. 667, 670.

The purpose of the law is to exact work as evidence of good faith on the part of the owner and to discourage the holding of mining claims without development or intention to develop to the exclusion of others who might improve such ground if opportunity was afforded, and accordingly the annual work must be performed by the owner, at his instance, by some one in privity with him, or by some one who holds an equitable or beneficial interest in the property, as work done by such a person will inure to the benefit of the claim. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Book v. Justice Min. Co. (C. C. 1893)

58 Fed. 106; Wailes v. Davies (C. C. 1907) 158 Fed. 667, 672; Anderson v. Caughey (1906) 84 P. 223, 3 Cal. App. 22; Eberle v. Carmichael (1895) 42 P. 95, 8 N. M. 169; Dye v. Crary (1906) 85 P. 360, 13 N. M. 439; Godfrey v. Faust (1904) 101 N. W. 718, 18 S. D. 567, 571.

The object of the provision requiring annual assessment work is to give substantial evidence of the locator's good faith, and the law should be liberally construed with that end in view; a compliance with the statute may be proved by any evidence which establishes that the work done and improvements made are reasonably worth the sum of $100. McCulloch v. Murphy (C. C. 1903) 125 Fed. 147.

The purpose of this section was the development of the mineral resources of the country, and to the accomplishment of this end the appropriator of the mineral domain was required to expend not less than $100 in labor or improvements for the development of each claim in each year; but when claims were held in common the expenditure can be made upon one, as Congress intended to provide a method for the economical development of a group of continuous claims. Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345, 348.

The object of the requirement as to the amount of labor performed on a claim, or improvements made, is that the holder of a mining claim shall give substantial guaranty of his good faith, and not from the desire on the part of the government to obtain the money of the locator, and it would be against public policy to permit a person to hold a mining claim for years against all other persons with no design or intention to develop it; but the labor is not required to be applied in any particular manner if it is devoted to the claim. Lockhart v. Rollins (1889) 21 P. 413 2 Idaho (Hasb.) 540. See McGarrity v. Byington (1859) 12 Cal. 426.

Congress required the assessment work to be done by way of a continuous annual assertion or renewal of the original claim or location, and the amount of expenditure required is too small to be of any practical consequence as a development of the claim. Sherlock v. Leighton (1901) 63 P. 580, 63 P. 934, 9 Wyo. 297, 308. See Mount Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

61. Performance as condition of possession.—Discovery and appropriation are the sources of title to mining claims, and development and working is the condition of continued ownership until a patent is obtained. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 40 L. Ed. 436; De Lamar's Nevada Gold Min. Co. v. Nesbitt (1900) 20 Sup. Ct. 715, 716, 177 U. S. 523, 44 L. Ed. 872; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710; El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 256, 58 L. Ed. 943, L. R. A. 1915A, 1113; Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286; O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 109 (affirmed [1905] 140 Fed. 854, 72 C. C. A. 645, 4 L. R. A. [N. S.] 919); Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207; Ware v. White (1907) 108 S. W. 831, 81 Ark. 220; Wright v. Killian (1901) 64 P. 98, 132 Cal. 56; Big Three Min. & Mill. Co. v. Hamilton, (1910) 107 P. 301, 157 Cal. 130; Harper v. Hill (Cal. 1911) 113 P. 162; Holmes v. Salamanca Gold Min. & Mill. Co. (Cal. App. 1907) 91 P. 160; Anderson v. Caughey (1906) 84 P. 223, 3 Cal. App. 22; McCleary v. Broaddus (1910) 111 P. 125, 14 Cal. App. 60; Lancaster v. Coale (1915) 150 Pac. 821, 27 Colo. App. 495; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321; Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248, 256; Gottschall v. Melsing (1866) 2 Nev. 185; Ford v. Campbell (Nev. 1907) 92 P. 206; Wills v. Blain (1889) 20 P. 798, 4 N. M. (Johns.) 378; Strickland v. Commercial Mining Co. (Or. 1909) 104 P. 965. See, also, Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 321, 49 L. Ed. 770.

A mining claim, until patent therefor has been issued, is held by a peculiar title, which is never complete and absolute, and which can only be maintained by the annual expenditure thereon of the work as required by law. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 256, 58 L. Ed. 936; Bay State Silver Min. Co. v. Brown (C. C. 1884) 21 Fed. 167, 168.

A claimant of mining ground, until patent is issued, must be an actor and must annually perform the statutory work required, and in establishing his title to such claim he must show compliance with the statute in this respect. Bay State Silver Min. Co. v. Brown (C. C. 1884) 21 Fed. 167, 168, distinguished in Aurora Hill, Con. Min. Co., v. Eighty-Five Min. Co. (C. C. 1888) 34 Fed. 515, 519.

Evidence in support of the possession of a mining claim must show the performance of the assessment work as required by this section. McDonald v. McDonald (1914) 144 P. 950, 16 Ariz. 103; Rosenthal v. Ives (1887) 12 P. 904, 2 Idaho (Hasb.) 265.

The required annual assessment work must be performed to entitle the locator to hold his claim; otherwise it becomes subject to relocation. First Nat.

Gold Min. Co. of New York & Colorado v. Altvater (1906) 149 Fed. 393, 79 C. C. A. 213.

If assessment work is done for the benefit of a claim, it is immaterial whether such claim is patented or unpatented. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 561. See Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207; McGarrity v. Byington (1859) 12 Cal. 426; Hall v. Kearney (1893) 33 Pac. 373, 18 Colo. 505, 509; Kramer v. Settle (1873) 1 Idaho, 485; Godfrey v. Faust (1905) 105 N. W. 460, 20 S. Dak. 203, 207.

Until an actual discovery of mineral is made upon a claim, the location is not perfected, and annual assessment work is not necessary. Borgwardt v. McKittrick Oil Co. (1913) 130 P. 417, 164 Cal. 650.

Possession of a mining claim for the statutory period for adverse possession establishing a right to patent, as section 4631, post, provides, does not relieve the possessor from doing the annual assessment work. Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96.

62. Lode and placer claims.—The performance of the annual assessment work is required upon placer claims, as well as lode claims. Carney v. Arizona Gold Min. Co. (1884) 65 Cal. 40, 2 Pac. 734; Sweet v. Webber (1884) 7 Colo. 443, 4 Pac. 752. But separate work need not be performed on each 20 acres in a 160-acre claim. McDonald v. Montana Wood Co. (1894) 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

63. Effect of entry or application for patent.—See Benson Mining & Smelting Co. v. Alta Mining & Smelting Co. (1892) 12 Sup. Ct. 877, 145 U. S. 428, 36 L. Ed. 762; Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 12 Sup. Ct. 877, 145 U. S. 428, 431, 36 L. Ed. 762; Neilson v. Champagne Min., etc., Co. (C. C. 1901) 111 Fed. 655, 657; Aurora Hill Consolidated Min. Co. v. 85 Mining Co. (C. C. 1888) 34 Fed. 515; Alta Mining & Smelting Co. v. Benson Mining & Smelting Co. (1888) 16 Pac. 565, 2 Ariz. 362; Cranes Gulch Min. Co. v. Scherrer (1901) 66 P. 487, 134 Cal. 350, 353, 86 Am. St. Rep. 279; Southern Cross Gold Min. Co. v. Sexton (1905) 82 P. 423, 147 Cal. 758; Batterton v. Douglas Mining Co. (1911) 120 P. 827, 20 Idaho, 760; Deno v. Griffin (1889) 20 Nev. 249, 20 P. 308; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114. See, also, Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221.

The annual expenditure required by this section relates only to expenditures before a patent is issued, proof of which is a matter for consideration at the time application is made for a patent, and this requirement is not affected, or the proof required at the time of making application for a patent changed, whether the application is for a patent for one claim or for several claims held in common. Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875.

The filing of an application for a patent does not suspend the obligation to keep up the required annual work where, without paying the purchase money, the claimant permits his application to sleep for years; and the claim is open to relocation. Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286.

An entryman, who makes final entry and obtains the receiver's receipt showing he is entitled to a patent is not relieved of the necessity of doing the annual representation work where such receipt was obtained by fraud. Murray v. Polglase (1899) 59 P. 439, 23 Mont. 401.

The duty to perform annual assessment work continues until payment of the purchase price to the government, and neither the pendency of proceedings for a patent before the land office nor of an adverse suit will excuse the nonperformance of the work. Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19.

64. Amount required.—To maintain a valid location $100 worth of labor must be done or improvements made each year until a patent is issued. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 351, 28 L. Ed. 452; Gwillim v. Donnellan (1884) 5 Sup. Ct. 1110, 115 U. S. 45, 48, 29 L. Ed. 348; De Lamar's Nevada Gold Min. Co. v. Nesbitt (1900) 20 Sup. Ct. 715, 177 U. S. 523, 526, 44 L. Ed. 872; Malone v. Jackson (1905) 137 Fed. 878, 880, 70 C. C. A. 216; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 536; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 681; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Royston v. Miller (C. C. 1896) 76 Fed. 50, 52; Peachy v. Frisco Gold Mines Co. (D. C. 1913) 204 Fed. 659, 666; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275; Fredericks v. Klauser (1908) 96 Pac. 679, 52 Or. 110, 116; Nesbitt v. De Lamar's Nevada Gold Mining Co. (1898) 52 Pac. 609, 24 Nev. 273, 283, 77 Am. St. Rep. 807.

This section requires that on each claim located after May 10, 1872, there shall be annually expended, in labor or improvements, $100 until patent issues; and on claims located prior thereto an annual expenditure of $10 for each 100 feet in length along the vein; but where the claims are held in common the expenditure may be upon any one claim. Smelting Co. v. Kemp (1881) 104 U. S. 636, 654, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 27 L. Ed. 990.

Congress, by these statutes, adopted the prevalent rule as to claims asserted

prior to the date of the enactment, but as to those made afterwards it required $100 worth of labor or improvements to be done in each year on every claim. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452; Bishop v. Baisley (1895) 41 Pac. 936, 28 Or. 119, 134. See Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296, 300; Remmington v. Baudit (1886) 9 Pac. 819, 6 Mont. 138, 141; Thompson v. Jacobs (1883) 3 Utah, 246, 2 Pac. 714.

A locator of a placer claim may or may not work the claim at his option and may prolong indefinitely his possessory right by performing the required statutory assessment work or by making that amount of improvements on the claim in each year. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 68, 104 C. C. A. 136.

The expenditure of $100 in work or improvements up to the time of the issuance of the government patent is essential without reference to the condition of the locator or the position of the claims located, except that where claims are held in common the expenditure may be made upon any one claim. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 541.

An attempt to assert a continuous right to a mining claim cannot be based upon a mere pretense of work so plainly a sham that it must be disregarded, but this principle can not be applied where the work done was actual and valuable. Belcher Consol. Gold Min. Co. v. Defarrari (1882) 62 Cal. 160, 163.

It is fraud against the government and the law to hold quartz claims by merely doing a few dollars' worth of work thereon at or near the beginning of the year next following the year on which the claimant failed to do the necessary work, when such work is not commenced with the bona fide intention of being continued until the full amount is done. McCormick v. Baldwin (1894) 37 P. 903, 104 Cal. 227, 229.

So long as $100 is expended each year upon a mining claim the owner's right to exclusive possession and to extract and exhaust the ore is as complete as if he held a patent, for which he may never apply unless he desires. Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 138.

65. Determination of amount or value.—In determining the amount of work done on the claim, the test is as to the reasonable value of the work, and not what was paid for it, or what the contract price was. McKay v. Neussler (1906) 148 Fed. 86, 78 C. C. A. 154; Whalen Consol. Copper Min. Co. v. Whalen (C. C. 1904) 127 Fed. 611. See, also, Big Three Min. & Mill. Co. v. Hamilton (1910) 107 P. 301, 157 Cal. 130; Stolp v. Treasury Gold Min. Co. (1905) 80 P. 817, 38 Wash. 619; Protective Min. Co. v. Forest City Min. Co. (1909) 99 P. 1033, 51 Wash. 643.

In considering the amount and value of annual labor and improvements upon a mining claim it is proper to consider all the circumstances in connection with the claim, the remoteness of the claim from any place where labor can be relied upon as available, the cost of supplies, the inconvenience in procuring wood and water, the fact that a team must be kept at or near the location, the lack of facilities for cooking, and other like circumstances, and if, considering such circumstances, the work on the claim amounted to $100, and such amount was paid in good faith for the work done, and was intended to comply with the statute, a court will not, under such circumstances, permit a claim to be forfeited on merely conflicting evidence. Wright v. Killian (1901) 64 P. 98, 132 Cal. 56, 60. See, also, Gear v. Ford (1906) 88 P. 600, 4 Cal. App. 556; Hirschler v. McKendricks (1895) 16 Mont. 211, 40 Pac. 290; Fredricks v. Klauser (1908) 96 P. 679, 52 Or. 110.

A contest as to representation work is not as to the number of days worked upon the mining claim, but is the reasonable value of the labor performed or improvements made, and the value of either is to be measured not in days but in dollars, and regulations or customs of miners cannot fix the number of days' work without reference to the value of the work or improvements. Penn v. Oldhauber (1900) 61 P. 649, 24 Mont. 287, 291. See Mattingly v. Lewisohn (1893) 35 P. 111, 13 Mont. 508.

Picking rock from the walls of a shaft or outcropping of a ledge, in small quantities, from day to day, and testing it, in order to find a paying vein, cannot be credited as part of the $100 worth of work and improvements required. Bishop v. Baisley (1895) 28 Or. 119, 41 Pac. 936.

The value of assessment work done by hydraulic washing includes not only the wages of the men holding the nozzle, but the value of the use of the plant. Anderson v. Robinson (Or. 1912) 126 P. 988, rehearing denied (Or. 1912) 127 P. 546.

66. Persons entitled to perform work or make improvements.—Work done on a mining claim by anyone, whether holding the legal or equitable title, done in the interest of the claim, is available to preserve the claim. Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; McDonald v. McDonald (1914) 144 P. 950, 16 Ariz. 103; Anderson v. Caughey (1906) 84 P. 223, 3 Cal. App. 22.

Work done by any grantor of an applicant while holding the claim under either a legal or equitable title in the interests of the claim is available to preserve it, and no mere relocation for forfeiture made before the forfeiture actually attaches by actual default

would be valid to defeat the claim. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 682.

By a conveyance of his interest the locator ceases to do any work on the claim, and he thereby puts another in possession with all rights to do the work called for, and gives the purchaser the right to do all that he could have done toward purchasing the land itself. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 451, 41 L. Ed. 221.

The annual assessment work may be performed by a person or corporation for whose benefit or interest the legal title of a mine or mining claim is held in trust. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Wailes v. Davies (C. C. 1907) 158 Fed. 667, 673 (decree affirmed [1908] 164 Fed. 397, 90 C. C. A. 385); Musser v. Fitting (1915) 148 P. 536, 26 Cal. App. 746; Dye v. Crary (1906) 85 P. 1038, 13 N. Mex. 439, 9 L. R. A. (N. S.) 1136; Godfrey v. Faust (1904) 101 N. W. 718, 18 S. D. 567; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673; Hickey v. Parrot Silver & Copper Co. (1901) 64 P. 330, 25 Mont. 164, 184; Nesbitt v. De Lamar's Nevada Gold-Min. Co. (1898) 52 P. 609, 24 Nev. 273, 77 Am. St. Rep. 807; Little Gunnell Co. v. Kimber (C. C. 1878) Fed. Cas. No. 8,402.

A deed for an interest in a mining claim may compel the grantees to perform all the assessment work required under this section. Shaw v. Caldwell (1911) 115 P. 941, 16 Cal. App. 1, 3.

The term "legal representative" is only used in this section in reference to the performance of annual labor upon mining claims, and does not authorize an administrator of a deceased mineral claimant to maintain an action to quiet title to a mining claim. Keeler v. Trueman (1890) 25 P. 311, 15 Colo. 143, 146.

67. Time for performance of work or making improvements.—A locator is entitled to the whole of the year in which to make the annual expenditure. Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 148, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; Malone v. Jackson (1905) 137 Fed. 878, 70 C. C. A. 216; Rooney v. Barnette (1912) 200 Fed. 700, 708, 119 C. C. A. 116; Slavonian Min. Co. v. Perasich (C. C. 1881) 7 Fed. 331; Original Co., etc., v. Winthrop Min. Co. (1882) 60 Cal. 631; Mills v. Fletcher, 100 Cal. 142, 34 Pac. 637; McGinnis v. Egbert (1884) 8 Colo. 41, 5 Pac. 652; Hall v. Hale (1885) 8 Colo. 351, 8 Pac. 580; Atkins v. Hendree (1867) 1 Idaho, 95; Ambergris Min. Co. v. Day (1906) 12 Idaho, 108, 120; Belk v. Meagher (1878) 3 Mont. 65; Lacey v. Woodward (1891) 5 N. Mex. 583, 589. See, also, Belk v. Meagher (1881) 104 U. S. 279, 282, 26 L. Ed. 735.

This statute, for the purpose of convenience, provides that the period within which all annual assessment work has to be done shall commence on the 1st day of January succeeding the date of location of a claim. Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462, 468; Madison v. Octave Oil Co. (1908) 99 P. 176, 154 Cal. 768, 773; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 136.

Where one was in possession of mining claims on January 1st, performing work, the claims were not subject to relocation; and work performed thereafter could apply on the assessment work for the year. Anderson v. Robinson (Or. 1912) 126 P. 988, rehearing denied (Or. 1912) 127 P. 546.

68. Character of work or improvements in general.—Assessment work may be done on the surface or below the surface of a claim. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 560. Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886.

Assessment work may be done on a lode having its apex outside of the surface lines of the location. Id.

This section does not specify the kind of labor, and labor expended in extracting ore from the claim is within the requirement. It is only when labor is performed without the boundaries of the claim that its character becomes material, and in that case it must tend to the development or improvement of the claim or it will not count. Wailes v. Davies (C. C. 1907) 158 Fed. 667, decree affirmed (C. C. A. 1908) 164 Fed. 397, 90 C. C. A. 385.

The court cannot be permitted to substitute its judgment as to the expediency of the methods employed for developing a mine for that of the owners. Mann v. Budlong (1900) 62 P. 120, 129 Cal. 577.

Assessment work in mining law means the annual labor required by this section. Smith v. Union Oil Co. (1913) 135 Pac. 966, 166 Cal. 217.

Whether work was done for the purpose of developing the claim, or was adapted to that purpose, are questions of fact. Gear v. Ford (Cal. App. 1906) 88 P. 600. See Taylor v. Middleton, 67 Cal. 656; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 Pac. 1047, 114 Cal. 100.

Work done on a mining claim to withdraw water from the mine so that it could be examined by a prospective purchaser, not operating to develop or improve the mine, or to enable the co-owners performing the work to work the mine, is not assessment work required by this section. Evalina Gold Mining Co. v. Yosemite Gold Min. & Mill. Co. (1911) 115 P. 946, 15 Cal. App. 714.

The statute authorizes the expenditure to be either in work and labor or

improvements. Power v. Sla (1900) 61 P. 468, 24 Mont. 243.

69. Labor or improvements for developing claim.—A liberal construction is given to this requirement of the law, and the required labor or improvements is deemed to be done when the labor is performed or the improvements made for the purpose of working, prospecting, or developing the ground embraced in the surface location, or for the purpose of facilitating the extraction or removal of the ore therefrom. McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 149; Sexton v. Washington Min., etc., Co. (1909) 104 P. 614, 55 Wash. 380, 383. See Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 117; Mt. Diablo Mill. & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Debney v. Iles, 3 Alaska (1907) 438.

Work done on a placer claim to determine whether or not there are existing lodes within the placer limits is the performance of annual labor within this section. U. S. v. Iron Silver Min. Co. (C. C. 1885) 24 Fed. 568, 571. See Kielley v. Belcher Silver Min. Co. (C. C. 1875) Fed. Cas. No. 7,760; Buckley v. Gould, etc., Min. Co. (C. C. 1882) 14 Fed. 833; United States v. King (1889) 22 P. 498, 9 Mont. 75, 80; Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 135.

Personal expenses and the value of locator's time in endeavoring to procure water to operate a mill for crushing ore from the mine are not work done on the claim. Du Prat v. James (1884) 65 Cal. 555, 4 Pac. 562.

Work on a claim, done by one after making a valid location and a subsequent invalid one, will be attributed to the valid location. Temescal Oil Mining & Development Co. v. Salcido (1902) 69 P. 1010, 137 Cal. 211.

To make a building erected upon a mining claim an improvement, it must have been placed there for the purpose of benefiting the claim, and for its improvement. Bryan v. McCaig (1887) 10 Colo. 309, 15 Pac. 413.

The mere prospecting of a mining claim cannot be credited as assessment work unless the term is applied to work or improvement in the sense of development and demonstration, and the mere picking rock from the walls of a shaft or from an outcropping ledge in small quantities from day to day, and making tests for the purpose of sampling or crushing it in a mortar and panning it out for assays, is not labor which adds to the value of the claim nor tends to develop the mine, and is not work that can be credited as assessment work or improvements within the meaning of the statute. Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 136. See Honaker v. Martin (1891) 27 P. 397, 11 Mont. 91.

The word "improvement," in this section, means such an artificial change of the physical conditions of the earth in, on, or so reasonably near a mining claim as to evidence a design to discover mineral therein, or to facilitate its extraction, and in all cases the alteration must be reasonably permanent in character. Fredericks v. Klauser (Or. 1908) 96 P. 679; Fredericks v. Klauser (1908) 96 P. 679, 52 Or. 110, 116.

70. Services of watchman.—Whether the employment of a watchman and the payment of services as such may be counted as assessment work on a mining claim depends on the necessity of a watchman. Merchants' Nat. Bank v. McKeown (Or. 1911) 119 P. 334.

Expense in employing a watchman may be counted as part of the assessment work where his services are necessary for the preservation of structures or other property to be used in developing the claim. Ingersoll v. Scott (Ariz. 1910) 108 P. 460. Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 P. 1047, 114 Cal. 100; Lockhart v. Rollins (1889) 2 Idaho, 503, 21 Pac. 413. But the placing of a watchman on a claim merely to warn prospectors and thereby prevent a relocation is not labor upon a mine within the meaning of the statute, though his presence shows possession, open and notorious. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 562; Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, 591. See New England & Coalinga Oil Co. v. Congdon (1907) 92 P. 480, 152 Cal. 211; Quimby v. Boyd (1884) 6 P. 462, 8 Colo. 194; Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1, 25; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 P. 1047, 114 Cal. 100.

Where the locators of a quartz mine, after being in possession for several years and expending $1,000 in developing it, suspended work, and during a year did only $25 worth of work on the mines, but hired a man to live in a house on the location and watch the property, the amount paid him could not be counted to make up the assessment work. Hough v. Hunt (1902) 70 P. 1059, 138 Cal. 142, 94 Am. St. Rep. 17.

Where the original locator of a mining claim suspended work from 1900 until 1904, when an adverse location was made, money expended by her in employing watchmen for the premises is not a compliance with this section. Gear v. Ford (Cal. App. 1906) 88 P. 600.

Where there was no machinery or fixtures at a mining claim which necessitated the employment of a watchman after the development work ceased, the worth of the actual labor of an employé in making an honest effort to discover minerals on the claim was the

only credit to which the locator was entitled, but credit should be allowed for the actual labor which the employé performed. Fredricks v. Klauser (Or. 1908) 96 P. 679.

In an action to quiet title to a group of mines alleged by defendant to have been abandoned by plaintiff, evidence considered, and held sufficient to sustain a finding of the trial court that a keeper was necessary and the expense thereof properly a part of the assessment work. Kinsley v. New Vulture Min. Co. (Ariz. 1907) 90 P. 438.

71. Traveling expenses.—The amount of work performed by a laborer at a mine in good working order furnishes but a poor criterion as to proof of performance of assessment work, and neither can the owner be held to the amount paid to laborers at the mine, but he is entitled to credit for traveling expenses of persons sent some considerable distance on an order of court, and for their time in going and returning, the expenses for tools, freight hauling, etc. Whalen Consol. Copper Min. Co. v. Whalen (C. C. 1904) 127 Fed. 611, 612. See Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 117, 128; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147; Walton v. Wild Goose Min. Co. (1903) 123 Fed. 209, 218, 60 C. C. A. 155; Willitt v. Baker (C. C. 1904) 133 Fed. 937, 948; McKay v. Neussler (1906) 148 Fed. 86, 87, 78 C. C. A. 154.

Personal expenses in traveling and the value of the time of a locator of the mining claim in endeavoring to procure water to run a mill to crush rock and ore from the mine cannot be said to be labor performed on the mine within the meaning of this section. Du Prat v. James (1884) 4 P. 562, 65 Cal. 555, 558.

72. Development work and improvements outside of claim.—Labor and improvements, within the meaning of this section, are deemed to be had on a mining claim when such labor is performed or the improvements are made for its development in such manner as to facilitate the extraction of the metals, though such labor and improvements may not be on the particular location itself. Smelting Co. v. Kemp (1881) 104 U. S. 636, 651, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 444, 27 L. Ed. 990; Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 560; Anvil Hydraulic, etc., Co. v. Code (1910) 182 Fed. 205, 206, 105 C. C. A. 45; Hall v. Kearny (1893) 18 Colo. 505, 33 Pac. 373; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. (1902) 71 P. 389, 30 Colo. 431; Kramer v. Settle (1873) 1 Idaho, 485; Remmington v. Baudit (1886) 9 P. 819, 6 Mont. 138, 141; Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co. (1909) 104 P. 540, 39 Mont. 487; Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 135; Klopenstine v. Hays (1899) 57 P. 712, 20 Utah, 45; Sherlock v. Leighton (1901) 63 P. 580, 63 P. 934, 9 Wyo. 297, 301. See Gird v. Calif. Oil Co. (C. C. 1894) 60 Fed. 531, 542; De Noon v. Morrison (1890) 23 P. 374, 83 Cal. 163, 166; Strasburger v. Beecher (1897) 49 P. 740, 20 Mont. 143; Power v. Sla (1900) 61 P. 468, 24 Mont. 243.

Work done outside of the limits of a mining claim for the purpose of prosecuting or working it will hold the claim under this statute the same as if done within the boundaries of the claim itself. Walton v. Wild Goose Min., etc., Co. (1885) 23 Fed. 209, 217, 218, 60 C. C. A. 155; Jupiter Min. Co. v. Bodie, etc., Co. (C. C. 1881) 11 Fed. 666, 682; U. S. v. Iron Silver Min. Co. (C. C. 1885) 24 Fed. 568; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Willitt v. Baker (C. C. 1904) 133 Fed. 937, 948; Mt. Diablo Mill & Mining Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Bakke v. Latimer (1906) 3 Alaska, 95; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 P. 1047, 114 Cal. 100; Big Three Min., etc., Co. v. Hamilton (1909) 107 P. 301, 157 Cal. 130, 138; Big Three Min. & Mill. Co. v. Hamilton (1910) 107 P. 301, 157 Cal. 130; Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co. (1909) 104 P. 540, 39 Mont. 487; Godfrey v. Faust (1905) 105 N. W. 460, 20 S. Dak. 203, 207; Hawgood v. Emery (1909) 119 N. W. 177, 22 S. Dak. 573; Harrington v. Chambers (1881) 3 Utah, 94, 1 Pac. 362.

A drain two miles away from a placer claim and without an intention to extend it cannot in any way tend to enhance the money value of the same, and can be of no use whatever in prospecting, developing, or operating it; but if such a drain is begun under a definite plan for its extension through a series of claims it might then, when completed, be of benefit and value to each, and in such case work done at a distance from any one of the claims may be reckoned as assessment work thereon, as it would tend to its benefit or improvement. Anvil Hydraulic, etc., Co. v. Code (1910) 182 Fed. 205, 207, 105 C. C. A. 45.

Assessment work may be done on other claims or on other ground if in reasonable proximity to the claim. U. S. v. Iron Silver Min. Co. (C. C. 1885) 24 Fed. 568; Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 560. See Debney v. Iles (1907) 28 P. 85, 3 Alaska, 438, 452; Doherty v. Morris (1891) 17 Colo. 105.

73. Kind of work or improvement outside of claim.—The labor and improvements contemplated by this sec-

tion may be performed at a distance from the mining claim, where such labor and improvements are made or performed for the purpose of developing the claim, as in the turning of a stream, or the introduction of water, or the construction of a flume to carry off the débris or waste material. Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 442, 27 L. Ed. 990; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 354, 28 L. Ed. 452; De Noon v. Morrison (1890) 23 P. 374, 83 Cal. 163, 165; Hain v. Mattes (1905) 83 P. 127; 34 Colo. 345, 351. See Bryan v. McCaig (1887) 15 P. 413, 10 Colo. 309, 315. Hall v. Kearney (1893) 33 P. 373, 18 Colo. 505; Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345, 352; Strasburger v. Beecher (1897) 49 P. 740, 20 Mont. 143; Power v. Sla (1894) 61 P. 468, 24 Mont. 243.

Work performed outside a claim cannot be considered as assessment work done on the claim, unless it is shown that the work is of value to the claim on which it is sought to apply the work as annual labor, generally enhancing the money value of the claim or in the way of prospecting, developing, or operating it. Anvil Hydraulic & Drainage Co. v. Code (1910) 182 Fed. 205, 105 C. C. A. 45.

Labor performed in constructing a road to a mine for the purpose of better developing and operating the same may be treated as a compliance with the law relating to annual assessment work. Doherty v. Morris (1891) 17 Colo. 105, 28 Pac. 85. See, also, Sexton v. Washington Min. & Mill. Co. (Wash. 1909) 104 P. 614.

The erection of a house outside the boundaries of a mining claim, for the convenience and shelter of miners, is not a part of the annual work which must be done. Remmington v. Baudit (1886) 6 Mont. 138, 9 Pac. 819.

74. **Group claims.**—Labor and improvements within the meaning of this section are deemed to be on a mining claim, whether it consists of one or several locations owned by the same party and contiguous to each other, when such labor is performed or improvements made for the purpose of working and developing the ground embraced in such location or locations. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 117. See, also, Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554; McDonald v. McDonald (1914) 144 P. 950, 16 Ariz. 103; Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co. (1909) 104 P. 540, 39 Mont. 487; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275. See Godfrey v. Faust (1905) 105 N. W. 460, 20 S. D. 203, 207; Hawgood v. Emery (1909) 119 N. W. 177, 22 S. D. 573, 574.

Whether work done on a mining claim is such as to benefit or develop other claims and so satisfy the requirement as to development of such claims is a question of fact. Big Three Min. & Mill. Co. v. Hamilton (Cal. 1910) 107 P. 301; Yreka Min. & Mill. Co. v. Knight (1901) 65 P. 1091, 133 Cal. 544; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

While work done outside of a claim or outside of contiguous claims may be credited to all the claims, if done for the benefit of all, yet it is necessary that the work shall at least be advantageous to all parts of the group. Morgan v. Myers (1911) 113 P. 153, 159 Cal. 187, 189.

A location by an association is treated as an entirety for the purpose of doing assessment work. Merced Oil Mining Co. v. Patterson (1912) 122 P. 950, 162 Cal. 358.

Where contiguous mining claims constitute a group, and expenditures are made on an improvement which is intended to aid the development of all the claims, the improvement is a distinct entity not subject to physical subdivision or apportionment in its application to the claims intended to be benefited by it, and the work performed attaches to the claims collectively. Duncan v. Eagle Rock Gold Mining & Reduction Co. (Colo. 1910) 111 P. 588.

Where the owner of a mining claim in good faith performs work on one of the claims to develop a group, the court should not substitute its judgment for that of the mineowner as to the wisdom or expediency of the method employed in adopting the plan pursued, unless the plan could have no reasonable adaptation to a general development of all of the claims. Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co. (1909) 104 P. 540, 39 Mont. 487.

75. —— **System of development.**—A general system may be formed well adapted and intended to work several contiguous claims or lodes, and when such is the case work in furtherance of the system is work upon the claim intended to be developed by it. Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 27 L. Ed. 990; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 354, 28 L. Ed. 452; Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345, 350. And see Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 682; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 117. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 541. Royston v. Miller (C. C. 1896) 76 Fed. 50.

Where the same person or company owns several contiguous mining claims capable of being advantageously worked together and one general system has

been adopted for the purpose of their development, the value of the work done and improvements made annually for their development pursuant to such system, whether done on one claim or outside of all of them, is available toward meeting the requirements as to the annual expenditure for the several claims. Smelting Co. v. Kemp (1881) 104 U. S. 636, 653, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 444, 27 L. Ed. 990; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452; Mt. Diablo, etc., Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 542; Hawgood v. Emery (1909) 119 N. W. 177, 22 S. D. 573.

The claimant need not prepare plans and specifications to show how he intends to develop his claims. Nevada Exploration & Mining Co. v. Spriggs (Utah, 1912) 124 P. 770.

76. —— Claims held in common.—Where several claims are held in common the statute allows the necessary work to be done on one of them, or upon adjacent patented lands, or upon public lands, but the expenditure of money or labor must equal in value that which would be required on all the claims if they were separate and independent; and in such case the claims must be contiguous, so that each claim thus associated may in some way be benefited by the work done. Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 444, 27 L. Ed. 990; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452; Eilers v. Boatman (1884) 4 Sup. Ct. 432, 111 U. S. 356, 28 L. Ed. 454; Anvil Hydraulic & Drainage Co. v. Code (1910) 182 Fed. 205, 105 C. C. A. 45; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 541; Royston v. Miller (C. C. 1896) 76 Fed. 50, 52; Mt. Diablo, Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; De Noon v. Morrison (1890) 83 Cal. 163, 23 Pac. 374; Big Three Min. & Mill. Co. v. Hamilton (1910) 107 P. 301, 157 Cal. 130; Morgan v. Myers (Cal. 1911) 113 P. 153; Belcher Consol. Gold Min. Co. v. Defarrari (1882) 62 Cal. 160, 163; Gregory v. Pershbaker (1887) 14 P. 610, 73 Cal. 109, 119; Pharis v. Muldoon (1888) 17 P. 70, 75 Cal. 284; Sweet v. Webber (1884) 4 P. 752, 7 Colo. 443, 447; Hall v. Kearney (1893) 33 P. 373, 18 Colo. 505; Taylor v. Parenteau (1897) 48 P. 505, 23 Colo. 368, 372; Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345, 352; Duncan v. Eagle Rock, etc., Min., etc., Co. (1910) 111 P. 588, 48 Colo. 569, 585; Strasburger v. Beecher (1897) 49 P. 740, 20 Mont. 143, 151; Power v. Sla (1894) 61 P. 468, 24 Mont. 243; Eberle v. Carmichael (1895) 8 N. M. 169, 42 Pac. 95; Fredricks v. Klauser (Or. 1908) 96 P. 679; Hawgood v. Emery (1909) 119 N. W. 177, 22 S. Dak. 573; Fissure Min. Co. v. Old Susan Min. Co. (1900) 63 P. 587, 22 Utah, 438. See North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 539; Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337, 343.

The use of a claim as a place of deposit for waste material from other claims, and the building of a flume over it for the carriage of such waste, is not an expenditure for development, within the statute. Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 27 L. Ed. 990.

The phrase "held in common" in this section means a claim whereof there are more owners of a claim than one, while the use of the words "claims held in common," on which work done on one of such claims shall be sufficient, means that there must be more than one claim so held, in order to make a case where work on one of them shall answer the statutory requirement as to all. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 352, 28 L. Ed. 452.

Mining claims which touch each other only at a common corner are not contiguous within the rule authorizing the performance of assessment work for several contiguous claims on any one of them. Anvil Hydraulic & Drainage Co. v. Code (1910) 182 Fed. 205, 105 C. C. A. 45. See, also, Morgan v. Myers (1911) 113 P. 153, 159 Cal. 187.

Under this section work done and improvements made in the general development of an oil district including many distinct claims owned by one person can only inure to be benefit of contiguous claims, though it may be the most practical method of working and ultimately reaching the oil in all claims. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 542.

Work done for the express purpose of prospecting two or more claims held in common may be credited to such claims within the meaning of this statute. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 560; Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 135, 136.

Contiguous locations held in common are treated as entireties, and an expenditure of an amount equal to $100 for each may be made upon one or more of such locations, provided such expenditure tends to the development of the property as a whole. Axiom Min. Co. v. White (1897) 72 N. W. 462, 10 S. Dak. 198, 200.

77. —— Amount or value of expenditure on group.—The expenditure of

money or labor on one claim held in common must equal in value that which would be required on all claims if they were separate and independent. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452. See Mt. Diablo Mill & Min. Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Morgan v. Myers (1911) 113 Pac. 153, 159 Cal. 187; Eberle v. Carmichael (1895) 42 P. 95, 8 N. M. 169.

The law does not require assessment work to be done on each 20 acres of an association placer mining claim. Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116. See Miller v. Chrisman (1903) 73 P. 1083, 140 Cal. 440, 450, 98 Am. St. Rep. 63; Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1.

78. Tunnel construction work.—See, also, notes to § 4621, post.

The running of a tunnel for the purpose of developing two separate mining claims owned by the same person is to be credited to both of said claims, and, if the necessary work is done, the owner is not required to also perform work on the surface of the locations, in order to hold the same. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

Under this section in its present form, where a locator runs a tunnel for the purpose of developing his vein or lode, the money so expended in such tunnel is taken and considered as expended on the vein or lode. Id.

Where the running of a tunnel is a practical way to work and prospect a mining claim the assessment work required by the statute may be done in the construction of a tunnel. Id.

Work done on a tunnel as an improvement upon the mining claim must be done for the express purpose of benefiting the claim and for its development. Duncan v. Eagle Rock, etc., Min., etc., Co. (1910) 111 P. 588, 48 Colo. 569, 583. See Bryan v. McCaig (1887) 15 P. 413, 10 Colo. 309.

The construction of a tunnel on property outside of a mining claim, made solely with reference to the development of the claim, is work on the claim, available as annual development work thereon. Godfrey v. Faust (1905) 105 N. W. 460, 20 S. D. 203, denying rehearing (1904) 101 N. W. 718, 18 S. D. 567. See, also, Hain v. Mattes (1905) 83 Pac. 127, 34 Colo. 345.

Work done in a tunnel and shafts may be beneficial and sufficient for development purposes of consolidated claims. Fissure Min. Co. v. Old Susan Min. Co. (1900) 63 P. 687, 22 Utah, 438.

79. Effect of failure to perform work.—See, also, notes under "Forfeiture," "Abandonment," and "Relocation," post.

On failure of an owner of a mining claim to perform the annual assessment work, the claim is subject to relocation, and a valid relocation may be made thereon. Belk v. Meagher (1881) 104 U. S. 279, 282, 26 L. Ed. 735; Lockhart v. Johnson (1901) 21 Sup. Ct. 665, 181 U. S. 516, 527, 45 L. Ed. 979; Faxon v. Barnard (C. C. 1880) 4 Fed. 702; Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748, 750. See, also, McKay v. McDougall (1901) 64 P. 669, 25 Mont. 258, 87 Am. St. Rep. 395.

If a locator remains in possession and fails to perform the assessment work his interest terminates, and the same result follows if he voluntary abandons the possession. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 148, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

A mining claim is a contingent estate and is kept alive by the performance of the statutory worth of work each year, and if this work is not performed the claim is forfeited and the land becomes a part of the public domain. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 553; Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462, 467; Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248, 254.

Mere failure during one year to perform the required annual development work, does not divest title to a mining claim in favor of a junior overlapping location, which is not thereafter relocated in the manner prescribed by the local law; and the resumption of development works on the senior claim in the succeeding years restores to its owner all his original rights. Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 7 C. C. A. 233. See, also, Madison v. Octave Oil Co. (1908) 99 P. 176, 154 Cal. 768.

The government or a subsequent locator under a valid location is the only one who can complain of a failure on the part of a locator to do the necessary annual work. Thornton v. Kaufman (1910) 106 P. 361, 40 Mont. 282.

In contemplation of law a mining claim is restored to the public domain as soon as abandonment takes place; and a claim is never subject to forfeiture until the expiration of the time within which the annual labor may be done. Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 386.

See McKay v. McDougall (1901) 64 P. 669, 25 Mont. 258, 87 Am. St. Rep. 430.

80. Proof of performance of work.—This section requires that proof be shown that some work was done on, or for the benefit of, each discovery or claim to hold it, and to protect the same from relocation, and to sustain the right of possession in the applicant. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 353, 28 L. Ed. 452.

Where the assessment work is not done within the boundaries of a mining claim, the burden is on the claimant not only to show the work done outside

the boundaries was intended as the assessment work on his claim, but also that it was of such character that it would inure to the benefit of his claim. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 561; Hall v. Kearny (1803) 18 Colo. 505, 33 Pac. 373; Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co. (1909) 104 P. 540, 39 Mont. 487; Fredricks v. Klauser (Or. 1908) 96 P. 679; Merchants' Nat. Bank v. McKeown (Or. 1911) 119 P. 334; Sherlock v. Leighton (1901) 63 P. 580, 9 Wyo. 297, rehearing denied (1901) 63 P. 934, 9 Wyo. 297. See Dyer v. Brogan (1886) 11 P. 589, 70 Cal. 136; Strasburger v. Beecher (1897) 49 P. 740, 20 Mont. 143. See, also, Beals v. Cone (1900) 62 P. 948, 27 Colo. 473, 83 Am. St. Rep. 92; Coleman v. Curtis (1892) 30 Pac. 266, 12 Mont. 301.

Where a proof of labor was offered and objected to because the affidavit did not state the amount or character of the actual cost of the work done, nor the names of the persons who actually performed the same, nor the time when it was done, the court held that the proof of labor was properly rejected. McKnight v. El Paso Brick Co. (1911) 120 Pac. 694, 16 N. Mex. 721, 739, Ann. Cas. 1912D, 1309. See Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. Mex. 96.

It is competent to prove the entire amount of work done on a mining claim to show good faith in working the property. Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 288, 160 U. S. 303, 40 L. Ed. 436. See, also, McCormick v. Parriott (1905) 80 Pac. 1044, 33 Colo. 382.

The method of proving the doing of the required assessment work is not uniform, but the mere proof of the expenditure of $100 is not sufficient, but only furnishes an element tending to establish the good faith of the locator, and it is not the question of what or how much was paid for such labor or improvements, but whether or not the labor and improvements were reasonably worth the sum of $100. McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 149. See Willitt v. Baker (C. C. 1904) 133 Fed. 937, 948; Wright v. Killian (1901) 64 Pac. 98, 132 Cal. 56; Quimby v. Boyd (1884) 6 Pac. 462, 8 Colo. 194, 208; Mattingly v. Lewisohn (1893) 35 Pac. 111, 13 Mont. 508, 520; Penn v. Oldhauber (1900) 61 Pac. 649, 24 Mont. 287.

An admission that a claimant was the owner of a mining claim during certain years, is an admission that he did the requisite amount of assessment work during such years. Wright v. Killian (1901) 64 Pac. 98, 132 Cal. 56.

A claim on which the required improvements have been made and labor performed is not rendered open to relocation by failure to file an affidavit of labor and improvements as required by a state statute. Murray Hill Min. & Mill. Co. v. Havenor (1901) 66 P. 762, 24 Utah, 73.

81. Land department's jurisdiction.—The land department has nothing to do with settling questions as to the performance of annual expenditure upon mining claims, nor of the alleged relocation thereof because of the failure to perform the annual assessment. Poore v. Kaufman (1911) 119 Pac. 785, 44 Mont. 248, 257.

(B) Forfeiture of claim

82. Construction of section.—The forfeiture provisions of this section are strictly construed, and to the effect that where a co-owner bringing the proceedings was not a co-owner at the time the expenditures for which contribution was demanded were made, the proceedings must fail. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 585, 37 L. Ed. 1189; Brundy v. Mayfield (1895) 38 Pac. 1067, 15 Mont. 201, 206; Delmoe v. Long (1907) 88 P. 778, 35 Mont. 139, 154.

This section is so far qualified by section 4623, post, as to prevent mineral lands which have become the subject of conflicting locations from becoming unqualifiedly a part of the unoccupied mineral lands by the mere forfeiture of one of such locations. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 456, 49 L. Ed. 1119.

The word "forfeiture" does not occur in this section, but the word is sufficiently comprehensive to express results which flow from a failure to comply with the law. McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 150.

A plea of forfeiture is an admission of a prior valid location. Bakke v. Latimer (1906) 3 Alaska, 95, 99; Bakke v. Latimer (1906) 3 Alaska, 95. See Power v. Sla (1900) 61 Pac. 468, 24 Mont. 243.

Failure of a locator to comply with the local miners' rules does not work a forfeiture, unless the rules themselves so provide. Rush v. French (1874) 1 Ariz. 99, 25 Pac. 816; Bell v. Bed Rock Tunnel & Mining Co. (1868) 36 Cal. 214.

Forfeitures of mining rights are deemed odious in law. Debney v. Iles (1907) 3 Alaska, 438.

A forfeiture of a mining claim under this section is not to be favored by basing it upon language which does not plainly and unmistakably provide for it, and a resumption of work is sufficient under this section to prevent forfeiture. Belcher Consol. Gold Min. Co. v. Defarrari (1882) 62 Cal. 160, 163. See Temescal Oil Min. & Dev. Co. v. Salcido (1902) 69 Pac. 1010, 137 Cal. 211, 214.

The term "lapsed" is unknown to mining usage or laws. Contreras v.

Merck (1900) 63 Pac. 836, 131 Cal. 211.

Where a valid location of a mining claim has been made, and work done thereon in good faith, possession maintained, and no intention to abandon is shown, the law should be construed liberally, to prevent a forfeiture. Emerson v. McWhirter (1901) 65 Pac. 1036, 133 Cal. 510. See Same v. Yosemite Gold Min., etc., Co. (1906) 85 Pac. 122, 149 Cal. 50, 53.

This is a statute of forfeitures, but in order that the forfeiture may be worked the facts constituting it or laying the foundation therefor must exist, and the statute must be strictly construed. Brundy v. Mayfield (1895) 38 Pac. 1067, 15 Mont. 201, 206.

Noncompliance with the miners' rules, or with the state or federal laws, regarding locations, works a forfeiture of the claim, whether such rules or laws so provide or not. Sissons v. Sommers (1899) 55 Pac. 829, 24 Nev. 379, 77 Am. St. Rep. 815.

83. What constitutes forfeiture.—A mining claim would not be forfeited by failure to record the location thereof, unless the rules and regulations provide that such failure to record shall work a forfeiture of the claim. Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 680; Bell v. Bed Rock Co. (1868) 36 Cal. 219; McGarrity v. Byington (1859) 12 Cal. 426, 431.

This section does not make a failure to record an affidavit setting forth the amount of money expended, or value of labor performed or improvements made, a forfeiture of the claim, and the section is not susceptible of such a construction. Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 118.

The right or title of a locator to a vein discovered by him on land open to exploration is not lost or forfeited because he unwittingly places one or more of his stakes on land already claimed. Perigo v. Erwin (C. C. 1898) 85 Fed. 904, 907.

The question whether, by virtue of the mining laws, a forfeiture has accrued, is a question of law. Fairbanks v. Woodhouse (1856) 6 Cal. 433.

84. Forfeiture by failure to perform work.—A forfeiture takes place by operation of law, without regard to the intention of the locator, when he neglects to preserve his right by complying with the conditions imposed by law, and is made effectual by one entering on the ground after the expiration of the time within which the labor may be done, and completing a location before resumption of work by the original locator; but a claim is never subject to forfeiture, until expiration of the time within which the annual labor may be done. Shank v. Holmes (1914) 137 Pac. 871, 875, 15 Ariz. 229; Belk v. Meagher (1878) 3 Mont. 65; Street v. Delta Mining Co. (1910) 112 Pac. 701, 42 Mont. 371. See, also, Cunningham v. Pirrung (1905) 80 Pac. 329, 9 Ariz. 288; Atkins v. Hendree (1867) 1 Idaho, 95; McKay v. McDougall (1901) 64 Pac. 669, 25 Mont. 258, 87 Am. St. Rep. 430; Mallett v. Uncle Sam Gold, etc., Min. Co. (1865) 1 Nev. 188, 90 Am. Dec. 484.

Wrongful adverse possession of a mining claim excuses the rightful owner or locator from doing the assessment work required by law, during the time of such adverse possession. Mills v. Fletcher (1893) 100 Cal. 142, 34 Pac. 637; Trevaskis v. Peard (1896) 111 Cal. 599, 44 Pac. 246; Field v. Tanner (1904) 75 P. 916, 32 Colo. 278; Garvey v. Elder (1906) 109 N. W. 508, 21 S. D. 77, 130 Am. St. Rep. 704; Utah Min. & Mfg. Co. v. Dickert & Myers Sulphur Co. (1889) 6 Utah, 183, 21 Pac. 1002, 5 L. R. A. 259.

The mere failure to comply with the statutory requirement does not terminate the right of the locator, but the sole effect is to throw the land open to location by others, and, in the absence of such other location, his right to resume work and to hold his claim remains, and his estate is not divested until there has been a peaceable entry for relocation. Madison v. Octave Oil Co. (1908) 99 P. 176, 154 Cal. 768. See, also, McCormick v. Baldwin (1894) 37 P. 903, 104 Cal. 227; Emerson v. McWhirter (1901) 65 P. 1036, 133 Cal. 510; Moorhead v. Erie Min. & Mill. Co. (Colo. 1908) 96 P. 253; Co-operative Copper & Gold Mining Co. v. Law (Or. 1913) 132 P. 521.

This conditional right of the locator may be forfeited by the failure to do the necessary amount of work, or if he is one of several locators by neglecting to pay his share for the work which has been done by his co-owner. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Perigo v. Erwin (C. C. 1898) 85 Fed. 904, 905. See, also, Original Co., etc., v. Winthrop Min. Co. (1882) 60 Cal. 631, 632.

The failure to perform the required annual assessment work does not in and of itself work a forfeiture, but only permits a relocation, and cannot aid an adverse location which was made prior to the year in which the failure occurred. Bingham Amalgamated Copper Co. v. Ute Copper Co. (C. C. 1910) 181 Fed. 748. See, also, Beals v. Cone (1900) 62 P. 948, 27 Colo. 473, 83 Am. St. Rep. 93.

Nonperformance of assessment work by a locator would not forfeit his claim unless there was a valid location by another, and one who did not himself make a valid location could not question the sufficiency of the assessment work done by the locator. Wilson v. Freeman (1904) 75 P. 84, 29 Mont.

470, 68 L. R. A. 833; Knutson v. Fredlund (1910) 106 P. 200, 56 Wash. 634.

A mineral claimant failing to act promptly will lose all right to disputed ground upon the perfecting of a location thereon by another party. Belk v. Meagher (1881) 104 U. S. 279, 285, 26 L. Ed. 735; Moorhead v. Erie Min., etc., Co. (1908) 96 P. 253, 43 Colo. 408, 416. See Oscamp v. Crystal River Min. Co. (1893) 7 C. C. A. 233, 58 Fed. 293, 295.

There can be no forfeiture of a claim for failure to perform the assessment work until the claim is relocated by another, and until such time the original locator can re-enter and resume work at any time before other rights attach in favor of any subsequent locator. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337, 343.

The officers, directors, and stockholders of a mining corporation against which a judgment has been recovered cannot, by refusing or neglecting to have the annual assessment work performed, suffer a forfeiture of the mining claim and relocate the same in the individual name or names of one or more of such officers or stockholders for the purpose of preventing the judgment plaintiff from collecting his judgment by levy and sale of the mine, and especially where certain stockholders had on their own behalf performed such assessment work in order to prevent a forfeiture. Wailes v. Davies (C. C. 1907) 158 Fed. 667, 677; affirmed Wailes v. Davies (1908) 164 Fed. 397, 90 C. C. A. 385.

Locators, whose claims had been patented as a town site, and who afterwards failed to do the required work, held to have lost their title. Callahan v. James (1902) 71 Pac. 104, reversed (1903) 74 Pac. 853, 141 Cal. 291.

As between a locator and the government the failure to do the annual assessment work does not result in a forfeiture, but it is only necessary to perform the annual labor in order to protect rights of a locator against third persons. Beals v. Cone (1900) 62 P. 948, 27 Colo. 473, 500, 83 Am. St. Rep. 92.

That all the co-owners did their share of the required amount of work performed is immaterial. Yarwood v. Johnson (1902) 70 P. 123, 29 Wash. 643.

85. Forfeiture by abandonment.—The interest of a locator in a claim may be forfeited by abandonment with an intention to renounce his right of possession, and any act which would work an abandonment of any other easement is sufficient to terminate all the right of possession which the locator may have in a mining claim. Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 450, 41 L. Ed. 221; Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 147, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

A locator of a mining claim may abandon a portion of his original location without forfeiting any rights he may have to the balance of the claim. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 4 C. C. A. 329.

The forfeiture of a mining claim is different from abandonment, and it can occur only at the termination of the prescribed period, and is created by statute. Inez Min. Co. v. Kinney (C. C. 1891) 46 Fed. 832, 835.

Where an interest in a mining claim had been forfeited under this section relief will be denied to a person claiming an interest after an inexcusable delay of 12 years. Kavanaugh v. Flavin (1907) 88 P. 764, 35 Mont. 133, 137, 88 Pac. 764.

86. Forfeiture and relocation.—Where a forfeiture and relocation are claimed, the question is as to whether the former locator performed the requisite labor. Belk v. Meagher (1881) 104 U. S. 279, 283, 26 L. Ed. 735; Jackson v. Prior Hill Min. Co. (1905) 104 N. W. 207, 19 S. Dak. 453, 458. See Providence Gold Min. Co. v. Burke (1899) 57 P. 641, 6 Ariz. 323; Wills v. Blain (1889) 20 P. 798, 5 N. M. 238.

Where there is a conflict in area between a senior and a junior location, and the senior location is afterwards forfeited, such disputed area does not become unqualifiedly a part of the public domain, but the right of the junior locator becomes operative upon the area in conflict upon such forfeiture of the senior locator, and the rights of such junior locator become superior as against a relocator of such original senior location. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 453, 49 L. Ed. 1119; Swanson v. Kettler (1909) 105 P. 1059, 17 Idaho, 321, 331; Helena Gold & Iron Co. v. Baggaley (1906) 87 P. 455, 34 Mont. 464, 475; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 381. See Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; Sanders v. Noble (1899) 55 P. 1037, 22 Mont. 110; Bramlett v. Flick (1899) 57 P. 869, 23 Mont. 95.

An original locator after a forfeiture incurred cannot maintain ejectment, except by actually resuming work before an entry by a person seeking to relocate for the forfeiture, and an ouster by such person. Slavonian Min. Co. v. Perasich (C. C. 1881) 7 Fed. 331, 337.

An original locator cannot make effectual a forfeiture arising from his own delinquency by perfecting a relocation. McCann v. McMillan (1900)

62 P. 31, 129 Cal. 350; Ingemarson v. Coffey (1907) 92 P. 908, 41 Colo. 407, 414.

The use of a placer claim for pasture and the cutting of wood therefrom does not defeat the right to the claim, if sufficient mining work is done thereon. Richen v. Davis (Or. 1915) 148 P. 1130.

87. **Proof of forfeiture.**—A forfeiture of a mining claim for failure to do annual work can be established only upon clear and convincing proof. Hammer v. Garfield Min., etc., Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 301, 32 L. Ed. 964; Walton v. Wild Goose Mining & Trading Co. (1903) 123 Fed. 209, 60 C. C. A. 155 (writ of certiorari denied [1904] 24 Sup. Ct. 856, 194 U. S. 631, 48 L. Ed. 1158); McKay v. Neussler (1906) 148 Fed. 86, 78 C. C. A. 154; Mt. Diablo Mill & Mining Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 118; Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 559; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147; Whalen Consol. Copper Min. Co. v. Whalen (C. C. 1904) 127 Fed. 611; Willitt v. Baker (C. C. 1904) 133 Fed. 937, 946; Wailes v. Davies (C. C. 1907) 158 Fed. 667 (decree affirmed [1908] 164 Fed. 397, 90 C. C. A. 385); Thomson v. Allen (1902) 1 Alaska, 636; Loeser v. Gardiner (1902) 1 Alaska, 641; Bakke v. Latimer (1906) 3 Alaska, 95; Debney v. Iles (1907) 3 Alaska, 438; Colman v. Clements (1863) 23 Cal. 245; Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462; Emerson v. McWhirter (1901) 65 P. 1036, 133 Cal. 510; Goldberg v. Bruschi (1905) 81 P. 23, 146 Cal. 708; Gear v. Ford (Cal. App. 1906) 88 Pac 600; Johnson v. Young (1893) 34 P. 173, 18 Colo. 625, 629; Strasburger v. Beecher (1897) 49 P. 740, 20 Mont. 143; Copper Mountain Mining & Smelting Co. v. Butte & Corbin Consol. Copper & Silver Mining Co. (1909) 104 P. 540, 39 Mont. 487; Bishop v. Baisley (1895) 41 P. 936. 28 Or. 119, 125; Crown Point Gold-Min. Co. v. Crismon (1901) 65 P. 87, 39 Or. 364; Dibble v. Castle Chief Gold-Min. Co. (1897) 70 N. W. 1055, 9 S. D. 618; Axiom Min. Co. v. White (1897) 72 N. W. 462, 10 S. D. 198, 210; Oreamuno v. Uncle Sam Min. Co. (1865) 1 Nev. 215, 218; Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96, 132; Sherlock v. Leighton (1901) 63 P. 580, 9 Wyo. 297, rehearing denied (1901) 63 P. 934, 9 Wyo. 297. See Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Loeser v. Gardiner (1902) 1 Alaska, 641; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 540, 91 Am. St. Rep. 87; Goldberg v. Bruschi (1905) 81 P. 23, 146 Cal. 708, 712; Richen v. Davis (Or. 1915) 148 P. 1130; Florence-Rae Copper Co. v. Kimbel (1915) 147 P. 881, 85 Wash. 162; Maxwell v. Cunningham (1901) 40 S. E. 499, 50 W. Va. 298.

The burden of proving a forfeiture rests upon the party who claims a right by reason of such alleged forfeiture. Hammer v. Garfield Min., etc., Co. (1888) 9 Sup. Ct. 548, 130 U. S. 291, 301, 32 L. Ed. 964; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 151; Whalen Consol. Copper Min. Co. v. Whalen (C. C. 1904) 127 Fed. 611; Willitt v. Baker (C. C. 1904) 133 Fed. 937, 946; Wailes v. Davies (C. C. 1907) 158 Fed. 667, 669; Debney v. Iles (1907) 3 Alaska, 438; Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska, 496; Providence Gold-Min. Co. v. Burke (1899) 57 P. 641, 6 Ariz. 323; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87; Gear v. Ford (1906) 4 Cal. App. 556, 88 Pac. 600; Quigley v. Gillett (1894) 101 Cal. 462, 35 Pac. 1040; Harris v. Kellogg (1897) 49 P. 708, 117 Cal. 484; Emerson v. McWhirter (1901) 65 P. 1036, 133 Cal. 510; Callahan v. James (1903) 74 P. 853, 141 Cal. 291 (reversing judgment [1902] 71 P. 104); Johnson v. Young (1893) 18 Colo. 625, 34 Pac. 173; Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321, 327; Lozar v. Neill (Mont. 1908) 96 P. 343; Tiggeman v. Mrzlak (1909) 105 P. 77, 40 Mont. 19; Fredricks v. Klauser (Or. 1908) 96 P. 679; Axiom Min. Co. v. White (1897) 72 N. W. 462, 10 S. D. 198. See, also, Goldberg v. Bruschi (1905) 81 P. 23, 146 Cal. 708; Musser v. Fitting (1915) 148 P. 536, 26 Cal. App. 746; Bishop v. Baisley (1895) 28 Or. 119, 41 Pac. 936; Richen v. Davis (Or. 1915) 148 P. 1130; Florence-Rae Copper Co. v. Kimbel (1915) 147 P. 881, 85 Wash. 162.

A forfeiture must be set up before it can be insisted upon. Cache Creek Mining Co. v. Brahenberg (1914) 217 Fed. 240, 133 C. C. A. 234.

The bona fides of a prior locator of a mining claim may be taken into consideration in determining whether he has performed the necessary assessment work to retain his claim, and courts will not enforce a forfeiture except upon clear and convincing proof of the failure of the former locator or owner to perform the required assessment work. McKay v. Neussler (1906) 148 Fed. 86, 88, 78 C. C. A. 154. See Hammer v. Garfield Min. Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 301, 32 L. Ed. 964; Emerson v. McWhirter (1901) 65 P. 1036, 133 Cal. 510; Gear v. Ford (1906) 88 P. 600, 4 Cal. App. 556, 561; Callahan v. James (1903) 74 P. 853, 141 Cal. 291; Quimby v. Boyd (1885) 6 P. 462, 8 Colo. 194.

Proof of forfeiture under this section and a complete abstract of title and the

payment of the money is sufficient to obtain title to a mining claim. Delmoe v. Long (1907) 88 P. 778, 35 Mont. 139, 149.

Every reasonable doubt will be resolved in favor of the validity of a mining claim as against the assertion of a forfeiture. Thornton v. Kaufman (1910) 106 P. 361, 40 Mont. 282.

(C) Abandonment of claim

88. What constitutes.—Abandonment of a mining location is a question of intention, and such intention is a question of fact, to be determined from all the circumstances. Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87; Stone v. Geyser Quicksilver Min. Co. (1877) 52 Cal. 315; Taylor v. Middleton (1885) 67 Cal. 656, 8 Pac. 594; Omar v. Soper (1888) 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246; King Solomon Tunnel & Development Co. v. Mary Verna Mining Co. (1912) 127 P. 129, 22 Colo. App. 528; Oreamuno v. Uncle Sam Gold & Silver Min. Co. (1865) 1 Nev. 215; Weill v. Lucerne Min. Co. (1876) 11 Nev. 200; Indiana Nevada Mining Co. v. Gold Hills Min. & Mill. Co. (1912) 126 P. 965; Marshall v. Harney Peak Tin Min., etc., Co. (1890) 47 N. W. 290, 1 S. D. 350, 365; National Mill. & Min. Co. v. Piccolo (1909) 104 P. 128, 54 Wash. 617. See Myers v. Spooner (1880) 55 Cal. 257; Tayor v. Middleton (1885) 8 P. 594, 67 Cal. 656.

Abandonment is a matter of intent and takes place at once whenever a miner gives up his claim and leaves it without any intention of repossessing it, and regardless of what may become of it, or who may appropriate it, and in such case the property reverts to its original status as a part of the unoccupied public domain, and becomes open to location by the first comer. Harkrader v. Carroll (D. C. 1896) 76 Fed. 474; Conn v. Oberto (1904) 76 P. 369, 32 Colo. 313; O'Hanlon v. Ruby Gulch Mining Co. (Mont. 1913) 135 P. 913.

See, also, Brown v. Gurney (1906) 26 Sup. Ct. 509, 512, 201 U. S. 184, 50 L. Ed. 717; Bell v. Bed Rock Tunnel & Mining Co. (1868) 36 Cal. 214; Emerson v. Akin (Colo. App.) 140 P. 481; Mallett v. Uncle Sam Gold & Silver Min. Co. (1865) 1 Nev. 188, 90 Am. Dec. 484; Davis v. Dennis (1906) 85 P. 1079, 43 Wash. 54.

Abandonment of a mining claim is a question of intent, and can be sustained only by clear and convincing proof. Loeser v. Gardiner (1902) 1 Alaska, 641. See, also, Cunningham v. Pirrung (1905) 80 P. 329, 9 Ariz. 288; Peachy v. Gaddis (Ariz. 1912) 127 P. 739; McCann v. McMillan (1900) 62 P. 81, 129 Cal. 350; Street v. Delta Mining Co. (1910) 112 P. 701, 42 Mont. 871.

"Abandonment" includes both the intention to abandon and the act by which the claim or property is relinquished, so that it may be appropriated by the next comer. Peachy v. Frisco Gold Mines Co. (D. C. 1913) 204 Fed. 659. See, also, Sharkey v. Candiani (1906) 85 P. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791.

An attempt to relocate an invalid location is not an abandonment or forfeiture of the former location. Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234. See, also, Temescal Oil Mining & Development Co. v. Salcido (1902) 69 P. 1010, 137 Cal. 211; Weill v. Lucerne Min. Co. (1876) 11 Nev. 200.

An abandonment by a locator is merely surrendering his right to the exclusive possession given him by the statute, and this exclusive possession remains during the pleasure of the government. Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 451, 16 Sup. Ct. 1101, 41 L. Ed. 221.

Permitting other persons to become joint locators is not an abandonment of any right of the original locator. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 458, 17 C. C. A. 190.

An amended location of a lode mining claim, made for the purpose of correcting an error in the course of the vein, and in consequence of which the original side lines become end lines, does not operate as an abandonment of all rights under the original location, where such amended location expressly states that such is not the intention; and if such new end lines do not entirely coincide with the original side lines a court may treat as abandoned only so much of the original claim with its planes extended as lay outside the extended end line planes of the amended location. Empire State, etc., Co. v. Bunker Hill, etc., Co. (1904) 131 Fed. 591, 603, 66 C. C. A. 99. See McEvoy v. Hyman (C. C. 1885) 25 Fed. 596; Thompson v. Spray (1887) 14 P. 182, 72 Cal. 528; Hallack v. Traber (1896) 46 P. 110, 23 Colo. 14; Duncan v. Fulton (1900) 61 P. 244, 15 Colo. App. 140; Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291.

There is no abandonment of a mining claim when the locator transfers his possession to another with intent to have the latter possess it and own it. Richardson v. McNulty (1864) 24 Cal. 339.

Abandonment cannot be charged against a locator if, while he is in possession, and before the expiration of the time within which he may perfect his location under the United States statutes, the claim is seized by another, who holds possession adversely to him. Lockhart v. Wills (1897) 50 P. 318, 9 N. M. 263.

One co-owner attempting to exclude another from a mining claim by a relocation does not thereby abandon the

land. Hulst v. Doerstler (1898) 75 N. W. 270, 11 S. D. 14.

89. Abandonment by failure to perform work.—The failure to perform upon a mining claim the work required by law amounts to an abandonment of the claim, and it may thereupon be occupied by another. Depuy v. Williams (1864) 26 Cal. 309; Kramer v. Settle (1873) 1 Idaho, 485. See Omar v. Soper (1888) 18 P. 443, 11 Colo. 380, 7 Am. St. Rep. 246; Johnson v. Young (1893) 18 Colo. 625, 34 Pac. 173; Niles v. Kennan (1900) 62 P. 360, 27 Colo. 502.

Where the owner of a claim relocates it under a different name in order to protect his rights, and to preserve the claim from relocation by others until he can obtain title by deeds from the original owners, and work is done to protect the lode under both titles, such work will inure to the benefit of the original claim, as afterwards deeded to him. Johnson v. Young (1893) 18 Colo. 625, 34 Pac. 173. Compare Niles v. Kennan (1900) 62 P. 360, 27 Colo. 502.

A mining claim may be abandoned by failure to do the required development work. Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 267, 57 L. Ed. 820, Ann. Cas. 1913E, 710. See Chambers v. Harrington (1884) 111 U. S. 350, 353, 4 Sup. Ct. 428, 28 L. Ed. 452; Erhardt v. Boaro (1885) 113 U. S. 527, 535, 5 Sup. Ct. 560, 28 L. Ed. 1113; Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 450, 16 Sup. Ct. 1101, 41 L. Ed. 221.

The failure to perform the assessment work as required by this section is an abandonment of a claim, and any other person is authorized to go on the property and relocate it, and where no such work is done during the year the claim on the 1st day of January of the next year is abandoned and forfeited, and subject to relocation, unless the original claimant is then in possession and has resumed work thereon. Little Gunnel Co. v. Kimber (C. C. 1878) Fed. Cas. No. 8,402.

A mining claim is not abandoned and not subject to relocation where the original claimant has resumed work upon the claim before relocation has been made. Belcher Consol. Gold Min. Co. v. Defarrari (1882) 62 Cal. 160, 162. See Temescal Oil Min., etc., Co. v. Salcido (1902) 69 P. 1010, 137 Cal. 211, 214.

90. Abandonment by conveyance.—A conveyance to another of his interest in a claim is equivalent to an abandonment by the locator of all his rights under the statute. Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 450, 16 Sup. Ct. 1101, 41 L. Ed. 221.

A parol transfer by the discoverer of a mineral lode of an interest in his right to locate a claim is not an abandonment of the right. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11.

91. Abandonment by absence.—An "abandonment" of a mining claim held by location takes place where the locator voluntarily leaves his claim to be appropriated by another, without any intention of again claiming it in the future. Shank v. Holmes (Ariz. 1914) 137 Pac. 871; Derry v. Ross (1880) 5 Colo. 295: Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 386. See, also, Harkrader v. Carroll (D. C. 1896) 76 Fed. 474; Kinney v. Fleming (1899) 56 P. 723, 6 Ariz. 263; McKay v. McDougall (1901) 64 P. 669, 25 Mont. 258, 87 Am. St. Rep. 395; Strickland v. Commercial Mining Co. (1909) 104 Pac. 965, 55 Or. 48.

An abandonment by simply leaving the claim is not more efficacious than the conveyance of the rights of the locator and by leaving possession without intention of returning. Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 451, 16 Sup. Ct. 1101, 41 L. Ed. 221.

Mere absence from a mining claim is not an abandonment where the claimant always asserted a right to the ground, and where there is no evidence of an intention to abandon the claim. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554, 559; Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, 591.

A voluntary absence of nine years from a mining claim and without the exercise of any acts of ownership over it constitutes an abandonment. Harkrader v. Carroll (D. C. 1896) 76 Fed. 474, 476. See Trevaskis v. Peard (1896) 44 P. 246, 111 Cal. 599.

92. Abandonment by lapse of time.—Lapse of time does not of itself constitute an abandonment of a mining claim or a mill site used in connection therewith, but is only a circumstance that may be considered in determining the question of abandonment, which is one of intent. Valcalda v. Silver Peak Mines (1898) 86 Fed. 90, 95, 29 C. C. A. 591.

Neither lapse of time, absence from the claim, nor failure to work a mining claim for any definite period, if unaccompanied by other circumstances, are evidence of abandonment, and an original locator may resume work at any time before location; an alleged forfeiture is not complete until another has appropriated the property. McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 370, 50 L. R. A. 184.

93. Proof of abandonment.—The burden to prove abandonment is upon him asserting it. Gear v. Ford (1906) 88 P. 600. See, also, Moffatt v. Blue River Gold Excavating Co. (1905) 80 P. 139, 33 Colo. 142.

Abandonment is a voluntary act which

must be proven by competent evidence before the fact can be found to exist. Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337, 343.

94. Effect of abandonment.—Ground embraced in a mining location may become a part of the public domain so as to become subject to another location before the expiration of the period for performing the assessment work, where there is an actual abandonment of the claim by the first locator. Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162 (qualifying Lavagnino v. Uhlig [1905] 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119); Copper Queen Consol. Mining Co. v. Stratton (Ariz. 1915) 149 P. 389; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 384; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 P. 673, 18 Wyo. 234, 269. See, also, Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 115 U. S. 45, 5 Sup. Ct. 1100, 29 L. Ed. 348; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 194 U. S. 220, 24 Sup. Ct. 632, 48 L. Ed. 944; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 196 U. S. 337, 25 Sup. Ct. 266, 49 L. Ed. 501; Brown v. Gurney (1906) 201 U. S. 184, 26 Sup. Ct. 509, 50 L. Ed. 717; Lozar v. Neill (1908) 96 P. 343, 37 Mont. 287; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694, criticising Lavagnino v. Uhlig (1905) 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

An abandoned claim becomes part of the public domain, subject to sale and disposition by the government. Migeon v. Montana Cent. Ry. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Wolfskill v. Smith (Cal. App. 1907) 89 Pac. 1001; Bonner v. Rio Grande S. R. Co. (1903) 72 Pac. 1065, 31 Colo. 446; Emerson v. Akin (1914) 140 Pac. 481, 482, 26 Colo. App. 40; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 385. See Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 451, 16 Sup. Ct. 1101, 41 L. Ed. 221.

If ground once included within a location be abandoned, and a new location made thereon the last location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any rights on account of the abandoned location. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787; Slothower v. Hunter (1906) 88 P. 36, 15 Wyo. 189, 197.

A senior locator possessed of a paramount right in mineral lands for which a patent is sought may abandon such right and render the location subject to relocation before expiration of the time within which annual labor must be performed. Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321. See, also, Willison v. Ringwood (1911) 190 Fed. 549, 111 C. C. A. 401.

The abandonment of a claim by a locator leaves no right to his wife to claim dower in case of his death; neither can his wife allege a right of dower in case of a conveyance by the locator. Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 451, 16 Sup. Ct. 1101, 41 L. Ed. 221.

When peaceable possession of a mine which had been abandoned by a former locator was taken, and a relocation was made by other persons in their own names, whatever legal title to the claim a third person had by virtue of such prior location made by a partner was cut off. Lockhart v. Johnson (1901) 181 U. S. 516, 529, 21 Sup. Ct. 665, 45 L. Ed. 979; Bergquist v. West Virginia-Wyoming Copper Co. (1910) 106 Pac. 673, 18 Wyo. 234, 267.

A locator may abandon a portion of his original location without forfeiting any rights he may have to the balance of the claim. Tyler Min. Co. v. Sweeney (1893) 54 Fed. 284, 4 C. C. A. 329.

The rights of an original locator are wholly divested by abandonment, and he has nothing thereafter to convey. Harkrader v. Carroll (D. C. 1896) 76 Fed. 474, 475; Davis v. Butler (1856) 6 Cal. 510; Richardson v. McNulty (1864) 24 Cal. 339; Bell v. Bed Rock, etc., Min. Co. (1868) 36 Cal. 214; Derry v. Ross (1880) 5 Colo. 295; Mallett v. Uncle Sam Min. Co. (1865) 1 Nev. 188, 90 Am. Dec. 484.

An abandonment of mining claim determines the right of the party thereto from the date of the act, and it is as to him as though he had never owned or occupied it. Davis v. Butler (1856) 6 Cal. 510.

Where the first locator of a mining claim has forfeited or abandoned his claim, the claim, though still staked off, is open to location by others. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

95. —— Loss of discovery.—See, also, notes to § 4615, ante.

If a locator permits one to patent that part of his claim on which the discovery shaft is located, the remaining part is relocatable. Miller v. Girard (1893) 33 Pac. 69, 3 Colo. App. 278, following Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 29 L. Ed. 348.

96. Abandonment of part of interest.—Where the conflicting portion of a mining claim is abandoned by the senior locator, it does not inure to the benefit of the junior locator, but under this section becomes a part of the public domain, subject to location by a third person. Montagne v. Labay (1905) 2 Alaska, 575; Dufresne v. Northern

Light Min. Co. (1905) 2 Alaska, 592; Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska, 496, following Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735, and denying Lavagnino v. Uhlig (1905) 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119. See, also, Moorhead v. Erie Min., etc., Co. (1908) 96 P. 253, 43 Colo. 408.

Where a person interested with others in the location of a mining claim abandons his interest in the claim it does not revert to the government, as the other cotenants may acquire the entire claim by compliance with the statute. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215. See, also, Conn v. Oberto (1904) 76 P. 369, 32 Colo. 313.

Where a mining claim was located and possession held by one of two partners for the firm, the abandonment of the claim by the locating partner necessarily terminates the constructive possession of the other partner and leaves the ground open to relocation. Lockhart v. Johnson (1901) 181 U. S. 516, 529, 21 Sup. Ct. 665, 45 L. Ed. 979.

By an abandonment of an undivided interest in a mining claim by a joint locator such locator leaves the claim free to the location of the next comer, but such an abandonment does not operate to transfer his interest to the other owners, and by such abandonment he loses all interest in the claim and cannot convey any right to a third person. Badger Gold Min. etc., Co. v. Stockton Gold, etc., Min. Co. (C. C. 1905) 139 Fed. 838, 841.

The abandonment of a mining claim, the legal title to which is in the United States, by a part owner, does not vest any right or title to his interest in his co-owner. Id.

The action of the owners of three-fourths of a mining claim, in granting permission to another to enter into possession thereof and locate another claim, constitutes an abandonment on their part of the claim, but does not deprive the owner of the remaining portion of his interest therein. Conn v. Oberto (1904) 76 P. 369, 32 Colo. 313.

(D) Relocation of claims

97. Claims subject to relocation.—A relocation of a mining claim can only be made where there has been a prior valid location, and the rights of the original locator have terminated. Hence a relocation admits the validity of the original location. Belk v. Meagher (1881) 104 U. S. 279, 289, 26 L. Ed. 735; Zerres v. Vanina (1907) 150 Fed. 564, 80 C. C. A. 366 (affirming judgment [C. C. 1905] 134 Fed. 610); Thompson v. Burke (1904) 2 Alaska, 249, 254; Providence Gold Min. Co. v. Burke (1899) 57 P. 641, 6 Ariz. 323; Zeiger v. Dowdy (1911) 114 P. 565, 13 Ariz. 331, 334; Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462; Meyendorf v. Frohner (1879) 3 Mont. 282; Wills v. Blain (1889) 20 P. 798, 4 N. M. (Johns.) 378. See Thompson v. Burke (1904) 2 Alaska, 249, 254; Providence Gold Min. Co. v. Burke (1899) 57 P. 641, 6 Ariz. 323; Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462; Jackson v. Prior Hill Min. Co. (1905) 104 N. W. 207, 19 S. D. 453, 458. See, also, Malone v. Jackson (1905) 137 Fed. 878, 881, 70 C. C. A. 216.

The statute plainly says that what has been once located under the law shall not be relocated until the first location has expired. Belk v. Meagher (1881) 104 U. S. 279, 285, 26 L. Ed. 735; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 383; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 57; Wills v. Blain (1889) 20 P. 798, 4 N. Mex. (Johns.) 378, 380; Id. (1889) 20 P. 798, 5 N. Mex. 238.

Where an original locator performed the necessary assessment work on the claim for the previous year, the fact that he was absent from the ground, and that during such absence some of the boundary stakes had fallen down, and that others had made a relocation of the claim, did not deprive him of the right to re-enter to do the annual assessment work for the succeeding year; his prior location not having been terminated by abandonment or forfeiture. Zerres v. Vanina (C. C. 1905) 134 Fed. 610, judgment affirmed (1907) 150 Fed. 564, 80 C. C. A. 366.

A locator and a relocator of a mining claim stand in different attitudes in relation to a mining claim, and the original locator is a discoverer of the mineral therein contained, while a relocator is not a discoverer, but an appropriator of the mineral, and he cannot hold the claim, except upon proof that the original locator has abandoned or forfeited his rights by failure to comply with the mining laws. Id.

A mining claim is subject to relocation where the original owner gives it up and goes away without any intention of repossessing it, and a purchaser from him thereafter acquires no title as against a relocator. Harkrader v. Carroll (D. C. 1896) 76 Fed. 474, 475.

A claim under a relocation is an implied admission of the validity of the location, but one who has attempted a relocation and then expressly renounced any claim under it, but who yet claims an interest in some other right which would entitle him to show that he never attempted such relocation, is not necessarily precluded from showing that the original locator never made a location, but is, in fact, perpetrating a fraud upon the government. Zeiger v. Dowdy (Ariz. 1911) 114 P. 565.

Where locators of a placer mine are

at most in constructive possession only, their location must be valid, to be effectual against one who seeks to relocate the ground. Saxton v. Perry (1910) 107 P. 281, 47 Colo. 263.

After a mining claim has been located in conformity with the mining laws and regulations it is not subject to relocation as long as the locator or his successor in interest continues to perform the labor or make the improvements required, and the fact that the owner of a mining claim failed to record an affidavit of labor and improvements as required by a state statute does not render the claim subject to relocation. Murray Hill Min., etc., Co. v. Havenor (1901) 66 P. 762, 24 Utah, 73, 82.

98. Relocation on existing claim.—A relocation can only be made in accordance with the statutory provisions, and a relocation on lands actually covered by another valid and subsisting location is void, not only against the prior locator, but all the world, as the statute does not permit it to be done. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 115 U. S. 45, 5 Sup. Ct. 1100, 29 L. Ed. 348; Manuel v. Wulff (1894) 152 U. S. 505, 511, 14 Sup. Ct. 651, 38 L. Ed. 532; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 78, 18 Sup. Ct. 895, 43 L. Ed. 72; Swanson v. Sears (1912) 32 Sup. Ct. 455, 456, 224 U. S. 180, 56 L. Ed. 721; Malone v. Jackson (1905) 137 Fed. 878, 881, 70 C. C. A. 216; Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 35, 130 C. C. A. 426; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147, 153; Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska, 496; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 24, 50 L. R. A. 209, 83 Am. St. Rep. 17; Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 59, 50 L. R. A. 289, 77 Am. St. Rep. 245; Rebecca Gold Min. Co. v. Bryant (1903) 71 P. 1110, 31 Colo. 119, 123, 102 Am. St. Rep. 17; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321; Street v. Delta Mining Co. (1910) 112 P. 701, 42 Mont. 371; Rose v. Richmond Min. Co. (1882) 27 P. 1105, 17 Nev. 25, 57; Nesbitt v. De Lamar's Nevada Gold-Min. Co. (1898) 52 Pac. 609, 24 Nev. 273, 77 Am. St. Rep. 807; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 127, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694. Lockhart v. Farrell (1906) 86 P. 1077, 31 Utah, 155. See Garth v. Hart (1887) 15 P. 93, 73 Cal. 541; Armstrong v. Lower (1882) 6 Colo. 393; McFeters v. Pierson (1890) 24 Pac. 1076, 15 Colo. 201, 22 Am. St. Rep. 388; Seymour v. Fisher (1891) 27 Pac. 240, 16 Colo. 188; Risch v. Wiseman (1900) 59 P. 1111, 36 Or. 484, 78 Am. St. Rep. 783.

Ground embraced in a mining location may become subject to another location before the expiration of the statutory period for performing annual labor if, at the time when the second location is made, there has been an actual abandonment of the claim by the first locator. Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162, qualifying Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 719, 198 U. S. 443, 49 L. Ed. 1119, and reversing Lockhart v. Farrell (1906) 86 P. 1077, 31 Utah, 155. See, also, Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 50 L. Ed. 717; Willison v. Ringwood (1911) 190 Fed. 549, 111 C. C. A. 401; Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

A relocator seeking to avail himself of minerals in public lands which another has discovered can not do so until the discoverer has either abandoned his claim or left the property open for another to take, or in some other way his rights have come to an end. Belk v. Meagher (1881) 104 U. S. 279, 284, 26 L. Ed. 735; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 78, 18 Sup. Ct. 895, 43 L. Ed. 72; Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 295, 7 C. C. A. 233; Malone v. Jackson (C. C. A. 1905) 137 Fed. 878, 881; Zerres v. Vanina (1907) 150 Fed. 564, 565, 80 C. C. A. 366; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 97, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; Perigo v. Erwin (C. C. 1898) 85 Fed. 904, 906; Porter v. Tonopah North Star Tunnel, etc., Co. (C. C. 1904) 133 Fed. 756, 758; Lancaster v. Coale (1915) 150 P. 821, 27 Colo. App. 495; Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co. (1910) 107 P. 60, 17 Idaho, 630, 635; Street v. Delta Min. Co. (1910) 112 P. 701, 42 Mont. 371, 383; Wills v. Blain (1889) 20 P. 798, 4 N. Mex. (Johns.) 378, 380; Id. (1889) 20 P. 798, 5 N. Mex. 238; Lockhart v. Farrell (1906) 86 P. 1077, 31 Utah, 155, 159.

Where the locators of a claim were at work on the 31st of December, and that night left their tools, intending to resume work the next morning at the usual time, which they did, their possession and work were, in law, continuous; and one who made a relocation in the night, during their absence, was a trespasser, and acquired no rights by the relocation. Willitt v. Baker (C. C. 1904) 133 Fed. 937. See, also, Fee v. Durham (1903) 121 Fed. 468, 57 C. C. A. 584.

To hold that before a former location has expired an entry may be made and the several acts done necessary to perfect a location will encourage unseem-

ingly contests about the possession of the public mineral bearing lands, which would almost necessarily be followed by breaches of the peace. Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 99, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

A relocation of a placer mining claim cannot be made on an existing location on the ground that it is excessive, as such a location is void only as to the excess, and until the locator has been advised of such excess and has had a reasonable time to make his selection, his possession extends to the entire location, and it was so far segregated from the public domain as to exempt it entire from relocation. Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 98, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

An entry upon a mining claim before a prior locator is in default cannot be made for the purpose of making a provisional location, to be valid in case the prior locator fails to do the annual work. Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116.

There cannot be any relocation, before the period within which work is required has expired, which can be made valid by a failure to work on the part of the original locators. Slavonian Min. Co. v. Perasich (C. C. 1881) 7 Fed. 331.

Where one attempts to locate a mining claim by a compliance with the location statutes, but fails to comply with their requirements, that portion of the location as marked on the surface of which he is not in the actual occupation is open to exploration and relocation by others. Armstrong v. Lower (1883) 6 Colo. 581.

99. Failure to perform statutory requirements.—A failure to perform the statutory requirements opens the claim to a relocation in the same manner as if no location had ever been made, if the assigns or representatives of the original locator have not resumed work after such failure and before relocation. Belk v. Meagher (1881) 104 U. S. 279, 282, 26 L. Ed. 735; Jackson v. Roby (1883) 109 U. S. 440, 442, 3 Sup. Ct. 301, 27 L. Ed. 990; Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 448, 16 Sup. Ct. 1101, 41 L. Ed. 221; Yosemite Gold Min. & Mill. Co. v. Emerson (1908) 28 Sup. Ct. 196, 208 U. S. 25, 52 L. Ed. 374; Oscamp v. Crystal River Min. Co. (C. C. A. 1893) 58 Fed. 293, 295; Preston v. Hunter (C. C. A. 1895) 67 Fed. 996, 1000; O'Connell v. Pinnacle Gold Mines Co. (C. C. A. 1905) 140 Fed. 854, 855; North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522, 536; Jupiter Min. Co. v. Bodie, etc., Min. Co. (C. C. 1881) 11 Fed. 666, 681; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 539; Carney v. Arizona Gold Min. Co. (1884) 2 P. 734, 65 Cal. 40, 41; Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296, 300; Snowy Peak Mining Co. v. Tamarack & Chesapeak Mining Co. (1910) 107 P. 60, 17 Idaho, 630; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 371, 50 L. R. A. 184.

A peaceable entry for relocation may be made after failure to perform the annual labor, though the claim is occupied by the original locator. Du Prat v. James (1884) 65 Cal. 555, 4 Pac. 562; Goldberg v. Bruschi (1905) 81 P. 23, 146 Cal. 708. See Weese v. Barker (1883) 2 P. 919, 7 Colo. 178; Eilers v. Boatman (1881) 2 P. 66, 3 Utah, 159.

A mining claim becomes subject to relocation when the locator fails to perform the required annual labor, and there is no complete forfeiture until a third person acquires title to the claim. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 226. See Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 7 C. C. A. 233; Little Gunnell Co. v. Kimber (C. C. 1878) Fed. Cas. No. 8,402; McDonald v. McDonald (1914) 144 P. 950, 16 Ariz. 103.

An agreement between individuals as to the performance of the representation work cannot prevent a relocation of public mineral land. Saunders v. Mackey (1885) 6 P. 361, 5 Mont. 523, 534.

A mining claim is not subject to relocation because the prior locators failed to do the required assessment work where the required work was not completed by servant employed for that purpose, owing to the fact that the relocator caused the servant to leave the claim by threatening him with arrest if he continued at work. Garvey v. Elder (S. D. 1906) 109 N. W. 508.

100. Effect of entry or application for patent.—Where a person abandons his application for a patent to a mining claim, and ceases work on it, without having obtained a certificate of purchase, the claim may be relocated. South End Min. Co. v. Tinney (1894) 22 Nev. 19, 35 Pac. 89, distinguishing Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762, and Deno v. Griffin (1889) 20 P. 308, 20 Nev. 249.

A mining claim is not subject to relocation on the ground that the applicant has not performed the annual assessment work during the pendency of his application for a patent, where he has paid the purchase price and has received a certificate therefor. Aurora Hill, etc., Min. Co. v. Eighty-Five Min. Co. (C. C. 1888) 34 Fed. 515, 517.

After entry of a mining claim in the land office, a relocation of the premises cannot be made by another so long as that entry stands. Neilson v. Champaigne Min. & Mill. Co. (C. C. 1901) 111 Fed. 655.

A person attempting to relocate a

mine is conclusively presumed to know of the existence of a prior valid location where a patent has been issued. Alta Min., etc., Co. v. Benson Min., etc., Co. (1888) 16 P. 565, 2 Ariz. 362, 371. See Deffeback v. Hawke (1885) 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423.

Since the applicant can hold a claim against relocation so long as he is not in default in failing to perform the annual labor, the cancellation of a mineral patent does not of itself make the land subject to relocation. McKnight v. El Paso Brick Co. (N. M. 1911) 120 P. 694.

101. Resumption of work.—Although the owner of a location has failed in his assessment work, so that the ground is open to relocation, yet if, before any valid relocation is made by others, or after the abandonment of a valid relocation, the original locator or his grantee resumes possession, and does the necessary work, his rights are revived under the original location. Belk v. Meagher (1881) 104 U. S. 279, 282, 26 L. Ed. 735; Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 296, 7 C. C. A. 233; Thatcher v. Brown (1911) 190 Fed. 708, 111 C. C. A. 436; Little Gunnell Co. v. Kimber (C. C. 1878) Fed. Cas. No. 8,402; North Noonday Min. Co. v. Orient, etc., Min. Co. (C. C. 1880) 1 Fed. 522, 536; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666, 681; Lakin v. Sierra Buttes Gold-Min. Co. (C. C. 1885) 25 Fed. 337; Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554; Debney v. Iles (1907) 3 Alaska, 438; Jordan v. Duke (1898) 53 P. 197, 6 Ariz. 55, 70; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215; Belcher Consol. Gold Min. Co. v. Deferrari (1882) 62 Cal. 160; Du Prat v. James (1884) 65 Cal. 555, 4 Pac. 562; Russell v. Brosseau (1884) 65 Cal. 605, 4 Pac. 643; Pharis v. Muldoon (1888) 17 Pac. 70, 75 Cal. 284, 287; Harris v. Kellogg (1897) 49 P. 708, 117 Cal. 484, 489; Emerson v. McWhirter (1901) 65 P. 1036, 133 Cal. 510; Same v. Yosemite Gold Min., etc., Co. (1906) 85 P. 122, 149 Cal. 50, 53; Holmes v. Salamanca Gold Min., etc., Co. (1907) 91 P. 160, 5 Cal. App. 659, 664; Honaker v. Martin (1891) 27 P. 397, 11 Mont. 91, 95; Thornton v. Kaufman (1907) 88 P. 796, 35 Mont. 181; Id. (1910) 106 P. 361, 40 Mont. 282, 285, 135 Am. St. Rep. 618; Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 125; Crown Point Min. Co. v. Crismon (1901) 65 P. 87, 39 Or. 364, 368; Richen v. Davis (Or. 1915) 148 P. 1130; Lacey v. Woodward (1891) 5 N. M. 583, 25 Pac. 785; Klopenstine v. Hays (1899) 57 P. 712, 20 Utah, 45; Lockhart v. Farrell (1906) 86 P. 1077, 31 Utah, 155. See Temescal Oil Min., etc., Co. v. Salcido (1902) 69 P. 1010, 137 Cal. 211; Field v. Tanner (1904) 75 P. 916, 32 Colo. 278; Gonu v. Russell (1879) 3 Mont. 358; Hirschler v. McKendricks (1895) 16 Mont. 211, 40 Pac. 290; McKay v. McDougall (Mont. 1901) 64 P. 669, 87 Am. St. Rep. 395.

A claimant who has failed to perform the required work, but resumes work in good faith, is entitled to the property, as against a relocator after resumption. Peachy v. Frisco Gold Mines Co. (D. C. 1913) 204 Fed. 659, 666; Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87; Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 226; Emerson v. McWhirter (1901) 65 P. 1036, 133 Cal. 510; Little Dorrit Gold Min. Co. v. Arapahoe Gold Min. Co. (1902) 71 P. 389, 30 Colo. 431. See North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Peachy v. Gaddis (Ariz. 1912) 127 P. 739; Hirschler v. McKendricks (1895) 16 Mont. 211, 40 Pac. 290; McKnight v. El Pasco Brick Co. (N. M. 1911) 120 P. 694; Richen v. Davis (Or. 1915) 148 P. 1130; Florence-Rae Copper Co. v. Kimbel (1915) 147 P. 881, 85 Wash. 162.

The statute does not authorize a trespass upon, or a relocation of, a claim previously located by another, however derelict in performing the required work the first locator may have been, provided he has returned and resumed work, and is actually engaged in developing his claim at the time the second locator enters and attempts to secure the claim. North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; Honaker v. Martin (1891) 27 P. 397, 11 Mont. 91, 94; Hirschler v. McKendricks (1895) 40 P. 290, 16 Mont. 211, 213. See Jordan v. Duke (1898) 53 P. 197, 6 Ariz. 55; Gonu v. Russell (1879) 3 Mont. 358.

To "resume work" means to begin work anew with a bona fide intention of prosecuting it. McCormick v. Baldwin (1894) 104 Cal. 227, 37 Pac. 903. See Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 226; Honaker v. Martin (1891) 11 Mont. 91, 27 Pac. 397.

A relocation of a mining claim made because of the failure to do the necessary assessment work, but afterwards abandoned, cannot aid one who subsequently attempts to relocate the same ground after the original claimant had performed the required work. Justice Min. Co. v. Barclay (C. C. 1897) 82 Fed. 554; Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska, 496, 505. See Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119.

One who attempts to relocate a claim after default in the assessment work must complete his location, by marking the boundaries and fulfilling the other requisites of location, before resumption of work by the first locator; otherwise, the first locator will not have forfeited his rights. Pharis v. Muldoon

(1888) 75 Cal. 284, 17 Pac. 70; Gonu v. Russell (1879) 3 Mont. 358.

The resumption of work by a locator who has failed to perform the annual labor must be in good faith, and a failure to resume such work by reason of a mere threat of violence, made far distant from the claim, will not prevent a forfeiture. Slavonian Min. Co. v. Perasich (C. C. 1881) 7 Fed. 331, 333.

To save a forfeiture after expiration of the statutory period, there must be a bona fide attempt, at least, to resume work. Threats made seven miles from the claim, without any act towards carrying them out, are not a sufficient excuse for nonperformance. Id.

If relocators have entered, and are in actual possession after a forfeiture, although they have not relocated, the original locators have no right to make a forcible entry for the purpose of resuming work. Id.

The question as to whether there was a resumption of work after failure to do the annual work required for a particular year is a question of fact to be determined upon the trial of a case, and cannot be determined as a matter of law. Peachy v. Frisco Gold Mines Co. (D. C. 1913) 204 Fed. 659, 669.

A valid relocation of a mining claim cannot be made by an entry by stealth at one o'clock in the morning of January 1 and posting the notice of such relocation, though the boundaries were not marked on the surface until January 5, and at the usual hour for commencing work on the first day of January of the same year the original locator resumed work and did the required amount of work up to January 5. Pharis v. Muldoon (1888) 17 P. 70, 75 Cal. 284, 287. See Honaker v. Martin (1891) 27 P. 397, 11 Mont. 91, 94.

The locator, by doing work of the amount required in a certain year, after failure for some years to do work, will be treated as having resumed work. Temescal Oil Mining & Development Co. v. Salcido (1902) 69 P. 1010, 137 Cal. 211.

Where a locator merely failed to diligently prosecute the work of discovery, a relocation by others, who also failed to prosecute the work of discovery till after re-entry and renewal of discovery work by the first locator, will not bar his rights under the original location. Borgwardt v. McKittrick Oil Co. (1913) 130 P. 417, 164 Cal. 650.

It is not resuming work, within the meaning of this section, where a locator of a mining claim, having failed to perform the necessary representation work within the required time, did, after the expiration of the time, resume work and before the completion of the required amount ceased work, merely posting a notice soliciting proposals for the work required on the mining claim. Hirschler v. McKendricks (1895) 40 P. 290, 16 Mont. 211, 212, 215.

A defective relocation by an adverse claimant does not prevent the original locator from resuming work and saving his claim after failure to do the required amount during a previous year. Thornton v. Kaufman (1910) 106 P. 361, 40 Mont. 282, 135 Am. St. Rep. 618.

Going onto the claim, with tools, and securing samples of ore, is not a resumption of work. Bishop v. Baisley (1895) 28 Or. 119, 41 Pac. 936.

102. Rights and relation of locator and relocator.—The power conferred by this section to relocate a forfeited claim does not place the locator in privity of title with the owner of the prior and forfeited location. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 719, 198 U. S. 443, 49 L. Ed. 1119; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321, 331.

Persons asserting rights to a mining claim as relocators, on the theory that the claim had been forfeited for failure to perform the required assessment work, recognize the prior location, which became forfeited by the relocation. Golden v. Murphy (Nev. 1909) 103 P. 394, rehearing denied (1909) 105 P. 99. See, also, Wills v. Blain (1889) 4 N. M. (Johns.) 378, 20 Pac. 798.

Under the provisions of this section a relocator cannot get a patent for a claim attempted to be relocated, unless he secures what is here made the equivalent of a valid location by actually holding and working the claim for the requisite time. Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735; Malone v. Jackson (1905) 137 Fed. 878, 881, 70 C. C. A. 216; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 127, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

Matters which estop a second locator from showing that the premises in dispute were unoccupied mineral lands at the time of his location, deny to him the protection of the relocation provisions of this section. Lavagnino v. Uhlig (1905) 198 U. S. 443, 452, 25 Sup. Ct. 716, 49 L. Ed. 1119; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 127, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694. See Farrell v. Lockhart (1908) 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

In case of a conflict of boundaries between a senior and a junior location, and where the senior location is subsequently forfeited and a relocation is made by a third person, such third person as the relocator, does not acquire the right, in adverse proceedings, to assail the title of such original junior locator, as to the conflict area previously existing between his location and the senior location so forfeited. Lavagnino v. Uhlig (1905) 198 U. S. 443, 453, 25 Sup. Ct. 716, 49 L. Ed. 1119. See Farrell v. Lockhart (1908) 210 U. S. 142, 28 Sup. Ct. 681, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

There is no privity between the first locator of a mining claim and a subse-

quent relocator, where the relocation was not made in furtherance of the prior location, but was in fact made in hostility to such prior location. Burke v. Southern Pac. R. Co. (1914) 34 Sup. Ct. 907, 234 U. S. 699, 58 L. Ed. 1527.

A relocator describing himself as such admits that he is not a discoverer of mineral, but an appropriator thereof on the ground that the original discoverer had perfected his right and his notice of relocation is an admission of record that such relocator claims a forfeiture by reason of a failure of the first locator to make his annual expenditure. Zerres v. Vanina (1907) 150 Fed. 564, 566, 80 C. C. A. 366; Wills v. Blain (1889) 20 P. 798, 4 N. M. (Johns.) 378.

A junior location made on ground covered by a valid existing senior location will not prevail over a relocation on the same ground, made after a failure to do the work on the senior location. Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

103. Rights of relocator.—If ground once included within the location of a lode mining claim be abandoned, and a new location made thereon, as abandoned ground, said location dates only from the relocation thereof as abandoned ground, and does not relate back to or obtain any rights on account of the location which has been abandoned. Cheesman v. Shreeve (C. C. 1889) 40 Fed. 787.

A relocation made under this section on the failure of a prior locator to perform the annual labor or assessment work gives the locator a valid ownership in the claim, good against the whole world save the government. Dufresne v. Northern Light Min. Co. (1905) 2 Alaska, 592, 597; Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska, 496, 500, following Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735, and denying Lavagnino v. Uhlig (1905) 198 U. S. 443, 25 Sup. Ct. 716, 49 L. Ed. 1119.

104. Relocation by original locator.—A locator who has allowed his location to lapse and become subject to relocation by failure to do the required annual amount of work has the right to make a new location, covering the same ground. Warnock v. De Witt (1895) 11 Utah, 324, 40 Pac. 205. See Hunt v. Patchin (C. C. 1888) 35 Fed. 816.

A locator may relocate his claim, including additional vacant ground unclaimed by others, under a different name, and convey it by the designation of the last name. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223; affirming decree Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37.

That part of land on which a miner located a claim was patented to another without his objection did not prevent him from including the part unappropriated in another claim located on adjoining land, and obtaining a valid title to the claim so established. Erwin v. Perego (1899) 93 Fed. 608, 35 C. C. A. 482.

Where persons interested in a mining location conveyed their interests to one of their number for the benefit of all, and he neglected to do assessment for one year, he was not guilty of fraud in procuring others to relocate the property for the benefit of the original holders. U. S. v. McCutchen (D. C. 1914) 217 Fed. 650.

The rule that a locator cannot by relocation extend the time within which the necessary steps must be taken to complete the location applies only where rights of third persons intervene. Eureka Exploration Co. v. Tom Moore Min. & Mill. Co. (Colo. 1912) 123 P. 655.

Where the owner of a mining claim abandoned part of it, his relocation of another claim, which included part of the abandoned claim, is good; it not appearing that the abandonment was with any fraudulent purpose. Emerson v. Akin (Colo. App. 1914) 140 P. 481.

105. Relocation by agent or trustee.—An agent, trustee, cotenant, or other person holding confidential relations with an original locator or the owner of a mining claim, who attempts, in violation of a contract or in breach of the trust, to relocate or fraudulently obtains title to the claim in his own name, will be charged in equity as a trustee of the rightful owner, and he will not be permitted to secure any advantage by such attempted relocation or title obtained. Turner v. Sawyer (1893) 150 U. S. 578, 584, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189. See Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337; Hunt v. Patchin (C. C. 1888) 35 Fed. 816; Fisher v. Seymour (1897) 49 P. 30, 23 Colo. 542; Mills v. Hart (1898) 52 P. 680, 24 Colo. 505, 508, 65 Am. St. Rep. 241; Van Wagenen v. Carpenter (1900) 61 P. 698, 27 Colo. 444; Ballard v. Golob (1905) 83 P. 376, 34 Colo. 417, 423; Lockhart v. Rollins (1889) 21 P. 413, 2 Idaho (Hasb.) 540; Largey v. Bartlett (1896) 44 P. 962, 18 Mont. 265; O'Neill v. Otero (1910) 113 P. 614, 15 N. Mex. 707, 720; Co-operative Copper & Gold Mining Co. v. Law (Or. 1913) 132 P. 521, 65 Or. 250; Utah Min., etc., Co. v. Dickert, etc., Co. (1889) 21 P. 1002, 6 Utah, 183; Argentine Min. Co. v. Benedict (1898) 55 P. 559, 18 Utah, 183.

(E) Co-owners

106. Nature of estate and relation of cotenants.—Cotenants of a mining claim hold by unity of possession and the possession of one is presumed to be for the benefit of all, and the purchase of a hostile or outstanding title or encumbrance upon the joint estate by one cotenant inures to the benefit of all. Turner v. Sawyer (1893) 150 U. S. 586, 14 Sup. Ct. 192, 37 L. Ed. 1189. See Franklin Min. Co. v. O'Brien (1896) 43 P. 1016, 22 Colo. 129, 55 Am. St. Rep. 118; Mills v. Hart (1898) 52 P. 680, 24 Colo. 505, 65

Am. St. Rep. 241; Van Wagenen v. Carpenter (1900) 61 P. 698, 27 Colo. 444, 456; Lockhart v. Rollins (1889) 21 P. 413, 2 Idaho (Hasb.) 540; Brundy v. Mayfield (1895) 38 P. 1067, 15 Mont. 201; Cedar Canyon Min. Co. v. Yarwood (1902) 67 P. 749, 27 Wash. 271, 280, 91 Am. St. Rep. 841.

One cotenant can recover possession of an entire mining claim as against all persons except his cotenants. Erhardt v. Boaro (1885) 113 U. S. 527, 537, 5 Sup. Ct. 560, 28 L. Ed. 1113; Field v. Tanner (1904) 75 P. 916, 32 Colo. 278, 290. See Weese v. Barker (1883) 2 P. 919, 7 Colo. 178.

The general rule that co-tenants stand in a relation to one another of mutual trust and confidence, that one will not be permitted to act in hostility to the others in respect to the joint estate, and that a distinct title acquired by one will inure to the benefit of all, applies with full force to the joint owners of a mining claim. Stevens v. Grand Central Min. Co. (1904) 133 Fed. 28, 67 C. C. A. 284.

The rights of co-owners under this section apply alike to placer and lode locations. Sweet v. Webber (1884) 4 P. 752, 7 Colo. 443, 448. See Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610.

When one cotenant asserts that he has divested his cotenant of his interest in the common property, a court will examine the circumstances under which the alleged divestiture has been brought about, and will deny the claim unless the facts existed authorizing the invocation of the provision and the prescribed notice has been given in strict conformity with the statutory requirement. O'Hanlon v. Ruby Gulch Min. Co. (1913) 135 Pac. 913, 917, 48 Mont. 65. See Turner v. Sawyer (1893) 150 U. S. 578, 14 Sup. Ct. 192, 37 L. Ed. 1189; Elder v. Horseshoe Min. Co. (1904) 194 U. S. 248, 24 Sup. Ct. 643, 48 L. Ed. 960; Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Royston v. Miller (C. C. 1896) 76 Fed. 50; Evalina Gold Min. Co. v. Yosemite Gold Min. Co. (1911) 115 P. 946, 15 Cal. App. 714; Brundy v. Mayfield (1895) 38 P. 1067, 15 Mont. 201; Elder v. Horseshoe Min. Co. (1897) 70 N. W. 1060, 9 S. D. 636, 62 Am. St. Rep. 895.

One cotenant cannot abandon a mining claim so as to destroy the interest of the other cotenant; but he may abandon it as to his own interest so as to preclude him from afterwards asserting an interest therein. O'Hanlon v. Ruby Gulch Mining Co. (1913) 135 P. 913, 48 Mont. 65.

Cotenants of mining property cannot be deprived of their inchoate rights by the tortious acts of others, nor can intruders and trespassers initiate any right which would defeat those of prior discoverers. Lockhart v. Leeds (1900) 63 P. 48, 10 N. Mex. 568, 597. See Erhardt v. Boaro (1885) 113 U. S. 527, 534, 5 Sup. Ct. 560, 28 L. Ed. 1113.

107. Who are co-owners.—One is not a "co-owner," within the meaning of the statute, who merely holds a sheriff's certificate of purchase at an execution sale of a part interest. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 37 L. Ed. 1189.

The owner of an interest in a mining claim, who holds an option for the purchase of an interest of another co-owner who has failed to contribute his proportionate share of the assessment work, has such an interest in the claim as to entitle him to make a tender of the amount due from such co-owner, and thereby prevent a forfeiture of such interest. Knickerbocker v. Halla (1910) 177 Fed. 172, 175, 100 C. C. A. 634.

108. Performance of assessment work by one co-owner.—The possession of a mining claim by one cotenant is possession by all tenants, and the failure of one cotenant to perform the assessment work does not thereby forfeit his possession. Union Consol. Mining Co. v. Taylor (1879) 100 U. S. 37, 40, 25 L. Ed. 541; Van Valkenburg v. Huff (1865) 1 Nev. 142; Lockhart v. Leeds (1900) 63 P. 48, 10 N. Mex. 568, 597.

If the required work is not performed, after the expiration of a year, and notice of contribution properly given, the rights of delinquents are absolutely cut off, though the failure to do such work may have been caused by the death of the locator during the year. Elder v. Horseshoe Min., etc., Co. (1904) 194 U. S. 248, 256, 24 Sup. Ct. 643, 48 L. Ed. 960; Badger Gold Min., etc., Co. v. Stockton Gold, etc., Min. Co. (C. C. 1905) 139 Fed. 838, 842.

The policy exhibited by this section would be ill subserved if a co-owner of an unpatented mining claim could safely refuse or neglect to co-operate or contribute to the annual assessment work, and inasmuch as the duty here imposed upon a co-owner is not alone to his associates but is also because of considerations of the common welfare. Van Sice v. Ibex Min. Co. (1909) 173 Fed. 895, 897, 97 C. C. A. 587.

The abandonment of a mining claim by one colocator, or the refusal by him to contribute his proportion of the cost of the assessment work, does not work the destruction of the entire location, but his interest may become the property of his co-owners when they make the required expenditures. Miller v. Chrisman (1903) 73 P. 1083, 74 P. 444, 140 Cal. 440, 451, 98 Am. St. Rep. 63.

Any neglect to do the annual assessment work required by the statutes is not excused by the failure of one or more joint owners to do such work under a promise to his co-owners to that

effect; and a valid relocation, by a stranger, for such neglect, is not affected by such understanding between the original owners. Doherty v. Morris (1887) 11 Colo. 12, 16 Pac. 911.

A cotenant of a mining claim cannot escape the forfeiture provided for where work is not done by reason of having relied on the agreement of his cotenant to do the work necessary. Saunders v. Mackey (1885) 5 Mont. 523, 6 Pac. 361.

When a location is made by two or more persons they become co-owners, and one or more of such co-owners may perform the required assessment work and thereby continue the right of themselves and co-owners to the exclusive possession of the claim; but if the work is done by one or more the law requires the other co-owners to contribute their share of the expense, and upon failure to do so their interest in the claim is subject to forfeiture on proper notice to such co-owners, or if they are dead, to their heirs. Elder v. Horseshoe Min., etc., Co. (1897) 70 N. W. 1060, 9 S. D. 636, 642, 62 Am. St. Rep. 895.

Where $100 worth of work is done in a certain year on a mining claim belonging to co-owners, it is to be presumed, in the absence of any showing to the contrary, that it was done by the co-owners, or some of them. Yarwood v. Johnson (1902) 70 P. 123, 29 Wash. 643.

109. Remedy against delinquent co-owner.—To entitle a part owner to forfeit the interest of another part owner for failure to contribute to assessment work for any year, he must have done the amount of work required by statute to protect the title to the claim for that year. Pack v. Thompson (1915) 223 Fed. 635, 139 C. C. A. 181; Thompson v. Pack (D. C. 1914) 219 Fed. 624. See, also, Pack v. Thompson (1915) 223 Fed. 641, 139 C. C. A. 187; Id., 223 Fed. 642, 139 C. C. A. 188; Id., 223 Fed. 643, 139 C. C. A. 189; Id., 223 Fed. 645, 139 C. C. A. 191.

This section gives one co-owner who performs the assessment work a remedy against his co-owner who fails to contribute his share of such work, and points out the method by which the remedy may be enforced. Chambers v. Harrington (1884) 111 U. S. 350, 352, 4 Sup. Ct. 428, 28 L. Ed. 452; Turner v. Sawyer (1893) 150 U. S. 578, 584, 14 Sup. Ct. 192, 37 L. Ed. 1189; Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 448, 16 Sup. Ct. 1101, 41 L. Ed. 221; Emerson v. Yosemite Gold Min., etc., Co. (1906) 85 P. 122, 149 Cal. 50, 54; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 370, 50 L. R. A. 184; McCarthy v. Speed (1899) 80 N. W. 135, 12 S. D. 7, 9, 50 L. R. A. 184. See Suessenbach v. First National Bank (1889) 41 N. W. 662, 5 D. 477.

This statute should be strictly construed as a statute providing for a forfeiture. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 194, 150 U. S. 578, 37 L. Ed. 1189.

The provision of this section for the extinguishment of the interest of a co-owner in a mining claim for his failure to contribute to the assessment work is constitutional and valid. Van Sice v. Ibex Mining Co. (1909) 173 Fed. 895, 97 C. C. A. 587, appeal dismissed (1911) 32 Sup. Ct. 520, 223 U. S. 712, 56 L. Ed. 625, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

A forfeiture will be enforced in a court of equity, when such relief accords more with the principles of right and justice than would the denial thereof; and this rule is particularly applicable to a forfeiture of the interest of a co-owner in a mining claim, provided for by this section, for his failure to contribute to the work of development required thereby as a matter of public policy. Id.

This section providing for the extinguishment of the interest of a co-owner for a failure to contribute to the work of exploration and development, is part of the very law upon which he is compelled to rely for the source of his title and the existence of any right whatever, and he cannot claim a vested interest freed from the statutory conditions which qualify it, and the right and its limitations necessarily go together. Id.

The defaulting co-owner is not personally responsible for any part of the assessment work, but the remedy given by this section is exclusive. McDaniel v. Moore (1910) 112 P. 317, 19 Idaho, 43.

There may be an implied promise on the part of a co-owner of a mining claim to pay his part of the assessment work, as required by this section, as well as his part of the expense of procuring a patent. Id.

The purpose of the provisions requiring co-owners to contribute to the assessment is to afford a speedy, convenient, and effective method of taking from one cotenant his interest in the property and giving it to another without the intervention of courts. O'Hanlon v. Ruby Gulch Min. Co. (1913) 135 Pac. 913, 917, 48 Mont. 65.

110. Delinquency of co-owner—Effect.—One who does the assessment work on an association placer mining claim for which he is paid by one of the part owners has no right to enforce a forfeiture of the interest of another part owner for failure to contribute. Knickerbocker v. Halla (1910) 177 Fed. 172, 100 C. C. A. 634.

A part owner of a mining claim who holds an option to purchase the interest of a co-owner has the right to tender the contribution of the latter to

the cost of assessment work to avoid a forfeiture. Id.

A part owner of a mining claim has implied authority to make a tender of the amount due from a co-owner as a contribution to the cost of assessment work to avoid a forfeiture. Id.

Upon the failure of any co-owner to contribute his proportionate share of the required expenditures after notice, his interest in the claim may become the property of the co-owners. Forbes v. Gracey (C. C. 1877) Fed. Cas. No. 4,924.

A tender of the sum due from a cotenant for assessment work, made by his friend, is valid, and prevents a forfeiture where it is ratified when made known to him. Forderer v. Schmidt (1907) 154 Fed. 475, 84 C. C. A. 426, 12 Ann. Cas. 80.

One of the tenants in common of a mining claim does not lose to his cotenant his interest in the mine by not contributing to the assessment work of the latter. Faubel v. McFarland (1904) 78 P. 261, 144 Cal. 717.

A co-owner who fails to do his assessment work on the mine may, under this section, be "advertised out," and his co-owners obtain title to the entire claim. Evalina Gold Min. Co. v. Yosemite Gold Min., etc., Co. (1911) 115 P. 946, 15 Cal. App. 714, 716.

To entitle a locator to a patent it is not necessary that there be a record that one to whom he had sold an interest has lost title by his failure to contribute his share of work and expense to represent the claim for certain years, and that the locator advertised the vendee out, by publication, as provided by this section. Riste v. Morton (1897) 49 P. 656, 20 Mont. 139.

III. Notice to delinquent co-owner.— Expenditures of several years for holding a mining claim may be grouped in a single notice. Elder v. Horseshoe Min. & Mill. Co. (1904) 24 Sup. Ct. 643, 646, 194 U. S. 248, 48 L. Ed. 960; Id. (1897) 70 N. W. 1060, 9 S. D. 636, 62 Am. St. Rep. 895.

The publication of notice to a part owner of a mining claim to contribute to the cost of assessment work for the previous year under penalty of forfeiture of his interest is a waiver of a prior personal notice, and the delinquent may make his contribution at any time within 90 days from such notice by publication. Knickerbocker v. Halla (1910) 177 Fed. 172, 100 C. C. A. 634. See, also, Knickerbocker v. Halla (1908) 162 Fed. 318, 89 C. C. A. 298.

The right to give the notice provided by this section is limited to a co-owner who has performed the required labor. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 194, 150 U. S. 578, 37 L. Ed. 1189; Badger Gold Min., etc., Co. v. Stockton Gold, etc., Min. Co. (C. C. 1905) 139 Fed. 838, 841.

A notice by publication is not insufficient to work a forfeiture because addressed to a deceased co-owner by name, and "his heirs, administrators, and to all whom it may concern," without specifically naming the heirs. Elder v. Horseshoe Min. & Mill. Co. (1904) 24 Sup. Ct. 643, 645, 194 U. S. 248, 48 L. Ed. 960; Id. (1897) 70 N. W. 1060, 9 S. D. 636, 62 Am. St. Rep. 895.

This section provides that upon the failure of any one of several co-owners of a mining claim to contribute his proportion of the annual assessment work, the co-owners who have performed the work or made the required expenditure may, at the expiration of the year, by personal service or by publication, give such delinquent co-owner notice, and may forfeit his interest in the property if he fails to pay within 90 days. Knickerbocker v. Halla (1908) 162 Fed. 318, 89 C. C. A. 298. See Knickerbocker v. Halla (1910) 177 Fed. 172, 100 C. C. A. 634.

The beneficial owners of part interests in a mining claim are the proper parties to give the notice to a co-owner, under this section, to forfeit his interest for a failure to contribute to assessment work, although they have conveyed their interests in trust. Van Sice v. Ibex Mining Co. (1909) 173 Fed. 895, 97 C. C. A. 587, appeal dismissed (1911) 32 Sup. Ct. 520, 223 U. S. 712, 56 L. Ed. 625, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

A notice addressed to the individuals supposed to be the co-owners in default and personally served on them, and also delivered to their grantee under a prior unrecorded deed, is sufficient to forfeit the rights of the grantee; the co-owners serving the notice having neither actual nor constructive notice of the conveyance. Evalina Gold Mining Co. v. Yosemite Gold Min. & Mill. Co. (1911) 115 P. 946, 15 Cal. App. 714.

A notice of forfeiture of the interest of a co-owner of mining claims, because of failure to contribute his proportion of the expenditures, is fatally defective, if not specifying the amount of money spent upon each claim, nor facts which might excuse expenditure on each claim. Haynes v. Briscoe (1901) 67 P. 156, 29 Colo. 137.

A published notice of forfeiture is invalid as to a co-owner whose name does not appear therein. Ballard v. Golob (1905) 83 P. 376, 34 Colo. 417.

The notice of failure of a cotenant to contribute to the cost of representation work cannot be served on the administrator of such cotenant; the heirs of the delinquent being the proper persons to receive service. O'Hanlon v. Ruby Gulch Mining Co. (Mont. 1913) 135 P. 913.

The fact that the administrator informs the heirs that he has received the notice is not sufficient notice to such heirs to forfeit their interest. Id.

It is optional with the co-owner who makes the improvements, to serve personal notice or publish the same. Elder v. Horseshoe Mining & Milling Co. (1897) 70 N. W. 1060, 9 S. D. 636, 62 Am. St. Rep. 895.

One co-owner may forfeit the interest of another co-owner by proper notice for failure to perform his part of the assessment work. Hawgood v. Emery (1909) 22 S. D. 573, 574, 119 N. W. 177, 133 Am. St. Rep. 941.

112. Publication against co-owner.—The statute requires a publication at least once each week for 90 days, and a daily publication from January 7 to April 2 of the same year is sufficient. Elder v. Horseshoe Min., etc., Co. (1904) 194 U. S. 248, 256, 24 Sup. Ct. 643, 48 L. Ed. 960; Evalina Gold Min. Co. v. Yosemite, etc., Min. Co. (1911) 115 P. 946, 15 Cal. App. 714, 718.

Publication every day except Sunday in the proper newspaper, beginning Monday, January 7th, and concluding Tuesday, April 2d, is sufficient. Elder v. Horseshoe Min. & Mill. Co. (1904) 24 Sup. Ct. 643, 646, 194 U. S. 248, 48 L. Ed. 960, affirming judgment (1901) 87 N. W. 586, 15 S. D. 124, 102 Am. St. Rep. 681.

A publication on each succeeding Monday for the entire period of 90 days constitutes at least one publication each week. Id.

The 90-day period spoken of in the statute begins with the first publication of the notice. Id.

There can be no question about the effect of a notice rightly published under this section. Van Sice v. Ibex Min. Co. (1909) 173 Fed. 895, 897, 97 C. C. A. 587. See Elder v. Horseshoe Min., etc., Co. (1904) 24 Sup. Ct. 643, 194 U. S. 248, 48 L. Ed. 960.

The phrase in this section "for at least once a week during 90 days" means at least once a week during 90 days there must be at least one publication in each week during the prescribed period, thus making the notice to continue 90 days, and the 90-day period begins with the first publication. Elder v. Horseshoe Min., etc., Co. (1901) 87 N. W. 586, 15 S. D. 124, 125, 102 Am. St. Rep. 681.

113. Conveyance by co-owner—Effect on right to forfeit.—The fact that after the owners of a part interest in a mining claim had done assessment work for a particular year they conveyed the claim to a corporation, taking in payment substantially all of its capital stock, which they retained, did not preclude the forfeiture of the interest of their co-owner for failure to contribute to the work by a notice signed both by them and by the corporation, and the vesting of such interest in the corporation by virtue of their deed, which purported to convey the entire claim. Badger Gold Min. & Mill. Co. v. Stockton Gold & Copper Min. Co. (C. C. 1905) 139 Fed. 838.

114. Proof to establish forfeiture.—This section does not authorize the forfeiture of a co-owner's interest by publication of the statutory notice, when he is not in fact in default in contributing for expenditures. Brundy v. Mayfield (1895) 15 Mont. 201, 38 Pac. 1067.

115. Rights and title acquired by forfeiture.—When the statutory notice has been rightfully published it effectually cuts off all the claims of all parties and thereby keeps the title free and clear from uncertainty and doubt. Elder v. Horseshoe Min., etc., Co. (1904) 194 U. S. 248, 256, 24 Sup. Ct. 643, 48 L. Ed. 960.

The title accruing to a co-owner by a rightful notice under this section is similar to that conveyed by a sheriff's deed after judgment and execution sale. Van Sice v. Ibex Mining Co. (1909) 173 Fed. 895, 97 C. C. A. 587, dismissed (1911) 32 Sup. Ct. 520, 223 U. S. 712, 56 L. Ed. 625, certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

The purpose of the mining statute was to encourage the exploration, development, and sale of the mineral lands of the United States, and all of the provisions of the mining statutes have been framed with this object in view, and where the required assessment work is not performed within the statutory period, and notice of contribution has been properly served or sufficiently published, the rights of a delinquent co-owner are absolutely cut off, and the title is perfected in the other co-owners performing the work. Evalina Gold Min. Co. v. Yosemite Gold Min., etc., Co. (1911) 115 P. 946, 15 Cal. App. 714, 718.

Ex parte proceedings by a co-owner of a mining claim to forfeit the interest of his cotenant for failure and refusal to contribute to necessary assessment work are ineffective where no assessment work was in fact done as alleged in such proceedings. Delmoe v. Long (1907) 88 P. 778, 35 Mont. 38.

116. Title acquired by conveyance by co-owner.—On the theory that one colocator may acquire the rights and title of all locators to a placer mining claim of 160 acres, there is no reason why he cannot acquire title by conveyance to him of the rights of his colocators instead of title by abandonment and by refusal to join in the work. Miller v. Chrisman (1903) 73 P. 1083; 74 P. 444, 140 Cal. 440, 451, 98 Am. St. Rep. 63.

117. Liability of co-owner as trustee.—A joint owner and manager of a mining claim who, by arrangement with other joint owners and for good reasons, made a relocation of a mining claim in his individual name holds the

relocated claim in trust for all the joint owners. Hunt v. Patchin (C. C. 1888) 35 Fed. 816; Royston v. Miller (C. C. 1896) 76 Fed. 50, 53; Butte Hardware Co. v. Cobban (1893) 34 P. 24, 13 Mont. 351, 360; Lockhart v. Washington Gold, etc., Min. Co. (1911) 117 P. 833, 16 N. Mex. 223, 231. See Gore v. McBrayer (1861) 18 Cal. 582; Van Wagenen v. Carpenter (1900) 61 P. 698, 27 Colo. 444, 456; Ballard v. Golob (1905) 83 P. 376, 34 Colo. 417, 423; Lockhart v. Rollins (1889) 21 P. 413, 2 Idaho, 540; Hibour v. Reeding (1877) 3 Mont. 15; Welland v. Huber (1873) 8 Nev. 203; Lockhart v. Leeds (1900) 63 P. 48, 10 N. M. 568; O'Neill v. Otero (1910) 113 P. 614, 15 N. M. 707, 720.

A co-owner, who relocates the claim, or otherwise procures the issuance of a patent in his own name, will hold the title in trust for all. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 37 L. Ed. 1189; Lockhart v. Johnson (1901) 21 Sup. Ct. 665, 181 U. S. 516, 45 L. Ed. 979 (affirming judgment Same v. Wills [1898] 54 P. 336, 9 N. M. 344); Stevens v. Grand Central Min. Co. (1904) 133 Fed. 28, 67 C. C. A. 284; Hallack v. Traber (1896) 46 P. 110, 23 Colo. 14; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362. See, also, Lockhart v. Leeds (1904) 25 Sup. Ct. 76, 195 U. S. 427, 49 L. Ed. 263; Doherty v. Morris (1887) 11 Colo. 12, 16 Pac. 911; Saunders v. Mackay (1885) 6 P. 361, 5 Mont. 523.

Where a title is held in trust, the rights of the parties may be determined by a bill in equity. Turner v. Sawyer (1893) 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189; Lockhart v. Johnson (1901) 181 U. S. 516, 529, 21 Sup. Ct. 665, 45 L. Ed. 979.

One co-owner cannot obtain title to the claim as against his co-owner by relocating the claim on the ground that the required annual assessment work had not been done. Speed v. McCarthy (1901) 181 U. S. 269, 273, 21 Sup. Ct. 613, 45 L. Ed. 855.

A joint owner of a claim may maintain a suit for the determination of his rights therein as against his co-owner who has procured a forfeiture and obtained a receiver's final receipt without waiting until a patent has been issued to the latter. Malaby v. Rice (1900) 62 P. 228, 15 Colo. App. 364.

Where patentees received their patent with knowledge of the interests of certain co-tenants with them in the claim, and with knowledge that they received title in trust for such co-tenants, and the grantees of the patentees knew or had notice of the same facts, any attempted forfeiture proceedings instituted by the patentees or their grantees against the cotenants were ineffectual to defeat the cotenant's rights. Stephens v. Golob (1905) 83 P. 381, 34 Colo. 429.

Where an agent or one part owner of a mining claim fraudulently makes a relocation in his own name or procures a patent in his own name, he holds it in trust for his principal or co-owners. Suessenbach v. First National Bank (1889) 41 N. W. 662, 5 Dak. 477, 504.

If part of the co-owners apply for patent for a mining claim and exclude a co-owner, they will hold the title in trust for all. Butte Hardware Co. v. Cobban (1893) 34 P. 24, 13 Mont. 351, 360; Brundy v. Mayfield (1895) 38 P. 1067, 15 Mont. 201, 211; Delmoe v. Long (1907) 88 P. 778, 35 Mont. 139, 156. See Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337.

An agreement by one to perform assessment work on a claim for an interest therein, and an agreement by him to relocate another claim in the joint names of the parties establishes a trust relation, and if he fails to perform the work, and the first claim reverts to the public, and in relocating the second one he does not include his co-owner, the latter can enforce the trust. Clark v. Mitchell (Nev. 1913) 130 P. 760.

118. Patent proceedings by co-owners.—See, also, notes to § 4622, post.

An excluded cotenant is not required to adverse an application for patent. Turner v. Sawyer (1893) 150 U. S. 578, 587, 14 Sup. Ct. 192, 37 L. Ed. 1189; Suessenbach v. First National Bank (1889) 41 N. W. 662, 5 Dak. 477; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 370; Id. (1899) 80 N. W. 135, 12 S. D. 7, 9, 50 L. R. A. 184.

Co-owners of a mining claim who procure a forfeiture of the interest of a delinquent co-owner must comply strictly with the statute, and such co-owners cannot procure a patent for the claim without showing notice and that the alleged delinquent co-owner failed to contribute his part of the assessment work. Turner v. Sawyer (1893) 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189.

Where two of the four locators, after taking steps to forfeit the interests of their co-owners, obtained a patent in their own names, a conveyance by them, made between the date of final receipt and issuance of the patent, divested them of all title and interest, whether held in their own right or as trustee for another of the original locators, whose interest they failed to extinguish. Cassidy v. Silver King Coalition Mines Co. (1912) 199 Fed. 100, 117 C. C. A. 640.

(F) Jurisdiction of courts

119. Federal questions.—See, also, notes to §§ 991, 1010, 1214, ante.

Federal questions which determine the jurisdiction of federal courts may arise under this section of the statute. Elder v. Horseshoe Min., etc., Co. (1904) 194 U. S. 248, 253, 24 Sup. Ct. 643, 48 L. Ed. 960.

The question as to whether a mining

claim has been abandoned does not involve the construction of an act of congress, so as to give the federal courts jurisdiction. Inez Min. Co. v. Kinney (C. C. 1891) 46 Fed. 832.

The mere failure to perform the annual assessment work does not involve a construction of this section, so as to give jurisdiction to a federal court, where there is no dispute between the parties as to the amount of work to be done upon a mining claim in a particular year, and where no question of law is presented as to what constitutes a resumption of work. Wise v. Nixon (C. C. 1896) 76 Fed. 3, 4.

§ 4621. (Act Feb. 11, 1875, c. 41.) Expenditure of money on tunnels.

Section two thousand three hundred and twenty-four of the revised statutes, be, and the same is hereby, amended so that where a person or company has or may run a tunnel for the purposes of developing a lode or lodes, owned by said person or company, the money so expended in said tunnel shall be taken and considered as expended on said lode or lodes, whether located prior to or since the passage of said act; and such person or company shall not be required to perform work on the surface of said lode or lodes in order to hold the same as required by said act. (18 Stat. 315.)

This was an act entitled "An act to amend section twenty-three hundred and twenty-four of the Revised Statutes of the United States relating to mining claims."

R. S. § 2324, mentioned in this act, is set forth ante, § 4620.

Notes of Decisions

Tunnel construction as work.—See, also, notes to § 4620, ante.

This section does not affect the character of other work to be done or improvements to be made according to the law before the section took effect, except as it gives a special value to making a tunnel. Chambers v. Harrington (1884) 111 U. S. 350, 355, 4 Sup. Ct. 428, 28 L. Ed. 452; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 117.

Contiguity of claims.—Work done in a tunnel may be applied as assessment work on a mining location, though the person doing the work does not own a continuous strip of territory from the portal of the tunnel to the boundary of such location. Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345.

§ 4622. (R. S. § 2325, as amended, Act Jan. 22, 1880, c. 9, § 2.) Patents for mineral lands, how obtained.

A patent for any land claimed and located for valuable deposits may be obtained in the following manner: Any person, association, or corporation authorized to locate a claim under this chapter, having claimed and located a piece of land for such purposes, who has, or have, complied with the terms of this chapter, may file in the proper land-office an application for a patent, under oath, showing such compliance, together with a plat and field-notes of the claim or claims in common, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of the claim or claims, which shall be distinctly marked by monuments on the ground, and shall post a copy of such plat, together with a notice of such application for a patent, in a conspicuous place on the land embraced in such plat previous to the filing of the application for a patent, and shall file an affidavit of at least two persons that such notice has been duly posted, and shall file a copy of the notice in such land-office, and shall thereupon be entitled to a patent for the land, in the manner following: The register of the land-office, upon the filing of such application, plat, field-notes, notices, and affidavits, shall publish a notice that such application has been made, for the period of sixty days, in a newspaper to be by him designated as published nearest to such claim; and he shall also post such notice in his office for the same period. The claimant at the time of filing this application, or at any time thereafter, within the sixty days of publication, shall file with the register a certificate of the United States surveyor-general that five hundred dollars' worth of labor has

been expended or improvements made upon the claim by himself or grantors; that the plat is correct, with such further description by such reference to natural objects or permanent monuments as shall identify the claim, and furnish an accurate description, to be incorporated in the patent. At the expiration of the sixty days of publication the claimant shall file his affidavit, showing that the plat and notice have been posted in a conspicuous place on the claim during such period of publication. If no adverse claim shall have been filed with the register and the receiver of the proper land-office at the expiration of the sixty days of publication, it shall be assumed that the applicant is entitled to a patent, upon the payment to the proper officer of five dollars per acre, and that no adverse claim exists; and thereafter no objection from third parties to the issuance of a patent shall be heard, except it be shown that the applicant has failed to comply with the terms of this chapter. Provided, That where the claimant for a patent is not a resident of or within the land district wherein the vein, lode, ledge, or deposit sought to be patented is located, the application for patent and the affidavits required to be made in this section by the claimant for such patent may be made by his, her, or its authorized agent, where said agent is conversant with the facts sought to be established by said affidavits. And provided, That this section shall apply to all applications now pending for patents to mineral lands.

Act May 10, 1872, c. 152, § 6, 17 Stat. 92. Act Jan. 22, 1880, c. 9, § 2, 21 Stat. 61.

This section was amended by Act Jan. 22, 1880, c. 9, cited above, by adding at the end of the section as originally enacted the proviso as set forth here.

The times allowed for filing adverse claims and for instituting adverse suits thereon, under this section and R. S. § 2326, post, § 4623, were extended, in Alaska, by Act June 7, 1910, c. 265, post, § 5053.

Notes of Decisions

I. Construction of section in general

1. Scope and purpose.
2. Nature of proceedings.
3. Extralateral rights.
4. Disposal of mineral lands.
5. Nature of claims before patent.

II. Land department and officers

6. Jurisdiction and authority.
7. Determination as to mineral character of land.
8. Issuance of patents.
9. —— Conclusiveness of judgment of court.
10. —— Termination of jurisdiction.
11. Conclusiveness of decisions of department.

III. Application for patent

12. Essential requisites.
13. —— Qualifications of applicant.
14. —— Location.
15. —— Possession of claim.
16. Mineral character of land.
17. Boundaries of claim.
18. Conflicting claims.
19. Affidavit.
20. Effect on obligation to perform assessment work.
21. Effect of rejection of application.

IV. Survey of claim

22. Jurisdiction and duty of surveyor-general.
23. Requisites and effect of survey.
24. Plat.
25. Surveyor general's certificate as to plat and survey.
26. Effect of errors in survey.

V. Improvements and expenditures

27. Requirements and purpose.
28. Character and value.
29. Proof expenditures.
30. —— Surveyor general's certificate.

VI. Notice of application for patent

31. Purpose and reason.
32. Publication.
33. Insufficient notice.

VII. Adverse claims

34. Scope and purpose of statute.
35. Nature of adverse claims.
36. —— Co-owners or other claiming under same location.
37. —— Tunnel site claim.
38. —— Town-site occupants.
39. Duty to file and assert claim.
40. Time of filing.
41. Effect of failure to assert adverse claim.
42. Proof of adverse claim.
43. Adverse suit.
44. —— Jurisdiction of federal court.

VIII. Protest and intervention

45. Right to protest or intervene.
46. Effect.

IX. Entry

47. Nature and effect.
48. Effect on obligation to perform assessment work.
49. Effect on right to cut timber.
50. Equitable title acquired by entry and payment.
51. Effect of certificate.
52. Title by relation.
53. Cancellation of entry.
54. —— Notice.
55. —— Effect.

X. Patent

56. Scope and purpose of section.
57. Purpose of patent.
58. Mineral character of lands.
59. Title or estate acquired before patent.
60. Merger of estates.
61. Nature and effect of patents for placer and lode claims.
62. Conditions precedent to issuance.
63. —— Location and possession.
64. Requisites and validity.
65. —— Issuance pending suit.
66. —— Area or dimensions of ground.
67. —— Consolidated claims.
68. —— Noncontiguous tracts.
69. —— Exceptions and reservations.
70. —— Presumptions.
71. —— Persons entitled to attack patent.
72. Patentees.
73. —— Co-owners.
74. —— Trust.
75. Description of land.
76. —— Reference to survey.
77. Effect as conveyance.
78. Effect as conveyance of surface and subsurface or extralateral rights.
79. Effect as evidence and determination of rights.
80. —— Tunnel owners.
81. Effect of patent for part of claim.
82. Date of patentee's title, and title by relation.
83. Conclusiveness.
84. —— Validity, and rights of patentee.
85. —— Matters not concluded.
86. Collateral attack.
87. —— Void patent.
88. Cancellation and vacation.
89. —— Cancellation for fraud.
90. —— Proof.
91. —— Effect.

I. CONSTRUCTION OF SECTION IN GENERAL

1. Scope and purpose.—This, with the following section, prescribes the procedure which a party or an association seeking a patent must follow. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; McKinley v. Wheeler (1889) 9 Sup. Ct. 638, 639, 130 U. S. 630, 32 L. Ed. 1048; U. S. v. Fickett (1913) 205 Fed. 134, 135, 123 C. C. A. 366; Harper v. Hill (1911) 113 P. 162, 159 Cal. 250, 254; Meyendorf v. Frohner (1879) 3 Mont. 282, 323; Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378, 410; Mattingly v. Lewisohn (1888) 19 P. 310, 8 Mont. 259, 263; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 37.

The provisions of this section apply to applications for a placer patent. Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 256, 4 C. C. A. 303 (appeal dismissed [1896] 17 Sup. Ct. 997, 41 L. Ed. 1180); Northern Pacific R. Co. v. Cannon (1893) 54 Fed. 252, 256, 4 C. C. A. 303.

On making the proper application and showing the required facts, and on the publication by the register, it is assumed that the applicant is entitled to a patent upon the payment of the required price, and that no adverse claim exists. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 656, 26 L. Ed. 875.

This section prescribes the necessary steps to be taken by an applicant to obtain a patent for mineral land, and in the absence of an adverse claim it shall be assumed that the applicant is entitled to patent on proof that he has complied with the law. Marshall Silver Min. Co. v. Kirtley (1889) 21 P. 492, 12 Colo. 410, 414; Lee v. Stahl (1889) 22 P. 436, 13 Colo. 174, 176.

The provisions relating to proceedings upon applications for patent are for the purpose of enabling claimants to obtain a final grant of the legal title from the government for ground previously acquired and to avoid the necessity of doing annual work. Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 137, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694. See, also, Aurora Hill Con. Min. Co. v. Eighty-Five Mining Co. (C. C. 1888) 34 Fed. 515, 519.

After the applicant for patent has once initiated the proceeding in the Land Office under this and the following section, an independent suit in equity to quiet title, not in any way connected with the patent proceeding, will be dismissed, because the plaintiff has in the patent proceeding a plain, adequate, and complete remedy at law. Allen v. Myers (1901) 1 Alaska, 114.

2. Nature of proceedings.—The proceedings to obtain a patent under this section is in the nature of a proceeding in rem, and is binding upon all the world, so far as any unrepresented adverse claim is concerned. Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C. 1887) 33 Fed. 562, 565.

The proceedings of the general land office with reference to an application and the granting of a patent for a mining claim is judicial in its character and is in the nature of a proceeding in rem. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 873.

The proceedings on application for patent to a mining claim before the land department are ex parte unless an adverse claim is filed, and when filed the proceedings are referred to the courts, but in all other cases they are heard and determined in the land department. South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 47 (dissenting opinion).

3. Extralateral rights.—Questions of extralateral rights are not involved in proceedings for patent. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129 Pac. 308; Id. (1914) 138 Pac. 71, 73, 36 Nev. 543.

Under this section the only matters mentioned for examination and consideration relate to the surface of the ground, and there is no provision for any determination of subterranean rights. Lawson v. United States Min.

Co. (1907) 207 U. S. 1, 16, 28 Sup. Ct. 15, 52 L. Ed. 65; affirming United States Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587.

This section makes no provision for granting any extralateral rights. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 49, 27 C. C. A. 50.

4. Disposal of mineral lands.—The term "valuable deposits" in this section, the expression "lands valuable for mineral" in section 4613, ante, the term "valuable mineral deposits" in section 2319, R. S., as well as the word "mines" in section 4619, ante, and "mines of gold" in section 4798, post, all refer substantially to the same thing and embrace both lodes and veins and placers. Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 33.

Provisions for classifications of mineral lands by the laws of Spain and Mexico are similar to provisions of this section, and the disposition of mineral lands under either government was a matter of revenue. U. S. v. San Pedro & Cannon del Agua Co. (1888) 17 Pac. 337, 4 N. Mex. (Johns.) 225, 304.

5. Nature of claims before patent.—See, also, notes to § 4618, ante.

Permission is given and the terms prescribed upon which the locators of mining claims may purchase the property, but they are not compelled to do so. Black v. Elkhorn Min. Co. (1892) 52 Fed. 859, 860, 3 C. C. A. 312. See Forbes v. Gracey (1876) 94 U. S. 762, 24 L. Ed. 313.

This section contains nothing which prevents local legislatures from legislating upon matters relating to the regulation of mining claims. O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 258.

Lands located under this and other sections of the mining laws are called mining claims, and the locators are regarded as owners antecedent to the entry for patent. Allen v. Dunlap (1893) 33 P. 675, 24 Or. 229, 233.

II. LAND DEPARTMENT AND OFFICERS

6. Jurisdiction and authority.—See, also, notes to § 4623, post.

The land department has jurisdiction to determine the question of priority as between conflicting lode locations embraced in the same group application. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129 Pac. 308.

Individual rights to mining claims can be acquired through the land office only upon the terms and conditions prescribed by the mining laws. Lily Min. Co. v. Kellogg (1903) 74 Pac. 518, 27 Utah, 111, 115.

7. Determination as to mineral character of land.—Whenever mines are found in lands belonging to the United States, they may be claimed and worked, provided existing rights of others, from prior location, are not interfered with, and whether these rights are thus interfered with, which should preclude the location of the miner and the issue of a patent to him or his successor in interest, is, when not subjected under the law of congress to local tribunals, a matter properly cognizable by the land department when application is made to it for patent; and the inquiry thus presented must necessarily involve the determination of the mineral character of the land. Steele v. Smelting Co. (1882) 106 U. S. 447, 450, 1 Sup. Ct. 389, 27 L. Ed. 226; Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 35.

The decision of the land department in reference to the existence or nonexistence of salines or mines is conclusive upon the courts. Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 Pac. 333, 11 Ariz. 241, 250. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226.

Where the character of land is involved in a controversy between conflicting claimants, and the determination of that question fixes the right to purchase such land, the question can only be decided by the land department, as the courts are not clothed with power to decide the question. Wright v. Town of Hartville (1905) 81 Pac. 649; 82 Pac. 450, 13 Wyo. 497, 507.

The question of whether land is mineral in character cannot be determined in an action in aid of an adverse claim, but such determination is for the United States Land Department in the first instance; and, where the land department has recognized a mining location as valid, the court in an adverse action cannot review the action of the department. Nevada Exploration & Mining Co. v. Spriggs (Utah, 1912) 124 Pac. 770.

8. Issuance of patents.—See, also, notes to § 4623, post.

The land officers, who are merely agents of the law, have no authority to insert in the patent any other terms than those of conveyance, with recitals showing a compliance with the law and the conditions which it prescribes. Deffeback v. Hawke (1885) 115 U. S. 392, 406, 6 Sup. Ct. 95, 29 L. Ed. 423; Davis v. Weibbold (1891) 139 U. S. 507, 527, 11 Sup. Ct. 628, 35 L. Ed. 238; Shaw v. Kellogg (1898) 170 U. S. 312, 18 Sup. Ct. 632, 42 L. Ed. 1050; Roberts v. Southern Pacific R. Co. (C. C. 1911) 186 Fed. 934, 945.

In issuing a patent to a mining claim, the land department must take notice, not only of acts of congress, but of local laws and regulations. Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co. (1912) 194 Fed. 620, 114 C. C. A. 392.

The land department, in cases of pat-

ents to pre-emptioners, homestead claimants, and other purchasers of the public lands has acted upon the theory that patents to lands not known to be mineral lands at the time the patent is issued carry the title to all mines subsequently discovered in such lands, notwithstanding the reservation from sale of mineral lands in the statute. Cowell v. Lammers (C. C. 1884) 21 Fed. 200, 206.

An executive officer has no authority to issue a patent for mineral lands entered by cash entry as agricultural lands. U. S. v. Culver (C. C. 1892) 52 Fed. 81, 83.

In an action at law parol evidence is admissible to show that officers of the land department had no authority to issue a patent where the land had been previously disposed of or reserved from sale, and in actions of ejectment the plaintiff must prevail on the strength of his own title. Horsky v. Moran (1898) 53 Pac. 1064, 21 Mont. 345, 353. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 644, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 106 U. S. 447, 453, 1 Sup. Ct. 389, 27 L. Ed. 226.

The government having issued a patent for a mining claim cannot by the authority of its own officers invalidate such patent by the issuing of a second one for the same property. Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 Pac. 71, 73, 36 Nev. 543.

9. —— Conclusiveness of judgment of court.—See, also, notes to § 4623, post.

The officers of the government as to the issuance of a patent are governed by the judgment of the court where the conflicting claims are determined. Richmond Min. Co. v. Rose (1885) 114 U. S. 576, 585, 5 Sup. Ct. 1055, 29 L. Ed. 273; Last Chance Min. Co. v. Tyler Min. Co. (1895) 157 U. S. 683, 693, 15 Sup. Ct. 733, 39 L. Ed. 859. See Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; Wright v. Town of Hartville (1905) 81 P. 649; 82 P. 450, 13 Wyo. 497, 506.

The land department may inquire into the character of the land involved in an adverse suit. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 194 U. S. 220, 232, 24 Sup. Ct. 632, 48 L. Ed. 944.

10. —— Termination of jurisdiction.—This and the next section do not apply where a person, before the required publication, has gone through all the regular proceedings required to obtain a patent and has received it. In such case the control of the land department over the title has ceased. Iron Silver-Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 768, 135 U. S. 286, 34 L. Ed. 155.

When the government has issued and delivered a patent for a mining claim the control of the department ceases, and the title can then be impeached only by a bill in chancery. Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 286, 301, 10 Sup. Ct. 765, 34 L. Ed. 155; Lightner Min. Co. v. Superior Court, etc. (1911) 112 P. 909, 14 Cal. App. 642, 648.

When a patent for a mining claim is issued the functions of the land department terminate, as this is the culmination of the proceeding in rem and the final judgment of the tribunal specially charged with passing the government title, and with the title passes all authority or control of the executive department over the land and over the title which it conveys. Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 73, 36 Nev. 543.

11. Conclusiveness of decisions of department.—See, also, notes to § 699, ante.

It is the province of the land department, in an application for a patent for a mining claim, to pass upon the qualifications of the applicant, the acts done by him to secure title, and the nature of the land, and its judgment upon these matters is conclusive. Steel v. Smelting Co. (1882) 106 U. S. 447, 451, 1 Sup. Ct. 389, 27 L. Ed. 226. New Dunderberg Min. Co. v. Old (C. C. A. 1897) 79 Fed. 598; Durango Land & Coal Co. v. Evans (1897) 80 Fed. 425, 25 C. C. A. 523; Buena Vista Petroleum Co. v. Tulare, etc., Min. Co. (C. C. 1895) 67 Fed. 226; Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597; Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 874; Roberts v. Southern Pacific R. Co. (C. C. 1911) 186 Fed. 934, 941; Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 P. 333, 11 Ariz. 241, 250; Poire v. Wells (1882) 6 Colo. 406, 412; Gurney v. Brown (1904) 77 P. 357, 32 Colo. 472, 480; Le Fevre v. Amonson (1905) 81 P. 71, 11 Idaho, 45; Talbot v. King (1886) 9 P. 434, 6 Mont. 76, 105; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 73, 36 Nev. 543; Board of Education v. Mansfield (1903) 95 N. W. 286, 17 S. D. 72, 78, 106 Am. St. Rep. 771. See Davis v. Weibbold (1891) 139 U. S. 507, 523, 11 Sup. Ct. 628, 35 L. Ed. 238; Barden v. Northern Pacific R. Co. (1894) 154 U. S. 288, 320, 14 Sup. Ct. 1030, 38 L. Ed. 992; Pacific Coast Min. etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 940; Carter v. Thompson (C. C. 1894) 65 Fed. 329.

The decision of the land department as to whether certain land is swamp land, saline land, or mineral land, is conclusive, and is not open to relitigation in the courts except in cases of fraud. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875;

Steel v. Smelting Co. (1882) 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Burfenning v. Chicago, etc., R. Co. (1896) 163 U. S. 321, 323, 16 Sup. Ct. 1018, 41 L. Ed. 175; Jameson v. James, 155 Cal. 275, 278.

In the matter of issuing a patent to a mining claim the officers of the land department exercise a judicial function and their judgment as to matters of fact and within their exclusive jurisdiction is unassailable except in a direct proceeding. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 640, 26 L. Ed. 875; Emmons v. U. S. (C. C. 1909) 175 Fed. 514, 515.

The land department, as a part of the administrative and executive branches of the government, supervises all proceedings taken to obtain title to a mining claim; and as its officers are called upon to hear testimony as to matters presented for their consideration and to pass upon the same, they exercise a judicial function, and their judgment as to certain matters of fact is conclusive as against collateral attack. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 640, 26 L. Ed. 875; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 43. See Wight v. Dubois (C. C. 1884) 21 Fed. 693; Jeffords v. Hine (1886) 11 P. 351, 2 Ariz. 162; Talbott v. King (1886) 9 P. 434, 6 Mont. 76; Ferry v. Street (1886) 7 P. 712, 11 P. 571, 4 Utah, 521.

Where the land department under its duty has ascertained the existence of certain required facts, its determination is conclusive against any collateral attack. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 645, 26 L. Ed. 875; McKnight v. El Paso Brick Co. (1911) 120 P. 694, 16 N. Mex. 721, 730. See Knight v. United States Land Ass'n (1891) 142 U. S. 161, 211, 12 Sup. Ct. 258, 35 L. Ed. 974; Mantle v. Noyes (1885) 5 P. 856, 5 Mont. 274, 293.

The land officers are charged with the duty of ascertaining whether lands are subject to be patented or not, and their determination is conclusive as against a person claiming the subsequent location of a mining claim on such lands. Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348, 349.

When the officers of the land department are invested with judicial authority to decide the facts upon which the title to a mining claim in controversy may be obtained the patent or certificate of entry affords evidence of such decision, and the courts will not review them, as they are conclusive of the legal title in all courts and in all forms of judicial proceedings. McEvoy v. Hyman (C. C. 1885) 25 Fed. 539, 540.

Upon all questions of fact the decisions of department officers relating to mining claims are conclusive, and their decisions upon questions of law only can be reviewed in a proper case made in a direct proceeding for that purpose, and their decisions upon questions of law or fact are not subject to collateral attack. Aurora Hill, etc., Min., Co. v. Eighty-Five Min. Co. (C. C. 1888) 34 Fed. 515, 518.

The question as to the true boundary of a mining claim for which a patent is asked is a question of fact, coming properly within the jurisdiction of the land department; and its action therein is conclusive, in the absence of fraud. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 873.

A decision of the land office awarding a patent to a claimant for mineral lands, in the absence of an adverse claim, is a judgment by default and is as conclusive as to the matters adjudicated as a judgment upon contested issues. Id.

III. APPLICATION FOR PATENT

12. Essential requisites.—By this section the applicant for a patent must show compliance with the following conditions: (1) Filing an application showing a compliance with the law, with a plat and field notes of his claim made by or under the direction of the surveyor general, and that the boundaries were distinctly marked by monuments on the ground. (2) A previous posting of a copy of the plat with notice of his intended application placed in a conspicuous position on the claim. (3) An affidavit of at least two persons that such notice was duly posted. (4) Filing a copy of the notice with his application. (5) The designation of a newspaper nearest to the claim in which notice may be given by the register. (6) Filing with his application, or within 60 days thereafter, a certificate of the United States surveyor general that $500 worth of labor has been expended or improvements to that amount have been made upon the claim. (7) Filing a certificate of the United States surveyor general that the plat is correct, and with such further description, by reference to natural objects or permanent monuments, as shall identify the claim. (8) Furnishing an accurate description to be incorporated in the patent. (9) At the expiration of 60 days to file his affidavit showing that the plat and notice have been posted in a conspicuous position on the claim during the period of publication. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 656, 26 L. Ed. 875; Gwillim v. Donnellan (1885) 115 U. S. 45, 48, 5 Sup. Ct. 1110, 29 L. Ed. 348; Chambers v. Harrington (1884) 111 U. S. 350, 351, 4 Sup. Ct. 428, 28 L. Ed. 452; Richmond Min. Co. v. Rose (1885) 114 U. S. 576, 581, 5 Sup. Ct. 1055, 29 L. Ed. 273; Wolverton v. Nichols (1886) 119 U. S. 485, 486, 7 Sup. Ct. 289, 30 L. Ed. 474; McKinley v. Wheeler (1889) 130 U. S. 630, 634, 9 Sup. Ct. 638, 32

L. Ed. 1048; Dahl v. Raunheim (1889) 132 U. S. 260, 261, 10 Sup. Ct. 74, 33 L. Ed. 324; Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 286, 297, 10 Sup. Ct. 765, 34 L. Ed. 155; Ducie v. Ford (1891) 138 U. S. 587, 591, 11 Sup. Ct. 417, 34 L. Ed. 1091; Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 145 U. S. 428, 431, 12 Sup. Ct. 877, 36 L. Ed. 762; Perego v. Dodge (1896) 163 U. S. 160, 164, 16 Sup. Ct. 971, 41 L. Ed. 113; Black v. Elkhorn Min. Co. (1896) 163 U. S. 445, 448, 16 Sup. Ct. 1101, 41 L. Ed. 221; Del Monte Min. Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 71, 18 Sup. Ct. 895, 43 L. Ed. 72; Blackburn v. Portland Gold Min. Co. (1900) 175 U. S. 571, 575, 20 Sup. Ct. 222, 44 L. Ed. 276; El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 256, 58 L. Ed. 943, L. R. A. 1915A, 1113; New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 604, 25 C. C. A. 116; Erwin v. Perego (1899) 93 Fed. 608, 609, 35 C. C. A. 482; Bunker Hill, etc., Min. Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665.

The applicant must show, under oath, compliance with the mining laws and the filing of a plat and field notes, and that the boundaries of the claim have been distinctly marked upon the ground, and the register shall then publish a notice of such application for a period of 60 days. Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219, 226. See Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

13. —— Qualifications of applicant.—See, also, notes to § 4614, ante.

A corporation, all of whose members are citizens of the United States, is competent to locate a mining claim. McKinley v. Wheeler (1889) 9 Sup. Ct. 638, 130 U. S. 630, 32 L. Ed. 1048.

Persons authorized to locate mining claims may make application for patent to the same. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 463, 17 C. C. A. 190.

An applicant for a patent must have the right to possession and must be a qualified locator. Lee Doon v. Tesh (1885) 6 P. 97, 68 Cal. 43, 45.

14. —— Location.—See, also, notes to § 4615, ante.

As between the government and a locator, it is not a vital fact that there was a discovery of mineral before the commencement of any of the steps required to perfect a location, where at the time of the entry everything had been done which entitled the locator to an entry, such as a discovery and a perfect location, and does not justify the government in rejecting the application because the customary order of procedure had not been followed. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 196 U. S. 337, 354, 25 Sup. Ct. 266, 49 L. Ed. 501. See Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 99, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392.

An application for a patent necessarily carries with it, if not in express terms, certainly an implied allegation, that the location upon which the application was based was made upon land open to location and therefore was the prior location. Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 545, 48 C. C. A. 665, affirmed in Empire State, etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 420, 421, 52 C. C. A. 222.

The location on a vein must be made by taking up "a piece of land" to include it, and no other means are provided; and it is only upon condition of complying with the law that the locator becomes entitled to anything, and in no case is a location complete until the surface claim is defined. Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442, 458.

The location of a mining claim on a vein must be made by taking up "a piece of land" to include the vein. Id.

15. —— Possession of claim.—A peaceable adverse entry, coupled with the right to hold the possession of a relocated mining claim thereby acquired, operates as an ouster of the relocator by breaking the continuity of his holding and deprives him of the title he might have obtained if he had kept it for the requisite length of time. Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735; Malone v. Jackson (1905) 137 Fed. 878, 881, 70 C. C. A. 216. See Ware v. White (1907) 108 S. W. 831, 81 Ark. 220, 228.

If a relocator of a mining claim holds possession and works his claim long enough and keeps all others out, his right to a patent is complete. Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735; Malone v. Jackson (1905) 137 Fed. 878, 881, 70 C. C. A. 216.

A relocator has no grant of any right of possession and his ultimate right to a patent depends entirely upon his keeping himself in and all others out, and if he is not actually in, he is in law out. Id.

Under this section an applicant for a patent claiming under a mining location is not required to show actual possession of the claim in order to entitle him to a patent therefor. Burke v. McDonald (1888) 13 P. 351, 2 Idaho (Hasb.) 339, 355.

16. Mineral character of land.—See, also, notes to §§ 4613, 4614, ante.

An application for patent must show that the land described was not only located for valuable mineral deposits, but that it is claimed for such deposits; and if it appears that the purpose of either the location or of the patent is to secure valuable water power or timber that the claimant is not entitled to under the mineral land laws, the

patent can not be issued. Multnomah Mining, Milling & Development Co. v. U. S. (1914) 211 Fed. 100, 128 C. C. A. 28; U. S. v. Lavenson (D. C. 1913) 206 Fed. 755, 763.

17. Boundaries of claim.—The Spanish and Mexican mining law confined the locator to perpendicular lines on every side. Flagstaff Mining Co. v. Tarbet (1878) 98 U. S. 463, 468, 25 L. Ed. 253; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 61, 18 Sup. Ct. 895, 43 L. Ed. 72.

A mineral claimant is restricted to the lines of his survey as to the linear course of the lode. Hall v. Equator Min. & Smelting Co. (C. C. 1879) Fed. Cas. No. 5,931. See Patterson v. Hitchcock (1877) 3 Colo. 533; Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

The requirements of this section as to the proof showing accurately the boundaries of a mining claim in an application for patent applies to a placer claim located on surveyed lands. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 224.

18. Conflicting claims.—See, also, notes to § 4618, ante.

While the area in conflict is usually awarded to the senior claim, it is not always or necessarily so, because acts or circumstances entirely consistent with the true order of location may have intervened, which require that this area be awarded to a junior claim. U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587, judgment affirmed Lawson v. U. S. Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

An application for a patent to one of conflicting claims presents the question as to which of the claims is superior within the overlapping surface boundaries, and the inclusion of the areas in conflict within a patent on such application is necessarily a determination that at the time of its issue such area was a part of the patented claim. Id.

19. Affidavit.—A defective affidavit does not render the patent proceedings void. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 258, 58 L. Ed. 943, L. R. A. 1915A, 1113.

20. Effect on obligation to perform assessment work.—See, also, notes to § 4620, ante.

The filing of an application for a patent does not suspend the obligation to keep up the required work where such application remains dormant for years, and the full purchase money has not been paid, and the claim or mine is open to relocation. Gillis v. Downey (1898) 85 Fed. 483, 489, 29 C. C. A. 286.

21. Effect of rejection of application.—While the land department has the power to set aside a mining location and restore the land to the public domain, yet the mere rejection of an application for entry on the ground that the land was not placer mining ground, nor subject to entry as a placer mining claim does not have that effect, and the applicant may submit a second or amended application and offer further testimony as to his right to a patent. Clipper Min. Co. v. Eli Min. Co. (1904) 194 U. S. 220, 223, 24 Sup. Ct. 632, 48 L. Ed. 944; Clipper Min. Co. v. Eli Min., etc., Co. (1902) 68 P. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89.

The judgment of the land department rejecting an application for patent to a mining claim leaves the applicant as though no application had been made. Beals v. Cone (1900) 62 P. 948, 27 Colo. 473, 483, 83 Am. St. Rep. 92; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 P. 915, 20 Colo. App. 474, 483.

IV. SURVEY OF CLAIM

22. Jurisdiction and duty of surveyor general.—See, also, notes to § 4642, post.

It seems that the surveyor general has no jurisdiction to decide the respective rights of the parties in case of conflicting claims. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 80, 18 Sup. Ct. 895, 43 L. Ed. 72.

In making a survey for a patent the surveyor general may ascertain and locate the true line of the apex in order to fix the boundaries of the claim. Harper v. Hill (1911) 113 P. 162, 159 Cal. 250, 255. See Howeth v. Sullenger (1896) 45 P. 841, 113 Cal. 547, 551.

When the title to a mining claim has passed out of the United States, an applicant for patent may not be required to perform all the acts specified in this section, but he should perform such as could and would be of any avail, among these a survey made of the claim under the directions of the surveyor general. Meyendorf v. Frohner (1879) 3 Mont. 282, 323.

23. Requisites and effect of survey.—In every survey of a mining claim the following particulars should be observed: (a) The exterior boundaries of the claim should be represented on the plat and in the field notes. (b) The intersections of lines with those of a conflicting prior survey should be noted. (2) Conflicts with unsurveyed claims should be shown by actual survey if the applicant does not claim the area in conflict. (d) The total area of the claim embraced by the exterior boundaries should be stated and also the area in conflict with any intersecting survey. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 80, 81, 18 Sup. Ct. 895, 43 L. Ed. 72.

Each locator of a mining claim on his application to the surveyor general is entitled to the survey of the entire

claim as located if he has otherwise complied with the law. Id.

The official survey of land entered as a mining claim may serve for a second application after the cancellation of the first entry. Shank v. Holmes (Ariz. 1914) 137 P. 871.

Owing to priority in patent survey the owners of a mining claim held to have priority over a conflicting claim. Indiana Nevada Mining Co. v. Gold Hills Min. & Mill. Co. (Nev. 1912) 126 Pac. 965.

The rules and regulations of the general land office in relation to mining claims have the force and effect of law and may require the description of a mining claim to show definitely the portions intended to be included and may require that the survey of contiguous locations shall distinguish the several locations and exhibit the boundaries of each and state the area of each location and also the area in conflict with any intersecting survey or claim. Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 75, 36 Nev. 543.

24. Plat.—The plat must show that the end lines of each location are parallel in order that the patentee may have the right to follow a vein outside of the bounds of his location. Iron Silver Min. Co. v. Elgin Min., etc., Co. (1886) 118 U. S. 196, 6 Sup. Ct. 1177, 30 L. Ed. 98.

In surveying a claim, if it is found that two surveys conflict, the plat and field notes should show the extent of such conflict and give the area embraced in both surveys and the distances from the established corners at which the respective boundaries of the respective surveys intersect. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 80, 18 Sup. Ct. 895, 43 L. Ed. 72.

25. Surveyor general's certificate as to plat and survey.—The surveyor general makes the certificate required by this section on the reports furnished him by the deputy mineral surveyors, and for this reason they are prohibited from having any interest in the mining claim surveyed. Waskey v. Hammer (1912) 223 U. S. 85, 92, 32 Sup. Ct. 187, 56 L. Ed. 359.

The plat and field notes of a deputy mineral surveyor must have the approval of the United States surveyor general before transmission to the general land office; and when the field notes of a deputy mineral surveyor are approved by the surveyor general, and such plat and field notes show an exclusion made by the officials of the government upon whom the duty is imposed of making the same, and when patent issues and reference is made to such field notes, the exclusions therein mentioned become the exclusions of the government itself, and it is immaterial at whose instance they were made, even if made at the suggestion of the applicant himself. Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 Pac. 71, 76, 36 Nev. 543.

26. Effect of errors in survey.—The owner of a mining claim, seeking a patent, cannot be deprived of his property because of the surveyor's error, which is cured by a resurvey. Basin Mining & Concentrating Co. v. White (1899) 55 Pac. 1049, 22 Mont. 147.

V. IMPROVEMENTS AND EXPENDITURES

27. Requirements and purpose.—This section requires, among other things, proof of the expenditure of $500 upon the claim, and a person claiming a patent under the possession held under section 2332 R. S. is not exempted from the requirements of this section. Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. Mex. 96, 121.

Two purposes, at least, of this and the preceding sections were to insure good faith in the location of a mining claim and to require the locator to exhibit a claim which would, by reason of its development or the improvements made for its benefit, be of some value, and congress assumed that $500 worth of labor or improvements would demonstrate its value as a mine. Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 135.

28. Character and value.—Labor or improvements, to be credited on a group of claims under this section, must actually promote, or directly tend to promote, the extraction of mineral from the land or facilitate the development of the claim as a mine or mining claim, or be necessary for its care or the protection of the mining works located thereon. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875; United States v. Iron Silver Min. Co. (C. C. 1885) 24 Fed. 568; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 117; Doherty v. Morris (1891) 28 P. 85, 17 Colo. 105; Lockhart v. Rollins (1889) 21 P. 413, 2 Idaho (Hasb.) 540. See, also, Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345, 353.

Work done for the purpose of discovering mineral, whatever the particular form or character of the deposit which is the object of the search, is within this section. U. S. v. Iron Silver-Min. Co. (C. C. 1885) 24 Fed. 568, decree affirmed (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571.

In any case at least $500 shall have been expended to entitle the locator to a patent, though for a single location $100 per year will protect his possessory right. McDonald v. Montana

Wood Co. (1894) 35 P. 668, 14 Mont. 88, 91, 43 Am. St. Rep. 616.

29. **Proof expenditures.**—In an application for a patent for a mining claim the proof must show that the improvements have been made for the purpose of developing the particular claim applied for, but where there is no adverse claim the applicant may be permitted to furnish satisfactory evidence of the mineral character of the land, and of the value of the improvements placed thereon. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 655, 26 L. Ed. 875.

An applicant for a patent is required to furnish proof of the character and value of labor and improvements made upon a mining claim in an application for a patent, but he is not responsible for false statements or affidavits made by witnesses. U. S. v. King (1897) 83 Fed. 188, 190, 27 C. C. A. 509.

30. —— **Surveyor general's certificate.**—The certificate of the surveyor general as to the quantity of annual assessment work and as to the character of improvements upon a mining claim is subject to be examined by the department before patent is issued; but such certificate cannot be impeached in the courts after patent issues. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 200, 128 U. S. 673, 32 L. Ed. 571; Same v. King (1889) 9 Mont. 75, 22 Pac. 498.

The sufficiency of the character and value of labor and improvements made upon the premises by an applicant for a mineral patent, is to be determined by the surveyor general from his own observations or those of his deputy, or from the testimony of persons having knowledge of the subject. U. S. v. Iron Silver Min. Co. (1888) 9 S. Ct. 195, 128 U. S. 673, 685, 32 L. Ed. 571; U. S. v. King (1897) 83 Fed. 188, 27 C. C. A. 509.

The certificate of the surveyor general that $500 in labor or improvements has been expended is conclusive evidence that such labor has been done or improvements made. U. S. v. Iron Silver-Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 673, affirming decree (C. C. 1885) 24 Fed. 568.

The statute makes the certificate of the surveyor general evidence as to the sufficiency of the work performed and improvements made upon any mining claims. Id.

It will be presumed that a surveyor general who has certified to the value of labor and improvements upon a mineral claim did his duty as an officer. U. S. v. King (1897) 83 Fed. 188, 190, 27 C. C. A. 509.

An applicant for a mineral patent must file with the register with his application, or within 60 days thereafter, a certificate of the surveyor general that $500 worth of labor has been expended upon the claim. Id.

VI. NOTICE OF APPLICATION FOR PATENT

31. **Purpose and reason.**—The publication required by this section in adverse proceedings is itself process and brings all adverse claimants into court, though no supposed adversary is named in the notice, and on failure to assert their claims it is conclusively presumed that none exist, and that no third persons have any rights or equities in the land. Gwillim v. Donnellan (1885) 115 U. S. 45, 5 Sup. Ct. 1110, 29 L. Ed. 348; Deffeback v. Hawke (1885) 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423; Wight v. Dubois (C. C. 1884) 21 Fed. 693; Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C. 1887) 33 Fed. 562; Marshall Silver Min. Co. v. Kirtley (1888) 21 P. 492, 12 Colo. 410, 416; Hunt v. Eureka Gulch Min. Co. (1890) 24 P. 550, 14 Colo. 451, 455; People v. District Court (1894) 35 P. 731, 19 Colo. 343, 347. See South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 57.

The notice required by this section is a general notice to all persons who may from any cause have any interest in the land, and need not be personally served. Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 256, 257, 4 C. C. A. 303, appeal dismissed (1896) 17 Sup. Ct. 997, 41 L. Ed. 1180.

A person claiming an interest in a mining claim is charged with knowledge of the notice, which the mineral applicant is required to give by general publication and by posting notices upon the claim and of the notices required to be given by the land department; and on failure to file a contest the question then as to the character of the land is between the applicant and the government, and the decision on that point is conclusive. Id.

The publication of notice of an application for a patent required by the statute is notice to all the world to present to the land office any adverse claim to such application and a failure to do so constitutes in law an admission of the truth of every fact covered by such application and the issuance of a patent pursuant to such application, and a failure to adverse the same is as conclusive of the patentee's rights as if a contest in respect to such application had been initiated in the land office and subsequently adjudicated by a competent court in favor of the applicant, and in either case it is absolutely conclusive against all adverse claimants. Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 545, 48 C. C. A. 665, overruling Bunker Hill, etc., Co. v. Empire State, etc., Co. (C. C. 1900) 108 Fed. 189. See Richmond Min. Co. v. Rose (1885) 5 S. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Gwillim v. Donnellan (1885) 5 S. Ct. 1110, 115 U. S. 45, 29 L. Ed. 348; Last Chance Min., etc., Co. v. Tyler Min. Co. (1895)

15 S. Ct. 733, 157 U. S. 683, 695, 39 L. Ed. 859; Hamilton v. Southern Nev. Gold, etc., Min. Co. (C. C. 1887) 33 Fed. 562.

One claiming an interest in a mine must take notice of the patent proceedings, and he will not be permitted to attack the patent after a delay of 30 years. Socrates Quicksilver Mines v. Carr Realty Co. (1904) 130 Fed. 293, 64 C. C. A. 539.

After publication of notice in adverse proceedings the only right or privilege which any third person may assert is that of protest or objection filed with the land department. Wight v. Dubois (C. C. 1884) 21 Fed. 693, 696; Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248, 255.

The notice of an application for a patent for mineral lands for which the statute provides is the notice that is required, and when such a notice is given all persons are charged with such notice and no one is permitted to say that he did not in fact have notice. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 875.

The notice required to be given by an applicant for a patent is in effect a summons to all adverse claimants who are required to assert their right by filing an adverse within the time prescribed by this section. Healey v. Rupp (1906) 86 P. 1015, 37 Colo. 25.

32. Publication.—When the proper application is made, the register of the land office is required to publish a notice of such application for a period of 60 days in a newspaper designated by him and to post such notice in his office for the same period. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 656, 26 L. Ed. 875. See, also, Hunt v. Eureka Gulch Min. Co. (1890) 24 P. 550, 14 Colo. 451, 456.

The publication of the proper notice for the prescribed period by the land office on an application for a patent for mineral lands is due process of law. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 873.

The 60-day period for the publication of notice of application for patent commences to run from the date of the first publication, and in the absence of any showing when the first publication of notice was made the presumption will not be indulged that the first publication was made upon the same date of the filing of the application. Helbert v. Tatem (1906) 85 P. 733, 34 Mont. 3, 5.

33. Insufficient notice.—Where by mistake of the officers of the land department the published notice to adverse claimants did not contain a sufficient description of the premises, but notwithstanding this a final certificate of purchase was issued to the claimants, and 10 years after an order was made by the commissioner of the land office requiring publication of a supplemental notice to cure such defect, an order subsequently entered, after such publication, canceling the certificate of purchase as of the date of the republication order, was erroneous. Southern Cross Gold Min. Co. v. Sexton (1905) 82 P. 423, 147 Cal. 758.

VII. ADVERSE CLAIMS

34. Scope and purpose of statute.—This and the following section contain the legislation in reference to adverse claims. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 167 U. S. 108, 115, 17 Sup. Ct. 762, 42 L. Ed. 96; Blackburn v. Portland Gold Min. Co. (1900) 175 U. S. 571, 575, 20 Sup. Ct. 222, 44 L. Ed. 276; Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248, 253.

The statute in terms provides for the settlement of disputes and conflicts when a locator makes application for a patent, and authorizes the institution of adverse proceedings. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 77, 18 Sup. Ct. 895, 43 L. Ed. 72.

The purpose of the provisions of this and the following section is to secure a settlement and adjustment of all controversies respecting the property in order that the patent may be issued to the rightful owner, and if no adverse claim is presented it is assumed that no such claim exists, and it is this that makes the patent conclusive on all questions affecting the title pending at the time it is issued. Hall v. Equator Min. & Smelting Co. (C. C. 1879) Fed. Cas. No. 5,931. See Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112.

After publication of the statutory notice by the applicant, the only right or privilege remaining to any third parties is that of protest or objection filed with the land department, and cognizable there only. If sustained by the department, the proceedings had by the applicant are set aside; if overruled, the protester or objector is without further remedy. Wight v. Dubois (C. C. 1884) 21 Fed. 693.

This and the next section provide a special method of determining to which of two or more conflicting claimants patent shall issue, but the form of the action is not provided for. Davidson v. Calkins (C. C. 1899) 92 Fed. 230, 238. See, also, O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 422, 116 U. S. 418, 29 L. Ed. 669.

This section contemplates only the right of any person to come into the land office as a kind of amicus curiæ and protest or object to the issuance of a patent, and gives no right to assert an adverse claim, so that it cannot be said to provide an exclusive tribunal for the hearing of adverse claims arising after the period of publication, and thereby to prevent the assertion of such claims in

the state courts. Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248.

The purpose of a suit or an adverse claim is to determine for the information of the officers of the land department if either of the parties is entitled to be vested with the fee of the premises in dispute by purchase from the government. Healey v. Rupp (1900) 63 P. 319, 28 Colo. 102; Id. (1906) 86 P. 1015, 37 Colo. 25, 26; Mares v. Dillon (1904) 75 P. 963, 30 Mont. 117, 136.

The provisions of this and the following section relative to adverse claims contemplate proceedings to determine the right of possession between claimants of the same unpatented mineral lands. Le Fevre v. Amonson (1905) 81 P. 71, 11 Idaho, 45, 47; Wright v. Town of Hartville (1905) 81 P. 649, 82 P. 450, 13 Wyo. 497, 507.

The requirement as to the filing of adverse claims has no application to adverse claims that accrued before the act. Eclipse Gold & Silver Min. Co. v. Spring (1881) 59 Cal. 304.

Prior to the adoption of this statute and the enactment of any provision for filing or contesting adverse claims, the courts adjudicated upon conflicting rights to the public mineral lands, and this was founded in the necessities of the case, and though the general government was the owner yet not asserting title, the theory was maintained that possession under the rules and customs established and in force gave as to mining property a right which, excepting as to the United States, would be upheld as though title actually vested in the possessor. Lee Doon v. Tesh (1885) 6 P. 97, 68 Cal. 43. 47.

Adverse claims must be presented in the manner prescribed by law and during the period of publication of notice of application for patent, with one exception, that where abandonment occurs subsequent to such publication and prior to entry and payment, the executive department is then compelled to take jurisdiction, as the law allows the abandoned ground to be again located by any qualified person in the same manner as if no location had ever been made. South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 49.

On an application for a patent the land office, in the absence of the filing of an adverse claim, will indulge the presumption that no conflicting claims exist to the premises, but when an adverse claim is filed the presumption does not arise. Lockhart v. Farrell (1906) 86 P. 1077, 31 Utah, 155.

35. **Nature of adverse claims.**—Where lode claims are located within the boundaries of prior located placer claims, the rights of the conflicting claimants are determinable in adverse proceedings. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160.

The rights of an adverse claimant to a mining location are limited to those existing at the time of the filing of his adverse so that he is not entitled to urge a subsequent discovery for the purpose of preventing the issuance of a patent to the applicant. Healey v. Rupp (1906) 86 P. 1015, 37 Colo. 25.

On an application for a patent by a junior locator on failure of senior locator to adverse, it will be presumed that, at the time the junior location was made, the ground was open to entry, but where there is a third location, such third locator may adverse the application of the junior locator, and show that it is void, because the ground was not open to location. Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321.

The adverse claim mentioned in this section and the following section means the land-office adverse claim and the term used in section 4631, post, has reference to the adverse claim required to be filed under these sections. McCowan v. McClay (1895) 40 P. 602, 16 Mont. 234, 240.

The intersection of veins does not give rise to an adverse claim. Hickey v. Anaconda Copper Min. Co. (1905) 81 P. 806, 33 Mont. 46.

This section refers to a present tangible claim existing at some time during the 60-day period of publication. Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248, 254.

The right to relocate a mining claim for failure to do representation work accruing after the 60-day limitation has run, is not such an existing claim as was contemplated by the statute. Id.

36. —— **Co-owners or others claiming under same location.**—The provisions for the filing of adverse claims have reference to adverse claims arising from independent and conflicting locations, and not to a controversy between co-owners or others claiming under the same location. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 195, 150 U. S. 578, 37 L. Ed. 1189; Stevens v. Grand Central Min. Co. (1904) 133 Fed. 28, 67 C. C. A. 284; Hunt v. Patchin (C. C. 1888) 35 Fed. 816, 820; Doherty v. Morris (1887) 16 P. 911, 11 Colo. 12; Malaby v. Rice (1900) 62 P. 228, 15 Colo. App. 364, 368; Davidson v. Fraser (1906) 84 P. 695, 36 Colo. 1, 4 L. R. A. (N. S.) 1126; Allen v. Blanche Gold Mining Co. (1909) 102 Pac. 1072, 46 Colo. 199; Suessenbach v. First Nat. Bank (1889) 5 Dak. 477, 41 N. W. 662; Brundy v. Mayfield (1895) 38 P. 1067, 15 Mont. 201; McCarthy v. Speed (1899) 80 N. W. 135, 12 S. D. 7, 50 L. R. A. 184.

37. —— **Tunnel site claim.**—The failure of persons engaged in running a mining tunnel to "adverse" a surface claim located near the line of the tunnel, prior to a discovery of the vein in the tunnel, does not prejudice their rights to such vein. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. (1899) 17 Sup. Ct. 762, 764, 167 U. S. 108, 42 L. Ed. 96, affirming (1895) 13 C. C. A. 390, 66 Fed. 200.

The owner of a tunnel site, who simply seeks to protect his tunnel, and has as yet discovered no lode claim, is not required, to adverse an application for the patent of the lode claim through which the tunnel runs, the lode of which was discovered on the surface. Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. (1905) 25 Sup. Ct. 266, 274, 196 U. S. 337, 49 L. Ed. 501, affirming judgment Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200.

This and the following section do not require claimant of a tunnel site located across lode claims to file an adverse claim, when applications for patents of the lode claims are made, to protect his rights, where his interest is so uncertain that it cannot be fairly litigated when the applications are made. Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200, judgment affirmed Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

38. —— Town-site occupants.—See, also, notes to § 4798, post.

Occupants of lots in a town located on public lands of the United States, who have built on and improved the same, have a possessory right, which entitles them to contest the issuance of a patent to the claimant of a mining location covering such lots, though neither they nor the authorities of the town have taken any steps to secure title to themselves. Bonner v. Meikle (C. C. 1897) 82 Fed. 697.

The owner of a town lot, unpatented, lying within the exterior boundaries of a mining claim, cannot adverse an application for a patent for the claim. Behrends v. Goldsteen (1902) 1 Alaska, 518. See Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 286, 10 Sup. Ct. 765, 34 L. Ed. 155; Wright v. Town of Hartville (1905) 81 P. 649; 82 P. 450, 13 Wyo. 497.

Claimants claiming title, under a town-site patent, to the surface ground of a mining claim over which the town site is extended, are not relieved by such town-site patent from setting up their adverse claims on notice of application for a patent to the mining claim, and their failure to assert their claims before such patent is issued bars them from doing so thereafter. Butte City Smoke-House Lode Cases (1887) 6 Mont. 397, 12 Pac. 858.

39. Duty to file and assert claim.—Where an agent, trustee, or other person holding a confidential relation with the locator or owner of a mining claim, attempts, in violation of such relation, to relocate and obtain patent for such claim, the original locator or owner is not required to adverse the proceedings, but may after patent issues assert his rights in a court of justice. Turner v. Sawyer (1893) 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189; Lockhart v. Johnson (1901) 181 U. S. 516, 530, 21 Sup. Ct. 665, 45 L. Ed. 979. See Lockhart v. Leeds (1904) 195 U. S. 427, 433, 25 Sup. Ct. 76, 49 L. Ed. 263; Lakin v. Sierra Buttes Gold Min. Co. (C. C. 1885) 25 Fed. 337; Thompson v. Burke (1904) 2 Alaska, 249, 253; Fisher v. Seymour (1897) 49 P. 30, 23 Colo. 542; Van Wagenen v. Carpenter (1900) 61 P. 698, 27 Colo. 444; Ballard v. Golob (1905) 83 P. 376, 34 Colo. 417, 423; Largey v. Bartlett (1896) 44 P. 962, 18 Mont. 265; O'Neill v. Otero (1910) 113 P. 614, 15 N. Mex. 707, 720; Utah Min. Co. v. Dickert (1889) 21 P. 1002, 6 Utah, 183, 5 L. R. A. 259; Argentine Min. Co. v. Benedict (1898) 55 P. 559, 18 Utah, 183.

The adverse claim is the claim made by the party opposing the application, and the party to waive a claim is the one who makes it. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 737, 157 U. S. 683, 39 L. Ed. 859, reversing (1894) 9 C. C. A. 613, 61 Fed. 557.

The fact that one has properly located a mining claim does not of itself relieve him from the necessity of contesting in the land office the issue of a patent to another for a portion of it, and his rights under such location will be deemed waived unless it be shown that knowledge of proceedings to procure the patent was fraudulently withheld from him. Seymour v. Fisher (1891) 16 Colo. 188, 27 Pac. 240.

Adverse claimants are required to file their claims in order that their rights may be preserved. People v. District Court (1894) 35 P. 731, 19 Colo. 343, 347.

The prior patentee of a lode claim need not, in order to preserve his title, file a protest or adverse claim to the application of another to the property embraced in his patent. Mantle v. Noyes (1885) 5 Mont. 274, 5 Pac. 856.

40. Time of filing.—The fact that the 60 days prescribed for publication of notice has expired before the application is adversed does not preclude a contest, where the adverse claim does not arise until after the expiration of the 60 days, and where the applicant has let his application lie dormant for years without either paying the purchase money or doing the required work each year. Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286. See, also, Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 167 U. S. 108, 17 Sup. Ct. 762, 42 L. Ed. 96; Id. (1895) 66 Fed. 200, 13 C. C. A. 390.

The adverse claim must be filed within 60 days after the commencement of the publication of the notice of application for the patent. Hunt v. Eureka

Gulch Min. Co. (1890) 14 Colo. 451, 24 Pac. 550.

41. Effect of failure to assert adverse claim.—This section, among other things, provides that if no adverse claim has been filed at the expiration of the period of publication it shall be assumed that the applicant is entitled to a patent and that all matters which might have been tried under adverse proceedings are treated as adjudicated in favor of the applicant upon payment of the purchase price, and this provision is mandatory and the right to a patent immediately arises, and any delay in issuing the patent does not diminish the rights flowing from the purchase or cast any additional burdens on the purchaser or expose him to the assaults of third parties, and a protestant can only show that the applicant has not complied with the law, as the proceedings are absolutely conclusive against all adverse claimants, and their failure to adverse is a waiver of all rights. Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; Turner v. Sawyer (1893) 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 167 U. S. 108, 115, 17 Sup. Ct. 762, 42 L. Ed. 96; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 196 U. S. 337, 357, 25 Sup. Ct. 266, 49 L. Ed. 501; Wight v. Dubois (C. C. 1884) 21 Fed. 693; Hamilton v. Southern Nevada, etc., Min. Co. (C. C. 1887) 33 Fed. 562, 566; Lightner Min. Co. v. Superior Court, etc. (1910) 112 P. 909, 14 Cal. App. 642, 647; Hunt v. Eureka Gulch Min. Co. (1890) 24 P. 550, 14 Colo. 451, 455; Healy v. Rupp (1906) 86 Pac. 10, 15, 37 Colo. 25, 28; Suessenbach v. First National Bank (1889) 41 N. W. 662, 5 Dak. 477, 500; Brundy v. Mayfield (1895) 38 P. 1067, 15 Mont. 201, 209; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 47 (dissenting opinion); Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 73, 36 Nev. 543; Mars v. Oro Fino Min. Co. (1895) 65 N. W. 19, 7 S. D. 605, 615; Lily Min. Co. v. Kellogg (1903) 74 P. 518, 27 Utah, 111.

Claimants of an unpatented location are precluded from objecting to the issue of a patent to another, where they fail to present their objections after the prescribed notice has been given, and their silence is a waiver of their priority. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562; Marshall Silver Min. Co. v. Kirtley (1888) 21 P. 492, 12 Colo. 410, 416; Rose v. Richmond Min. Co. (1882) 27 P. 1105, 17 Nev. 25, 65; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 73, 36 Nev. 543; Lavagnino v. Uhlig (1903) 71 P. 1046, 26 Utah, 1, 19, 99 Am. St. Rep. 808. See Wight v. Dubois (C. C. 1884) 21 Fed. 693, 696; Lily Min. Co. v. Kellogg (1903) 74 P. 518, 27 Utah, 111, 115.

The words "it shall be assumed" as used in this section are construed to mean conclusively presumed, and a failure to adverse as provided deprives the adverse claimant of all remedies except those which a court of equity might allow to be urged against a judgment at law. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 874; Lavagnino v. Uhlig (1903) 71 P. 1046, 26 Utah, 1, 20, 99 Am. St. Rep. 808; Lily Min. Co. v. Kellogg (1903) 74 P. 518, 27 Utah, 111, 116. See Dahl v. Raunheim (1889) 132 U. S. 260, 10 Sup. Ct. 74, 33 L. Ed. 324; Four Hundred Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989; Hamilton v. Southern Nevada, etc., Min. Co. (C. C. 1887) 33 Fed. 562; Kannaugh v. Quartette Min. Co. (1891) 27 P. 245, 16 Colo. 341.

If no adverse claim is filed with the register within 60 days from the filing of the application, the law assumes that the applicant is entitled to a patent, and third persons cannot object except, perhaps, to show that the applicant has not complied with the law. Gwillim v. Donnellan (1885) 115 U. S. 45, 49, 5 Sup. Ct. 1110, 29 L. Ed. 348; Dahl v. Raunheim (1889) 132 U. S. 260, 261, 10 Sup. Ct. 74, 33 L. Ed. 324; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 171 U. S. 55, 72, 18 Sup. Ct. 895, 43 L. Ed. 72; Golden Reward Min. Co. v. Buxton Min. Co. (1897) 79 Fed. 868, 873; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 136, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

All adverse claims not filed within the prescribed time are waived. Nesbitt v. De Lamar's Nevada Gold-Min. Co. (1898) 53 P. 178, 24 Nev. 273, 77 Am. St. Rep. 807. See, also, Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 73, 36 Nev. 543.

If the owner of one claim applies for a patent and the owner of a conflicting claim does not adverse the application, upon the establishment of a prima facie right to his patent by the applicant an indisputable presumption arises that no conflicting claims exist. Gwillim v. Donnellan (1885) 115 U. S. 45, 51, 5 Sup. Ct. 1110, 29 L. Ed. 348; Lavagnino v. Uhlig (1905) 198 U. S. 443, 455, 25 Sup. Ct. 716, 49 L. Ed. 1119; Helena Gold & Iron Co. v. Baggaley (1906) 87 P. 455, 34 Mont. 464, 474; Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 136, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

Where an applicant for a patent for land as placer mining ground has com-

plied with all legal requirements, one who has set up no adverse claim cannot complain that the applicant did not show that the ground claimed was placer mining ground. Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 132 U. S. 260, 33 L. Ed. 324, affirming Raunheim v. Dahl (1886) 13 P. 247, 6 Mont. 167.

Any interested person who fails to file an adverse claim is thereafter precluded from calling in question the location of the applicant. Id.

A failure to adverse within the statutory time in the absence of fraud or mistake forfeits the rights of any adverse claimant. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 208, 13 C. C. A. 390; Erwin v. Perego (1899) 93 Fed. 608, 611, 35 C. C. A. 482; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Kannaugh v. Quartette Min. Co. (1891) 27 P. 245, 16 Colo. 341.

A widow who is entitled to dower in a mining claim forfeits her right when a patent is issued, if she fails to adverse the application for the patent. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 554. See Id. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 41 L. Ed. 221.

Owners of a claim overlapping on the surface, having a portion of the apex on the same vein, who fail to make any protest or adverse, are concluded by the patent, as fully as if an adverse had been filed and suit in support thereof had been brought and determined against the adverse. Jefferson Min. Co. v. Anchoria-Leland Min. & Mill. Co. (1904) 75 P. 1070, 32 Colo. 176, 64 L. R. A. 925.

On an application for a patent by a junior locator, and on a failure of the senior locator to adverse, it will be presumed that, at the time the junior location was made, the ground was open to entry. Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321.

The assumption that no adverse claim exists where none is filed during the period of publication relates to the time of the expiration of the period of publication and has nothing to do with adverse claims initiated subsequent to that time and which could not have been made known at the local office during the period of publication. Poore v. Kaufman (1911) 119 P. 785, 44 Mont. 248, 254.

Where a group patent to several claims settled the priority of a claim by excluding conflicting claims, those objecting to the adjudication must then and there institute adverse proceedings or protest in the land office, and, having failed to do so, cannot thereafter contest the adjudication of the land office as to the priorities between the different locations. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392.

A person interested in a mining claim whose rights are affected by an application for a patent for the same or for a conflicting claim who fails to file an adverse claim or fails to institute adverse proceedings after filing an adverse claim, or fails to protest in the land office against the issuance of a patent, cannot, after the issuance of a patent to the applicant, be heard to contest a question of fact upon which the patent is based. Id.

While the charge of noncompliance with the law against a mineral locator may form the basis of a hearing, yet the protestant in such a case is not entitled to set up his own claim to the land in the absence of an adverse claim. Lavignino v. Uhlig (1903) 71 P. 1046, 26 Utah, 1, 21. See Wight v. Dubois (C. C. 1884) 21 Fed. 693.

42. Proof of adverse claim.—An adverse claimant must show, in order to establish a valid mining claim, compliance with local customs, rules, and regulations of miners as well as with governing statutes. Becker v. Pugh (1886) 13 P. 906, 9 Colo. 589, 590. See Sullivan v. Hense (1874) 2 Colo. 424; Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co. (1886) 12 P. 212, 9 Colo. 343; Bryan v. McCaig (1887) 15 P. 418, 10 Colo. 309.

43. Adverse suit.—See, also, notes to § 4623, post.

The purpose of an action brought on an adverse claim pursuant to this and the succeeding section is to determine the right of possession to a mining claim. Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 369, 89 Am. St. Rep. 207. See Iron Silver Min. Co. v. Mike & Star, etc., Min. Co. (1892) 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201.

In an action by an adverse claimant based on his adverse claim the complaint must aver or otherwise show that the adverse claim was filed within the period prescribed by this section. Cronin v. Bear Creek Gold Min. Co. (1893) 32 P. 204, 3 Idaho, 614, 617.

44. —— Jurisdiction of federal court.—See, also, notes to § 4623, post.

A suit brought in support of an adverse claim to a mine is not a suit arising under the laws of the United States in such a sense as to confer jurisdiction on a federal court without regard to the citizenship of the parties, unless it involves the determination of a question as to the construction or effect of the mining laws. Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864 (reversing judgment [1898] 87 Fed. 801, 31 C. C. A. 223); De Lamar's Nevada, etc., Min. Co. v. Nesbitt (1900) 177 U. S. 523, 527, 20 Sup. Ct. 715, 44 L. Ed. 872; Mountain View M. & M. Co. v. McFadden (1901) 21 Sup. Ct. 488, 180 U. S.

533, 45 L. Ed. 656; Beals v. Cone (1903) 188 U. S. 184, 23 Sup. Ct. 275, 47 L. Ed. 435; Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252; Bunker Hill & S. Mining & Concentration Co. v. Shoshone Min. Co. (1901) 109 Fed. 504, 507, 47 C. C. A. 200; W. G. Coyle & Co. v. Stern (1912) 193 Fed. 582, 113 C. C. A. 450; Trafton v. Nougues (C. C. 1877) Fed. Cas. No. 14,134; Burke v. Bunker Hill Min. Co. (C. C. 1891) 46 Fed. 644; Blue Bird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 292; Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37; Wise v. Nixon (C. C. 1896) 76 Fed. 3, 6; California Oil & Gas Co. v. Miller (C. C. 1899) 96 Fed. 12, 18. See, also, Blackburn v. Portland Gold-Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 44 L. Ed. 276.

VIII. PROTEST AND INTERVENTION

45. Right to protest or intervene.—The owner of a town lot, unpatented, lying within the exterior boundaries of a mining claim, may contest the mining location and determine the character of the ground by a protest filed in the land office. Behrends v. Goldsteen (1902) 1 Alaska, 518.

A municipal corporation, though not an adverse claimant in the land office proceeding, may intervene in a suit against an adverse claimant by the applicant for a mining patent, and protect its public property lying within the limits of the mining location, by showing that neither has complied with the law. Nome-Sinook Co. v. Simpson (1902) 1 Alaska, 578. See, also, Gavigan v. Crary (1905) 2 Alaska, 370, 378; Bechtol v. Bechtol (1905) 2 Alaska, 397; Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 P. 1047, 114 Cal. 100.

46. Effect.—A protest against the application of a patent to lands selected in lieu of lands surrendered within the forest reservation district is sufficient if it alleges in express terms that the lands selected were mineral in character and therefore not subject to selection under this forest reserve lieu land act. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 40.

A mere protest filed in the land department against the issuance of a patent to an applicant for a patent to a mining claim has no force or effect, except to suggest to the land officers that there has been an error and that proceedings be stayed until further examination can be had; but it does not bring such protestant into court for the asservation of his own right or title, and if he fails to properly adverse as required by statute he loses all rights if his protest is overruled. Neilson v. Champagne Min., etc., Co. (1902) 119 Fed. 123, 125, 55 C. C. A. 576.

A protest is sufficient to authorize a hearing, even while suit is pending on an adverse claim, where the subject-matter of the protest is not involved in the suit, but relates solely to the applicant's noncompliance with the mining law. South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 50.

IX. ENTRY

47. Nature and effect.—An entry of a mining claim under the statute segregates the land from the public domain, appropriates it to private use, and withdraws it from subsequent entry or acquisition until the prior entry is officially canceled. Benson Min., etc., Co. v. Alta, etc., Min. Co. (1892) 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762; Last Chance Min. Co. v. Tyler (1894) 61 Fed. 557, 561, 9 C. C. A. 613; James v. Germania Min. Co. (1901) 107 Fed. 597, 46 C. C. A. 476; Batterton v. Douglas Mining Co. (1911) 120 P. 827, 20 Idaho, 760.

The term "entry" means that act by which an individual acquires an inceptive right to a portion of the unappropriated soil of the country by filing his claim. Sturr v. Beck (1890) 133 U. S. 541, 549, 10 Sup. Ct. 350, 33 L. Ed. 761; McGuire v. Brown (1895) 39 P. 1060, 106 Cal. 660, 666, 30 L. R. A. 384.

By accepting the entry and confirming it by patent the government does not determine as to the order of proceeding prior to the entry, but only that all legal requirements have been taken. Creede & Cripple Creek, etc., Min. Co. v. Uinta Tunnel Min., etc., Co. (1905) 196 U. S. 337, 354, 25 Sup. Ct. 266, 49 L. Ed. 501.

The defeasible possessory title held by the locator of a mining claim on compliance with the United States statutes may, by payment of the purchase price, be converted into a fee simple. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 256, 58 L. Ed. 943, L. R. A. 1915A, 1113.

Where a locator of a mining claim has complied with all the conditions necessary to entitle him to a patent, his estate in the land is not perceptibly different from that acquired by entrymen of agricultural land. Tyee Consol. Min. Co. v. Langstedt (1905) 136 Fed. 124, 69 C. C. A. 548, reversing judgment (1903) 121 Fed. 709, 58 C. C. A. 129.

Entry is the mode of acquiring nonmineral lands. Collins v. Bubb (C. C. 1896) 73 Fed. 735, 739.

48. Effect on obligation to perform assessment work.—See, also, notes to § 4620, ante.

By the purchase and entry of a min-

ing claim, the equitable title vests in the purchaser, and his right to a patent is thereby established and duty to perform assessment work ceases. Benson Min., etc., Co., v. Alta Min., etc., Co. (1892) 145 U. S. 428, 12 Sup. Ct. 877, 36 L. Ed. 762.

49. Effect on right to cut timber.—See, also, notes to § 4980, post.

An occupant of a mineral claim, who has applied for a patent before the purchase price is paid and before he receives a certificate, has no right to cut the timber on such claim with intent to export or remove the same, and a license from him to so cut the timber gives no protection to the licensee as against the government. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230.

50. Equitable title acquired by entry and payment.—In case of cash sales when the full price has been paid, or in other cases, where all of the conditions of entry are performed, the full equitable title has passed and only the naked legal title remains in the government in trust for the applicant, in whom are vested all the rights and obligations of ownership. Deffeback v. Hawke (1885) 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423; Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 145 U. S. 428, 432, 434, 12 Sup. Ct. 877, 36 L. Ed. 762; Calhoun Gold Min. Co. v. Ajax, etc., Min. Co. (1901) 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 257, 58 L. Ed. 943, L. R. A. 1915A, 1113; Neilson v. Champagne Mining & Milling Co. (1902) 119 Fed. 123, 55 C. C. A. 576; Leonard v. Lennox (1910) 181 Fed. 760, 762, 104 C. C. A. 296; Aspen Mining & Smelting Co. v. Rucker (C. C. 1886) 28 Fed. 220, 221; Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 574; Neilson v. Champagne Min., etc., Co. (C. C. 1901) 111 Fed. 655, 657; Murray v. Montana Lumber & Mfg. Co. (1901) 63 P. 719, 25 Mont. 14; Deno v. Griffin (1889) 20 P. 308, 20 Nev. 249, 253; McKnight v. El Pasco Brick Co. (N. M. 1911) 120 P. 694; Allen v. Dunlap (1893) 33 P. 675, 24 Or. 229, 234; Duffy v. Mix (1893) 33 P. 807, 24 Or. 265, 268. See Union Mill & Min. Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370; Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348, 349; Amador Medean Gold Min. Co. v. South Spring Hill Gold Min. Co. (C. C. 1888) 36 Fed. 668.

Where lode claimants have done all that is necessary under the law for the acquisition of an exclusive right to the possession and enjoyment of their claim, it is thenceforth their property, and they can obtain at any time a patent upon proof, and until the patent issues the government holds the title in trust for them, and the ground included within their locations is not open to sale. Noyes v. Mantle (1888) 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168; Suessenbach v. First National Bank (1889) 41 N. W. 662, 5 Dak. 477, 498.

A locator who complies with all the proceedings essential for the issuance of a patent is the equitable owner of the mining ground, and the government holds the premises in trust for him, and in a case involving his rights he must be treated as though the patent had been issued and delivered. Dahl v. Raunheim (1889) 132 U. S. 260, 262, 10 Sup. Ct. 74, 33 L. Ed. 324; Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286. See, also, Aspen Mining & Smelting Co. v. Rucker (C. C. 1886) 28 Fed. 220.

When the price of a location or claim is paid, the right of the locator to a patent immediately arises, and any delay in the administration of affairs in the land department does not diminish the rights flowing from such purchase, nor cast any additional burdens on the purchaser or expose him to the assaults of third persons. Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 145 U. S. 428, 431, 12 Sup. Ct. 877, 36 L. Ed. 762; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 574; Teller v. U. S. (1901) 113 Fed. 273, 282, 51 C. C. A. 230.

A locator acquires a right to a patent on compliance with the mining laws and the payment of the price, and the right of action passes at that time, though the patent is issued at a later date. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 257, 58 L. Ed. 943, L. R. A. 1915A, 1113. Alta Min., etc., Co. v. Benson Min., etc., Co. (1888) 16 P. 565, 2 Ariz. 362, 369. See Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 405, 29 L. Ed. 423.

Payment for mineral lands or a mining claim gives the claimant an equitable title thereto and entitles him to a patent, and he is not required to wait for the actual issuance of a patent before exercising all the incidents of ownership. Teller v. U. S. (1901) 113 Fed. 273, 279, 51 C. C. A. 230. See Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 29 L. Ed. 423.

There is no difference as to the rights of the parties where a mining location was made after the entry and payment for the land but before patent issued, and where the mining location was made after a patent issued, as the purchaser became the equitable owner of the land when it was entered and paid for. Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348, 349. See Union Mill. & Min. Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370; Hamilton v. Southern Nevada Gold,

etc., Min. Co. (C. C. 1887) 33 Fed. 562, 566.

An equitable estate in a mining claim when clearly established will be enforced in equity. Lakin v. Sierra Buttes Min. Co. (C. C. 1885) 25 Fed. 337; Hunt v. Patchin (C. C. 1888) 35 Fed. 816; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106.

The title to a mining claim is a legal title, and until a locator of such a claim has done everything the United States statutes requires upon an application for a patent and has paid the purchase price thereof, he cannot be said to have any equitable title in that estate not vested by the mining location. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 552; Belk v. Meagher (1878) 3 Mont. 65, 79.

The patentee of a mining claim, on which he has made valuable improvements, has an equitable title, when the patent fails by reason of mistake in the description, which will prevail against one who with notice attempts to acquire the legal title to the claim. Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, 586.

The law severs the right of possession and enjoyment of a mining claim from the title, and until the right to a patent has been perfected and an equitable title acquired by full compliance with the law the government retains the title to all mines within the public domain. O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 110.

51. **Effect of certificate.**—The doctrine of freedom from collateral attack applies where final entry has been made and certificate issued. Brown v. Gurney (1906) 201 U. S. 184, 193, 26 Sup. Ct. 509, 50 L. Ed. 717; Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C. 1887) 33 Fed. 562, 566; Aurora Hill Consolidated Min. Co. v. 85 Mining Co. (C. C. 1888) 34 Fed. 515.

A final certificate issued by a receiver after the submission of final proof and payment of the purchase price is for many purposes the equivalent of a patent. Brown v. Gurney (1906) 201 U. S. 184, 193, 26 Sup. Ct. 509, 50 L. Ed. 717; Aurora Hill Consolidated Min. Co. v. 85 Mining Co. (C. C. 1888) 34 Fed. 515. See Malaby v. Rice (1900) 62 P. 228, 15 Colo. App. 364.

The certificate of purchase entitles an applicant to a patent, and the United States holds the title in trust for the holder of the certificate. Deffeback v. Hawke (1885) 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423.

A receiver's receipt and a register's certificate of purchase for a mining claim can not be assailed on the ground that the holder had not, on the abandonment of a part of his mining claim in an action contesting his right, caused a new survey to be made. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 561, 9 C. C. A. 613. See Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 12 S. Ct. 877, 145 U. S. 428, 36 L. Ed. 762; Hamilton v. Southern Nev., etc., Min. Co. (C. C. 1887) 33 Fed. 562, 566.

In actions at law a certificate of entry of a mining claim, like a patent, is conclusive of the title. McEvoy v. Hyman (C. C. 1885) 25 Fed. 539, 540.

Even though a final receipt for mineral land issued upon an application for a patent was obtained by fraud, it would be valid until avoided; the fraud only rendering it voidable. McKnight v. El Paso Brick Co. (N. M. 1911) 120 Pac. 694.

One who has entered, has paid for a mining claim, and obtained a certificate of purchase from the government, is the fee-simple owner of the estate. Bash v. Cascade Min. Co. (Wash. 1902) 69 P. 402, rehearing denied (1902) 70 P. 487, 29 Wash. 50.

52. **Title by relation.**—The payment of the price vests in the applicant the equitable title to the land by relation as of the date of the application, including timber cut from the land after that date. Teller v. U. S. (1902) 117 Fed. 577, 54 C. C. A. 349.

The title to a mining claim established by a receiver's receipt and a register's certificate relates back to the date of the original location. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 562, 9 C. C. A. 613.

The right to a certificate has its inception at the making of an application for a mining claim, and though delayed by adverse claims and proceedings, when issued the right relates back to the time of its inception for the purpose of supporting any right of the claimant. Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C. 1887) 33 Fed. 562, 565. See Unión Mill & Min. Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370.

53. **Cancellation of entry.**—The rule of the department is that after a decision by the Land Office, holding an entry for cancellation, an application to enter may be received during the time allowed for appeal from such decision, but should not be made of record until the rights of the former entryman are finally determined. U. S. v. Steenerson (1892) 50 Fed. 504, 1 C. C. A. 552.

The commissioner of the general land office has no power to cancel a mineral entry. Rebecca Gold Min. Co. v. Bryant (1903) 71 P. 1110, 31 Colo. 119, 126, 102 Am. St. Rep. 17.

This section does not prevent the commissioner of the general land office from canceling an entry, of his own motion, for failure of the applicant to comply with some statute or rule of the department, even though no adverse claim is filed. Mineral Farm Min. Co. v.

Barrick (1905) 80 P. 1055, 33 Colo. 410.

The land department may cancel an application on the ground that the applicant has not complied with the mining laws. South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 49.

54. —— **Notice.**—A mineral entry should not be canceled unless it is affirmatively shown that the entryman had notice of the intention of the department to cancel the entry, and an entry so improperly canceled should be reinstated and on such reinstatement an opportunity afforded a transferee to show the facts as to his compliance with the statute. Beals v. Cone (1900) 62 P. 948, 27 Colo. 473, 483, 83 Am. St. Rep. 92. See Southern Cross Gold Min. Co. v. Sexton (1905) 82 P. 423, 147 Cal. 758; Peoria & Colorado Min., etc., Co. v. Turner (1905) 79 P. 915, 20 Colo. App. 474, 483.

The commissioner of the general land office has no power to cancel a mineral entry without notice and proper showing. Rebecca Gold Min. Co. v. Bryant (1903) 71 P. 1110, 31 Colo. 119, 102 Am. St. Rep. 17.

55. —— **Effect.**—The legal effect of the allowance of an entry by the local land officer issuing the final receipt as a determination that the original locations were valid and that everything necessary to keep them in force had been done, is not destroyed by the cancellation by the land department of such entry and final receipt, based upon a mistake of law. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 58 L. Ed. 943, L. R. A. 1915A, 1113.

Rights to a patent vesting by a full compliance with the requirements of this section are not destroyed because the applicant yields to an erroneous ruling of the land department canceling the entry, on the ground that the affidavit of posting was executed before an officer residing outside of the mining district, and institutes new patent proceedings. Id.

The cancellation of a mineral entry determines that the entryman obtained no title by his entry, and the fact that money sufficient to purchase the land remains on deposit after cancellation does not give him any equitable rights in the land, nor does he acquire any title by procuring an official survey thereof. Shank v. Holmes (Ariz. 1914) 137 P. 871.

A cancellation of an entry is conclusive that the entryman failed to comply with the conditions of entry, such as furnishing a proper affidavit of continuous posting of notice as required by this section. Id.

The cancellation of an entry or of the receiver's receipt is, like its issuance, a mere incident in the proceedings prescribed for procuring title from the government; and while the receiver's receipt when in force is evidence of compliance with preliminary patent conditions, yet its revocation or cancellation and nothing more, of itself, does not evidence either the forfeiture or relinquishment of the location made by the applicant, and it has no necessary connection either with the segregation of the land from the public domain or its restoration thereto. Id.

The locator of a mining claim who makes a second application for patent after a cancellation of the entry on his former application thereby accepts and acquiesces in the decision of the general land office canceling his former entry, and from the date of such cancellation the applicant's right to the possession of the ground located depends upon the location and the rights arising therefrom under the laws pertaining thereto, without reference to the former application and entry. Id.

The cancellation of a mineral entry alone is not determinative of another application for patent, and the facts found upon which such cancellation was based are not admissible to support an adverse claim against a second application for the same premises. Beals v. Cone (1900) 62 P. 948, 27 Colo. 473, 482, 83 Am. St. Rep. 92; Clipper Min. Co. v. Eli Min., etc., Co. (1902) 68 P. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89.

The mere cancellation of an entry of a mining location does not render the ground open to relocation. Rebecca Gold Min. Co. v. Bryant (1903) 71 P. 1110, 31 Colo. 119, 102 Am. St. Rep. 17. See, also, Murray v. Polglase (1899) 59 P. 439, 23 Mont. 401.

The mere suspension of a mineral entry for the purpose of requiring compliance with regulations does not destroy the force of the certificate of entry or enable third persons to attack its validity. Gurney v. Brown (1904) 77 P. 357, 32 Colo. 472, 484. See Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613.

Where a receiver's receipt, showing that the entryman of a mining claim is entitled to the patent, is subsequently annulled for fraud practiced in obtaining it, and the entryman has failed to do the annual representation work, the claim is subject to relocation. Murray v. Polglase (1899) 59 P. 439, 23 Mont. 401.

X. PATENT

56. **Scope and purpose of section.**—This section does not apply to the case of a party who has a prior patent to the land which may be the subject of controversy before the receiver and register of the land office. McKinley v. Wheeler (1889) 130 U. S. 630, 634, 9 Sup. Ct. 638, 32 L. Ed. 1048; Iron Silver Min. Co. v. Campbell (1890) 135

U. S. 286, 301, 10 Sup. Ct. 765, 34 L. Ed. 155.

This section does not refer to easements or other rights nor the acquisition of title generally, but only to land claimed and located for valuable mineral deposits. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 196 U. S. 337, 356, 25 Sup. Ct. 266, 49 L. Ed. 501.

57. **Purpose of patent.**—The purpose of a patent for a mining claim is to do away with the necessity of going back to the facts upon which the patent is based. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 665, 28 C. C. A. 333; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 940; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 662. See Iron Silver Min. Co. v. Campbell (1892) 29 P. 513, 17 Colo. 267; Chambers v. Jones (1895) 42 P. 758, 17 Mont. 156.

58. **Mineral character of lands.**—See, also, notes to §§ 4613, 4614, ante.

Land may be patented for other purposes, unless it is shown to be more valuable for mining than for such other purposes. Davis v. Weibbold (1891) 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238.

A patent for mineral lands can only issue under the acts of congress relating to the disposition of mineral lands on proof that they are such. Van Horn v. State (1895) 40 P. 964, 5 Wyo. 501, 509. See Gregory v. Pershbaker (1887) 14 P. 401, 73 Cal. 109, 116.

59. **Title or estate acquired before patent.**—See, also, notes to § 4618, ante.

The mining laws create three distinct classes of title: (1) Title in fee simple; (2) title by possession; (3) the complete equitable title. The first is indefeasible; the second is a title in the nature of an easement and may be defeated at any time by a failure to perform the annual assessment work. The third accrues immediately from purchase, as the entry entitles the purchaser to a patent, and the right to a patent once vested is equivalent to a patent issued. Benson Min., etc., Co. v. Alta Min., etc., Co. (1892) 145 U. S. 428, 430. 12 Sup. Ct. 877, 36 L. Ed. 762; Fulkerson v. Chisna Min., etc., Co. (1903) 122 Fed. 782, 786, 58 C. C. A. 582; O'Connell v. Pinnacle Gold Mines Co. (C. C. 1904) 131 Fed. 106, 110.

An order refusing to grant a patent does not of itself restore the land to the public domain. Brown v. Gurney (1906) 201 U. S. 184, 194, 26 Sup. Ct. 509, 50 L. Ed. 717.

A citizen may acquire any one of three possible estates in mineral lands upon the public domain: (1) A location in compliance with the statute giving a possessory title only; (2) after making the location he may comply with the requirements of law and pay the required purchase price, thus acquiring the equitable title; and (3) he may then proceed and obtain a patent, thereby acquiring the legal title. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675, 681. And see Poncia v. Eagle (1915) 152 P. 208, 28 Idaho, 60.

60. **Merger of estates.**—The only distinction between a patentee of a mining claim and a mineral locator is in the ownership of the fee. Forbes v. Gracey (1876) 94 U. S. 762, 766, 24 L. Ed. 313; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 123. See Pacific Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348; Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112, 114; McCormick v. Varnes (1877) 2 Utah, 355, 362.

When a person in possession of a mining claim obtains a patent, the claim, as a separate estate, is merged in the full fee-simple title. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549.

When a patent issues the mining claim becomes merged in the paramount title and perishes, and there is no longer any estate in the mining claim as such, or as property to which dower can attach. Id.

61. **Nature and effect of patents for placer and lode claims.**—See, also, notes to § 4632, post.

The patent of a placer mining claim carries with it the title to the surface included within the lines of the mining location as well as to the lands beneath the surface. Deffeback v. Hawke (1885) 115 U. S. 392, 406, 6 Sup. Ct. 95, 29 L. Ed. 423; Mason v. Washington-Butte Min. Co. (1914) 130 C. C. A. 426, 214 Fed. 32, 34.

The rights conferred by respective patents for placer and lode claims and the conditions upon which they are held are entirely different. U. S. v. Iron Silver Min. Co. (1888) 128 U. S. 673, 680, 9 Sup. Ct. 195, 32 L. Ed. 571. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 651, 26 L. Ed. 875; Iron Silver Min. Co. v. Reynolds (1888) 124 U. S. 374, 8 Sup. Ct. 598, 31 L. Ed. 466.

62. **Conditions precedent to issuance.**—A perfected mining claim is the property of the locator and he needs only a patent to render his title perfect, and this can be obtained at any time upon proof of performance of the acts required by the statute, and the governmen in such case holds the title in trust for the locator, and the ground is not open to sale. Noyes v. Mantle (1888) 127 U. S. 348, 351, 8 Sup. Ct. 1132, 32 L. Ed. 168.

The payment of the purchase money is made a condition precedent to the issuance of a patent. Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286.

The United States gratuitously grants the privilege of mining and locating mining claims to its citizens, but it does not give away the land containing such minerals, but will sell the same to the locator if he desires to purchase on the terms fixed by the statute. Teller v. U. S. (1901) 113 Fed. 273, 280, 51 C. C. A. 230.

The purchase price of a mining claim on application for patent must be on deposit and so remain until accepted by the Interior Department; but the department has no right to accept the purchase price of public lands and appropriate the same to the sale of any specified tract, until the purchaser has met all the conditions prescribed by law and the legal regulations made pursuant thereto which entitle him to the full legal rights to become the purchaser. Shank v. Holmes (1914) 137 Pac. 871, 875, 15 Ariz. 229.

The policy of the law requires all rights and equities to mining claims to be adjusted prior to the issuance of the patent, to the end that the patent may be impregnable against all comers. Lee v. Stahl (1886) 11 P. 77, 9 Colo. 208, 211.

No title from the government to mineral lands can be acquired in any other way than as prescribed by this statute. South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 38.

63. —— Location and possession.—See, also, notes to § 4615, ante.

Whether a particular vein bearing gold, silver, cinnabar, lead, or other valuable deposit is one that a discoverer could obtain title thereto under this and other sections is a question of fact to be determined as such. Iron Silver Min. Co. v. Mike & Starr, etc., Co. (1892) 143 U. S. 394, 404, 12 Sup. Ct. 543, 36 L. Ed. 201.

There must be a surface location before a patent can be issued. Campbell v. Ellet (1897) 167 U. S. 116, 119, 17 Sup. Ct. 765, 42 L. Ed. 101.

The fact that a few tons of silver-bearing rock, have been extracted from a mining claim, does not entitle the locator to enter the claim for a patent when no vein or lode has been discovered within the limits of the claim. Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685.

Possession is one of the elements of title, and if found to be in one other than the claimant it is a bar to the issuance of a patent. Shafer v. Constans (1879) 3 Mont. 369, 371.

A patent for a mining claim may be defeated by showing that the original location was void because the boundaries were not properly marked on the ground or because no vein was discovered, or because the law in other respects was not complied with and also, the purpose of the patent was to do away with the necessity of going back to the facts upon which it is based. South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 52. See Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 946.

The right to obtain patent to a mining claim depends upon the making of a location or upon having held possession during the period of the statute of limitations; but the making of the location and the time for making it do not depend upon the section regulating the proceedings upon application for patent which the claimant may never institute. Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 138, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

64. Requisites and validity.—If a patent is issued for land reserved by statute from sale, or otherwise appropriated, or if it is for an authorized amount, or if it is not executed by proper officers, it is void. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 644, 26 L. Ed. 875; Chicago Quartz Min. Co. v. Oliver (1888) 16 P. 780, 75 Cal. 194, 197, 7 Am. St. Rep. 143. See Burfenning v. Chicago, etc., R. Co. (1890) 163 U. S. 321, 323, 16 Sup. Ct. 1018, 41 L. Ed. 175.

To make a patent void on its face there must be something more than an apparent contradiction in its terms. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 644, 26 L. Ed. 875.

A patent may be seen to be invalid either when read in the light of the law or by reason of what the court must take judicial notice of. Id.

A patent for a mining claim is void if the government officers act without authority of law, or if the lands conveyed were never within their control, or if they had been withdrawn from their control before the patent issued. Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 258, 4 C. C. A. 303. See Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 27 L. Ed. 226; Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 29 L. Ed. 774; Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 328; Board of Education v. Mansfield (1903) 95 N. W. 286, 17 S. D. 72, 81, 106 Am. St. Rep. 771.

Neither the president nor any other officer has power to dispose of the public domain or to sign or cause the seal of the land office to be affixed to patents other than such as is conferred by the statutes of the United States. U. S. v. San Pedro & Canon del Agua Co. (1888) 17 P. 337, 4 N. M. (Gild.) 405, 571.

The want of authority which will make a patent void is a total want of authority to issue the same for the subject of the grant, and not a latent impropriety in exercising the authority by reason of unknown impositions mov-

ing thereto. Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174.

65. —— **Issuance pending suit.**—See, also, notes to § 4623, post.

A patent issued for a lode or vein claim at a time when a contest is pending between claimants in a state court in reference to the identical vein is void. Richmond Min. Co. v. Rose (1885) 114 U. S. 576, 5 Sup. Ct. 1055, 29 L. Ed. 273; Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 258, 4 C. C. A. 303; Rose v. Richmond Min. Co. (1882) 27 P. 1105, 17 Nev. 25.

66. —— **Area or dimensions of ground.**—See, also, notes to § 4615, ante.

A patent will not be declared void for the reason that it purports to be based on a single location, and conveys more than may lawfully be included in one location, when in fact the claims were several, and might have been united in a single patent. Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 49 C. C. A. 637.

A patent issued for a greater area of mining ground than is permitted by the statute is void only as to such excess. Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1900) 106 Fed. 241. See Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 821, 49 C. C. A. 637.

67. —— **Consolidated claims.**—Contiguous mining ground may be embraced in one patent as no limitation is upon the sale of the ground located nor upon the number of locations which may be acquired through purchase nor upon the number which may be included in a patent. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875; Carson City, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 664, 28 C. C. A. 333; McDonald v. Montana Wood Co. (1894) 35 P. 668, 14 Mont. 88, 91, 43 Am. St. Rep. 616; Big Black Foot Milling Co. v. Blue Bird Min. Co. (1897) 48 P. 778, 19 Mont. 454, 456. See, also, Tucker v. Masser (1885) 5 Sup. Ct. 420, 113 U. S. 203, 28 L. Ed. 979.

Neither the statute nor the reason of the thing prevents an individual from acquiring by purchase the ground located by others and adding it to his own, and securing a patent therefor as an entirety. St. Louis Smelting Co. v. Kemp (1891) 104 U. S. 636, 648, 26 L. Ed. 87 (overruling St. Louis Smelting & Refining Co. v. Kemp [C. C. 1879] Fed. Cas. No. 12,239a, and St. Louis Smelting & Refining Co. v. Ray [C. C. 1879] Fed. Cas. No. 12,239b); Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 664, 28 C. C. A. 333; Cook v. Klonos (1908) 164 Fed. 529, 538, 90 C. C. A. 403; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 660; Big Black Foot Milling Co. v. Blue Bird Min. Co. (1897) 48 P. 778, 19 Mont. 454, 456 (distinguishing Smelting Co. v. Kemp, supra).

A patent issued subsequently to the act of 1870 may embrace claims consisting of more than 160 acres and include as many adjoining locations as the patentee has purchased. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875 (overruling St. Louis Smelting & Refining Co. v. Kemp [C. C. 1879] Fed. Cas. No. 12,239a, and St. Louis Smelting & Refining Co. v. Ray [C. C. 1879] Fed. Cas. No. 12,239b); Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 820, 49 C. C. A. 637; Cook v. Klonos (1908) 164 Fed. 529, 538, 90 C. C. A. 403.

If one person should acquire any number of contiguous claims by purchase there is no reason why he should not be equally entitled to enter them all by one entry in his application for a patent. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 653, 26 L. Ed. 875; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 661.

A separate patent is not necessary for each location to insure the required expenditure of labor upon it, as the provisions of section 2324 relate to expenditures before a patent is issued, and proof of such expenditures is not changed nor the requirement affected whether the application be for a patent for one claim or for several claims held in common. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 654, 26 L. Ed. 875.

The statute limiting the extent of mining lands which one person may locate is deemed sufficient to prevent an accumulation of such land in the hands of one person, and the statute was not intended to limit the acquisition by purchase of any number of mining claims and a separate patent for each location thus acquired is not necessary. Id.

A patent may be issued for mineral lands consisting of an aggregation of small quartz mining claims located under the local mining rules and regulations where such claims were subsequently conveyed to the applicant for the patent, and the right to thus combine such claims and obtain a patent therefor is not impaired by the fact that the proceedings on which the patent was issued purported to have been instituted and carried out for the acquisition of a single quartz mining claim. Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 820, 49 C. C. A. 637.

The owner of several mining claims may procure separate patents, and may so change the end lines as to make them parallel; and if the several claims jointly include the entire apex, they can be so surveyed as to make all the end lines parallel to each other and

give the applicant the right to a patent for the entire claim as a unit. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 600.

Where a group patent to several mining claims is issued, the land department determines the priorities, if there are conflicts between the claims, this being shown by the rule requiring the field notes to state the conflicts and to make exclusions. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392, and rehearing denied (1914) 141 P. 849.

68. —— **Noncontiguous tracts.**—The land office will grant patents to noncontiguous pieces of ground embraced in the same claim and separated by a prior location; and hence the granting of a patent to such property does not determine the invalidity of the intervening location. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392, rehearing denied (1914) 141 P. 849.

69. —— **Exceptions and reservations.**—The officers of the land department have no authority to insert in a patent to mineral land an exception of all town property rights upon the surface, buildings, etc., but must confine themselves to terms of conveyance, and recitals showing compliance with the conditions prescribed by law. The patent carries with it the rights conferred by law, and these cannot be enlarged nor diminished by reservations of land-department officers depending for their fitness on the judgment of those officers. Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 35 L. Ed. 238, reversing on another point Weibold v. Davis (1887) 7 Mont. 107, 14 Pac. 865. See, also, Talbott v. King (1886) 6 Mont. 76, 9 Pac. 434; Butte City Smoke-House Lode Cases (1887) 6 Mont. 397, 12 Pac. 858; King v. Thomas (1887) 6 Mont. 409, 12 Pac. 865.

The officers of the land department have no authority to insert in a patent any other terms than those of conveyance with recitals showing compliance with the law. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 102. 115 U. S. 401, 29 L. Ed. 914. See (1881) 17 Op. Atty. Gen. 248.

Patents may contain a reservation to the effect that the premises granted with the exception of the surface may be entered by the proprietor of any vein or lode, the apex of which lies outside of the boundaries of the granted premises if it extends into the premises granted. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50.

This section does not authorize any exception as to the exclusion of lands in a patent, but if an exception is made, and it is no broader than the statute in its signification, it adds nothing to and takes nothing from the effect of the statute, and if it is broader than the statute, then it is wholly unauthorized by law and as to such excess, at least, is utterly void. Cowell v. Lammers (C. C. 1884) 21 Fed. 200, 207.

If a patent excepts certain described ground the patentee gets no title to a vein having its apex in such excluded ground. Montana Ore Purchasing Co. v. Boston & Montana, etc., Min. Co. (1897) 51 P. 159, 20 Mont. 336, 342. See Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868.

70. —— **Presumptions.**—The presumption attending a patent when assailed is that it was issued upon sufficient evidence and that the law had been complied with, and such presumptions can only be overcome by clear and convincing proof. U. S. v. Iron Silver Min. Co. (1888) 128 U. S. 673, 676, 9 Sup. Ct. 195. 32 L. Ed. 571; U. S. v. King (1897) 83 Fed. 188, 191, 27 C. C. A. 509; Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 813. See Deffeback v. Hawke (1885) 115 U. S. 392, 6 Sup. Ct. 95, 29 L. Ed. 423; Colorado Coal & Iron Co. v. U. S. (1887) 123 U. S. 307, 8 Sup. Ct. 131, 31 L. Ed. 182; U. S. v. Marshall Silver Min. Co. (1889) 129 U. S. 579, 588, 9 Sup. Ct. 343, 32 L. Ed. 734; Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 143 U. S. 394, 12 Sup. Ct. 543, 36 L. Ed. 201; U. S. v. Central Pac. R. Co. (C. C. 1899) 93 Fed. 871, 873; Alford v. Barnum (1873) 45 Cal. 482.

The presumption is that all antecedent steps necessary to the issuance of a patent for a mining claim were duly taken, and the holder can rely thereon for peace and security in his possession. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 664, 28 C. C. A. 333; Iron Silver Min. Co. v. Campbell (1892) 29 P. 513, 17 Colo. 267. See Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 662; Chambers v. Jones (1895) 42 P. 758, 17 Mont. 156; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 77, 36 Nev. 543; Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174.

'A patentee of a mining claim cannot be compelled by an intruder to establish the validity of the action of the land department and the correctness of its ruling, as the presumptions attending it are not open to rebuttal and its unassailable character is what gives it value as a means of quieting the possession and enjoyment of the claim embraced. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 641, 26 L. Ed. 875. See Steel v. Smelting Co. (1882) 106 U. S. 447, 455, 1 Sup. Ct.

389, 27 L. Ed. 226; Moore v. Wilkinson (1859) 13 Cal. 478.

A patent issued for a mining claim is prima facie evidence that there has been a discovery of mineral and that the lands were properly located as mineral lands, and that all the steps required by law have been regularly taken. Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 259, 4 C. C. A. 303. See Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

Patents for mining claims issued by the government after surveys of the land and examinations of the relative rights of the government and the patentees are buttressed by such a presumption of exactness that they cannot be overcome or set aside on the ground of mistake by a mere preponderance of evidence, but only by evidence so clear, unequivocal, and convincing that it does not leave the issue in doubt. Thallman v. Thomas (1901) 111 Fed. 277, 283, 49 C. C. A. 317.

If upon any theory of facts as developed in a contest over the rights to a patented mining location or mineral vein the patent may be sustained, it is the duty of a court to indulge the presumption that the facts existed and were properly brought to the attention of the officers of the land department before the patent was issued, and all intendments are in favor of the validity of such a patent. Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 819, 49 C. C. A. 637.

Before the issuance of a patent the officers of the land department are required to ascertain whether the necessary antecedent steps have been taken which justify its issuance, and they act upon the papers and proofs which are presented and base their conclusions thereon, and as it is their duty to investigate the facts it will be presumed by a court that such investigation was made. Id.

A court on the trial of the rights to conflicting claims will not presume that the land office determined the course of the vein or lode, and the marking of an ideal line across the survey and diagram does not have the effect of putting a lode into the ground if there was no vein there. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 552.

Where a patent has been issued to a relocator the presumption is that the proceedings in the land office prior to the issuance of the patent were regular and that the evidence was sufficient to show an abandonment and to authorize the granting of the patent. Harkrader v. Carroll (D. C. 1896) 76 Fed. 474, 476.

A patent for a mining claim raises the presumption that all the requirements of the law as to amount of work to be done on the claim before a patent would issue had been complied with. McDaniel v. Moore (Idaho, 1910) 112 P. 317.

A patent raises the presumption that the location was laid along the course of the vein, and that the vein or lode crosses the end lines of the claim as marked on the ground, and that the side lines are laid in the direction of the strike or onward course of the vein. Stewart Mining Co. v. Ontario Mining Co. (1913) 132 P. 787, 23 Idaho, 724.

Where several mining claims conflicted, and the patent did not mention any exclusions of the conflict area, although the total area recited showed that an exclusion had been made, it must be presumed that the exclusions were made in favor of that claim, the discovery point of which lay within the conflict territory. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392, rehearing denied (1914) 141 P. 849.

A patent conveys the paramount title to a mining claim to the applicant and under the statute is presumptive proof that the applicant was the owner of the mining claim thereby conveyed, and is conclusive except for fraud, or a mistake on the part of the officers of the land department. Black v. Elkhorn Min. Co. (C. C. 1892) 49 Fed. 549, 553.

71. —— **Persons entitled to attack patent.**—A stranger cannot complain of the act of the government in issuing a patent to a mining claim. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 647, 26 L. Ed. 875; Wight v. Dubois (C. C. 1884) 21 Fed. 693. See Boggs v. Merced Min. Co. (1859) 14 Cal. 279; Horsky v. Moran (1898) 53 P. 1064, 21 Mont. 345, 352; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 54.

When a person has obtained his patent he can only be required to answer persons who have some established claim and to contest with such person, not before the administrative departments, but in courts of justice only, and by legal proceedings, which determine finally the rights of the parties to property. Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 286, 301, 10 Sup. Ct. 765, 34 L. Ed. 155; Turner v. Sawyer (1893) 150 U. S. 578, 587, 14 Sup. Ct. 192, 37 L. Ed. 1189; Lightner Min. Co. v. Superior Court, etc. (1910) 112 P. 909, 14 Cal. App. 642, 648.

One not in privity with the United States, and who did not acquire any right to be preferred in the acquisition of a mineral lode or claim before the same was patented to another, and whose grantor was never in such privity, and never acquired any such right, cannot successfully attack such patent, either at law or in equity. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; Board of Educa-

tion v. Mansfield (1903) 95 N. W. 286, 17 S. Dak. 72, 78, 106 Am. St. Rep. 771.

In an action in a court of equity for relief as against a patent for a mining claim the complainant must connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of such patent, and he must possess such equities as will control the legal title in the patentee. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 647, 26 L. Ed. 875; Boggs v. Merced Min. Co. (1859) 14 Cal. 279, 363.

A person can only have relief against a patent issued by the government by showing a better right to the land than the patentee, and such as in law should have been respected by the officers of the land department, and would have given him the patent; and this rule applies to mining claims. Sparks v. Pierce (1885) 115 U. S. 408, 412, 6 Sup. Ct. 102, 29 L. Ed. 428.

Mere occupants of the public lands without title, and without any attempt having been made by them to secure the title, cannot resist the enforcement of a patent issued by the United States on the ground of such occupation. Id.

When one party is put out of court and his application for a patent dismissed, and he has a right of appeal, he cannot, after remaining silent for over eight years, and permitting the successful party to remain in possession of the lode, and work out its mineral, resume the contest, the legal title in the meantime having passed from the United States. U. S. v. Marshall Silver Min. Co. (1889) 9 Sup. Ct. 343, 129 U. S. 579, 32 L. Ed. 734.

A person who has gone through all the processes which the statutes of the United States require and has obtained title cannot be subjected by the officers of the government to defend that title before them from the attacks of a stranger. Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 292, 301, 10 Sup. Ct. 765, 34 L. Ed. 155.

A suit to set aside a patent for mineral lands on the ground of fraud practiced on the land department cannot be maintained by a private individual, who had at the time no claim upon any of the lands, but made a location thereon subsequently, such ground of invalidity being available only to the United States. Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 49 C. C. A. 637.

A protest filed against the issuance of a patent to a mining claim after the application for the patent has been allowed, the purchase money paid, and a certificate of entry issued does not give the protestant any basis for a suit in equity to annul the patent issued after the protest has been dismissed, or to charge the patentee as a trustee of the legal title. Neilson v. Champagne Mining & Milling Co. (1902) 119 Fed. 123, 55 C. C. A. 576.

A patent cannot be attacked on the ground that an adverse claim was pending at the time of its issuance by one who is not in privity with such adverse claimant. Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562.

72. **Patentees.**—It is a common practice to obtain patents in the names of the original locators, without regard to intervening changes in right or ownership, and the fact that a corporation grantee of certain owners proceeded upon an application made by prior owners, and obtained a patent running to them or their heirs and assigns, does not estop it from asserting that the interest of one of such patentees had been forfeited under the statute and vested in its grantors prior to the patent. Van Sice v. Ibex Mining Co. (1909) 173 Fed. 895, 97 C. C. A. 587, appeal dismissed (1911) 32 Sup. Ct. 520, 223 U. S. 712, 56 L. Ed. 625, and writ of certiorari denied (1910) 30 Sup. Ct. 408, 215 U. S. 607, 54 L. Ed. 346.

73. —— **Co-owners.**—See, also, notes to § 4620, ante.

The owner of a part interest in a mining claim is a cotenant with the other owners; and if, without their knowledge, he procures a patent in his own name, he becomes a trustee for them, and equity will enforce the trust in their favor. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 37 L. Ed. 1189; Ballard v. Golob (1905) 83 P. 376, 34 Colo. 417.

74. —— **Trust.**—See, also, notes to § 4620, ante.

Where a patent is wrongfully acquired the patentee holds it in trust for the true owner and a bill in equity will lie to enforce such trust. Turner v. Sawyer (1893) 150 U. S. 578, 586, 14 Sup. Ct. 192, 37 L. Ed. 1189; Mills v. Hart (1898) 52 P. 680, 24 Colo. 505, 508, 65 Am. St. Rep. 241. See, also, Cates v. Producers' & Consumers' Oil Co. (C. C. 1899) 96 Fed. 7.

When a patent is issued by the officers of the land department all reasonable presumptions are indulged in support of their action, and it is only when it is clear that some material error of law, imposition, or fraud has resulted in the issuance of a patent to one applicant when it should have been issued to another that the action of the officers of the land department can be called in question, and the patentee declared a trustee for the unsuccessful applicant. Leonard v. Lennox (1910) 181 Fed. 760, 762, 104 C. C. A. 296.

A mineral claimant must show his equity is superior in order to have the holder of the legal title of a mining claim declared a trustee as between himself and a town-site occupant.

Pierce v. Sparks (1885) 22 N. W. 491, 4 Dak. 1, 3. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 647, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 106 U. S. 447, 454, 1 Sup. Ct. 389, 27 L. Ed. 226; Boggs v. Merced Min. Co. (1860) 16 Cal. 279, 365; Nessler v. Biglow (1882) 60 Cal. 98.

A transfer of title by an applicant for a patent to a mining claim during the pendency of the application, has the effect only of making him the trustee for the transferee, and as such to hold the title for the purpose of the application, and when a patent is issued, the title passes to the transferee. Slothower v. Hunter (Wyo. 1906) 88 P. 36.

75. Description of land.— A patent is issued for the land described in the application, and the priority of right to the land is all that is necessarily determined in an adverse suit. Lawson v. U. S. (1907) 207 U. S. 1, 16, 28 Sup. Ct. 15, 52 L. Ed. 65.

In determining the location and boundaries of a patented mining claim, monuments control courses and distances; and a description of a monument as a rock in a mound of stones is not too indefinite a description of a monument, even in a country abounding in rocks and stones, if there is satisfactory proof of its location. Cullacott v. Cash Gold & Silver Min. Co. (1882) 8 Colo. 179, 6 Pac. 211.

A claim for mineral lands must be correctly described by reference to natural objects or permanent monuments, and the description must be incorporated in the patent. U. S. v. San Perdo & Canon del Agua Co. (1888) 17 P. 337, 4 N. Mex. (Johns.) 225, 304.

76. —— Reference to survey.—A reference in a patent to an official plat and survey makes such plat and the field notes of the survey part of the description of the land granted. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392, rehearing denied (1914) 141 P. 849.

77. Effect as conveyance.—A patent is the perfection and consummation of the title conveyed by the previous locations. Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378; Butte City Smoke-House Lode Cases (1887) 6 Mont. 397, 12 Pac. 858.

A patentee of a mining claim obtains the government title to the entire land, soil and mineral. Forbes v. Gracey (1876) 94 U. S. 762, 767, 24 L. Ed. 313; Duggan v. Davey (1886) 26 N. W. 887, 4 Dak. 110, 123. See Pacific Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348; Wolfley v. Lebanon Min. Co. (1878) 4 Colo. 112, 114; McCormick v. Varnes (1877) 2 Utah, 355, 362.

A patent adds little to the security of a party in the continuous possession of a mine he has located or purchased if he has complied with the statutory requirements. Chambers v. Harrington (1884) 111 U. S. 350, 351, 4 Sup. Ct. 428, 28 L. Ed. 452.

The patent to a mining claim carries with it such rights only to the land which includes the claim as the law confers and these rights can neither be enlarged nor diminished by the arbitrary action of the officers of the land department. Deffeback v. Hawke (1885) 115 U. S. 392, 406, 6 Sup. Ct. 95, 29 L. Ed. 423; Davis v. Weibbold (1891) 139 U. S. 507, 528, 11 Sup. Ct. 628, 35 L. Ed. 238.

A patent to land or mineral lodes within the jurisdiction of the land department conveys the legal title to the property, and constitutes a judgment of that tribunal upon the questions involved in its issue. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116.

A stream of running water is part and parcel of the land through which it flows, inseparably annexed to the soil, and the use of it as an incident to the soil passes to the patentee. Union Mill & Mining Co. v. Ferris (C. C. 1872) Fed. Cas. No. 14,371.

A patent granted by the United States for land, either agricultural or mineral, is something upon which its holder can rely for peace and security in his possession, and in its potency it is ironclad as against all merely speculative interferences. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Talbott v. King (1886) 9 P. 434, 6 Mont. 76, 107; Brownfield v. Bier (1895) 39 P. 461, 15 Mont. 403, 413; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 353, 61 Am. St. Rep. 511. See South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 62.

When a patent for a mining location is issued it covers everything embraced in the lands to which no prior rights have attached. Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348.

78. Effect as conveyance of surface and subsurface or extralateral rights.— See, also, notes to § 4618, ante.

A patent for a lode claim conveys the subsurface as well as the surface, limited only by the right given to pursue a vein which on its dip enters the subsurface, but the owner of such vein may not tunnel through a portion of the subsurface in order more conveniently to reach his vein. St. Louis Mining & M. Co. v. Montana M. Co. (1904) 24 Sup. Ct. 654, 655, 194 U. S. 235, 48 L. Ed. 953; St. Louis Min. & Mill. Co., of Montana, v. Montana Min. Co. (1904) 113 Fed. 900, 51 C. C. A. 530, 64 L. R. A. 207, judgment affirmed (1904) 24 Sup. Ct. 654, 194 U. S. 235, 48 L. Ed. 953.

One who has discovered and located a lode mining claim under the old

law abandons all right to follow his lode or vein on the course of its strike beyond the exterior lines of his patented claim extended downward vertically, when he locates it upon the surface of the ground, enters it, and accepts a patent for it under the new law. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116; Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

A patent for the claim located conveys the legal title to the surface and this carries with it the right to follow the vein, though it pass outside of the vertical side lines of the location. Gwillim v. Donnellan (1885) 115 U. S. 45, 47, 48, 5 Sup. Ct. 1110, 29 L. Ed. 348.

In the case of overlapping locations, a patent for the junior location, which first describes the entire rectangular claim by metes and bounds, and then excepts therefrom the premises previously granted to the senior claim, conveys to the patentee greater rights than would a patent specifically describing only the irregular tract lying outside the senior location. In the former case, an end line lying within the senior location is still to be considered the end line of the claim for the purpose of securing extralateral rights. Del Monte Min. & Mill. Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72.

Prima facie a patent conveys the right to everything found within the vertical planes drawn through the surface boundaries, with the exception that such boundaries may be invaded by an outside lode locator holding the apex of a vein in the pursuit of such vein on its downward course underneath the patented surface. St. Louis Min., etc., Co. v. Montana Min. Co. (1904) 194 U. S. 235, 238, 24 Sup. Ct. 654, 48 L. Ed. 953.

An election by the grantee of a patent for a lode claim to abandon rights acquired under the former law cannot be imported from the fact that such patent, in addition to granting such rights, also purports to grant all that would have been acquired by a location under the present law. East Central Eureka Min. Co. v. Central Eureka Min. Co. (1907) 27 Sup. Ct. 258, 259, 204 U. S. 266, 51 L. Ed. 476, affirming decree Central Eureka Min. Co. v. East Central Eureka Min. Co. (1905) 79 Pac. 834, 146 Cal. 147, 9 L. R. A. (N. S.) 940.

Priority of entry and patent does not conclusively establish seniority of location, so as to give the holder of a lode mining claim under such patent the right to the entire width of the vein on its dip, where part of the apex of such vein is within such claim and part within an adjoining claim. Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65, affirming judgment United States Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587.

It must be assumed in the absence of a record or some satisfactory evidence that a patent was issued without any contest and upon the surveys made under the proper officer of the government and included only ground in respect to which there was no conflict, and there is no presumption in such case that any subterranean rights were presented and adjudicated. Lawson v. United States Min. Co. (1907) 207 U. S. 1, 17, 28 Sup. Ct. 15, 52 L. Ed. 65. See Keely v. Ophir Hill Consol. Min. Co. (1909) 169 Fed. 601, 604, 95 C. C. A. 99.

A patent to mineral lands differs from a patent for agricultural lands in that it does not give title to the ground vertically to the center of the earth. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 564, 9 C. C. A. 613.

A title given by patent includes the surface ground embraced within the surface limits of the location and includes the veins and lodes, the tops or apices of which lie inside of such surface lines, in their course downward, though they depart from a perpendicular and extend outside the side lines. Id.

A patent for a mining claim conveys all veins, lodes, and ledges throughout their entire length, the top or apex of which lies within the surface boundaries though they may depart from a perpendicular and extend outside the vertical side lines. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 604, 25 C. C. A. 116; Crown Point Min. Co. v. Buck (1899) 97 Fed. 462, 465, 38 C. C. A. 278; Work Min., etc., Co. v. Doctor Jack Pot Min. Co. (1912) 194 Fed. 620, 628, 114 C. C. A. 392.

A patent may properly grant all extralateral rights. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 50, 27 C. C. A. 50.

The patentee of a number of consolidated mining locations is not required to show that separate lines of any of the original locations embraced within the surface boundaries of such consolidated patented claim entitle him to extralateral rights in respect to any lode or vein the apex of which is found within the exterior boundaries. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 663, 28 C. C. A. 333.

This statute secures to the patentee not only the surface ground, including all veins and lodes having their apices therein, but gives to him also the extralateral right to follow such lode or vein downward, though it passes outside of his side lines. Id.

The issuance of a patent to a mining claim, whether adverse or not, is not in any sense a determination of a con-

troversy over extralateral underground rights in following any surface conflict, as such rights could not have been made the subject of an issue or decision in the course of the patent proceedings. Montana Min. Co. v. St. Louis Min., etc., Co. (1900) 102 Fed. 430, 42 C. C. A. 415; U. S. Min. Co. v. Lawson (1904) 134 Fed. 769, 776, 67 C. C. A. 587.

The provisions of this and other sections tend to indicate that a patent for a mining claim when issued is a grant of land with all the rights incident to common-law owners and the reasons for specifying in the description of the grant the veins, lodes, and ledges is for the purpose of defining what is granted in addition to the land, that is the right to pursue such veins, lodes, and ledges extralaterally in case they depart from the perpendicular and extend beyond the side lines of the claim. St. Louis Min., etc., Co. v. Montana Min. Co. (1902) 113 Fed. 900, 902, 51 C. C. A. 530, 64 L. R. A. 207.

Where application for a patent is made by the owner of one of two overlapping claims, the issuance of a patent to him including the area within the overlapping boundaries is necessarily a determination that at the time of the proceedings such area is a part of that claim; but it does not necessarily determine the priority of location, and, where it does not appear that such question was put in issue and actually decided in the course of the patent proceedings, the owner of the other claim is not estopped from asserting the priority of his claim in a subsequent controversy respecting extralateral rights, which were not involved in the proceedings for a patent. United States Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587, judgment affirmed Lawson v. United States Mining Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

Where a lode mining claim is longer than it is wide, the end lines of the claim as fixed in the patent are prima facie at least the true end lines, as affecting extralateral rights. Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co. (1912) 194 Fed. 620, 114 C. C. A. 392.

A patent under this section or under the act of 1866 limits the patentee to veins or lodes lying within planes drawn vertically downward through the end lines of his location, and gives the patentees the right to take the ores found within those planes to any depth of any lodes the tops or apices of which lie within the surface lines of his location. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

A locator applying for and receiving a patent for his claim secures the exclusive right to the surface ground described in the patent and all lodes having their outcrop in that domain which would by the terms of the act pass with the grant, and if the patent is obtained without fraud it is in the hands of the patentee or of his grantee full evidence of title as against all antecedent claims to the same property. Hall v. Equator Mining & Smelting Co. (C. C. 1879) Fed. Cas. No. 5,931.

A conveyance by patent of a vein or lode whose top or apex is within the lines of a mining claim, and whose apex is cut by the end lines of such claim, is as complete as the conveyance of the surface of the claim itself. Blue Bird Min. Co. v. Largey (C. C. 1892) 49 Fed. 289, 292.

Where a mining claim as located does not have parallel end lines, but the United States surveyor draws in one end line so as to make them parallel, the rejection of such survey by the locator will not deprive his assignee, upon accepting the survey, and obtaining a patent in accordance therewith (abandoning the portion of his claim not included in the survey), of the right to follow the dip beyond his side lines within the vertical planes drawn through the parallel end lines. Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935.

This section provides for the issuing of patents for mining claims, and a patent when issued is for the land and conveys to the patentee the common-law right to the full enjoyment of the surface as well as all beneath the surface, and also to pursue the vein within the location throughout its entire depth though passing into adjoining lands. Hawke v. Deffenback (1885) 22 N. W. 480, 4 Dak. 20, 27.

The patent to a mining claim passes whatever title the government had to the surface and any vein or veins beneath it not otherwise granted. Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174.

79. Effect as evidence and determination of rights.—A patent to a mining claim duly executed operates not only to pass the title but is in the nature of an official declaration on the part of the land office that all the requirements preliminary to its issue have been complied with and the presumptions attending it are not open to rebuttal in an action at law, and its chief value is in its unassailable character and is the means of quieting the possessor in the enjoyment of his claim. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 640, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 106 U. S. 447, 1 Sup. Ct. 389, 27 L. Ed. 226; Poire v. Wells (1882) 6 Colo. 406, 408; Argonaut Consol. Min., etc., Co. v. Turner (1896) 48 P. 685, 23 Colo. 400, 405, 58 Am. St. Rep. 245; Hawke v. Deffenback (1885) 22 N. W. 480. 4 Dak. 20, 25; Duggan v. Davey (1886)

26 N. W. 887, 4 Dak. 110, 124; Talbott v. King (1886) 9 P. 434, 6 Mont. 76, 110; Mayer v. Carothers (1894) 36 P. 182, 14 Mont. 274, 289; Sharkey v. Candiani (1906) 85 P. 219, 46 Or. 112, 119, 7 L. R. A. (N. S.) 791. See Sparks v. Pierce (1885) 115 U. S. 408, 412, 6 Sup. Ct. 102, 29 L. Ed. 428; Calhoun Gold Min. Co. v. Ajax, etc., Co. (1901) 182 U. S. 499, 21 Sup. Ct. 885, 45 L. Ed. 1200; Uinta Tunnel, etc., Co. v. Creed Cripple Creek, etc., Min., etc., Co. (1902) 119 Fed. 164, 57 C. C. A. 200; Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co. (1904) 131 Fed. 579, 66 C. C. A. 299; Anderson v. Bartels (1883) 3 P. 225, 7 Colo. 256; Iron Silver Min. Co. v. Campbell (1892) 29 P. 513, 17 Colo. 267; Murray v. Buol (1887) 12 P. 858, 6 Mont. 397, 409.

The issue of a patent to a claimant is equivalent to a determination by the United States, in an adversary proceeding to which an adverse claimant is in law a party, that the original claimant had title to the discovery superior to that of the adverse claimant and that the latter's location is invalid. Gwillim v. Donnellan (1885) 115 U. S. 45, 51, 5 Sup. Ct. 1110, 29 L. Ed. 348; Perigo v. Erwin (C. C. 1898) 85 Fed. 904, 905.

Acceptance by the government of lode mining location notices given before Act July 26, 1866, recognizing the rights of locators who have conformed to local customs or rules, and the issue of patents thereon, is a recognition by the land department of conformity to the local rules and customs of the district, and such ruling is not open to challenge by third parties claiming rights arising subsequently to the notices. Lawson v. U. S. Min. Co. (1907) 28 Sup. Ct. 15, 21, 207 U. S. 1, 52 L. Ed. 65.

The issuance of a patent for a mining claim is a judicial determination of the rights of the patentee. Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 819, 49 C. C. A. 637.

In the case of interfering locations, for which patents have lawfully issued upon due notice to adverse parties, priority of right is determined by priority of patent, and not by priority of location. Hall v. Equator Mining & Smelting Co. (C. C. 1879) Fed. Cas. No. 5,931.

The rule that of two adverse mining locations made that which is prior in time is prior in right does not apply where a junior locator makes an application for a patent, and on due notice the senior locator either fails to appear and adverse the claim, or, having appeared, the claim is decided against him, and after a patent is issued the patentee has the older as well as the better title. Id.

The boundary lines of a claim as defined by the patent are the lines by which the rights of the parties are to be determined. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, judgment affirmed (1897) 83 Fed. 658, 28 C. C. A. 333.

Where a corporation, in applying for a patent for a mining claim, made a distinct disclaimer of a specific quantity of land, as being in conflict with a prior patent, it cannot claim relief in equity as to the conflict. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868.

The issuance of a patent to a mining claim necessarily determines the priority of right thereto, the discovery of mineral in place, and that the claim was properly located and marked, so that its boundaries could readily be traced. Fox v. Mackay (1901) 1 Alaska, 329.

Where a patent to a town site and a patent to a mining claim conflict, that one will be sustained which first vests the right. The Tombstone Townsite Cases (1887) 15 Pac. 26; Blackmore v. Reilly (1888) 17 Pac. 72, 2 Ariz. 442.

Where the general land office issued a patent in favor of one claim against a prior location, it must be conclusively presumed that the question of the validity of the prior location was adversely determined to the first locator. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392.

A patent is evidence of the series of proceedings recited therein, and is a solemn record of the action and judgment of the government with respect to the title of the claimant. U. S. v. San Pedro & Canon del Agua Co. (1888) 17 P. 337, 4 N. Mex. (Johns.) 225, 299. See McGarrahan v. New Idria, etc., Co. (1874) 49 Cal. 331.

80. —— Tunnel owners.—The entries and patents to lode mining claims vest the titles thereof in the locators subject to the rights of the prior claimant of a tunnel site, just as they vest them subject to the rights of adjoining lode claimants to follow the dip of veins or lodes having their apices in such locations. Iron Silver Min. Co. v. Campbell (1890) 135 U. S. 286, 301, 10 Sup. Ct. 765, 34 L. Ed. 155; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (C. C. A. 1895) 66 Fed. 200, 210; Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min., etc., Co. (C. C. A. 1902) 119 Fed. 164, 168; Hall v. Equator Mining & Smelting Co. (C. C. 1879) Fed. Cas. No. 5,931; Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408, 412; Lee v. Stahl (1886) 11 P. 77, 9 Colo. 208, 210; Morgenson v. Middlesex Min., etc., Co. (1887) 17 P. 513, 11 Colo. 176, 179.

Patents of lode claims based on entries made after the location of a claim

for a tunnel site across them are subject to the rights of the claimants of the tunnel site where the rights were so uncertain and contingent that they could not be fairly litigated when the applications for the patents were made. Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200, judgment affirmed Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

81. Effect of patent for part of claim.—When the applicant for a patent, pending an adverse suit over a conflicting overlap with another location, obtains a patent for the part not in dispute, he does not thereby waive his right to contest for the part in litigation. Fox v. Mackay (1901) 1 Alaska, 329. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 157 U. S. 683. 15 Sup. Ct. 733, 39 L. Ed. 859.

A locator of a mining claim by obtaining patent for part of his claim does not thereby admit that the remainder is held by a superior title, nor does this debar him from contesting the title to the remainder of the claim. Miller v. Hamley (1903) 74 P. 980, 31 Colo. 495, 501. See Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed 725.

82. Date of patentee's title, and title by relation.—A patent for a mining claim relates back to the time of the original location and entry and perfects the right of the claimant to the exclusion of adverse intervening claims. Heydenfeldt v. Daney, etc., Min. Co. (1876) 93 U. S. 634, 641, 23 L. Ed. 995; Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Silver Bow Min. & Mill. Co. v. Clark (1885) 5 Mont. 378, 5 Pac. 570; Talbott v. King (1886) 6 Mont. 76, 9 Pac. 434; Butte City Smoke-House Lode Cases (1887) 6 Mont. 397, 12 Pac. 858; Deno v. Griffin (1889) 20 Pac. 308, 20 Nev. 249, 252; Las Vegas & T. R. Co. v. Summerfield (Nev. 1913) 129 P. 303. See South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 46.

A right to a patent to mineral lands or a mining claim once vested is treated by the government as equivalent to a patent issued and when the patent issues it relates back to the inception of the right thus acquired. Deffeback v. Hawke (1885) 115 U. S. 392, 405, 6 Sup. Ct. 95, 29 L. Ed. 423; Davis v. Weibbold (1891) 139 U. S. 507, 11 Sup. Ct. 628, 35 L. Ed. 238; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 11, 50 C. C. A. 79, 61 L. R. A. 230; Deno v. Griffin (1889) 20 P. 308, 20 Nev. 249, 252. See Talbott v. King (1886) 36 P. 182, 6 Mont. 76; Courchaine v. Bullion Min. Co. (1868) 4 Nev. 369, 375; South End Min. Co. v. Tinney (1894) 35 P. 89, 22 Nev. 19, 46; Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174.

When, in following the dip of a vein, the owners of two claims come in conflict, priority of right is determined by priority of location; and, where a patent issued to one of the parties is silent as to the date of location, the same may be proved by testimony aliunde. Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 9 C. C. A. 613, judgment reversed (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859. See Champion Min. Co. v. Consolidated, etc., Min. Co. (1888) 16 P. 513, 75 Cal. 78; Kahn v. Old Telegraph Min. Co. (1877) 2 Utah, 174, 188.

The conclusiveness of a patent does not prevent the patentee from showing the date of the original proceedings for the acquisition of the title, where it is not stated in the instrument, as the patent takes effect by relation as of that date, for the purpose of cutting intervening claims. St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 647, 26 L. Ed. 875.

A patent for a mining claim takes effect by relation to the date of the entry, and that is the earliest evidence of any movement for the acquisition of title from the government. Davis v. Weibbold (1891) 139 U. S. 507, 517, 11 Sup. Ct. 628, 35 L. Ed. 238.

A patent is proof of the discovery and relates back to the date of the location and is conclusive on this point. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 182 U. S. 499, 510, 21 Sup. Ct. 885, 45 L. Ed. 1200; Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 196 U. S. 337, 353, 25 Sup. Ct. 266, 49 L. Ed. 501; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 565, 9 C. C. A. 613; Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min. etc., Co. (1902) 119 Fed. 164, 170, 57 C. C. A. 200.

In respect of conflicting mining claims, seniority is determined by the order in which they were located, whether they have been patented or remain unpatented. United States Min. Co. v. Lawson (1907) 134 Fed. 769, 67 C. C. A. 587, judgment affirmed Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 52 L. Ed. 65.

The doctrine of "relation" cannot be applied so as to cut off the rights of the earlier patentee under a later location. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

The title of a patentee dates from the date of the entry and payment and not from the date of the patent, and a condition in such patent making it subject to the right of a proprietor of a vein or lode relates to that date and antedates the subsequent location of any

mining claim, and the patentee has the legal title to any vein or lode within such land as well as to the land itself. Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348, 349.

83. Conclusiveness.—A patent is conclusive as to all matters determinable by the land department when its action is within the scope of its authority and when it has jurisdiction under the law to convey the land. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 646, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 27 L. Ed. 226; Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 584, 29 L. Ed. 273; Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 317, 31 L. Ed. 182; U. S. v. Iron Silver Min. Co. (1889) 9 Sup. Ct. 195, 128 U. S. 673, 685, 32 L. Ed. 571; Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 529, 35 L. Ed. 238; Barden v. Northern Pac. R. Co. (1894) 14 Sup. Ct. 1030, 154 U. S. 288, 328, 38 L. Ed. 992; Creede & C. C. Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 345, 49 L. Ed. 501; Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 565, 9 C. C. A. 613; Carson City, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 664, 28 C. C. A. 333; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 820, 49 C. C. A. 637; Last Chance Min. Co. v. Bunker Hill, etc., Min., etc., Co. (1904) 131 Fed. 579, 586, 66 C. C. A. 299; Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685, 687; Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1899) 97 Fed. 657, 660; Roberts v. Southern Pac. R. Co. (C. C. 1911) 186 Fed. 934, 945; Argonaut Consol. Min. & Mill. Co. v. Turner (1897) 48 Pac. 685, 23 Colo. 400, 58 Am. St. Rep. 245; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 29, 50 L. R. A. 209, 83 Am. St. Rep. 17; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 425; Talbott v. King (1886) 9 Pac. 434, 6 Mont. 76. 104; Chambers v. Jones (1895) 42 Pac. 758, 17 Mont. 156, 162; Horsky v. Moran (1898) 53 Pac. 1064, 21 Mont. 345, 352; Board of Education v. Mansfield (1903) 95 N. W. 286, 17 S. D. 72, 82, 106 Am. St. Rep. 771. See Poire v. Wells (1882) 6 Colo. 406; Justice Min. Co. v. Lee (1895) 40 Pac. 444, 21 Colo. 260, 52 Am. St. Rep. 216; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 53.

The issuance of a patent to the original locator is a bar to the right of a subsequent locator to apply to the United States for a patent and defeats his location. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 51, 29 L. Ed. 348.

The question of the mineral or nonmineral character of lands is open to consideration up to the time of issuing the patent, but when the legal title passes by patent it passes free from the contingency of future discovery of mineral. Shaw v. Kellogg (1898) 18 Sup. Ct. 632, 170 U. S. 312, 339, 42 L. Ed. 1050. See Barden v. Northern Pac. R. Co. (1894) 14 Sup. Ct. 1030, 154 U. S. 288, 38 L. Ed. 992; Roberts v. Southern Pac. R. Co. (C. C. 1911) 186 Fed. 934, 945.

The patentee of a mining claim cannot be deprived of all benefits arising from his patent, including those which attach to the original location while unpatented. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 600.

The granting of a mineral patent is res adjudicata that lands were mineral lands at the time of location, and known to be such. The Tombstone Town Site Cases (Ariz. 1887) 15 Pac. 26.

84. —— Validity, and rights of patentee.—A patent is evidence that all previous steps have been regularly taken and justify its making. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 646, 26 L. Ed. 875; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 890, 182 U. S. 499, 45 L. Ed. 1200; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

An entry when sustained by a patent is conclusive evidence that at the time of such entry there had been a valid location, and such valid location implies a discovery. Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 353, 49 L. Ed. 501; Talbott v. King (1886) 6 Mont. 76, 9 Pac. 434; Chambers v. Jones (1895) 17 Mont. 156, 42 Pac. 758.

A patent to a mining claim raises the conclusive presumption that all the preliminary requirements have been properly carried out. Stewart Mining Co. v. Bourne (1914) 218 Fed. 327, 134 C. C. A. 123; Same v. Bunker Hill & Sullivan Mining & Concentrating Co. (1914) 218 Fed. 330, 134 C. C. A. 126; Galbraith v. Shasta Iron Co. (1904) 76 Pac. 901, 143 Cal. 94; Id. (1904) 76 Pac. 1127, 143 Cal. xviii; Suessenbach v. First Nat. Bank (1889) 5 Dak. 477, 41 N. W. 662.

When a patent describes a claim as having parallel end lines, and grants extralateral rights, the courts are bound by the terms thereof, in a controversy with the owners of an adjoining claim, and cannot deny such extralateral rights on the theory that the end lines are not in fact parallel. Waterloo Min. Co. v. Doe (1897) 82 Fed. 45, 27 C. C. A. 50; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935.

A patent for a mining claim is con-

clusive of all the facts necessary to establish the validity thereof as against one claiming adversely to the patentee. Sharkey v. Candiani (1906) 85 P. 219, 48 Or. 112, 7 L. R. A. (N. S.) 791. See Anderson v. Bartels (1883) 3 Pac. 225, 7 Colo. 256; Iron Silver Min. Co. v. Campbell (1892) 29 Pac. 513, 17 Colo. 267.

A patent of a mining claim issued by the land department after proper adjudication is conclusive as to the matters presented for adjudication and as to all persons parties thereto, and hence, where the owner of a claim did not file an adverse, the issuance of a subsequent patent is conclusive as to the rights of the parties to the surface ground included in the application therefor. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (Nev. 1913) 129 P. 308; Id. (1914) 138 Pac. 71, 73, 36 Nev. 543.

As a general rule a person who has obtained a patent from the government for a mining claim cannot be called upon to answer touching the validity or invalidity of his patent before the officers of the land department. U. S. v. Schurz (1880) 102 U. S. 378, 26 L. Ed. 167; Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 301, 34 L. Ed. 155.

A patent for a mining claim is conclusive as to the date of the location and such date is an essential fact to be determined by the land office in issuing a patent, and the rule applies both in the determination by the land office and the determination of the fact by a judgment of a court of competent jurisdiction in an action by an adverse claimant. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 690, 39 L. Ed. 859; Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 546, 48 C. C. A. 665 (overruling Last Chance Min. Co. v. Tyler Min. Co. [1894] 61 Fed. 557, 9 C. C. A. 613, and Bunker Hill, etc., Co. v. Empire State, etc., Co. [C. C. 1900] 108 Fed. 189, 193). See U. S. v. Northern Pac. R. Co. (1899) 95 Fed. 864, 37 C. C. A. 290.

The issuance of a patent for a claim made up of several claims acquired by purchase is conclusive that the parties named therein as grantees were the owners, not only of the surface ground described, but of any vein included therein, to the extent that its apex is found within the exterior boundaries, and of all rights and privileges incident thereto; that the several locations included in the patent had been properly made in accordance with law, including a discovery of the lode; and that the amount of work required by law had been performed thereon. Carson City Gold & Silver Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 28 C. C. A. 333, affirming judgment (C. C. 1896) 73 Fed. 597, and certiorari denied (1898) 18 Sup. Ct. 940, 171 U. S. 687.

The issuance of a patent conclusively determines the priority of the applicant's location over any other, and confers upon the patentee not only the title to the entire surface of the claim, but also all extralateral rights given by statute, as against the owner of an unpatented conflicting claim. Bunker Hill & Sullivan Mining & Concentrating Co. v. Empire State-Idaho Mining & Developing Co. (1901) 109 Fed. 538, 48 C. C. A. 665, affirming judgment (C. C. 1900) 108 Fed. 189.

Issuance of a patent, after due notice, for a mining claim, conclusively determines its priority, as to the surface and the incident extralateral rights, over claims whose surface lines conflict therewith. Empire State-Idaho Mining & Developing Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1902) 114 Fed. 420, 52 C. C. A. 222.

The issuance of a patent for a mining claim is conclusive evidence of the sufficiency of the steps taken by the locator as against one claiming adverse rights. Last Chance Min. Co. v. Bunker Hill & Sullivan Mining & Concentrating Co. (1904) 131 Fed. 579, 66 C. C. A. 299, writ of certiorari denied (1906) 26 Sup. Ct. 754, 200 U. S. 617, 50 L. Ed. 622.

In the absence of evidence of bad faith on the part of the original locator in pointing out the boundaries adopted by the government surveyor, the patent procured by the assignee of the claim is conclusive as to the limits of the claim as against the patentee. Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685.

As a general rule the recitals in a mining patent are conclusive evidence of the extent and boundaries of the claim. Other evidence may be admitted to determine the location of the monuments and boundaries called for by the patent. Alaska Gold Min. Co. v. Barbridge (1901) 1 Alaska, 311.

In a law action, the fact that the vein disclosed in the discovery shaft of a patented claim departs from the side lines of the claim as marked upon the surface cannot be shown for the purpose of invalidating the patent as to that part of the claim which lies beyond the point of such departure. Argonaut Consol. Mining & Milling Co. v. Turner (1897) 48 P. 685, 23 Colo. 400, 58 Am. St. Rep. 245, distinguishing Armstrong v. Lower (1882) 6 Colo. 399.

The question whether a vein apexing in a patented claim contains mineral cannot be raised collaterally. Davis v. Shepherd (1903) 72 P. 57, 31 Colo. 141.

The issuance of a patent to a quartz lode mining claim is conclusive, as to the title to the land within its limits, upon the court in an action at law. Butte City Smoke-House Lode Cases (1887) 6 Mont. 397, 12 Pac. 858.

A patent to a mining claim raises the conclusive presumption that there is an apex of a vein within the patented

ground, but there is no presumption that such vein embraces ore without the side lines of the claim, or that the vein presumed is the one in dispute. Grand Cent. Min. Co. v. Mammoth Min. Co. (1905) 83 P. 648, 29 Utah, 490.

85. —— **Matters not concluded.**—Entries and patents of lode mining claims, in proceedings to which a claimant of a tunnel site located across them prior to the entries was not and was not required to be a party, will not estop him from establishing the fact that no discoveries of lodes or mines of mineral had been made in the lode claims before the claim for the tunnel site was located across them. Uinta Tunnel Min. & Transp. Co. v. Creede & Cripple Creek Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200 (judgment affirmed Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. [1905] 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501); Uinta Tunnel, Min. & Transp. Co. v. Ajax Gold Min. Co. (1905)141 Fed. 563, 73 C. C. A. 35.

The conclusiveness of a patent does not prevent a party resisting it from showing that no entry of the land was made as an initiatory proceeding, where such fact is not stated in the instrument. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 647, 26 L. Ed. 875.

An entry of a lode mining claim, sustained by a patent, though conclusive evidence that, at the time of entry, there had been a valid location, does not preclude the owner of a tunnel site located across the lode, who claims that his location was prior to any discovery in the lode claimed, from showing the order of the steps taken to perfect the lode location, including the date of discovery. Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min. & Transp. Co. (1905) 25 Sup. Ct. 266, 273, 196 U. S. 337, 49 L. Ed. 501, affirming judgment Uinta Tunnel Min. & Transp. Co. v. Creede & C. C. Min. & Mill. Co. (1902) 119 Fed. 164, 57 C. C. A. 200.

The fact that a patent to one mining claim excepts certain surface ground is not conclusive on the question of the priority of location, and the owner of such excepted ground is not precluded from contesting the claim. Van Zandt v. Argentine Min. Co. (C. C. 1881) 8 Fed. 725, 728.

A patent is not conclusive on the question of the existence of a vein or lode to the extent of giving the grantee the right to follow the alleged vein or lode downward on its dip outside of the lines of his location. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 552.

A patent for a mining claim is not conclusive as to the date of location, such fact not being one which it is essential for the land office to determine in issuing the patent; hence the failure of the owner of an adjoining claim, where the two overlap, to contest the application, is not an admission on his part of the priority of location of the patented claim, which concludes him and debars him from thereafter contesting the question in the courts. Bunker Hill & S. Mining & Concentrating Co. v. Empire State Idaho Mining & Developing Co. (C. C. 1900) 108 Fed. 189, judgment affirmed (1901) 109 Fed. 538, 48 C. C. A. 665.

A patent for a mining claim issued on a regular application after due notice and where no adverse claim has been filed is conclusive against third persons as to those things with respect to which adverse claims could be filed, but it does not settle the question as to the right of a vein below the point of junction where two separate surface veins unite. Champion Min. Co. v. Consolidated Wyoming Gold Min. Co. (1888) 16 Pac. 513, 75 Cal. 78, 80.

Where the land department does not determine the question of priority of claims in the same group, but makes a double grant of the conflicting area appearing upon the face of the patent, the court may determine such priority. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1913) 129 P. 308.

86. **Collateral attack.**—A patent for a mining claim is not subject to collateral attack and no relief is afforded in a court of law, though the government officers took mistaken views of the law or drew erroneous conclusions from the evidence or acted from imperfect views of their duty, or even from corrupt motives. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 647, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 1 S. Ct. 389, 106 U. S. 447, 27 L. Ed. 226; Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 529, 35 L. Ed. 238; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 167 U. S. 108, 42 L. Ed. 96; Creede & C. C. Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501; New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 604, 25 C. C. A. 116; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 820, 49 C. C. A. 637; Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 328; Justice Min. Co. v. Lee (1895) 40 Pac. 444, 21 Colo. 260, 262, 52 Am. St. Rep. 216; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 294. See Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 260, 4 C. C. A. 303; Durango Land & Coal Co. v. Evans (1897) 80 Fed. 425, 25 C. C. A. 523; Cowell v. Lammers (C. C. 1884) 21 Fed. 200, 208.

A patent to a mining claim is conclusive, as against collateral attack, on every question properly within the jurisdiction of the land department.

Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co. (1912) 194 Fed. 620, 114 C. C. A. 392; Carson City Gold, etc., Min. Co. v. North Star Min. Co. (C. C. 1896) 73 Fed. 597, 600; Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 Pac. 71, 73, 36 Nev. 543.

The validity of a patent cannot be assailed collaterally for false and perjured testimony used to secure it. Steel v. St. Louis, S. & R. Co. (1882) 1 Sup. Ct. 389, 395, 106 U. S. 447, 27 L. Ed. 226. See Casey v. Thieviege (1897) 48 Pac. 394, 19 Mont. 341, 353, 61 Am. St. Rep. 511; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 55.

Patents for lode-mining claims cannot be collaterally attacked by evidence that at the date of the subsequent location of a tunnel site no ore had been discovered in the lode claims. Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200, affirming judgment (1899) 59 Pac. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

It is not competent to show by proof outside the receiver's receipts or the patents that there had been no location of the patented claims or no discovery of the lodes or veins therein before they were entered for patent, as this is the issue between the parties before the land department, and its decision on such question is conclusive and not subject to collateral attack. Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min., etc., Co. (1902) 119 Fed. 164, 166, 57 C. C. A. 200. See Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 182 U. S. 499, 502, 503, 510, 21 Sup. Ct. 885, 45 L. Ed. 1200.

It is not a collateral attack upon a patent to a lode mining claim for a claimant to a tunnel site which crosses such lode claim and which was located before the entry of such lode claim, to assert his rights to his tunnel claim as against the patentee of the lode claim, as under the law such a patent issues subject to such right. Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min., etc., Co. (1902) 119 Fed. 164, 169, 57 C. C. A. 200.

No person can become the proprietor of a mine already granted or of a mine in lands a patent for which has been issued, except by purchase from the grantee; and such a patent cannot be attached collaterally on the ground that the land contained valuable minerals. Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348, 349.

The fact that a patented placer claim included part of a lode claim which had not been forfeited cannot be considered in a collateral attack upon such placer patent. Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 818.

The grant of a patent to a mining claim to one who procured it for and assigned it to an alien is the judgment of a special tribunal, and cannot be collaterally attacked by a third party. Justice Min. Co. v. Lee (1895) 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216, reversing Lee v. Justice Min. Co. (1892) 2 Colo. App. 112, 29 Pac. 1020.

The validity of a patent cannot be collaterally attacked by one who did not file an adverse to the application for the patent at the time it was pending. Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 P. 71, 36 Nev. 543, reversing judgment on rehearing (1913) 129 P. 308, 35 Nev. 392.

87. —— **Void patent.**—If a patent is void upon its face, or if it was issued without authority, or if it was prohibited by statute, it may be impeached collaterally in an action at law. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 644, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 27 L. Ed. 226; Garrard v. Silver Peak Mines (1899) 94 Fed. 983, 990, 36 C. C. A. 603; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 820, 49 C. C. A. 637. See Doolan v. Carr (1887) 8 Sup. Ct. 1228, 125 U. S. 618, 31 L. Ed. 844; Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 142 U. S. 161, 35 L. Ed. 974; Burfenning v. Chicago, etc., R. Co. (1896) 16 Sup. Ct. 1018, 163 U. S. 321, 323, 41 L. Ed. 175; Lakin v. Dolly (C. C. 1891) 53 Fed. 333; Heydenfeldt v. Daney, etc., Min. Co. (1875) 10 Nev. 290, 308.

A patent may be collaterally impeached in any action and its operation as a conveyance defeated by showing that the department had no jurisdiction to dispose of the land described or that the public officers acted without authority; as examples, where the land was never the property of the United States, or where its sale was not authorized by statute, or where it had previously been disposed of or reserved from sale, or dedicated to special purposes, or that the instrument was never executed by the person whose signature was attached to it. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 646, 26 L. Ed. 875; Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 452, 27 L. Ed. 226; Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, 583; Kansas City Min., etc., Co. v. Clay (1892) 29 Pac. 9, 3 Ariz. 326, 328; Van Ness v. Rooney (1911) 116 Pac. 392, 160 Cal. 131, 141; Heydenfeldt v. Daney, etc., Min. Co. (1875) 10 Nev. 290, 308. See Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Lakin v. Dolly (C. C. 1891) 53 Fed. 333.

A patent issued for a mining claim where the title has already passed out of the United States is utterly void and

is subject to collateral attack. Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 525, 35 L. Ed. 238; Francoeur v. Newhouse (C. C. 1889) 40 Fed. 618; Northern Pac. R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 606.

88. Cancellation and vacation.—A patent for a mining claim can only be vacated or limited by regular judicial proceedings taken in the name of the government for that special purpose. Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 454, 27 L. Ed. 226; Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 821, 49 C. C. A. 637; Jameson v. James (1909) 100 Pac. 700, 155 Cal. 275, 280; Quinn v. Baldwin Star Coal Co. (1904) 76 Pac. 552, 19 Colo. App. 497, 505.

Generally objections and defects to a patent must be put in issue by pleading in a direct proceeding to avoid the patent. Patterson v. Winn (1826) 24 U. S. 380, 6 L. Ed. 500; St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 644, 26 L. Ed. 875.

A patent to a mining claim cannot be vacated or limited by the government officers themselves as their power over the land is ended when the patent is issued and placed on the records of the department. Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 454, 27 L. Ed. 226.

A bill in chancery by the United States to vacate a patent is not to be treated as a writ of error, or petition for rehearing, nor as if it were a mere retrial of the case as it was before the land office, with such additional proof as the parties may be able to produce. U. S. v. Marshall Silver Min. Co. (1889) 9 Sup. Ct. 343, 129 U. S. 579, 32 L. Ed. 734.

If the officers of the land department have acted within the general scope of their power, and without fraud, a patent issued after contest in the land office will not be interfered with or canceled by the courts, unless there has been a gross mistake or violation of law. Id.

When the government has issued and delivered its patents for lands the control of the department over the title to such land has ceased, and the title of the patentee can only be impeached by a bill in chancery. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 301, 34 L. Ed. 155. See Chandler v. Calumet & Hecla Min. Co. (1893) 13 Sup. Ct. 798, 149 U. S. 79, 93, 37 L. Ed. 657; Horsky v. Moran (1898) 53 Pac. 1064, 21 Mont. 345, 356.

Where each of two parties has a patent for the same claim, the question as to the superiority of title may depend upon extrinsic facts not shown by the patents themselves; and it is competent in a controversy in a judicial proceeding to establish such priority by proof of such facts. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 34 L. Ed. 155. See Last Chance Min. Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 567, 9 C. C. A. 613.

Patents for mining claims may not be set aside or modified for mistakes unless such alleged mistakes are proved by evidence that is plain and convincing beyond reasonable controversy. Thallman v. Thomas (1901) 111 Fed. 277, 49 C. C. A. 317.

The government cannot avoid its patent on the ground that there was no mineral discovered in the discovery shaft, if mineral was in fact discovered within the location, though a state law may require a discovery in the discovered shaft. Wight v. Dubois (C. C. 1884) 21 Fed. 693, 694.

The United States held entitled to the cancellation of a patent for mining claims within a forest reservation, issued after the filing of a protest by the forester, on the ground that the failure to consider said protest was through either inadvertence or a mistake of law. U. S. v. Lavenson (D. C. 1913) 206 Fed. 755.

An action to annul a patent to a mining claim on the ground of the alienage of the patentee is prematurely brought while the patent proceedings are pending in the land office. Justice Min. Co. v. Lee (1895) 21 Colo. 260, 40 Pac. 444, 52 Am. St. Rep. 216, reversing Lee v. Justice Min. Co. (1892) 2 Colo. App. 112, 29 Pac. 1020.

If title to mineral lands has been acquired contrary to the term of the statute, such fact can be shown and the patent annulled in a proper proceeding. South End. Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 38.

A patent for mineral land may be annulled if the holder has failed to comply with the terms of this section in the matter of expenditures. Id.

89. —— Cancellation for fraud.—Before a court will set aside a patent to mineral land on the ground of fraud, it must appear, not merely that the applicant was mistaken as to the character of the land, but that the representations in regard thereto were falsely and fraudulently made; and this fact must clearly appear. Multnomah Mining, Milling & Development Co. v. U. S. (1914) 211 Fed. 100, 128 C. C. A. 28; U. S. v. Iron Silver Min. Co. (C. C. 1885) 24 Fed. 568, decree affirmed (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571. See U. S. v. Kostelak (D. C. 1913) 207 Fed. 447, 450.

A patent to a mining claim secured by fraudulent practices, although not void or subject to collateral attack, is nevertheless voidable and may be annulled in a suit by the United States government against the patentee or a purchaser with notice of the fraud. Diamond Coal Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 239, 58 L. Ed. 936.

Where a patent to a mining claim was procured by fraud and misrepre-

sentation and against the rights of an adverse claimant a court of equity may at the instance of the government cancel the patent and afford the adverse claimant an opportunity to contest his rights. See McLaughlin v. U. S. (1882) 2 Sup. Ct. 802, 107 U. S. 526, 528, 27 L. Ed. 806; U. S. v. Minor (1885) 5 Sup. Ct. 836, 114 U. S. 233, 240-244, 29 L. Ed. 110; Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 278-279, 30 L. Ed. 170; U. S. v. San Jacinto Tin Co. (1888) 8 Sup. Ct. 850, 125 U. S. 273, 285, 286, 31 L. Ed. 747.

The United States may have a patent for a mining claim annulled in a court of equity on the ground of fraud in procuring a patent as nonmineral, when it was in fact known to the applicant to be mineral land and was at the time of the entry worked as such. Diamond Coal, etc., Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 239, 58 L. Ed. 936; U. S. v. Rose (C. C. 1885) 24 Fed. 196. See U. S. v. Minor (1885) 5 Sup. Ct. 836, 114 U. S. 233, 29 L. Ed. 110; U. S. v. San Jacinto Tin Co. (C. C. 1885) 23 Fed. 279.

A patent can be assailed by a proceeding in equity and set aside as void on the ground of fraud in its procurement where there are no innocent holders for value. Meader v. Norton (1870) 78 U. S. 442, 458, 20 L. Ed. 184; U. S. v. Minor (1885) 5 Sup. Ct. 836, 114 U. S. 233, 243, 29 L. Ed. 110; Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 313, 31 L. Ed. 182; Montana Cent. R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 813.

A patent for a mining claim passes the legal title, though procured by fraud, but it may be assailed by a proceeding in equity and set aside on proof of the fraud, if rights of innocent purchasers have not intervened. Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 313, 31 L. Ed. 182.

The applicant's claim to a patent is not affected by the fact that he was moved to make the application as much by the existence of timber on the land, as by the existence of gold. U. S. v. Iron Silver-Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571, affirming decree (C. C. 1885) 24 Fed. 568.

The United States may sue to cancel a patent for mining lands obtained by fraud. Id.

A patent for a mining claim may be set aside on the ground of fraud or in cases where it appears on the face of the patent that its issuance was not authorized by law. Carson City Gold, etc., Min. Co. v. North Star Min. Co. (1897) 83 Fed. 658, 665, 28 C. C. A. 333.

It is a fraud on the government when a claimant obtains a patent on representations that the land described is valuable for its mineral deposits and that the purpose of obtaining the patent is because of such mineral deposits, when in fact the land is not valuable for such deposits and is in fact not desired by the patentee for that purpose, but for other and different purposes. U. S. v. Lavenson (D. C. 1913) 206 Fed. 755, 763.

Persons in possession of a mining claim under a location made in accordance with the law, are in such privity with the United States that they can contest a patent subsequently obtained by fraud, and assert their rights to the claim. South End Min. Co. v. Tinney (1894) 22 Nev. 19, 35 Pac. 89.

90. —— **Proof.**—The proof necessary to justify the vacation of a patent for a mining claim must be clear, convincing, and unambiguous. Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 316, 31 L. Ed. 182; U. S. v. King (1897) 83 Fed. 188, 27 C. C. A. 509; Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 813; U. S. v. King (1889) 9 Mont. 75, 22 Pac. 498. See, also, Diamond Coal Co. v. U. S. (1914) 34 Sup. Ct. 498, 233 U. S. 236, 239, 58 L. Ed. 936.

To cancel a patent for fraud the government must allege and prove fraud by clear evidence. Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 135, 1 C. C. A. 192.

91. —— **Effect.**—The cancellation of a mineral patent does not of itself render the ground embraced by it subject to relocation, but the effect is nothing more than a rejection of the application for patent and the applicant has the same rights as if no application had been made. McKnight v. El Paso Brick Co. (1911) 120 Pac. 694, 16 N. M. 721, 737, Ann. Cas. 1912D, 1309. See Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 83 Am. St. Rep. 92.

§ 4623. (R. S. § 2326.) Adverse claim, proceedings on.

Where an adverse claim is filed during the period of publication, it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of such adverse claim, and all proceedings, except the publication of notice and making and filing of the affidavit thereof, shall be stayed until the controversy shall have been settled or decided by a court of competent jurisdiction, or the adverse claim waived. It shall be the duty of the adverse claimant, within thirty days after filing his claim, to commence proceedings in a court of competent jurisdiction, to determine the

question of the right of possession, and prosecute the same with reasonable diligence to final judgment; and a failure so to do shall be a waiver of his adverse claim. After such judgment shall have been rendered, the party entitled to the possession of the claim, or any portion thereof, may, without giving further notice, file a certified copy of the judgment-roll with the register of the land-office, together with the certificate of the surveyor-general that the requisite amount of labor has been expended or improvements made thereon, and the description required in other cases, and shall pay to the receiver five dollars per acre for his claim, together with the proper fees, whereupon the whole proceedings and the judgment-roll shall be certified by the register to the Commissioner of the General Land-Office, and a patent shall issue thereon for the claim, or such portion thereof as the applicant shall appear, from the decision of the court, to rightly possess. If it appears from the decision of the court that several parties are entitled to separate and different portions of the claim, each party may pay for his portion of the claim, with the proper fees, and file the certificate and description by the surveyor-general, whereupon the register shall certify the proceedings and judgment-roll to the Commissioner of the General Land-Office, as in the preceding case, and patents shall issue to the several parties according to their respective rights. Nothing herein contained shall be construed to prevent the alienation of the title conveyed by a patent for a mining-claim to any person whatever.

Act May 10, 1872, c. 152, § 7, 17 Stat. 93.

This section was amended by Act March 3, 1881, c. 140, post, § 4625, and Act April 26, 1882, c. 106, § 1, post, § 4624.

The times allowed for filing adverse claims and for instituting adverse suits thereon, under R. S. § 2325, ante, § 4622, and this section, were extended, in Alaska, by Act June 7, 1910, c. 265, post, § 5053.

Notes of Decisions

I. Construction and application of section

1. Purpose and scope.
2. Application and methods of relief.
3. Determination of rights by suit.
4. Meaning of "claim."

II. Adverse claims

5. Necessity and effect of filing claim.
6. Nature and grounds of claim.
7. Co-owners or persons claiming under same location.
8. Town-site claimants.
9. Tunnel claimants.
10. Form and requisites.
11. Boundaries and survey of claim.
12. Proper parties.
13. Effect of failure to assert adverse claim.
14. Waiver of claim.

III. Authority and jurisdiction of land department

15. Jurisdiction and duty as to adverse claims.
16. Departmental regulations.

IV. Proceedings on adverse claims

17. Nature and purpose.
18. Matters determinable.
19. —— Character of land.
20. —— Location.
21. —— Expenditure on claim.
22. Form of action and procedure.
23. —— Power of congress to regulate.
24. Legal and equitable actions.
25. Jurisdiction of courts.
26. —— Court of competent jurisdiction.
27. —— Federal questions.
28. —— State courts.
29. Commencement of action.
30. —— Time of commencement.
31. Effect of failure to commence action in time.
32. Stay of proceedings in land office.
33. Diligence in prosecution of proceedings.
34. Dismissal or other termination of proceedings.
35. Parties.
36. —— Government as party.
37. Pleading and proof.
38. —— Complaint.
39. —— Answer or defense.
40. —— Citizenship as issue.
41. Title and proof to support recovery.
42. —— Burden of proof.
43. —— Location and discovery.
44. —— Custom.
45. —— Expenditure on claim.
46. —— Proof authorizing division of claim.
47. —— Neither party establishing title.
48. Trial by jury.
49. Verdict.
50. Judgment—Conclusiveness and effect.
51. —— Conclusiveness and effect as against government.
52. —— Conclusiveness as between lode and placer claimants.

V. Patent

53. Issuance of patent on judgment.
54. Effect.
55. Extralateral rights.
56. Cancellation of patent.

I. CONSTRUCTION AND APPLICATION OF SECTION

1. Purpose and scope.—It seems that this section does not contemplate adverse proceedings after a patent has

been issued. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 768, 135 U. S. 286, 299, 301, 34 L. Ed. 155.

The purpose of these sections is to require the conflicting claims of all parties to be adjusted and settled before a patent issues, so far as it can justly be done, at the time the application for the patent is made. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 208, 13 C. C. A. 390. See, also, Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 35, 130 C. C. A. 426.

2. Application and methods of relief.—This section requires the filing of adverse claims and points out the methods to be pursued. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 73, 43 L. Ed. 72; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 577, 44 L. Ed. 276; Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 454, 49 L. Ed. 1119; Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 143, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 410.

This section contemplates that, notwithstanding the provisions with reference to the rights of a locator to the possession of the surface ground, locations would overlap, and conflicts arise, and a method is provided for the adjustment of all such conflicts. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 77, 43 L. Ed. 72. See Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 164, 41 L. Ed. 113; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 41 L. Ed. 221.

This statutory provision for the final determination of conflicting claims is supplementary to the right to enforce temporary possession which has always been recognized by the rules and regulations of the mining districts. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 78, 43 L. Ed. 72.

The courts recognize the importance of extending to the locator of a mining claim every weapon in the armory of justice, offensive and defensive, to protect his right of enjoyment and secure him while prosecuting his work. Gillis v. Downey (1898) 85 Fed. 483, 488, 29 C. C. A. 286. See Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 62, 50 L. R. A. 289, 77 Am. St. Rep. 245.

3. Determination of rights by suit.—This section provides for the trial of an adverse claim and the rights of the parties to the land in dispute in a court of competent jurisdiction, and the object of the law is merely to require the parties to institute such proceedings in the proper court under the different forms of action therein which the local practice permits, as no specific form of action is required by the federal statute. Parley's Park Silver Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 130 U. S. 256, 260, 32 L. Ed. 906; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 940; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 392; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 53; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 369.

The purpose of this statute seems to be that where there are two claimants to the same mine, they shall present their respective claims before a local judicial tribunal, and the result of the judicial investigation shall govern the land department. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 299, 34 L. Ed. 155; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 513, 44 L. Ed. 864; Behrends v. Goldsteen (1902) 1 Alaska, 518, 520; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 509. See Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 306.

The law intends by this section to give an opportunity, where there is a possibility of conflicting claims, to have the controversy decided by a judicial tribunal before the rights of either party are foreclosed by the issuance of a patent. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 584, 29 L. Ed. 273; Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 498.

This and the preceding sections provide for a judicial determination of a controversy between persons contesting the possession of mineral lands, and the determination of such controversy by the court enables the land department to issue a patent. Creede & C. C. Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 357, 49 L. Ed. 501.

An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under this section, and such adverse claim does not estop the party from maintaining his action. Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

The adverse claimant is required to commence his proceedings in some court of competent jurisdiction to determine the right of possession to the ground in dispute, and according to the judgment of such court the rights of the parties are finally determined in the

land office. Providence Gold Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323, 330.

An action may be maintained under this section to establish the ownership and rights of possession to mining ground in dispute where a survey of one claim includes a strip of land within another claim. Meyer-Clarke-Rowe Mines Co. v. Steinfeld (1905) 80 Pac. 400, 9 Ariz. 245, 247. See Id. (1906) 85 Pac. 1067, 10 Ariz. 194.

The ordinary mining suit where the rights of the parties against each other are alone to be considered does not properly arise under this section. Conway v. Hart (1900) 62 Pac. 44, 129 Cal. 480, 488. See, also, Poncia v. Eagle (1915) 152 Pac. 208, 28 Idaho, 60.

This section has no reference to an action in ejectment purely. Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 73, 75 Am. St. Rep. 718.

4. Meaning of "claim."—See, also, notes to § 4615, ante.

The word "claim" or "claimant" is, in all legislation of congress on the subject of adverse claims, used in regard to a claim not yet perfected by a title from the government by way of a patent. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 299, 34 L. Ed. 155; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 506.

II. ADVERSE CLAIMS

5. Necessity and effect of filing claim.—See, also, notes to § 4622, ante.

A party who owns the fee in a mining claim is not called upon to file an adverse claim or commence as directed, as the statute has no application. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 34 L. Ed. 155; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 39 L. Ed. 1046; Lily Min. Co. v. Kellogg (1903) 74 Pac. 518, 27 Utah, 111, 114.

This section is not intended to affect a party who before the publication first required has himself gone through all the regular proceedings required to obtain a patent for mineral land and who has received his patent. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 298, 34 L. Ed. 155; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 506. See Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 306.

Where the owners of conflicting or overlapping claims have compromised and settled all such conflicts and have agreed upon their several lines, in a subsequent application for a patent by one of the locators, the other is not bound to file an adverse claim or contest his right in a judicial proceeding, but may rely upon his contract of compromise, and either he, or his grantees, or assigns, may enforce the rights conceded by such compromise agreement. St. Louis Min., etc., Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320.

Where an application is made for a patent to a mining claim which embraces land claimed by another it is the duty of the latter to file an adverse claim and then bring an action in a court of competent jurisdiction to determine the right to the area in conflict; but neither the statute nor public policy prevents a compromise and settlement of the dispute in any manner satisfactory to the parties even to granting to the adverse claimant an interest in or the right to all of the claim in dispute. St. Louis Min., etc., Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320. See Ducie v. Ford (1891) 11 Sup. Ct. 417, 138 U. S. 587, 34 L. Ed. 1091.

When the owner of a lode claim applies for a patent and another locator seeks to challenge the priority of such applicant as to the date of discovery, he must file an adverse claim, and if he fails to do so he will be concluded, as this is the purpose and effect of the adverse proceedings. Creede & C. C. Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501.

Under the provisions of this and the preceding section the filing of an adverse claim is made the first step to be taken in proceedings for determining the right of possession and title under a valid location and the proceedings thereupon are stayed until the right of the adverse claimant has been determined or waived and the adverse claimant must stand or fall by the rights which he asserts in his adverse claim, as the action brought must be based upon the rights asserted in such adverse claim. Marshall Silver Min. Co. v. Kirtley (1888) 21 Pac. 492, 12 Colo. 410, 414. See, also, Hunt v. Eureka Gulch Min. Co. (1890) 24 Pac. 550, 14 Colo. 451.

An action in support of an adverse claim cannot be maintained, unless the requirement of the preceding section, that the adverse be filed within 60 days after publication of application, has been fulfilled. Hunt v. Eureka Gulch Min. Co. (1890) 14 Colo. 451, 24 Pac. 550.

In adverse suit by plaintiff based on his adverse against application for patent by a devisee of a mining claim, an interest of a third person, who had filed no adverse claim, could not be relied on by plaintiff. Lancaster v. Coale (1915) 150 Pac. 821, 27 Colo. App. 495.

Where a claimant protests against the issuance of a patent to a lode, on the ground that he has a valid prior location, he is not bound to protest against a second application by the same party under a different name for a patent to the same lode, and a patent granted

been issued. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 768, 135 U. S. 286, 299, 301, 34 L. Ed. 155.

The purpose of these sections is to require the conflicting claims of all parties to be adjusted and settled before a patent issues, so far as it can justly be done, at the time the application for the patent is made. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 208, 13 C. C. A. 390. See, also, Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 35, 130 C. C. A. 426.

2. Application and methods of relief.—This section requires the filing of adverse claims and points out the methods to be pursued. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 73, 43 L. Ed. 72; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 577, 44 L. Ed. 276; Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 454, 49 L. Ed. 1119; Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 143, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; Silver Bow Min., etc., Co. v. Clark (1885) 5 Pac. 570, 5 Mont. 378, 410.

This section contemplates that, notwithstanding the provisions with reference to the rights of a locator to the possession of the surface ground, locations would overlap, and conflicts arise, and a method is provided for the adjustment of all such conflicts. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 77, 43 L. Ed. 72. See Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 164, 41 L. Ed. 113; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 41 L. Ed. 221.

This statutory provision for the final determination of conflicting claims is supplementary to the right to enforce temporary possession which has always been recognized by the rules and regulations of the mining districts. Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 78, 43 L. Ed. 72.

The courts recognize the importance of extending to the locator of a mining claim every weapon in the armory of justice, offensive and defensive, to protect his right of enjoyment and secure him while prosecuting his work. Gillis v. Downey (1898) 85 Fed. 483, 488, 29 C. C. A. 286. See Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 62, 50 L. R. A. 289, 77 Am. St. Rep. 245.

3. Determination of rights by suit.—This section provides for the trial of an adverse claim and the rights of the parties to the land in dispute in a court of competent jurisdiction, and the object of the law is merely to require the parties to institute such proceedings in the proper court under the different forms of action therein which the local practice permits, as no specific form of action is required by the federal statute. Parley's Park Silver Min. Co. v. Kerr (1889) 9 Sup. Ct. 511, 130 U. S. 256, 260, 32 L. Ed. 906; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 940; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 389, 392; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 53; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 369.

The purpose of this statute seems to be that where there are two claimants to the same mine, they shall present their respective claims before a local judicial tribunal, and the result of the judicial investigation shall govern the land department. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 299, 34 L. Ed. 155; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 513, 44 L. Ed. 864; Behrends v. Goldsteen (1902) 1 Alaska, 518, 520; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 509. See Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 306.

The law intends by this section to give an opportunity, where there is a possibility of conflicting claims, to have the controversy decided by a judicial tribunal before the rights of either party are foreclosed by the issuance of a patent. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 584, 29 L. Ed. 273; Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 498.

This and the preceding sections provide for a judicial determination of a controversy between persons contesting the possession of mineral lands, and the determination of such controversy by the court enables the land department to issue a patent. Creede & C. C. Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 357, 49 L. Ed. 501.

An action of ejectment based upon a patent issued prior to the initiation by the defendant of a mining claim for which he has applied for a patent is not inconsistent with a claim adverse to that application, under this section, and such adverse claim does not estop the party from maintaining his action. Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

The adverse claimant is required to commence his proceedings in some court of competent jurisdiction to determine the right of possession to the ground in dispute, and according to the judgment of such court the rights of the parties are finally determined in the

land office. Providence Gold Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323, 330.

An action may be maintained under this section to establish the ownership and rights of possession to mining ground in dispute where a survey of one claim includes a strip of land within another claim. Meyer-Clarke-Rowe Mines Co. v. Steinfeld (1905) 80 Pac. 400, 9 Ariz. 245, 247. See Id. (1906) 85 Pac. 1067, 10 Ariz. 194.

The ordinary mining suit where the rights of the parties against each other are alone to be considered does not properly arise under this section. Conway v. Hart (1900) 62 Pac. 44, 129 Cal. 480, 488. See, also, Poncia v. Eagle (1915) 152 Pac. 208, 28 Idaho, 60.

This section has no reference to an action in ejectment purely. Wilson v. Triumph Consol. Min. Co. (1899) 56 Pac. 300, 19 Utah, 66, 73, 75 Am. St. Rep. 718.

4. Meaning of "claim."—See, also, notes to § 4615, ante.

The word "claim" or "claimant" is, in all legislation of congress on the subject of adverse claims, used in regard to a claim not yet perfected by a title from the government by way of a patent. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 299, 34 L. Ed. 155; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 506.

II. ADVERSE CLAIMS

5. Necessity and effect of filing claim.—See, also, notes to § 4622, ante.

A party who owns the fee in a mining claim is not called upon to file an adverse claim or commence as directed, as the statute has no application. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 34 L. Ed. 155; Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 39 L. Ed. 1046; Lily Min. Co. v. Kellogg (1903) 74 Pac. 518, 27 Utah, 111, 114.

This section is not intended to affect a party who before the publication first required has himself gone through all the regular proceedings required to obtain a patent for mineral land and who has received his patent. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 298, 34 L. Ed. 155; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 506. See Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 306.

Where the owners of conflicting or overlapping claims have compromised and settled all such conflicts and have agreed upon their several lines, in a subsequent application for a patent by one of the locators, the other is not bound to file an adverse claim or contest his right in a judicial proceeding, but may rely upon his contract of compromise, and either he, or his grantees, or assigns, may enforce the rights conceded by such compromise agreement. St. Louis Min., etc., Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320.

Where an application is made for a patent to a mining claim which embraces land claimed by another it is the duty of the latter to file an adverse claim and then bring an action in a court of competent jurisdiction to determine the right to the area in conflict; but neither the statute nor public policy prevents a compromise and settlement of the dispute in any manner satisfactory to the parties even to granting to the adverse claimant an interest in or the right to all of the claim in dispute. St. Louis Min., etc., Co. v. Montana Min. Co. (1898) 19 Sup. Ct. 61, 171 U. S. 650, 655, 43 L. Ed. 320. See Ducie v. Ford (1891) 11 Sup. Ct. 417, 138 U. S. 587, 34 L. Ed. 1091.

When the owner of a lode claim applies for a patent and another locator seeks to challenge the priority of such applicant as to the date of discovery, he must file an adverse claim, and if he fails to do so he will be concluded, as this is the purpose and effect of the adverse proceedings. Creede & C. C. Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501.

Under the provisions of this and the preceding section the filing of an adverse claim is made the first step to be taken in proceedings for determining the right of possession and title under a valid location and the proceedings thereupon are stayed until the right of the adverse claimant has been determined or waived and the adverse claimant must stand or fall by the rights which he asserts in his adverse claim, as the action brought must be based upon the rights asserted in such adverse claim. Marshall Silver Min. Co. v. Kirtley (1888) 21 Pac. 492, 12 Colo. 410, 414. See, also, Hunt v. Eureka Gulch Min. Co. (1890) 24 Pac. 550, 14 Colo. 451.

An action in support of an adverse claim cannot be maintained, unless the requirement of the preceding section, that the adverse be filed within 60 days after publication of application, has been fulfilled. Hunt v. Eureka Gulch Min. Co. (1890) 14 Colo. 451, 24 Pac. 550.

In adverse suit by plaintiff based on his adverse against application for patent by a devisee of a mining claim, an interest of a third person, who had filed no adverse claim, could not be relied on by plaintiff. Lancaster v. Coale (1915) 150 Pac. 821, 27 Colo. App. 495.

Where a claimant protests against the issuance of a patent to a lode, on the ground that he has a valid prior location, he is not bound to protest against a second application by the same party under a different name for a patent to the same lode, and a patent granted

upon such second application is void. Rose v. Richmond Min. Co. (1882) 17 Nev. 25, 27 Pac. 1105.

A mining company which has applied for a patent for its claim need not, to preserve its rights, protest against a subsequent application made while its own is pending. Steel v. Gold Lead Gold & Silver Min. Co. (1883) 18 Nev. 80, 1 Pac. 448.

6. Nature and grounds of claim.—The contemplation of this section in respect to adverse proceedings is that there shall be a present tangible and certain right to be determined and not a mere possibility. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 115, 42 L. Ed. 96; Poore v. Kaufman (1911) 119 Pac. 785, 44 Mont. 248, 253.

Where the surface ground included in an application for a patent does not conflict with that of an adjoining claimant, the latter cannot question the right of the former to his patent, and where the boundary between two claims is undisputed the foundation for an adverse suit is lacking and subterranean rights must be adjusted on other principles than the right of adverse claimants. Lawson v. United States Min. Co. (1907) 207 U. S. 1, 17, 28 Sup. Ct. 15, 21, 52 L. Ed. 65 (affirming United States Min. Co. v. Lawson [1904] 134 Fed. 769, 67 C. C. A. 587); Keely v. Ophir Hill Consol. Min. Co. (1909) 169 Fed. 601, 604, 95 C. C. A. 99.

Conflicting adverse rights cannot be set up to defeat an application for a patent in the absence of an alleged surface conflict, as a possible union of veins underneath the surface cannot be foreshadowed at the time an application for a patent is made, and such subsequent arising conditions must be adjusted by reference to surface apex ownership and priority of location not involving surface conflict. Id.

This section does not expressly declare what kind of an adverse claim is required to be set up as a defense against the applicant; but the word "claim" as generally used by congress refers to a claim not yet perfected by a title from the government by way of a patent. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 299, 34 L. Ed. 155. See Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 306.

An action of ejectment, based on a patent issued prior to the initiation by the defendant of a mining claim, for which he has applied for a patent, is not inconsistent with a claim adverse to that application, and does not estop plaintiff from maintaining his action. Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

A questionable title obtained at a judicial sale of a mining claim, pending proceedings for patent, whether valid or void, is an adverse claim, and is lost if not presented as required by statute. Hamilton v. Southern Nevada Gold, etc., Min. Co. (C. C. 1887) 33 Fed. 562, 565.

A claimant of interest must, on application for patent by another interested party, assert his right by way of adverse claim. Fisher v. Seymour (1897) 49 Pac. 30, 23 Colo. 542.

Where the adverse claimant was not entitled to a judgment which he recovered on facts existing at the date of the filing of his adverse, the defeated parties were not precluded from objecting to such judgment by the fact that the jury found there had been no discovery on the claim on which the application for a patent was based. Healey v. Rupp (1906) 86 P. 1015, 37 Colo. 25.

An alleged claim or interest to a portion of a placer claim which is traced to and over the same location upon which the right of an applicant for patent rests is not an adverse claim within the meaning of this section. Suessenbach v. First Nat. Bank (1889) 41 N. W. 662, 5 Dak. 477, 501. See Hunt v. Patchin (C. C. 1888) 35 Fed. 816.

Where the locators of a placer mine apply for a patent, a person who has had possession of a portion of the land for 10 years, and before the location, is an adverse claimant, and may bring an action in the state court to determine his rights, even though he does not apply for a patent himself. Shafer v. Constans (1879) 3 Mont. 369.

The term "adverse claim," used in section 2332, R. S., section 4631, post, refers to the adverse claim mentioned in this section. McCowan v. Maclay (1895) 40 Pac. 602, 16 Mont. 234, 240.

The ownership on the intersection of veins is determined by the priority of title, but the intersection of veins does not give rise to an adverse claim. Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46, 64. See Champion Min. Co. v. Consolidated Wyo. Gold Min. Co. (1888) 16 Pac. 513, 75 Cal. 78.

A third locator is permitted to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. Street v. Delta Min. Co. (1910) 112 Pac. 701, 42 Mont. 371, 384. See Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

7. Co-owners or persons claiming under same location.—This and the preceding section apply only to adverse claims arising out of independent conflicting locations of the same ground, and not to controversies between co-owners claiming under the same location. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 587, 37 L. Ed. 1189; Nowell v. McBride (1908) 162 Fed. 432, 441, 89 C. C. A. 318; Hunt v. Patchin (C. C. 1888) 35 Fed. 816; Davidson v. Fraser

(1906) 84 Pac. 695, 36 Colo. 1, 4 L. R. A. (N. S.) 1126; Allen v. Blanche Gold Mining Co. (1909) 102 P. 1072, 46 Colo. 199; Brundy v. Mayfield (1895) 38 P. 1067, 15 Mont. 201, 209. See Stevens v. Grand Central Min. Co. (1904) 133 Fed. 28, 67 C. C. A. 284.

The failure to file an adverse claim to the application for patent does not estop a tenant in common from maintaining a suit to quiet his title to an undivided interest in the mining claim. Butte Hardware Co. v. Cobban (1893) 13 Mont. 351, 34 Pac. 24.

8. Town-site claimants.—See, also, notes to § 4798, post.

The owner of a town lot in Alaska, unpatented, may adverse an application for patent for a lode claim, and may maintain an action in a court of competent jurisdiction in support of such adverse. Young v. Goldsteen (D. C. 1899) 97 Fed. 303. Compare Behrends v. Goldsteen (1902) 1 Alaska, 518. See, also, Bonner v. Meikle (C. C. 1896) 82 Fed. 697.

A court has no jurisdiction under this section in a suit on an adverse claim where one of the parties is an applicant for patent to a mining claim and the other party claims the same or any part thereof under any of the laws providing for the disposal of nonmineral lands, including a town-site claimant either before or after patent is issued. Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 522.

9. Tunnel claimants.—The claimant of a tunnel site is not required to file an adverse claim and submit his rights to the lode claims in process of adjudication by the land department upon the filing of applications for patents by such lode claimants, when his rights are at such time contingent and intangible. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 112, 42 L. Ed. 96; Creede & C. C. Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 355, 49 L. Ed. 501; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 209, 210, 13 C. C. A. 390; Uinta Tunnel Min., etc., Co. v. Creede & Cripple Creek Min., etc., Co. (1902) 119 Fed. 164, 168, 57 C. C. A. 200. See Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200.

Adverse proceedings are called for only when one mineral claimant contests the right of another mineral claimant, and whatever may be the propriety or advantage of a tunnel owner contesting the right of the owner of a lode mining claim to a patent within the boundaries of whose claim the tunnel is being driven, such adverse proceedings can not be adjudged necessary, as congress has not specifically required it. Creede & C. C. Min., etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 360, 49 L. Ed. 501.

The owner of a tunnel mining claim may file an adverse claim against one who applies for a patent to a lode mining claim which has been located across the line of his tunnel and is based on a discovery made in a shaft directly over the line of such tunnel. Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1895) 66 Fed. 200, 208, 13 C. C. A. 390; Ellet v. Campbell (1893) 33 P. 521, 18 Colo. 510; Back v. Sierra Nevada, etc., Min. Co. (1889) 17 P. 83, 2 Idaho (Hasb.) 420; Hope Min. Co. v. Brown (1891) 28 P. 732, 11 Mont. 370.

The failure of a tunnel owner before discovery of mineral to adverse an application for a surface patent does not estop him from asserting a right prior to the date of discovery named in the certificate of location upon which the patent for the surface lode claim is based. Creede & C. C. Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 359, 49 L. Ed. 501; Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 15, 52 L. Ed. 65. See Enterprise Min. Co. v. Rico-Aspen Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96; United States Min. Co. v. Lawson (1904) 134 Fed. 769, 67 C. C. A. 587; Corning Tunnel Co. v. Pell (1878) 4 Colo. 507; Back v. Sierra Nevada, etc., Min. Co. (1888) 17 Pac. 83, 2 Idaho (Hasb.) 420.

The failure of persons engaged in running a tunnel to "adverse" a surface claim located near the line of the tunnel prior to a discovery of the vein in the tunnel does not prejudice their rights to such vein. Enterprise Min. Co. v. Rico-Aspen Consol. Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 42 L. Ed. 96, affirming (1895) 66 Fed. 200, 13 C. C. A. 390.

There is no propriety in maintaining a suit to establish a mere inchoate right or a purely speculative matter as to whether a vein would be discovered in a tunnel and thereby delay the surface locator from securing a patent, upon a mere possibility which might never ripen into a fact. Id.

The rights of a tunnel locator may be fully protected by permitting him to avail himself of the provisions of this section as to the filing and prosecuting of an adverse claim. Back v. Sierra Nevada Consol. Min. Co. (1888) 17 Pac. 83, 2 Idaho (Hasb.) 420.

10. Form and requisites.—Where an application for a patent is made an adverse claim must be filed within 60 days and must be accompanied by the oath of the person filing it, showing the natural boundaries and extent of his adverse claim. Proceedings are then stayed until the controversy is settled by a court of competent jurisdiction. Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 442, 27 L. Ed. 990;

Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 581, 29 L. Ed. 273; Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 873.

An adverse claim shall be filed during the period of publication and it shall be upon oath of the person or persons making the same, and shall show the nature, boundaries, and extent of the claim, and all proceedings shall thereupon be stayed until the controversy is settled. Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219, 226; Anchor v. Howe (C. C. 1892) 50 Fed. 366.

The adverse claim must be upon the oath of the person making it and show the nature, boundaries, and the extent of such adverse claim, and it must show that there is a conflict between different locators of the same claim. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 587, 37 L. Ed. 1189.

An adverse claim made in good faith and which clearly and definitely notifies the applicant for a patent of the conflict between his and the adverse mining claim is sufficient to comply with the object of the statute. Anchor v. Howe (C. C. 1892) 50 Fed. 366, 367.

An adverse claimant must show the nature, boundaries, and extent of his adverse claim and must commence proceedings in the proper court to determine the question of the right of possession. Pardee v. Murray (1882) 2 Pac. 16, 4 Mont. 234, 276.

11. Boundaries and survey of claim.—See, also, notes to § 4622, ante.

While the government does not design that its mineral lands shall be patented upon any survey except those specifically provided for, yet no patent is issued upon an official survey in case of an adverse claim until after an investigation by a court, where any error in the survey can be corrected and no injury result therefrom. Anchor v. Howe (C. C. 1892) 50 Fed. 366, 367.

In ascertaining the boundaries of a mining claim, monuments definitely established control courses and distances, and where monuments are not definitely established and identified, then courses and distances must be followed, unless they are irreconcilable, and in such cases courses prevail over distances. Meyer-Clarke-Rowe Mines Co. v. Steinfeld (Ariz. 1906) 85 P. 1067, reversing judgment on rehearing (1905) 80 Pac. 400, 9 Ariz. 245.

Where an actual survey of the adverse claim is impossible, the adverse claimant may show the nature, extent, and boundaries of his claim from other sources, and give a sufficient reason for not properly presenting the claim. Hoffman v. Beecher (1892) 12 Mont. 489, 31 Pac. 92.

An objection to the protest on the ground that it does not show the nature, boundaries and extent of the claim must be made in the land office, and cannot be made after the commencement of the suit on the adverse claim. Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 497. See Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25.

12. Proper parties.—The locator's legal heirs, who have executed an agreement to convey at a future time to another, are proper persons to adverse the application of a junior locator. Wolverton v. Nichols (1886) 7 Sup. Ct. 289, 119 U. S. 485, 30 L. Ed. 474.

13. Effect of failure to assert adverse claim.—See, also, § 4622, ante.

This section recognizes the fact that a person who, pursuant to other provisions of the statute, has acquired sufficient rights to a mining claim to entitle him to patent, will, on application after publication of the statutory notice, be entitled to a patent to his claim unless adverse rights are set up in the mode provided. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 455, 49 L. Ed. 1119; Swanson v. Kettler (1910) 105 P. 1059, 17 Idaho, 321, 333.

An action brought in support of an adverse claim must be based on the right asserted in such claim, as it must be assumed that no adverse claim exists except such as has been filed. Marshall Silver Min. Co. v. Kirtley (1888) 21 Pac. 492, 12 Colo. 410, 415; Lily Min. Co. v. Kellogg (1903) 74 Pac. 518, 27 Utah, 111, 115.

By failure to adverse and assert his claim, an adverse claimant loses his title as against the United States. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 51, 29 L. Ed. 348.

The statute makes the proceedings regularly prosecuted when the period of notice is completed without filing adverse claim conclusive against all adverse claimants, and the proceedings are in their nature in rem and binding upon all the world. Hamilton v. Southern Nev. Gold & Silver Min. Co. (C. C. 1887) 33 Fed. 562. See, also, Nesbitt v. De Lamar's Nevada Gold-Min. Co. (1898) 52 P. 609, 53 P. 178, 24 Nev. 273, 77 Am. St. Rep. 807.

These sections provide a method whereby all persons having adverse claims to mineral lands shall have their day in court, and if they fail to file an adverse claim within the time provided, or fail to commence the proceedings within the statutory period, any claim is waived. Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 873.

This section points out the steps to be taken by an adverse claimant who resists an application for a patent to a mining claim, and his rights are forfeited or lost if he fails to avail himself of the remedy given him by this section. Mattingly v. Lewisohn (1888) 19 Pac. 310, 8 Mont. 259, 263.

This section provides that by failure to assert an adverse claim a claimant

may lose any rights which he has in the same way that a defendant in an action may lose his right by default, and a failure to answer; and it provides also how rights already obtained may be defended, determined, preserved, or forfeited. Nash v. McNamara (1908) 93 Pac. 405, 30 Nev. 114, 135, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

14. Waiver of claim.—If a person adversely interested fails to file an adverse claim, he waives his rights acquired under his location, and the patent, when issued, relates back as of the date of the original location. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548; Steel v. Gold Lead Min. Co. (1883) 1 Pac. 448, 18 Nev. 80, 87. See Lee v. Stahl (1886) 11 Pac. 77, 9 Colo. 208, 210; Seymour v. Fisher (1891) 27 Pac. 240, 16 Colo. 188, 191; Kannaugh v. Quartette Min. Co. (1891) 27 Pac. 245, 16 Colo. 341, 346; South End Min. Co. v. Tinney (1894) 35 Pac. 89, 22 Nev. 19, 59.

Defendant's withdrawal of the answer interposed in a suit to determine an adverse claim, and the amendment of the application for patent, so as to leave out the ground in dispute, cannot be construed as a waiver of the adverse claim, as a waiver of such claim can only be made by the party filing it, and not by the party against whom it is made. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 39 L. Ed. 859, reversing judgment (1894) 61 Fed. 557, 9 C. C. A. 613. See, also, Mackay v. Fox (1903) 121 Fed. 487, 57 C. C. A. 439.

Where, after the filing of an adverse claim, and during the pendency of the action to establish the same, the adverse claimant files an amended application with the Interior Department, and obtains a patent for adjoining land under such amended application, not including any of the land in suit, the obtaining of such patent does not operate as a waiver of his adverse claim. Mackay v. Fox (1903) 121 Fed. 487, 57 C. C. A. 439, distinguishing Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 737, 157 U. S. 683, 39 L. Ed. 859.

A failure to assert prior rights is treated as a waiver. Lee v Stahl (1886) 11 Pac. 77, 9 Colo. 208, overruled in Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 27 Colo. 1, 59 Pac. 607, 50 L. R. A. 209, 83 Am. St. Rep. 17.

III. AUTHORITY AND JURISDICTION OF LAND DEPARTMENT

15. Jurisdiction and duty as to adverse claims.—See, also, notes to § 4622, ante.

The land department has authority to determine what public land is mineral land and, as such, open to mining location, and the courts will not interfere to control the exercise of that power, but there is no express authority given the land department to decide under which of the two different methods of acquiring mining claims any given mineral land may be located. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 482, 123 C. C. A. 548. See Creede & Cripple Creek Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 357, 49 L. Ed. 501.

This section creates a statutory exception to the exclusive jurisdiction of the land department, and courts hear and determine suits to determine the right of possession in the exercise of their general jurisdiction. Therefore a complaint affirmatively showing the filing by defendant of an application for patent, without alleging that the plaintiff had filed an adverse claim, is subject to a special demurrer to the jurisdiction of the court. Warnekros v. Cowan (Ariz. 1910) 108 P. 238.

16. Departmental regulations.—See, also, notes to § 5120, post.

The regulations of the commissioner of the general land office, whereby an adverse claimant may be held to prove his better right to enter public lands, do not oust the jurisdiction of the courts. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 195, 150 U. S. 578, 37 L. Ed. 1189.

Department regulations must be appropriate, reasonable, and within the limitations of the law; and a rule that a plat showing boundaries of the conflicting premises must be made from an actual survey by a deputy United States surveyor is void as imposing a requirement not required by this section. Anchor v. Howe (C. C. 1892) 50 Fed. 366.

IV. PROCEEDINGS ON ADVERSE CLAIMS

17. Nature and purpose.—The proceedings authorized by this section are purely statutory, and are for special relief, and may be for equitable relief, and are regarded as a continuance of the proceedings before the land department to have a determination of the question as to which of the contesting parties is entitled to a patent. Wolverton v. Nichols (1886) 7 Sup. Ct. 289, 119 U. S. 485, 489, 30 L. Ed. 474; Hammer v. Garfield Min., etc., Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 295, 32 L. Ed. 964; Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 165, 41 L. Ed. 113; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 1102, 163 U. S. 445, 41 L. Ed. 221; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 804, 31 C. C. A. 223; McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 38 C. C. A. 354; Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35; Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36, 130 C. C. A. 426; Doe v. Waterloo Min. Co. (C. C.

1890) 43 Fed. 219, 220; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 532; Durrant v. Corbin (C. C. 1899) 94 Fed. 382; Durgan v. Redding (C. C. 1900) 103 Fed. 914; Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583; Healey v. Rupp (1906) 86 P. 1015, 37 Colo. 25; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339; Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 414; Nesbitt v. Delamar's Nevada Gold Min. Co. (1898) 52 Pac. 609, 53 Pac. 178, 24 Nev. 273, 287, 77 Am. St. Rep. 807; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 287; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 111; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 365. See also, Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 939.

The proceeding directed and authorized by this section has no relation whatever to the action of ejectment or to any other common law action, and the sole object of the proceeding is the determination of the contest that arose in the Land Office and to determine which of the applicants is entitled to receive a patent from the Government. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 804, 31 C. C. A. 223; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219, 220; Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 308; Nesbitt v. De Lamar's Nevada Gold Min. Co. (1898) 52 P. 609, 53 P. 178, 24 Nev. 273, 287, 77 Am. St. Rep. 807.

"Adverse claim" is not available to an original owner to establish an equitable title in, and not against, a relocation of an abandoned lode. Doherty v. Morris (1887) 11 Colo. 12, 16 Pac. 911.

While the term "proceedings" is broader and more comprehensive than the term "action" yet the term "proceedings" in this section is used in the sense of "action" and refers to the commencement of an action. And the term "proceedings" in this section is used to enable a party to institute such proceedings under the different forms of actions allowed by the state and federal courts. Mars v. Oro Fino Min. Co. (1895) 65 N. W. 19, 7 S. D. 605, 617. See Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 28 L. Ed. 452; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4989; Cronin v. Bear Creek Gold Min. Co. (1893) 32 Pac. 204, 3 Idaho (Hasb.) 614; Mattingly v. Lewisohn (1893) 35 Pac. 111, 13 Mont. 508; Golden Fleece, etc., Min. Co. v. Cable Consol., etc., Min. Co. (1877) 12 Nev. 312.

An action on an adverse claim is purely statutory, and state statutes regulating generally actions for the recovery of real property, or questioning the title thereto, have no application. Lily Min. Co. v. Kellogg (1903) 74 P. 518, 27 Utah, 111.

18. Matters determinable.—The determination of the right of possession as between claimants, is, upon the filing of such adverse claims, referred to a court of competent jurisdiction in aid of the land office, but the form of the action is not provided for by the statute. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Perego v. Dodge (1896) 16 Sup. Ct 971, 163 U. S. 160, 165, 41 L. Ed. 113; Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286; Durgan v. Redding (C. C. 1900) 103 Fed. 914, 917; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 139; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 288; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 360.

An action under this section in a state court is not brought to recover possession of the property or damages for trespass thereon, or to quiet title thereto, but is a special action to determine the right of possession preliminary to the right to purchase from the United States, and an action may be brought by a plaintiff whether in or out of possession of the mining ground, and each party must prove his claim to the premises in dispute and the better claim prevails. Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312; Steel v. Gold Lead Min. Co. (1883) 1 Pac. 448, 18 Nev. 80, 87.

An action authorized by this section is purely possessory in its character. Dufficld v. San Francisco Chemical Co. (1912) 198 Fed. 942, 944; Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155, 158.

The object of a suit on an adverse claim is to establish the right to the possession of the premises in controversy and to stay proceedings upon an application for a patent until such right is adjudicated. Providence Gold Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323, 331; Marshall Silver Min. Co. v. Kirtley (1888) 21 Pac. 492, 12 Colo. 410, 416. See Wight v. Dubois (C. C. 1884) 21 Fed. 693.

Parties may under this section litigate for determining the question of right of possession of a mining claim on public land in order that the proper officers may patent the claim to the party establishing the right thereto. Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583; Ware v. White (1907) 108 S. W. 831, 81 Ark. 220, 223.

An action in support of an adverse

claim is a possessory action, since the title is not in either party, but in the government. Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371; Marshall Silver Min. Co. v. Kirtley (1888) 12 Colo. 410, 21 Pac. 492. See, also, Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291; Mattingly v. Lewisohn (1893) 13 Mont. 508, 35 Pac. 111; Bergquist v. West Virginia-Wyoming Cooper Co. (1910) 106 Pac. 673, 18 Wyo. 234.

In this action the only question presented is the priority of right to purchase the fee. Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 866, 158 U. S. 447, 39 L. Ed. 1048.

This section authorizes an adverse claimant to file his claim and bring suit in a proper court, and relegates to such court the jurisdiction to determine the right of possession between the adverse claimants. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 482, 123 C. C. A. 548.

An action pursuant to an adverse claim has for one of its objects the determination whether either party has divested the United States of the possessory title to the mining claim in dispute. Strasburger v. Beecher (C. C. 1890) 44 Fed. 209, 214. See Jackson v. Roby (1883) 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990.

This section requires a suit to be brought in a court of competent jurisdiction, but contains no direct limitation as to the parties and is for the purpose of determining the question of the right of possession; and there is nothing to prevent a court from determining this right under the law of the locality or denying to either party a favorable judgment, unless one or the other establishes a valid and legal title under the mining laws and the local rules and customs of miners. Nome-Sinook Co. v. Simpson (1902) 1 Alaska, 578, 581, 582. See Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36, 130 C. C. A. 426.

The validity of the title of an adverse claimant must be determined by a court of competent jurisdiction and not by the land office. Batterton v. Douglas Min. Co. (1911) 120 Pac. 827, 20 Idaho, 760, 764, 38 L. R. A. (N. S.) 1121.

In an action to determine the right to possession of a mining claim, brought pending the land office decision, the plaintiff need not prove actual possession, but only the right to possession. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

19. —— **Character of land.**—See, also, notes to § 4614, et seq., ante.

The Department of the Interior has sole jurisdiction and power to determine the mineral or nonmineral character of unpatented lands. The court has no such jurisdiction. Behrends v. Goldsteen (1902) 1 Alaska, 518; Wright v. Town of Hartville (1905) 81 P. 649, 13 Wyo. 497, rehearing denied 82 P. 450, 13 Wyo. 497. But see Durant v. Corbin (C. C. 1899) 94 Fed. 382.

Where certain lode claims were located within the limits of placer locations, and suits were brought to determine the adverse claims, the question whether the ground was placer or lode ground was determinable by the court in such actions. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160, overruling decree Duffield v. San Francisco Chemical Co. (D. C. 1912) 198 Fed. 942, decree reversed (1913) 205 Fed. 480, 123 C. C. 548.

Neither the provisions of this section nor the preceding section contemplate proceedings to decide controversies respecting the character of lands in controversy, as to whether they are mineral lands or nonmineral, as their mineral character is a question which must be decided by the land department, and proceedings cannot be transferred from the land department to the courts for the decision of that question. Le Fevre v. Amonson (1905) 81 Pac. 71, 11 Idaho, 45, 48.

The determination by the land department as to the nature of the land included in the patent is conclusive, but whether the land conveyed was public land and subject to sale is subject to inquiry by the courts. Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 293.

20. —— **Location.**—This section gives to a court of competent jurisdiction the power to determine the right of possession between adverse claimants, and the determination of such question necessarily involves not only the question which of the adverse claimants was prior in time in making location, and whether the location was made in compliance with the law, but also whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548; Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36. And the court may determine the right of possession as between locators of placer and lode claims on the same ground. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548, reversing decree (D. C. 1912) 198 Fed. 942. See, also, San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160.

In a contest as to the ownership of a mining claim the regularity and validity of the location are not in question where both parties derive title from the original owners. Union Consol. Silver Mining Co. v. Taylor (1879) 100 U. S. 37, 40, 25 L. Ed. 541.

The owner of a prior placer mining location may maintain an adverse suit against an application for a patent for

1890) 43 Fed. 219, 220; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 532; Durrant v. Corbin (C. C. 1899) 94 Fed. 382; Durgan v. Redding (C. C. 1900) 103 Fed. 914; Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583; Healey v. Rupp (1906) 86 P. 1015, 37 Colo. 25; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339; Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 414; Nesbitt v. Delamar's Nevada Gold Min. Co. (1898) 52 Pac. 609, 53 Pac. 178, 24 Nev. 273, 287, 77 Am. St. Rep. 807; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 287; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 111; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 365. See also, Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 939.

The proceeding directed and authorized by this section has no relation whatever to the action of ejectment or to any other common law action, and the sole object of the proceeding is the determination of the contest that arose in the Land Office and to determine which of the applicants is entitled to receive a patent from the Government. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 804, 31 C. C. A. 223; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219, 220; Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 308; Nesbitt v. De Lamar's Nevada Gold Min. Co. (1898) 52 P. 609, 53 P. 178, 24 Nev. 273, 287, 77 Am. St. Rep. 807.

"Adverse claim" is not available to an original owner to establish an equitable title in, and not against, a relocation of an abandoned lode. Doherty v. Morris (1887) 11 Colo. 12, 16 Pac. 911.

While the term "proceedings" is broader and more comprehensive than the term "action" yet the term "proceedings" in this section is used in the sense of "action" and refers to the commencement of an action. And the term "proceedings" in this section is used to enable a party to institute such proceedings under the different forms of actions allowed by the state and federal courts. Mars v. Oro Fino Min. Co. (1895) 65 N. W. 19, 7 S. D. 605, 617. See Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 28 L. Ed. 452; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4989; Cronin v. Bear Creek Gold Min. Co. (1893) 32 Pac. 204, 3 Idaho (Hasb.) 614; Mattingly v. Lewisohn (1893) 35 Pac. 111, 13 Mont. 508; Golden Fleece, etc., Min. Co. v. Cable Consol., etc., Min. Co. (1877) 12 Nev. 312.

An action on an adverse claim is purely statutory, and state statutes regulating generally actions for the recovery of real property, or questioning the title thereto, have no application. Lily Min. Co. v. Kellogg (1903) 74 P. 518, 27 Utah, 111.

18. Matters determinable.—The determination of the right of possession as between claimants, is, upon the filing of such adverse claims, referred to a court of competent jurisdiction in aid of the land office, but the form of the action is not provided for by the statute. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Perego v. Dodge (1896) 16 Sup. Ct 971, 163 U. S. 160, 165, 41 L. Ed. 113; Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286; Durgan v. Redding (C. C. 1900) 103 Fed. 914, 917; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 139; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 288; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 360.

An action under this section in a state court is not brought to recover possession of the property or damages for trespass thereon, or to quiet title thereto, but is a special action to determine the right of possession preliminary to the right to purchase from the United States, and an action may be brought by a plaintiff whether in or out of possession of the mining ground, and each party must prove his claim to the premises in dispute and the better claim prevails. Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41; Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339; Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312; Steel v. Gold Lead Min. Co. (1883) 1 Pac. 448, 18 Nev. 80, 87.

An action authorized by this section is purely possessory in its character. Dufficld v. San Francisco Chemical Co. (1912) 198 Fed. 942, 944; Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155, 158.

The object of a suit on an adverse claim is to establish the right to the possession of the premises in controversy and to stay proceedings upon an application for a patent until such right is adjudicated. Providence Gold Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323, 331; Marshall Silver Min. Co. v. Kirtley (1888) 21 Pac. 492, 12 Colo. 410, 416. See Wight v. Dubois (C. C. 1884) 21 Fed. 693.

Parties may under this section litigate for determining the question of right of possession of a mining claim on public land in order that the proper officers may patent the claim to the party establishing the right thereto. Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583; Ware v. White (1907) 108 S. W. 831, 81 Ark. 220, 223.

An action in support of an adverse

claim is a possessory action, since the title is not in either party, but in the government. Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371; Marshall Silver Min. Co. v. Kirtley (1888) 12 Colo. 410, 21 Pac. 492. See, also, Morrison v. Regan (1902) 67 P. 955, 8 Idaho, 291; Mattingly v. Lewisohn (1893) 13 Mont. 508, 35 Pac. 111; Bergquist v. West Virginia-Wyoming Cooper Co. (1910) 106 Pac. 673, 18 Wyo. 234.

In this action the only question presented is the priority of right to purchase the fee. Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 866, 158 U. S. 447, 39 L. Ed. 1048.

This section authorizes an adverse claimant to file his claim and bring suit in a proper court, and relegates to such court the jurisdiction to determine the right of possession between the adverse claimants. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 482, 123 C. C. A. 548.

An action pursuant to an adverse claim has for one of its objects the determination whether either party has divested the United States of the possessory title to the mining claim in dispute. Strasburger v. Beecher (C. C. 1890) 44 Fed. 209, 214. See Jackson v. Roby (1883) 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990.

This section requires a suit to be brought in a court of competent jurisdiction, but contains no direct limitation as to the parties and is for the purpose of determining the question of the right of possession; and there is nothing to prevent a court from determining this right under the law of the locality or denying to either party a favorable judgment, unless one or the other establishes a valid and legal title under the mining laws and the local rules and customs of miners. Nome-Sinook Co. v. Simpson (1902) 1 Alaska, 578, 581, 582. See Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36, 130 C. C. A. 426.

The validity of the title of an adverse claimant must be determined by a court of competent jurisdiction and not by the land office. Batterton v. Douglas Min. Co. (1911) 120 Pac. 827, 20 Idaho, 760, 764, 38 L. R. A. (N. S.) 1121.

In an action to determine the right to possession of a mining claim, brought pending the land office decision, the plaintiff need not prove actual possession, but only the right to possession. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

19. —— **Character of land.**—See, also, notes to § 4614, et seq., ante.

The Department of the Interior has sole jurisdiction and power to determine the mineral or nonmineral character of unpatented lands. The court has no such jurisdiction. Behrends v. Goldsteen (1902) 1 Alaska, 518; Wright v. Town of Hartville (1905) 81 P. 649, 13 Wyo. 497, rehearing denied 82 P. 450, 13 Wyo. 497. But see Durant v. Corbin (C. C. 1899) 94 Fed. 382.

Where certain lode claims were located within the limits of placer locations, and suits were brought to determine the adverse claims, the question whether the ground was placer or lode ground was determinable by the court in such actions. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160, overruling decree Duffield v. San Francisco Chemical Co. (D. C. 1912) 198 Fed. 942, decree reversed (1913) 205 Fed. 480, 123 C. C. 548.

Neither the provisions of this section nor the preceding section contemplate proceedings to decide controversies respecting the character of lands in controversy, as to whether they are mineral lands or nonmineral, as their mineral character is a question which must be decided by the land department, and proceedings cannot be transferred from the land department to the courts for the decision of that question. Le Fevre v. Amonson (1905) 81 Pac. 71, 11 Idaho, 45, 48.

The determination by the land department as to the nature of the land included in the patent is conclusive, but whether the land conveyed was public land and subject to sale is subject to inquiry by the courts. Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274, 293.

20. —— **Location.**—This section gives to a court of competent jurisdiction the power to determine the right of possession between adverse claimants, and the determination of such question necessarily involves not only the question which of the adverse claimants was prior in time in making location, and whether the location was made in compliance with the law, but also whether the land occupied and covered by the location was subject to location in the manner in which it was attempted to be acquired. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548; Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36. And the court may determine the right of possession as between locators of placer and lode claims on the same ground. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548, reversing decree (D. C. 1912) 198 Fed. 942. See, also, San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160.

In a contest as to the ownership of a mining claim the regularity and validity of the location are not in question where both parties derive title from the original owners. Union Consol. Silver Mining Co. v. Taylor (1879) 100 U. S. 37, 40, 25 L. Ed. 541.

The owner of a prior placer mining location may maintain an adverse suit against an application for a patent for

a subsequent lode location within the exterior boundaries of the placer claim, made by persons entering thereon against the will of the placer locators for the purpose of prospecting for unknown lodes or veins. Clipper Mining Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 636, 194 U. S. 220, 48 L. Ed. 944.

The statute is not to be construed so as to exclude the right of a subsequent locator to test the lawfulness of a prior location, upon the contention that at the time such prior location was made the ground embraced therein was covered by a valid and subsisting mining claim. Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 147, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

The validity of a mining location must be determined by the law in force at the time the location was made. Wilson v. Freeman (1904) 75 P. 84, 29 Mont. 470, 68 L. R. A. 833.

21. —— Expenditure on claim.—See, also, notes to § 4620, ante.

When an application is made for a patent for a mining claim and an adverse claim is filed and proceedings instituted thereon, the applicant is not then required to file a certificate showing that the required amount of labor has been expended or improvements made upon the claim, as he must establish the validity of his claim in the proceedings instituted; but after the determination of the proceedings the applicant cannot then be permitted to perform the representation work. Willitt v. Baker (C. C. 1904) 133 Fed. 937, 949. See Bay State Silver Min. Co. v. Brown (C. C. 1884) 21 Fed. 167; Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147; Whalen Consol. Copper Min. Co. v. Whalen (C. C. 1904) 127 Fed. 611.

In an action on an adverse claim under this section it is proper for the parties to stipulate as to the only issues to be tried, and the issue may be limited to the sole question as to whether or not the plaintiff resumed work on his claim after forfeiture and before the location under which the defendant claims title. Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583.

A plaintiff in an adverse suit cannot show a forfeiture of a mining claim by reason of the failure to do the assessment work for a particular year, where such plaintiff had no interest by reason of the fact that such location was void because made subsequent to another and covering the same area, and an adverse suit cannot be converted into a mere protest against the showing of a patent by persons or parties having no interest and who could in no way be benefited by the judgment to be rendered. Snowy Peak Min. Co. v. Tamarack & Chesapeake Min. Co. (1910) 107 P. 60, 17 Idaho, 630, 636. See Wight v. Dubois (C. C. 1884) 21 Fed. 693; Milwaukee Gold Extraction Co. v. Gordon (1908) 95 P. 995, 37 Mont. 209; Lozar v. Neill (1908) 96 P. 843, 37 Mont. 287; Lockhart v. Farrell (1906) 86 P. 1077, 31 Utah, 155.

The objection that the claimant had not placed on the claim sought to be patented $500 worth of work or improvements cannot be considered, such question being within the exclusive jurisdiction of the land office. Wilson v. Freeman (1904) 75 P. 84, 29 Mont. 470, 68 L. R. A. 833.

22. Form of action and procedure.—A state court does not concern itself with the question as to whether or not its judgment can be used in the land office. Nome-Sinook Co. v. Simpson (1902) 1 Alaska, 578, 590; Quigley v. Gillett (1894) 35 Pac. 1040, 101 Cal. 462; Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 Pac. 1047, 114 Cal. 100; Gruwell v. Rocca (1903) 74 Pac. 1028, 141 Cal. 417, 420. See Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989; Id. (1874) 9 Nev. 240.

In some states statutes have been passed for the purpose of supplementing the provisions of this section and the cases in the state courts are controlled by such special statutes. Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 804, 31 C. C. A. 223; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25; Steel v. Gold Lead Min. Co. (1883) 1 Pac. 448, 18 Nev. 80.

The statute does not prescribe the form of action, and the character of the suit to be brought depends on state practice. Bonner v. Meikle (C. C. 1897) 82 Fed. 697; Mares v. Dillon (1904) 75 P. 963, 30 Mont. 117. See, also, Nesbitt v. Delamar's Nevada Gold Min. Co. (1898) 52 Pac. 609, 53 Pac. 178, 24 Nev. 273, 280, 77 Am. St. Rep. 807.

An action under this section to determine the right to possession of a mining claim, must be according to the practice of the state where brought. Wolverton v. Nichols (1883) 5 Mont. 89, 2 Pac. 308; Milligan v. Savery (1886) 6 Mont. 129, 9 Pac. 894.

The statute of Montana makes it immaterial which party is in possession in an action brought under this section, and a state court has jurisdiction if it appears from the pleadings that an application for patent has been made and an adverse claim filed. Hopkins v. Butte Copper Co. (1904) 74 Pac. 1081, 29 Mont. 390, 394; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 141.

Congress has not attempted to regulate the practice in the state courts on adverse claims, but has merely relegated the litigation to the courts instead of litigating the questions before the department. Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583.

An action in ejectment may be maintained in a state court based on an adverse claim filed under this section.

Wenner v. McNulty (1887) 14 Pac. 643, 7 Mont. 30, 32. See Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449, 451; Flavin v. Mattingly (1888) 19 Pac. 384, 8 Mont. 242, 244.

An action in the state court under this section may be in ejectment or to quiet title according to the possession of the parties at the time suit is commenced. Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 413.

State courts adopt the forms of action by which the title to land is tried, and these may be ejectment or a bill to quiet title, but the real question to be determined is who is entitled to possession. Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 414. See Garfield Min., etc., Co. v. Hammer (1886) 8 Pac. 153, 6 Mont. 53; Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489.

When relief is afforded by the courts of a state, the rules of pleading and the methods of procedure of the state must be followed, yet the matters settled ought to be under the provisions of this section, or the relief will be wholly inadequate and the determination would be of no advantage to either the litigant or the government. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 363.

23. —— **Power of congress to regulate.**—Congress cannot prescribe the time within which an action may be brought and prosecuted to judgment in the state courts. Bernard v. Parmelee (Cal. App. 1907) 92 Pac. 658; Meyers v. Same, Id. 662.

This section does not impose on the state courts the duty and labor of determining for the land department who is entitled, as between conflicting claimants, to purchase from the government, but the question of the right to possession must be determined by the state courts by a proceeding authorized by the laws of the state, and not by reason of the statutes of the United States. Gruwell v. Rocco (1903) 74 P. 1028, 141 Cal. 417. See, also, Bernard v. Parmelee (Cal. App. 1907) 92 P. 658; Meyers v. Same, Id. 662; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

Congress while authorizing a suit upon an adverse claim has no power to regulate the practice or to prescribe the form of the action in the state court. Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 108. See Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 Pac. 1047, 114 Cal. 100, 101.

24. **Legal and equitable actions.**—An action at law to recover possession when plaintiff is out of possession, or a suit in equity to quiet title when he is in possession, is an appropriate remedy to determine the right of possession of a mining claim, as between claimants, under this section. Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 865, 158 U. S. 441, 39 L. Ed. 1046; Perego v. Dodge (1896) 16 Sup. Ct. 971, 973, 163 U. S. 160, 41 L. Ed. 113; Durgan v. Redding (C. C. 1900) 103 Fed. 914; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 938; Young v. Goldsteen (D. C. 1899) 97 Fed. 303, 308; Allen v. Myers (1901) 1 Alaska, 114; Keppler v. Becker (1905) 80 Pac. 334, 9 Ariz. 234, 238; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 139; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 112. See, also, Davidson v. Calkins (C. C. 1899) 92 Fed. 230.

A suit brought under this section to determine a contest between mining claims is of an equitable nature. McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 38 C. C. A. 354; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219; Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37, 38 (decree affirmed Shoshone Min. Co. v. Rutter [1898] 87 Fed. 801, 31 C. C. A. 223, and reversed [1900] 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864); Providence Gold-Min. Co. v. Burke (1899) 57 P. 641, 6 Ariz. 323; Kirby v. Higgins (1906) 85 Pac. 275, 33 Mont. 518. See Hammer v. Garfield Min., etc., Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 32 L. Ed. 964; California Oil & Gas Co. v. Miller (C. C. 1899) 96 Fed. 12, 18.

It is now a common practice in cases where irremedial mischief is being done or threatened, going to the destruction of the substance of the estate, such as the extraction of ores from a mine, or the removal of coal, to issue an injunction, though the title to the premises be in litigation. Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 539, 28 L. Ed. 1113; Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2610; Bishop v. Baisley (1895) 41 Pac. 936, 28 Or. 119, 140. See Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413; Allen v. Dunlap (1893) 33 P. 675, 24 Or. 229, 232; Duffy v. Mix (1893) 33 P. 807, 24 Or. 265; Old Telegraph Min. Co. v. Central Smelting Co. (1876) 1 Utah, 331.

An action in the nature of ejectment is the proper form of action to support an adverse claim filed under this section, but plaintiff need not prove an actual ouster, and it is not fatal that he is himself in possession, or that the premises at the time suit is commenced are not in possession of any person. Becker v. Pugh (1886) 9 Colo. 589. 13 Pac. 906; McFeters v. Pierson (1890) 24 Pac. 1076, 15 Colo. 201, 206, 22 Am. St. Rep. 388; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 360.

The plaintiff who brings a purely legal action of ejectment must recover on the strength of his legal title, and if the plaintiff has only equities, they

must be presented in an equity action. Lockhart v. Johnson (1901) 21 Sup. Ct. 665, 181 U. S. 516, 529, 45 L. Ed. 979; Thompson v. Burke (1904) 2 Alaska, 249, 255.

Equity will enjoin a trespass on a mining claim, but it will not under the guise of an injunction try title to such a claim where the remedy is legal. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610; Bishop v. Baisley (1895) 41 P. 936, 28 Or. 119, 140.

This section authorizes either an action at law or a suit in equity, as may be most appropriate. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 41 L. Ed. 813.

A court of equity is a court of competent jurisdiction, within the meaning of this section, in which a suit in support of an adverse claim to an application for a patent for mining ground may be maintained, where it appears that neither of the parties is in possession; but the jurisdiction of a federal court is dependent in such case upon diversity of citizenship. Willitt v. Baker (C. C. 1904) 133 Fed. 937, 943. See Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223; Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252; United States Min. Co. v. Lawson (C. C. 1902) 115 Fed. 1005, 1006.

This section does not provide what form of action shall be brought by the adverse claimant, and it may be ejectment, a suit to try the right to real property under the statute, an action to quiet title, or the form ordinarily used in adverse actions, but when it appears that the object of such a suit is to contest the right to a mining claim as against an applicant for a patent, it is necessary to allege and prove that the plaintiff is a citizen of the United States or has declared his intention to become such. Schultz v. Allyn (1897) 48 Pac. 960, 5 Ariz. 152, 159. See Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296; Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265.

An adverse suit under this section to determine the right of possession, the answer presenting no equitable defense, is a law action, and contains no elements of equity jurisdiction. Ware v. White (1907) 108 S. W. 831, 81 Ark. 220.

An action under this section is an action in equity to quiet title under the state statute of Montana and in order to maintain an action the plaintiff must allege and prove his possession. Montana Ore Purchasing Co. v. Boston & Montana Copper, etc., Min. Co. (1902) 70 Pac. 1114, 27 Mont. 288, 312. See Wolverton v. Nichols (1883) 2 Pac. 308, 5 Mont. 89; Mantle v. Noyes (1885) 5 Pac. 856, 5 Mont. 274; Garfield Min., etc., Co. v. Hammer (1886) 8 Pac. 153, 6 Mont. 53.

25. Jurisdiction of courts.—This section does not prescribe or create jurisdiction, but the controversy is to be decided according to the laws and procedure of the local tribunal. St. Louis Smelting & Ref. Co. v. Kemp (1881) 104 U. S. 636, 655, 656, 26 L. Ed. 875; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 111 U. S. 350, 351, 28 L. Ed. 452; Wolverton v. Nichols (1886) 7 Sup. Ct. 289, 119 U. S. 485, 486, 30 L. Ed. 474; Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113; Blackburn v. Portland Gold-Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 578, 44 L. Ed. 276; De Lamar's Nevada Gold Min. Co. v. Nesbitt (1900) 20 Sup. Ct. 715, 177 U. S. 523, 527, 44 L. Ed. 872; Nome-Sinook Co. v. Simpson (1902) 1 Alaska, 578, 583; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 107. See Gavigan v. Crary (1905) 2 Alaska, 370, 397; Bechtol v. Bechtol (1905) 2 Alaska, 397; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25.

The failure to pay the fees as required by a state statute has no effect over the jurisdiction of a court as to the time of the commencement of the proceedings on an adverse claim. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 582, 29 L. Ed. 273.

The principle that several parties having conflicting claims to property may come into an ordinary court and litigate their conflicting claims is applied to mining locations after a patent is issued. Turner v. Sawyer (1893) 14 Sup. Ct. 192, 150 U. S. 578, 585, 37 L. Ed. 1189.

The jurisdiction of a court contemplated by this section is of a controversy between individual claimants and not as between the applicant and the government. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113. See U. S. v. Jones (1889) 9 Sup. Ct. 669, 131 U. S. 1, 33 L. Ed. 90; Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 694, 39 L. Ed. 859.

In adverse suits preliminary to a patent to mining land, not merely questions of law arising under the statutes of the United States, but questions of fact and questions arising under local rules and customs and state statutes are open for consideration. Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 511, 44 L. Ed. 864.

Where a state court assumes that plaintiff is claiming rights under this section and that the theory was acted upon, the appeal from state to supreme court will not be dismissed. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 717, 198 U. S. 443, 49 L. Ed. 1119.

A suit to quiet title to a mining claim may be maintained in a federal court though the complainant has not yet obtained the legal title from the

United States. Gillis v. Downey (1898) 85 Fed. 483, 29 C. C. A. 286.

The statutes do not confer any additional jurisdiction upon the state courts, but merely requires parties contesting the issuance of a patent for mining lands to go to those courts to determine their controversy, governed by the same rules, principles, and statutes that apply to other controversies. 420 Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240.

This section gives a court jurisdiction of suits only when the parties are all mining claimants and when the land in controversy is unpatented government land, and a court would not have jurisdiction in a suit on an adverse claim where the parties were all mining claimants and a patent had already been issued to one, or where one party is a mining claimant and the other a town-site claimant, whether the patent had been issued or not. Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 504.

26. —— **Court of competent jurisdiction.**—The statute requires a judicial proceeding in a competent court, which means a court of general jurisdiction, whether state or federal, and the usual rules of practice, including appeals, must prevail. Chambers v. Harrington (1884) 4 Sup. Ct. 428, 429, 111 U. S. 350, 28 L. Ed. 452; Eilers v. Boatman (1884) 4 Sup. Ct. 432, 111 U. S. 356, 28 L. Ed. 454; Blackburn v. Portland Gold-Min. Co. (1900) 20 Sup. Ct. 222, 223, 175 U. S. 571, 44 L. Ed. 276. See, also, Hoyt v. Russell (1886) 6 Sup. Ct. 881, 882, 117 U. S. 401, 29 L. Ed. 914; Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

Congress did not by this section intend to prescribe jurisdiction in any particular court, state or federal. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 578, 44 L. Ed. 864.

The intention of congress as expressed in this section was to leave open to suitors all courts competent to determine the question of the right of possession. Id.

Under this section as it originally stood when an adverse claim was filed, the parties were referred to any court of competent jurisdiction, and the question between the successful party and the government was left to the determination of the commissioner of the general land office. Burke v. Bunker Hill, Min., etc., Co. (C. C. 1891) 46 Fed. 644, 647.

Where a state statute authorizes a suit to quiet title regardless of possession, a federal court of equity in such state is a court of competent jurisdiction, in which a suit in support of an adverse claim to mining ground may be maintained, when it appears that neither of the parties is in possession. Willitt v. Baker (C. C. 1904) 133 Fed. 937.

This section transfers the jurisdiction over the controversy on the filing of an adverse claim from the land department to the proper court and the department has no jurisdiction to act until the controversy has been determined in the court. Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 293.

By this section congress confided to local tribunals the determination of the rights of conflicting claimants, referring to courts of competent jurisdiction, that is courts already having jurisdiction of similar controversies. Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 108.

27. —— **Federal questions.**—A suit to try adverse rights to a mining claim does not necessarily involve a federal question. Bushnell v. Crooke Mining & Smelting Co. (1893) 13 Sup. Ct. 771, 773, 148 U. S. 682, 37 L. Ed. 610; Gillis v. Stinchfield (1895) 16 Sup. Ct. 131, 159 U. S. 658, 40 L. Ed. 295; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 44 L. Ed. 276; Telluride Power, etc., Co. v. Rio Grande W. R. Co. (1900) 20 Sup. Ct. 245, 175 U. S. 639, 44 L. Ed. 305; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 44 L. Ed. 864; De Lamar's Nevada Gold Min. Co. v. Nesbitt (1900) 20 Sup. Ct. 715, 177 U. S. 523, 527, 44 L. Ed. 872; Mountain View M. & M. Co. v. McFadden (1901) 21 Sup. Ct. 488, 180 U. S. 533, 45 L. Ed. 656; Beals v. Cone (1903) 23 Sup. Ct. 275, 276, 188 U. S. 184, 47 L. Ed. 435; McMillen v. Ferrum Min. Co. (1905) 25 Sup. Ct. 533, 197 U. S. 343, 347, 49 L. Ed. 784; Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252; Bunker Hill, etc., Min., etc., Co. v. Shoshone Min. Co. (1901) 109 Fed. 504, 507, 47 C. C. A. 200; McFadden v. Mountain View Min. & Mill. Co. (C. C. 1898) 87 Fed. 154; Willitt v. Baker (C. C. 1904) 133 Fed. 937. See, also, W. G. Coyle & Co. v. Stern (1912) 193 Fed. 582, 113 C. C. A. 450; McGoon v. Northern Pac. R. Co. (D. C. 1913) 204 Fed. 998, 1001. These cases overrule Burke v. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1891) 46 Fed. 644, distinguishing Trafton v. Nougues (1877) 4 Sawy. 178, Fed. Cas. No. 14,134, and Water Co. v. Keyes (1877) 96 U. S. 199, 24 L. Ed. 656. And they also overrule Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37, decree affirmed Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223; California Oil & Gas Co. v. Miller (C. C. 1899) 96 Fed. 12. And by implication overrule Frank Gold, etc., Min. Co. v. Larimer Min., etc., Co. (C. C. 1881) 8 Fed. 724; Cheesman v. Shreeve (C. C. 1888) 37 Fed. 36; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219; Strasburger v. Beecher (C. C. 1890) 44 Fed. 209, 213; Wise v. Nixon (C. C. 1896) 76 Fed. 3, 6.

The question as to whether or not the original locator of a mining claim is subsequently estopped to deny the validity of the original location, is not a federal question. Speed v. McCarthy (1901) 21 Sup. Ct. 613, 181 U. S. 269, 275, 45 L. Ed. 855. See Gillis v. Stinchfield (1895) 16 Sup. Ct. 131, 159 U. S. 658, 40 L. Ed. 295; Pittsburgh, etc., Iron Co. v. Cleveland Iron Min. Co. (1900) 20 Sup. Ct. 931, 178 U. S. 270, 44 L. Ed. 1065.

The fact that an action is brought, pursuant to this section, to determine the right to the possession of a mining claim, does not confer jurisdiction on a federal court. Larned v. Jenkins (1901) 109 Fed. 100, 48 C. C. A. 252. See, also, Yellow Aster Min. & Mill. Co. v. Winchell (C. C. 1899) 95 Fed. 213.

The federal courts have jurisdiction to determine questions arising in an action on an adverse or disputed mining claim. Frank Gold, etc., Min. Co. v. Larimer Min., etc., Co. (C. C. 1881) 8 Fed. 724.

An application to transfer a case brought under this section to a federal court must show that the matter in dispute is claimed by both parties. Back v. Sierra Nevada Consol. Min. Co. (C. C. 1891) 46 Fed. 673, 675.

The bill must show the value of the property in controversy to be sufficient to give the federal court jurisdiction. It is better practice, also to show affirmatively in the bill whether the ground in controversy is a lode or placer claim. Yellow Aster Min. & Mill. Co. v. Winchell (C. C. 1899) 95 Fed. 213. See, also, McFadden v. Mountain View Min. & Mill. Co. (1899) 97 Fed. 670, 38 C. C. A. 354.

The fact that an action was brought by virtue of this section does not exempt the complainant from the necessity of showing that the value of the property in controversy is sufficient to give the federal courts jurisdiction. Yellow Aster Min., etc., Co. v. Winchell (C. C. 1899) 95 Fed. 213, 214. See Chambers v. Harrington (1884) 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452; Shoshone Min. Co. v. Rutter (1898) 87 Fed. 801, 31 C. C. A. 223; Strasburger v. Beecher (C. C. 1890) 44 Fed. 209, 213; Burke v. Bunker Hill, etc., Min., etc., Co. (C. C. 1891) 46 Fed. 644; Quigley v. Gillett (1894) 35 P. 1040, 101 Cal. 462, 471.

A suit in support of an adverse claim to mining ground is not necessarily one of federal cognizance, but the jurisdiction of a federal court is dependent on diversity of citizenship. Willitt v. Baker (C. C. 1904) 133 Fed. 937.

See, also, notes under §§ 991, 1010, 1214, 1533.

28. —— **State courts.**—A state court may properly determine a controversy between rival claimants under this section. Bushnell v. Crooke Min., etc., Co. (1893) 13 Sup. Ct. 771, 148 U. S. 682, 690, 37 L. Ed. 610; Gillis v. Stinchfield (1895) 16 Sup. Ct. 131, 159 U. S. 658, 659, 40 L. Ed. 295; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 584, 44 L. Ed. 276; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 506, 44 L. Ed. 864; De Lamar's Nevada Gold Min. Co. v. Nesbitt (1900) 20 Sup. Ct. 715, 177 U. S. 523, 526, 44 L. Ed. 872; Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190; Matlock v. Stone (1905) 91 S. W. 553, 77 Ark. 195, 199; Giberson v. Wilson (1906) 96 S. W. 137, 79 Ark. 581, 583; Ware v. White (1907) 108 S. W. 831, 81 Ark. 220, 223; Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41; Lalande v. McDonald (1887) 13 Pac. 347, 2 Idaho (Hasb.) 307; Swanson v. Ketler (1910) 105 Pac. 1059, 17 Idaho, 321, 325; Flynn Group Min. Co. v. Murphy (1910) 109 Pac. 851, 18 Idaho, 266, 269, 138 Am. St. Rep. 201; Batterton v. Douglas Min. Co. (1911) 120 Pac. 827, 20 Idaho, 760, 762, 38 L. R. A. (N. S.) 1121; Upton v. Larkin (1888) 17 Pac. 728, 7 Mont. 449, 451; Flavin v. Mattingly (1888) 19 Pac. 384, 8 Mont. 242, 244; O'Donnell v. Glenn (1888) 19 Pac. 302, 8 Mont. 248, 250; Mattingly v. Lewisohn (1888) 19 Pac. 310, 8 Mont. 259, 263; Flick v. Gold Hill, etc., Min. Co. (1889) 20 Pac. 807, 8 Mont. 298, 302; Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 511; Shreve v. Copper Bell Min. Co. (1891) 28 Pac. 315, 11 Mont. 309, 328; Coleman v. Curtis (1892) 30 Pac. 266, 12 Mont. 301, 302; Mattingly v. Lewisohn (1893) 35 Pac. 111, 13 Mont. 508, 515; Basin Mining & Concentrating Co. v. White (1899) 55 Pac. 1049, 22 Mont. 147; Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 413; Hopkins v. Butte Copper Co. (1904) 74 Pac. 1081, 29 Mont. 390; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 129; Woody v. Hinds (1904) 76 Pac. 1, 30 Mont. 189, 190; Nichols v. Williams (1909) 100 Pac. 969, 38 Mont. 552; Copper Mountain Min., etc., Co. v. Butte & Corbin Consol. Copper, etc., Min. Co. (1909) 104 Pac. 540, 39 Mont. 487, 489, 133 Am. St. Rep. 595; Golden Fleece Gold, etc., Min. Co. v. Cable Consol., etc., Min. Co. (1877) 12 Nev. 312, 318; Harris v. Helena Gold Min. Co. (1907) 92 Pac. 1, 29 Nev. 506, 512; Indiana Nevada Mining Co. v. Gold Hills Min. & Mill. Co. (1912) 126 Pac. 965, 35 Nev. 158; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 107; Pierce v. Rock Creek Gold Min. Co. (1900) 61 Pac. 348, 37 Or. 342, 343; Gorman Min. Co. v. Alexander (1892) 51 N. W. 346, 2 S. D. 557, 559; Mars v. Oro Fino Min. Co. (1895) 65 N. W. 19, 7 S. D. 605, 607; Hulst v. Doerstler (1898) 75 N. W. 270, 11 S. D. 14, 15; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362,

50 L. R. A. 184; Id. (1899) 80 N. W. 135, 12 S. D. 7; Elder v. Horseshoe Min., etc., Co. (1901) 87 N. W. 586, 15 S. D. 124, 102 Am. St. Rep. 681. See Armstrong v. Lower (1882) 6 Colo. 393, 394; Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265; Schultz v. Keeler (1887) 13 Pac. 481, 2 Idaho (Hasb.) 333; Back v. Sierra Nevada Consol. Min. Co. (1888) 17 Pac. 83, 2 Idaho (Hasb.) 420; Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679; Hamburg Min. Co. v. Stephenson (1883) 30 Pac. 1088, 17 Nev. 449, 454; Wetzstein v. Boston, etc., Copper, etc., Min. Co. (1901) 66 Pac. 943, 26 Mont. 193; Same v. Largey (1902) 70 Pac. 717, 27 Mont. 212, 217; Montana Ore Purchasing Co. v. Boston & M. Copper, etc., Min. Co. (1902) 70 Pac. 1114, 27 Mont. 288, 295; Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46, 53; Butte Consol. Min. Co. v. Barker (1907) 89 Pac. 302, 90 Pac. 177, 35 Mont. 327, 331; Four Hundred Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240, 244; Steel v. Gold Lead Gold, etc., Min. Co. (1883) 1 Pac. 448, 18 Nev. 80, 84; Nesbitt v. Delamar's Nevada Gold Min. Co. (1898) 52 Pac. 609, 53 Pac. 178, 24 Nev. 273, 280, 77 Am. St. Rep. 807; Seidler v. Lafave (1889) 20 Pac. 789, 4 N. M. (Johns.) 369; Illinois Silver Min., etc., Co. v. Raff (1893) 34 Pac. 544, 7 N. M. 336, 339; Lincoln-Lucky & Lee Min. Co. v. Hendry (1897) 50 Pac. 330, 9 N. M. 149, 151; Lockhart v. Wills (1898) 54 Pac. 336, 9 N. M. 344, 346; Same v. Leeds (1900) 63 Pac. 48, 10 N. M. 568, 593; Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 287; Perego v. Dodge (1893) 33 Pac. 221, 9 Utah, 3.

In the absence of diverse citizenship, and where there is no question as to the meaning and construction of the statute, state courts are regarded, within the letter and meaning of this section, as courts of competent jurisdiction to determine the right of possession. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 588, 44 L. Ed. 276; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 507, 44 L. Ed. 864.

The action is properly brought in the county where the land in controversy is situated. Erwin v. Perego (1899) 93 Fed. 608, 610, 35 C. C. A. 482.

A state court has jurisdiction of a controversy as to the ownership of a mining claim in a suit by an adverse claimant, where the ownership is distinctly in issue and the controversy is for a court and not for the land department. Lightner Mining Co. v. Superior Court of Calaveras County (Cal. App. 1911) 112 P. 909.

In an action on an adverse claim under this section a state court has no jurisdiction to review the action of the officers of the land department in holding that a plat and adverse claim conformed to their rules; but a state court has the power to inquire whether an adverse claim has been framed in accordance with the requirements of this section. Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 497.

A court may substitute words denoting different directions in order to bring the survey back to the starting point. Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 116. See Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 497.

See, also, notes under § 1233.

29. **Commencement of action.**—The filing of a complaint in a proper court within the 30 days is a commencement of the proceedings, although the docket fee required by the state law is not paid until afterwards; and the objection that the proceeding was not commenced in time cannot be taken by a party who has demurred and answered, and gone to trial without it. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 1057, 114 U. S. 576, 29 L. Ed. 273.

What constitutes the commencement of an action in a state court is a matter of state law, and the decision of a state court upon that point is not a federal question and is not subject to review in a federal court. Id.

An action commenced within the 30 days allowed by this section proceeds to judgment as other actions, and the court, as in other actions, may permit amendments to the complaint so as to make it state a cause of action, even after the 30 days have expired. Woody v. Hinds (1904) 76 P. 1, 30 Mont. 189. But see Keppler v. Becker (1905) 80 P. 334, 9 Ariz. 234. See, also, Providence Gold-Min. Co. v. Marks (1900) 60 P. 938, 7 Ariz. 74.

Where the complaint on an adverse claim was filed within the 30 days as required by this section, the filing of a general demurrer after the 30 days is a waiver of the issuance of summons. Harris v. Helena Gold Min. Co. (Nev. 1907) 92 P. 1. See Iowa Min. Co. v. Bonanza Min. Co. (1881) 16 Nev. 64.

The limitation within which an action on an adverse claim must be commenced is fixed by the federal statute, but the question as to what constitutes the commencement of an action is determined by the state law. Harris v. Helena Gold Min. Co. (Nev. 1907) 92 P. 1. See Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

Where the summons is placed in the hands of the officer within 30 days after filing the claim, but service is delayed for more than a year, the proceeding is not commenced in time. Mars v. Oro Fino Min. Co. (1895) 7 S. D. 605, 65 N. W. 19.

A claim initiated nearly five years after the completion of the necessary

proceedings in the land office should not be entertained in a suit waged in pursuance of the filing of an adverse claim under this section. Wheeler v. Smith (1893) 32 Pac. 784, 5 Wash. 704, 706.

30. —— **Time of commencement.**—An action to quiet title to mining lands, though brought by an adverse claimant, is not an action on an adverse claim within this section; and hence it is immaterial that it is not commenced within 30 days from the filing of plaintiff's adverse claim, unless he thereby loses not only his claim to a patent, but also his right of possession. Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 P. 1047, 114 Cal. 100. See, also, Gruwell v. Rocco (1903) 74 P. 1028, 141 Cal. 417; Schroder v. Aden Gold Min. Co. (1904) 78 P. 20, 144 Cal. 628; 420 Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240.

The statute requires the adverse claimant to set up his claim when an application for patent is made and within 30 days thereafter to commence proceedings in a court of competent jurisdiction to determine the question of the right to possession and to prosecute the same diligently to final judgment. Jackson v. Roby (1883) 3 Sup. Ct. 301, 302, 109 U. S. 440, 27 L. Ed. 990; Chambers v. Harrington (1884) 4 Sup. Ct. 428, 429, 111 U. S. 350, 28 L. Ed. 452; Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 581, 29 L. Ed. 273; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 1111, 115 U. S. 45, 29 L. Ed. 348; Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 297, 34 L. Ed. 155; Ducie v. Ford (1891) 11 Sup. Ct. 417, 418, 138 U. S. 587, 34 L. Ed. 1091; Kendall v. San Juan Silver Min. Co. (1892) 12 Sup. Ct. 779, 780, 144 U. S. 658, 36 L. Ed. 583; Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 165, 41 L. Ed. 113; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 115, 42 L. Ed. 96; Del Monte Min., etc., Co. v. Last Chance Min. & Mill. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 77, 43 L. Ed. 72; Erwin v. Perego (1899) 93 Fed. 608, 609, 35 C. C. A. 482; Bunker Hill & S. Mining & Concentrating Co. v. Shoshone Min. Co. (1901) 109 Fed. 504, 506, 47 C. C. A. 200; Same v. Empire State-Idaho Mining & Developing Co. (1901) 109 Fed. 538, 544, 48 C. C. A. 665; First Nat. Gold Min. Co. of New York & Colorado v. Altvater (1906) 149 Fed. 393, 394, 79 C. C. A. 213; Steves v. Carson (C. C. 1890) 42 Fed. 821; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219, 220; Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37, 38; Golden Reward Min. Co. v. Buxton Min. Co. (C. C. 1897) 79 Fed. 868, 873; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 698; California Oil & Gas Co. v. Miller (C. C. 1899) 96 Fed. 12, 18; Providence Gold Min. Co. v. Marks (1900) 60 P. 938, 7 Ariz. 74, 76; Hunt v. Eureka Gulch Min. Co. (1890) 24 P. 550, 14 Colo. 451, 452; Mares v. Dillon (1904) 75 P. 963, 30 Mont. 117, 138.

A claimant, whether in or out of possession, must commence his action to determine the right within 30 days after filing his adverse claim; but he is not required to prove his own right of possession affirmatively, and also to disprove the claim of his adversary by negative testimony. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 320; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 52. See Scorpion Silver Min. Co. v. Marsano (1875) 10 Nev. 370, 379.

An adverse claimant must commence his suit in a court of competent jurisdiction within the specified time, and it is made the duty of the land department to be governed by the final judgment in the case and to issue a patent accordingly. People v. District Court (1894) 35 Pac. 731, 19 Colo. 343, 347.

A contestant must prove the filing of his adverse claim in the land office and the institution of his suit in proper time. Deeney v. Mineral Creek Milling Co. (1902) 67 Pac. 724, 11 N. M. 279, 288. See Mattingly v. Lewisohn (1888) 19 Pac. 310, 8 Mont. 259.

The state statute may be looked to as a safe and convenient guide in determining whether due diligence had been taken and used in commencing an action under this section. Mars v. Oro Fino Min. Co. (1895) 65 N. W. 19, 7 S. D. 605, 616.

31. **Effect of failure to commence action in time.**—A failure to institute proceedings in the proper court by the adverse claimant is a waiver of his adverse claim. Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 35, 130 C. C. A. 426.

The suit by the adverse claimant must be brought within the statutory period, and a failure to do so is a waiver of his claim, though his delay may be excusable under state legislation, permitting renewal of suits. Steves v. Carson (C. C. 1890) 42 Fed. 821.

Where a suit is not entered on an adverse claim within the prescribed time, such claim is by force of the statute waived and is no longer effective to stay the patent proceedings, and this waiver becomes effective immediately upon the expiration of the thirtieth day, and any proceedings thereafter upon the adverse claim are without authority of law and cannot affect the rights of the applicant for a patent. Corning Tunnel Co. v. Pell (1878) 4 Colo. 507.

32. **Stay of proceedings in land office.**—Under this section on the filing of an adverse claim all proceedings, except the publication of notice and making

and filing the affidavit thereof, shall be stayed until the controversy is decided by a court of competent jurisdiction or the adverse claim is waived, as all functions of the land department are suspended by the commencement of such action and the decision of the court is controlling upon the officers of the land department. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 585, 29 L. Ed. 273; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 49, 29 L. Ed. 348; Enterprise Min. Co. v. Rico-Aspen, etc., Min. Co. (1897) 17 Sup. Ct. 762, 167 U. S. 108, 115, 42 L. Ed. 96; Id. (1895) 66 Fed. 200, 208, 13 C. C. A. 390; Gillis v. Downey (1898) 85 Fed. 483, 487, 29 C. C. A. 286; Bunker Hill, etc., Co. v. Empire State, etc., Co. (1901) 109 Fed. 538, 542, 48 C. C. A. 665; Mackay v. Fox (1903) 121 Fed. 487, 491, 57 C. C. A. 439; McEvoy v. Hyman (C. C. 1885) 25 Fed. 539, 540; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 939; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 108; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 360; Slothower v. Hunter (1906) 88 Pac. 36, 15 Wyo. 189, 198. See Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 693, 39 L. Ed. 859; Young v. Goldsteen (D. C. 1899) 97 Fed. 303; Wright v. Town of Hartville (1905) 81 Pac. 649, 82 Pac. 450, 13 Wyo. 497, 502.

In proceedings to determine an adverse claim to mineral lands, pursuant to this section, a title founded on a patent for an adjoining claim, procured by one of the litigants on application pendente lite, will not be heard by the court to prejudice the merits of the case. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 1057, 114 U. S. 576, 29 L. Ed. 273.

When an adverse claim is filed the officers of the land office have no further jurisdiction over the case and can take no further action until a certified copy of the judgment is presented. Id.

Where an action commenced by an adverse claimant is pending the officers of the land department cannot assume from mere delay in placing the cause upon the trial calendar or taking proceedings therein that the adverse claim had been waived. Id.

After the decision in the adverse suit the officers of the land department are governed by it; but before the decision, once the proceeding is initiated, their function is suspended. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 737, 157 U. S. 683, 39 L. Ed. 859.

This section authorizes the commencement of an action by the adverse claimant and a stay of proceedings in the land department pending such action. Creede & C. C. Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 357, 49 L. Ed. 501.

Where an adverse claim has been filed and an action begun in the proper court, and such action is dismissed either by fraud or mistake, the land department cannot decide that the action has terminated and issue a certificate to either party, but the court alone in which the case was pending must determine when the controversy is at an end, and until such decision all acts of the land office will be ignored. McEvoy v. Hyman (C. C. 1885) 25 Fed. 539.

When an application is made for a patent to a mining claim, and an adverse claim thereto is regularly made, and a suit brought in a court of competent jurisdiction to determine the right of possession, all proceedings in the land office are stayed until the determination of such suit, and the judgment therein determines the rights of possession. Fox v. Mackay (1901) 1 Alaska, 329.

The jurisdiction of the land office on the filing of an application for patent to public mineral lands is exclusive and can be stayed only by the filing of an adverse claim. Warnekros v. Cowan (Ariz. 1910) 108 P. 238.

On the filing of an adverse claim the register and receiver may properly enter an order suspending all further proceedings on the application for patent and require the adverse claimant to commence an action in a court of competent jurisdiction to settle the controversy. Bernard v. Parmelee (1907) 92 Pac. 658, 6 Cal. App. 537, 539.

The land office has no jurisdiction to issue a receiver's receipt for mining applicant during the pendency of an action brought in support of an adverse claim. Deeney v. Mineral Creek Milling Co. (1902) 67 P. 724, 11 N. M. 279.

33. Diligence in prosecution of proceedings.—The court, and not the land department, has jurisdiction to determine the question of due diligence in the prosecution of the suit. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 1057, 114 U. S. 576, 29 L. Ed. 273; Rose v. Richmond Min. Co. (1882) 17 Nev. 25, 27 Pac. 1105.

Where one permits the statutory time for filing adverse claims, or for bringing suit in support thereof, to elapse, or, having filed claims and brought suit, permits it to be dismissed for failure to prosecute, his rights, so far as they could have been determined in such proceedings, are lost, and in an action against him for possession he cannot show that the patentee failed to comply with the law. Kannaugh v. Quartette Min. Co. (1891) 16 Colo. 341, 27 Pac. 245.

The dismissal of an adverse proceeding for want of prosecution is not improper. Carnahan v. Connolly (1901) 68 P. 836, 17 Colo. App. 98. See, also,

Doon v. Tesh (1901) 63 P. 764, 131 Cal. 406.

The question as to whether or not an adverse claimant has exercised reasonable diligence in prosecuting a suit to final judgment is for determination by the court in which the suit is pending, and the question cannot be determined by the land department. Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 294; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 108.

34. Dismissal or other termination of proceedings.—Under this statute an adverse claim against an application for a mining location may be terminated either by a settlement between the parties, by a judgment of the court, or by a waiver of the adverse claim, and under the decisions there are several ways in which an adverse claim can be waived while the case is pending without invading the jurisdiction of the court. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 585, 29 L. Ed. 273; Mackay v. Fox (1903) 121 Fed. 487, 57 C. C. A. 439. See, also, Cuenin v. Chloride Mining & Prospecting Co. (1914) 141 Pac. 463, 464, 57 Colo. 320.

When action has been taken by which one party is put out of court and his application for a patent dismissed, he cannot, after remaining silent for over eight years, and permitting the successful party to remain in possession, resume the contest. United States v. Marshall Silver Min. Co. (1889) 9 Sup. Ct. 343, 129 U. S. 579, 32 L. Ed. 734.

One whose adverse claim has been dismissed cannot contend that the patent is void because the receiver of the public land office accepted the purchase price and gave his receipt while the suit was pending. Deno v. Griffin (1889) 20 Nev. 249, 20 Pac. 808.

35. Parties.—In an action to determine an adverse claim to mining property, the fact that parties were joined as plaintiffs who had parted with their interest in the subject-matter was no ground for dismissal. Mackay v. Fox (1903) 121 Fed. 487, 57 C. C. A. 439.

An action to determine an adverse claim to a mining property was not subject to dismissal for nonjoinder as a party plaintiff of a person acquiring an interest in the property after the commencement of the action. Id.

One who appears to be the applicant for a patent and to be asserting his compliance with the statute is a proper and necessary party. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 223, 175 U. S. 571, 44 L. Ed. 276.

By this statute the suit must be instituted by the adverse claimant; but if a person becomes vested with the title between the institution of such adverse claim and the commencement of the action he may maintain the action in his own name. Willitt v. Baker (C. C. 1904) 133 Fed. 937, 944.

To an action brought under this section to determine the right of possession of a mining claim, those only who have filed claims to the land in the United States land office can properly be made parties, and such parties only are entitled to intervene. Mont Blanc Consol. Gravel Min. Co. v. Debour (1882) 61 Cal. 364.

One who has not filed his adverse claim cannot intervene in an action to determine adverse claims to a location, though he claims an interest in the premises adverse to both plaintiff and defendant. Murray v. Polglase (1899) 59 P. 439, 23 Mont. 401.

36. —— Government as party.—In proceedings for the acquisition of title from the United States the Government is a party in fact to the proceeding, and the objection of alienage, no matter by whom suggested, is based solely on the right of the government to interpose the fact of alienage as a bar to procuring or holding an interest in realty. O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181.

An applicant for public lands cannot have his right thereto as against the government determined in an adverse suit. Last Chance Min. Co. v. Tyler (1895) 15 Sup. Ct. 733, 157 U. S. 683, 694, 39 L. Ed. 859; Butte Land & Investment Co. v. Merriman (1905) 80 Pac. 675. 32 Mont. 402, 411, 108 Am. St. Rep. 590. See U. S. v. Jones (1889) 9 Sup. Ct. 669, 131 U. S. 1, 33 L. Ed. 90.

It is the question of the right of possession which is to be determined by the proceedings required to be had in a court of competent jurisdiction, and the United States is not required to be a party to the proceedings. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113; Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 698.

The question of the right of possession is to be determined by the courts, and the United States is not a party to the proceedings, but the only jurisdiction the court may have is of a controversy between individual claimants and the right of an applicant as against the government cannot be determined in such a suit. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113. See Last Chance Min. Co. v. Tyler (1895) 15 Sup. Ct. 733, 157 U. S. 683, 694, 39 L. Ed. 859.

The decree of a court in an action authorized by this section determines simply as between the litigants which one has the superior right to the possession of the premises in dispute; and as the title to the land is in the govern-

ment such a decree does not affect the title, except in so far as the judgment of the court may be binding on or influence the land department. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 833, 120 C. C. A. 160. See Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548; Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36, 130 C. C. A. 426.

In all contests over mining claims the government is an interested party so far as to see that the claimants have complied with the mining requirements before obtaining title to any land. Rutter v. Shoshone Min. Co. (C. C. 1896) 75 Fed. 37, 38. See, also, Burke v. Bunker Hill & S. Mining & Concentrating Co. (C. C. 1891) 46 Fed. 644.

The trial of suits of this character is had in order to aid the government through its proper department in determining whether the applicant or an adverse claimant is entitled to a patent, and while the government is not, strictly speaking, a party to the suit, yet it is interested in the proceedings to the extent of having established by the courts under the evidence at the trial, not only which of the parties has the better right to the claim, but also whether there has been a full compliance with the mining laws, rules, and regulations, and if neither of the parties has complied with the law in this respect the court must render judgment against both. Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 941. See Jackson v. Roby (1883) 109 U. S. 440, 442, 3 Sup. Ct. 301, 27 L. Ed. 990; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 419.

The intention of adverse proceedings authorized by this section is not to determine any of the rights of the United States, or the rights of the contestants to a patent, but it is for the information of the land department to determine as between the litigants the right to the possession of the mining claim in dispute. Lavagnino v. Uhlig (1903) 71 Pac. 1046, 26 Utah, 1, 22, 99 Am. St. Rep. 808, See, also, Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190; Wight v. Dubois (C. C. 1884) 21 Fed. 693.

37. Pleading and proof.—Where a plaintiff in an action on an adverse claim fails to prove the facts necessary to make a prima facie case it entitles the defendant to a nonsuit as to plaintiff's cause of action, and the defendant if he sees fit is not required to introduce any evidence; and in such a case the court may nonsuit the plaintiff. Kirk v. Meldrum (1901) 65 Pac. 633, 28 Colo. 453, 459. McWilliams v. Winslow (1905) 82 Pac. 538, 34 Colo. 341, 344; Cuenin v. Cloride Mining & Prospecting Co. (1914) 141 Pac. 463, 57 Colo. 320.

Many questions may be litigated in an adverse suit but they can only be litigated when they are set up in some appropriate pleading. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 691, 39 L. Ed. 859. See, also, Childers v. Laham (N. M. 1914) 142 P. 924.

38. —— Complaint.—Under this statute it is not necessary for a plaintiff in the action contemplated to set out specifically the character of his own title or the alleged title of the defendant, but it is sufficient simply to allege that the plaintiff is the owner and in possession of the described property, and that the defendants are unlawfully asserting a claim thereto adverse to him. Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 940; Four Hundred Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240, 248; Scorpion Silver Min. Co. v. Marsano (1875) 10 Nev. 370; Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 320, 321; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 51-54. Steel v. Gold Lead Min. Co. (1883) 1 Pac. 448, 18 Nev. 80, 87.

A complaint in an action under this section to contest an application for a patent for mining land must show that plaintiff filed his adverse claim within the period prescribed by the preceding section, and brought his action within the time allowed by this section. Cronin v. Bear Creek Gold Min. Co. (Idaho, 1893) 32 Pac. 204; Mattingly v. Lewisohn (1888) 8 Mont. 259, 19 Pac. 310; Thornton v. Kaufman (1907) 88 P. 796, 35 Mont. 181. See, also, Keppler v. Becker (1905) 80 Pac. 334, 9 Ariz. 234; Warnekros v. Cowan (1910) 108 Pac. 238, 13 Ariz. 42; Berry v. Cammet (1872) 44 Cal. 347; Woods v. Sawtelle (1873) 46 Cal. 389; Cadierque v. Duran (1874) 49 Cal. 356; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296; Pennsylvania Min. Co. v. Bales (1902) 70 P. 444, 18 Colo. App. 108; Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345; Wolverton v. Nichols (1883) 2 Pac. 308, 5 Mont. 89; Garfield Min., etc., Co. v. Hammer (1886) 8 Pac. 153, 6 Mont. 53; Milligan v. Savery (1886) 8 Pac. 894, 6 Mont. 129; McKay v. McDougal (1897) 48 Pac. 988, 19 Mont. 488; Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401; Hopkins v. Butte Copper Co. (1904) 74 P. 1081, 29 Mont. 390; Woody v. Hinds (1904) 76 P. 1, 30 Mont. 189; Helbert v. Tatem (1906) 85 P. 733, 34 Mont. 3.

In an action by an adverse claimant under this section the complaint or bill should show affirmatively whether the ground in controversy is a lode or a placer claim. Yellow Aster Min., etc., Co. v. Winchell (C. C. 1899) 95 Fed. 213, 214.

A complaint alleging, in effect, that plaintiff is in possession of the land in

controversy, and contains all the essentials of a bill in equity to quiet title, is sufficient in a federal court. Durgan v. Redding (C. C. 1900) 103 Fed. 914.

A complaint which alleges that the land is valuable mineral ground, constituting a part of a claim taken by plaintiff under the mining laws, and which has ever since been, and is still, occupied and held by him thereunder, and that defendant is seeking to obtain title thereto as a mill site, states a cause of action. Id.

A suit in support of an adverse claim is a statutory proceeding in aid of the land department, and a continuation of the proceedings instituted in the land office. It may be in form a suit in equity or an action at law; but, whatever its form, the pleadings are to be construed with reference to its purpose, which is to determine the applicant's right to a patent for the land in dispute, rather than by the strict rules of pleading. Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936.

As the statute does not prescribe the form of action or the requisites of the pleadings, it is competent for the state to legislate on the subject for the government of its own courts; and, while such legislation is not binding on a federal court in any equity suit, it may properly be followed by the court in determining the sufficiency of the pleadings. Id.

The plaintiff must allege facts which will entitle him to the possession of the land against the government as well as against his adversary; and a complaint which does not allege that the ground is mineral land subject to location, and which merely alleges in general terms that plaintiff is the owner and entitled to possession, is insufficient. Keppler v. Becker (1905) 80 P. 334, 9 Ariz. 234.

On proceedings to determine the rights of respective claimants to a mining claim under this section, the complaint must contain a definite description of the area in conflict in order to support the judgment, which must designate the part, if any, of the area in conflict, that might belong to each of the adverse claimants. Smith v. Imperial Copper Co. (Ariz. 1907) 89 P. 510, 512.

A complaint must contain such a description of the property as will enable the court to determine to what extent, if at all, the claim of plaintiff is covered by the claim of defendant, upon which patent is applied for. Cronin v. Bear Creek Gold Min. Co. (1893) 32 Pac. 204, 3 Idaho, 614.

A complaint in a state court may be sufficient to quiet title to a mining claim without reference to a contest between parties seeking to obtain a patent under this and the preceding section. Id.

The complaint in an action on an adverse claim need not allege that the adverse claim was filed in the land office within 60 days of publication. Hain v. Mattes (1905) 83 P. 127, 34 Colo. 345. See, also, Pennsylvania Min. Co. v. Bales (1902) 70 P. 444, 18 Colo. App. 108; Rawlings v. Casey (1903) 73 P. 1090, 19 Colo. App. 152.

Where an action is pending in a state court to obtain possession of mining ground or to settle a controversy as to the title, and where the defendant afterwards makes application for patent, the plaintiff may by supplemental complaint base the existing action upon the rights granted by this section and have the controversy determined accordingly. Jones v. Pacific Dredging Co. (1903) 72 Pac. 956, 9 Idaho, 186, 190. See Axiom Min. Co. v. Little (1894) 61 N. W. 441, 6 S. D. 438.

In an action on an adverse claim the complainant need not allege that the action is in reference to the ground stated in such adverse claim. Hoffman v. Beecher (1892) 31 Pac. 92, 12 Mont. 489, 499. See Hammer v. Garfield Min., etc., Co. (1889) 9 Sup. Ct. 548, 130 U. S. 291, 293, 32 L. Ed. 964; Garfield Min., etc., Co. v. Hammer (1886) 8 Pac. 153, 6 Mont. 53.

An action brought under this section in the absence of a showing of the filing of an adverse claim and a staying of the patent proceedings, must proceed as an ordinary action to quiet title or to determine an adverse claim under the state statute. O'Hanlon v. Ruby Gulch Min. Co. (1913) 135 Pac. 913, 915, 48 Mont. 65.

An ordinary declaration in ejectment is sufficient to present all the questions involved between the applicant for a patent and an adverse claimant. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275, following Deeney v. Mineral Creek Milling Co. (1902) 67 Pac. 724, 11 N. M. 279. See, also, Seatter v. Heid (1912) 196 Fed. 333, 116 C. C. A. 153; Campbell v. Taylor (1883) 3 Utah, 325, 3 Pac. 445.

In an action on an adverse claim under this section, an allegation by the plaintiff that an adverse claim, in due time and form, showing its nature, boundaries, and extent, was filed in the land office is traversable and is necessary to confer jurisdiction upon the court to decide the controversy. Lily Min. Co. v. Kellogg (1903) 74 Pac. 518, 27 Utah, 111, 114. See Mont Blanc, etc., Min. Co. v. Debour (1882) 61 Cal. 364.

39. —— **Answer or defense.**—In adverse proceedings an answer is sufficient where its denial is as broad as the averment in the complaint, and the date of the first location of the mine as claimed in the plaintiff's complaint is wholly immaterial, as the plaintiff on the trial is put upon proof of title and right of possession and the defendant is equally put upon proof of his title, and he can ask a decree in his favor. Bay State Silver Min. Co. v. Brown (C. C. 1884) 21 Fed. 167, 168.

On proceedings to determine the va-

lidity of respective claims to a patent for a placer mine under this section, the answer must set forth the facts on which defendant bases his claim, and show his right as against the government, as well as against plaintiff. Anthony v. Jillson (1890) 83 Cal. 296, 23 Pac. 419.

An allegation in the answer that defendant's right to a patent was not adversed by a claim under which plaintiff claims the right of possession of the premises in controversy presents a good defense. Marshall Silver Min. Co. v. Kirtley (1888) 12 Colo. 410, 21 Pac. 492.

In a suit to support an adverse claim a defendant may show that the plaintiff's location was made upon grounds embraced upon a prior valid, subsisting location. Hoban v. Boyer (1906) 85 Pac. 837, 37 Colo. 185, 186. See Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Armstrong v. Lower (1882) 6 Colo. 393; Calhoun Gold Min. Co. v. Ajax, etc., Min. Co. (1899) 59 Pac. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

In an action to quiet title to a mining claim where the court has jurisdiction to determine the controversy between the parties representing a mine and the ore therein, it is the duty of the defendant to set up all defenses to the plaintiff's claim, and having failed to do so it is debarred from interposing a defense then held in a subsequent action, and the judgment in the former case estops the defendant as to every ground of recovery or defense which was, or might have been, presented. Chemung Min. Co. v. Hanley (1905) 81 Pac. 619, 11 Idaho, 302, 309. See Empire State, etc., Min., etc., Co. v. Hanley (1905) 136 Fed. 99, 69 C. C. A. 87.

In a suit on an adverse claim an answer is sufficient which states facts which seem to entitle the defendant to affirmative relief under this section. Perego v. Dodge (1893) 33 Pac. 221, 9 Utah, 3, 7. See Wolverton v. Nichols (1886) 7 Sup. Ct. 289, 119 U. S. 485, 30 L. Ed. 474.

40. —— Citizenship as Issue.—See, also, notes § 4614, ante.

A complaint in an action under this section for the possession of a mining claim must aver, and the proof must show, that the plaintiff is a citizen of the United States or has declared his intention to become such, to entitle him to recover. Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43, 51; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296, 299; Jackson v. Dines (1889) 21 Pac. 918, 13 Colo. 90, 93; Sherlock v. Leighton (1901) 63 Pac. 580, 934, 9 Wyo. 297, 309. See North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Strickley v. Hill (1900) 62 Pac. 893, 22 Utah, 257, 269, 83 Am. St. Rep. 786.

The objection of alienage may be made by any one adversely interested, and if made at the proper time, when a party is seeking to procure the title to mining property from the United States, it will prevent the acquirement of title. O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Billings v. Aspen Min., etc., Co. (1892) 51 Fed. 338, 2 C. C. A. 252; Lohmann v. Helmer (C. C. 1900) 104 Fed. 178, 181.

In a suit brought under this statute the government, though not a party, requires that certain facts must be found whether alleged in the pleadings or not, and one of these is that the applicant for a patent must prove himself to be a citizen of the United States, as citizenship is an absolute qualification to the holding of mineral lands. Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936, 941; Burke v. McDonald (1890) 33 P. 49, 2 Idaho (Hasb.) 679. See Iba v. Central Association, etc. (1895) 40 P. 527, 42 P. 20, 5 Wyo. 355, 376.

A court must find on the question of citizenship in an action on an adverse claim. Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 270; Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679. See North Noonday Min. Co. v. Orient Min. Co. (C. C. 1880) 1 Fed. 522; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 376.

Under this section in all actions in relation to mining claims it is not necessary for the plaintiff to aver his citizenship. Lohman v. Helmer (C. C. 1900) 104 Fed. 178, 180. See Lee Doon v. Tesh (1885) 6 P. 97, 8 P. 621, 68 Cal. 43.

The adverse claimants must allege and prove that they are citizens of the United States, or have declared their intention to become such. Schultz v. Allyn (1897) 48 P. 960, 5 Ariz. 152. See, also, Buckley v. Fox (1902) 67 P. 659, 8 Idaho, 248.

It is not necessary, where it is admitted by the pleadings, to prove the filing of an adverse claim in the land office; but citizenship must be proved, and it constitutes an absolute qualification to the holding of a mineral claim. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 376. See Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265; Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679.

The absence of proof of citizenship authorizes the refusal of a judgment for the original claimant, but does not authorize a judgment for the adverse claimant. Sherlock v. Leighton (1901) 63 P. 580, 9 Wyo. 297, rehearing denied (1901) 63 P. 934, 9 Wyo. 297. See Manuel v. Wulff (1894) 14 Sup.

Ct. 651, 152 U. S. 505, 38 L. Ed. 532; Billings v. Aspen Min., etc., Co. (1892) 52 Fed. 250, 3 C. C. A. 69; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 50 L. R. A. 184; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355.

An adverse claim may be filed and a suit may be instituted thereon for the purpose of determining the citizenship of the defendant and thereby determine the validity of the original location. Sherlock v. Leighton (1901) 63 Pac. 580, 934, 9 Wyo. 297, 301.

Proof of citizenship in a suit on an adverse claim is required to enable a party to recover a judgment in his own favor. Sherlock v. Leighton (1901) 63 Pac. 580, 934, 9 Wyo. 297, 309. See O'Reilly v. Campbell (1886) 6 Sup. Ct. 421, 116 U. S. 418, 29 L. Ed. 669; Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105; Keeler v. Trueman (1890) 25 Pac. 311, 15 Colo. 143; McFeters v. Pierson (1890) 24 Pac. 1076, 15 Colo. 201, 207, 22 Am. St. Rep. 388; Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265.

The objection of alienage may be interposed in a suit on an adverse claim, but the naturalization of the alien applicant for patent before judgment cures the infirmity. Sherlock v. Leighton (1901) 63 Pac. 580, 934, 9 Wyo. 297, 312. See Manuel v. Wulff (1894) 14 Sup. Ct. 651, 152 U. S. 505, 38 L. Ed. 532.

41. Title and proof to support recovery.—A party to a contested mining claim may waive or abandon his right to a portion of the claim in controversy. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 585, 29 L. Ed. 273; Last Chance Min., etc., Co. v. Tyler Min. Co. (1894) 61 Fed. 557, 561, 9 C. C. A. 613.

An adverse claimant must recover on the strength of his own title and not on the weakness of his adversary's. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Keppler v. Becker (1905) 80 Pac. 334, 9 Ariz. 234, 239.

An admission against his interest by the plaintiff and fatal to his case is equivalent to proof to the same effect. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348.

In adverse proceedings each party is practically a plaintiff and must show title. Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 190, 50 L. Ed. 717. See Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 27 L. Ed. 990; Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 41 L. Ed. 113.

Where the rights of two mining claimants are apparently equal with respect to mining ground the element of priority is controlling and preference is given to the senior locator. St. Louis, etc., Co. v. Montana Min. Co. (1900) 104 Fed. 664, 668, 44 C. C. A. 120, 56 L. R. A. 725. See Argentine Min. Co. v. Terrible Min. Co. (1887) 122 U. S. 478, 484, 7 Sup. Ct. 1356, 30 L. Ed. 1140.

In suits to determine right of possession to mining claims, no presumptions of fact as to title arise. Title, right of possession, or forfeiture are facts to be established by the evidence. Bay State Silver-Min. Co. v. Brown (C. C. 1884) 21 Fed. 167.

An adverse claimant must establish a right in himself, good not only as against his adversary, but as against the United States. Schultz v. Allyn (1897) 48 P. 960, 5 Ariz. 152.

Proof of possession of a mining claim is always prima facie evidence of title. Lebanon Min. Co. v. Consolidated Republican Min. Co. (1882) 6 Colo. 371.

The plaintiff in an adverse suit cannot recover by reason of the weakness of the title of the applicant for patent, and the fact that a third person has made a subsequent location of the same property will not avail plaintiff in a suit not based on such subsequent location. Snowy Peak Mining Co. v. Tamarack & Chesapeak Mining Co. (1910) 107 P. 60, 17 Idaho, 630.

In an action on an adverse claim the plaintiff is not required to prove that he was in the actual possession of the premises in controversy at the time of the commencement of the action; but a right to the possession is all that the party is required to prove. Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 321.

Proceedings on an adverse claim are had for the purpose of determining which of the parties is entitled to patent, and each must rely on the strength of his own title, and not the weakness of that of his adversary. Murray Hill Min. & Mill. Co. v. Havenor (1901) 66 P. 762, 24 Utah, 73. See, also, Anderson v. Anvil Hydraudic Co. (1908) 3 Alaska, 496; Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105; Connolly v. Hughes (1902) 71 P. 681, 18 Colo. App. 372; Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265; Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355; Slothower v. Hunter (1906) 88 P. 36, 15 Wyo. 189.

42. —— Burden of proof.—The burden of proof is on the adverse claimant to establish a possessory title in himself good as against the world. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Kendall v. San Juan S. M. Co. (1886) 12 Pac. 198, 9 Colo. 349, 357.

An adverse claimant, to entitle him to recover, has the burden of showing that he is the owner of a valid and subsisting location of the claim in dispute and that his right is superior to

that of the defendant. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451, 454.

The burden of proof is on an adverse claimant to show that some part of mining ground sought to be patented is within the boundaries of a claim previously located by him or his grantors. Porter v. Tonopah North Star Tunnel & Development Co. (1906) 146 Fed. 385, 76 C. C. A. 657, affirming decree (C. C. 1904) 133 Fed. 756, and writ of certiorari denied (1907) 28 Sup. Ct. 254, 207 U. S. 586, 52 L. Ed. 352.

Actual possession by plaintiff throws the burden of proof on defendant to prove a better right. Golden Fleece Gold & Silver Min. Co. v. Cable Consol. Gold & Silver Min. Co. (1877) 12 Nev. 312.

The contestant in a suit on an adverse claim must show every fact which would entitle him to a patent except those acts necessary to initiate and prosecute an application for patent in the land office. Deeney v. Mineral Creek Mill. Co. (1902) 67 Pac. 724, 11 N. M. 279, 287. See Schultz v. Allyn (1897) 48 Pac. 960, 5 Ariz. 152.

43. —— Location and discovery.— See, also, notes to § 4615, ante.

The location must be one which entitles the locator to possession against the United States as well as against all other persons. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Tonopah & Salt Lake Min. Co. v. Tonopah Min. Co. (C. C. 1903) 125 Fed. 408, 414; Anthony v. Jillson (1890) 23 Pac. 419, 83 Cal. 296, 300; Kendall v. San Juan, etc., Min. Co. (1886) 12 Pac. 198, 9 Colo. 349, 357.

A location and discovery on land already withdrawn from the public domain by a valid and subsisting mining claim is absolutely void for the purpose of founding a contradictory right. Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 29 L. Ed. 348; Swanson v. Sears (1912) 32 Sup. Ct. 455, 224 U. S. 180, 56 L. Ed. 721. See Del Monte Min., etc., Co. v. Last Chance Min. Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 43 L. Ed. 72; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 48 L. Ed. 944; Creede & C. C. Min. & Mill. Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501; Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 50 L. Ed. 717; Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 944, 16 L. R. A. (N. S.) 162, overruling Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

When the defendant proves in adverse proceedings that his was the prior location, the plaintiff must then fail for the reason that his alleged discovery when made was not open to exploration. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348; Hoban v. Boyer (1906) 85 Pac. 837, 37 Colo. 185, 186.

The adverse claimant is not entitled to recover, in the absence of evidence that the ground he sought to locate was unoccupied and unappropriated public mineral domain, subject to location prior to his attempted location. Girard v. Carson (1896) 22 Colo. 345, 44 Pac. 508; McWilliams v. Winslow (1905) 82 Pac. 538, 34 Colo. 341. See, also, Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207.

In adverse proceedings the defendant may prove that at the time of the alleged entry by the adverse claimant, he, the defendant, held and owned a valid and subsisting location of the property, and was the first discoverer of the lode or vein the top or apex of which is within the surface lines of such adverse claimant. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 50, 29 L. Ed. 348.

In adverse proceedings the location is the plaintiff's title, and if it is good he can recover; but, if not, he must be defeated. Id.

An admission by a plaintiff in adverse proceedings that the part of his claim in which he sunk a discovery shaft had been patented to a third person prevents him from recovering. Id.

When the controversy is between two mineral claimants the rule as to the sufficiency of a discovery of mineral is more liberal than when the controversy is between a mineral claimant and one seeking to make an agricultural entry. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 323, 49 L. Ed. 770.

The area of conflict between two mining locations does not, upon the forfeiture of the senior location, become unoccupied lands, so as to enable a relocator of the forfeited location to adverse successfully the application for a patent by the junior locator. Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 720, 198 U. S. 443, 49 L. Ed. 1119. For cases in which the doctrine of this case has been modified or denied, see Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 50 L. Ed. 717; Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; Montagne v. Labay (1905) 2 Alaska, 575; Dufresne v. Northern Light Min. Co. (1905) 2 Alaska, 592; Hoban v. Boyer (1906) 85 Pac. 837, 37 Colo. 185; Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321; Street v. Delta Min. Co. (1910) 112 Pac. 701, 42 Mont. 371; Rose v. Richmond Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 57; Nash v. McNamara (1908) 93 Pac.

405, 30 Nev. 114, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

A third locator is permitted to offer proof tending to establish the existence of a valid and subsisting location anterior to that of the location which is being adversed. Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 147, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162, modifying Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119.

In adverse proceedings defendant may, to defeat plaintiff's claim, show that plaintiff's location was upon land not subject to location, having been included in the exterior limits of a patent to a third person. Girard v. Carson (1896) 22 Colo. 345, 44 Pac. 508.

An adverse claimant is permitted to show that at the time he made his location a senior location had actually been abandoned and the area of such senior location had thereby become a part of the public domain at the date of his junior location, and the ground was open to entry. Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321, 336. See Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162.

Where there is a third location made subsequent to a junior location, such third locator may adverse the application for patent by such junior locator and show that such junior location is void for the reason that at the time it was made the ground was not open to location under the mineral laws of the United States. Swanson v. Kettler (1910) 105 Pac. 1059, 17 Idaho, 321, 338. See Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106; McCulloch v. Murphy (C. C. 1903) 125 Fed. 147; Zerres v. Vanina (C. C. 1905) 134 Fed. 610.

A junior location made on ground covered by a valid existing senior location will not prevail over a relocation on the same ground, made after a failure to do the work on the senior location, notwithstanding that under this section a claimant, by failure to assert his rights acquired, may lose them. Nash v. McNamara (Nev. 1908) 93 P. 405.

44. —— **Custom.**—See, also, notes to §§ 4614, 4620, ante.

In a suit under this section to determine the right to possession of mining lands, it is proper to prove a custom in the mining district allowing discoverers 20 days to complete their location. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 462, 17 C. C. A. 190.

45. —— **Expenditure on claim.**—In a suit on an adverse claim the right of the plaintiff to recover cannot be defeated by proof on the part of the defendant that a senior location inured to his benefit on the failure of such senior locator to perform the assessment work within the statutory period, where it is made to appear that the defendant made his location over a part of such senior location before the expiration of the year for the performance of such labor by the senior locator, although such senior locator failed to adverse. Farrell v. Lockhart (1908) 28 Sup. Ct. 681, 210 U. S. 142, 146, 52 L. Ed. 994, 16 L. R. A. (N. S.) 162; modifying Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119, and reversing Lockhart v. Farrell (1906) 86 Pac. 1077, 31 Utah, 155. See Helena Gold & Iron Co. v. Baggaley (1906) 87 Pac. 455, 34 Mont. 464, 474; Street v. Delta Min. Co. (1910) 112 Pac. 701, 42 Mont. 371, 381.

In a suit by an adverse claimant to determine the right to the possession of a mining claim, the title of each party is brought in question; and, to entitle the defendant to a judgment or decree establishing his title, even where the plaintiff's case fails, he must prove that he did the assessment work for each year as required by the statute. Willitt v. Baker (C. C. 1904) 133 Fed. 937.

Plaintiffs are not required to prove that they had performed sufficient work to entitle them to a patent; the object of the litigation being merely to defeat defendant's application for a patent by showing that it was not in possession of the property, and was not entitled to possession thereof. Stolp v. Treasury Gold Min. Co. (1905) 80 P. 817, 38 Wash. 619.

46. —— **Proof authorizing division of claim.**—In a suit on an adverse claim each party must show affirmatively his title, and the court, on finding that one party is entitled to the possession of a claim as located by him, which includes a part of a claim of the adverse party, must find on the issues of possession and the right to patent the other part of the claim of the adverse party. Slothower v. Hunter (Wyo. 1906) 88 P. 36. See, also, Currency Min. Co. v. Bentley (1897) 50 P. 920, 10 Colo. App. 271.

47. —— **Neither party establishing title.**—In an action to determine an adverse claim, the issue is not which of the two claimants has the best right, but whether either claimant has sufficient right to entitle him to a patent; for, if not, the verdict and judgment will be against both. Jackson v. Roby (1883) 109 U. S. 440, 3 Sup. Ct. 301, 27 L. Ed. 990; Perego v. Dodge (1896) 163 U. S. 160, 16 Sup. Ct. 971, 41 L. Ed. 113; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936; Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451; Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105; Wilson v. Freeman (1904) 75 P. 84, 29 Mont. 470, 68 L. R. A. 833; Helena Gold & Iron Co. v. Baggaley (1906) 87 P. 455, 34 Mont. 464; Iba v. Cen-

tral Ass'n of Wyoming (1895) 5 Wyo. 355, 40 Pac. 527, 42 Pac. 20; Slothower v. Hunter (Wyo. 1906) 88 Pac. 36.

Where neither party established title to the ground in controversy judgment can not be for either party, and the suit must be dismissed. Bay State Silver Min. Co. v. Brown (C. C. 1884) 21 Fed. 167; Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296, 300. See Willitt v. Baker (C. C. 1904) 133 Fed. 937, 948.

A court cannot properly direct a verdict in an action brought by an adverse claimant under this section on the ground that neither party is entitled to the mining claim in dispute, where the evidence offered shows one party is entitled to at least a part of such claim. Crown Point Min. Co. v. Buck (1899) 97 Fed. 462, 465, 38 C. C. A. 278.

In adverse proceedings neither party can be adjudged to have title to the claim where it is not shown that either party has done the requisite work upon the claim in controversy. Bay State Silver Min. Co. v. Brown (C. C. 1884) 21 Fed. 167, 169. See Lalande v. McDonald (1887) 13 Pac. 347, 2 Idaho (Hasb.) 307.

In a contest between two locators as to the possession of a disputed tract of land, neither party is entitled to recover where it appears that there has been no discovery of mineral within the location of either. Waterloo Min. Co. v. Doe (C. C. 1893) 56 Fed. 685, 689.

In a contest for possession by a placer claimant against the locator of a vein or lode claim, the mere want of evidence to prove the existence of a vein of metallic ore of sufficient value to pay for extracting the metal will not warrant a recovery by the placer claimant any more than a second discoverer of a vein apparently valuable would entitle such second locator to recover possession from the owner of a placer claim. Bevis v. Markland (C. C. 1904) 130 Fed. 226, 228.

Neither party is entitled to judgment unless his title is established. Becker v. Pugh (1892) 17 Colo. 243, 29 Pac. 173.

Where the plaintiff fails to make out a prima facie case, a judgment of nonsuit may be entered on defendant's motion. Kirk v. Meldrum (1901) 65 P. 633, 28 Colo. 453.

Where, in a suit to support an adverse claim, defendant admitted conflict but pleaded and proved that plaintiff's claim in equity belonged to it, and prayed that he be compelled to convey the same, and that his adverse suit be dismissed, it was entitled to a nonsuit, though it could not have its own title determined without an affirmative showing of title thereto. Cuenin v. Chloride Mining & Prospecting Co. (Colo. 1914) 141 P. 463.

In an action on an adverse claim it is not enough that one party show better or superior title as against the other, but one of the parties must show as against the government the right to a patent for the disputed ground. Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265. See Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 441, 27 L. Ed. 990; Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43; McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41.

In a suit on an adverse claim the court may find that another party is entitled to the patent. Helena Gold & Iron Co. v. Baggaley (1906) 87 Pac. 455, 34 Mont. 464, 472.

The general rule that forfeiture as a defense must be specially pleaded does not necessarily obtain in a proceeding to determine adverse claims to a mining location where the title of each party is in issue, and neither can recover without proof of title. Merchants' Nat. Bank v. McKeown (Or. 1911) 119 P. 334. See also Steel v. Gold Lead Gold & Silver Min. Co. (1883) 18 Nev. 80, 1 Pac. 448. Compare Mattingly v. Lewisohn (1893) 35 Pac. 111, 13 Mont. 508.

The parties stand upon their own rights, and must recover on the strength of their own claims; and if neither party establishes a right to possession, a judgment to that effect is required. Phillips v. Brill (Wyo. 1908) 95 P. 856. See, also, Conway v. Hart (1900) 62 P. 44, 129 Cal. 480.

48. Trial by jury.—See, also, notes to § 4625, post.

An action to determine the right of possession as authorized by this section is an action at law in the territory of Idaho, and the parties are entitled to a trial by jury. Burke v. McDonald (1887) 13 Pac. 351, 2 Idaho (Hasb.) 339.

In an action for the possession of a mining claim under this section the parties are entitled to a trial by jury. Iba v. Central Ass'n., etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 360. See Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451.

49. Verdict.—In an action to determine an adverse claim to mining property no title in fee can be established, and a general verdict in favor of plaintiff is sufficient. Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 865, 158 U. S. 441, 39 L. Ed. 1046.

In an action in ejectment for the possession of a mining claim on the filing of an adverse claim for the possession of a mining claim, it is sufficient where the verdict finds "the defendant guilty," as this implies that the plaintiff was entitled to the possession and that the defendant unlawfully withheld such possession from the plaintiff, and gives the land office the information necessary. Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 113.

See McGinnis v. Egbert (1884) 5 Pac. 652, 8 Colo. 41, 55; Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451, 455; Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679; Golden Fleece Gold, etc., Min. Co. v. Cable Consol. Gold, etc., Min. Co. (1877) 12 Nev. 312, 320.

50. **Judgment—Conclusiveness and effect.**—A judgment by default in adverse proceedings is conclusive between the parties of all that is essential to support the judgment. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 691, 39 L. Ed. 859; Black v. Elkhorn Min. Co. (1896) 16 Sup. Ct. 1101, 163 U. S. 445, 449, 41 L. Ed. 221.

A judgment in adverse proceedings is conclusive as to matters which were in fact decided, but not as to matters which might have been determined. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 687, 39 L. Ed. 859; Jefferson Min. Co. v. Anchoria-Leland Min., etc., Co. (1904) 75 Pac. 1070, 32 Colo. 176, 182, 64 L. R. A. 925.

A judgment of a court in a suit on an adverse claim determines the right of possession, and a certified copy of the judgment proves such right only; but the applicant must still make the proof required by law to entitle him to a patent, and the sufficiency of that proof is a matter for the determination of the land department. Clipper Min. Co. v. Eli Min. Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 233, 48 L. Ed. 944; Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 109. See Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113.

Where a claimant bases his right in the adverse proceedings on a priority of location a judgment for the plaintiff upon such a complaint is necessarily an adjudication in favor of the alleged priority of location. Last Chance Min. Co. v. Tyler Min. Co. (1895) 15 Sup. Ct. 733, 157 U. S. 683, 691, 39 L. Ed. 859.

In an action on an adverse claim a judgment for the defendant establishes the right to the possession of the mining claim in controversy. Delmoe v. Long (1907) 88 Pac. 778, 35 Mont. 139, 154.

It is not the province of an adverse suit to show more than the plaintiff's right against any but the defendant, as all other persons who fail to adverse under this section lose all interest, and accordingly a finding as between the plaintiff and the defendant exhausts the field of controversy. Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 115. See Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679.

51. **—— Conclusiveness and effect as against government.**—This section contains the only provision by which the government has agreed to be bound by the judgment of a state court, and when a state court in an action on an adverse claim determines which of the parties is entitled to a mining claim, the government will accept the judgment as conclusive as between the parties; but it is not bound by the adjudication, and the judgment is not conclusive of the right of a successful party to the property as against the government, nor is it sufficient to divest the government of title, nor is it alone sufficient to entitle the prevailing party to a patent. Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36, 130 C. C. A. 426; Butte Land & Invest. Co. v. Merriman (1905) 80 P. 675, 32 Mont. 402, 412, 108 Am. St. Rep. 590. See Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113.

52. **—— Conclusiveness as between lode and placer claimants.**—A decision by the court that a lode claim is invalid, because located by a trespasser upon the exclusive possession of a placer claimant, does not preclude the land office from thereafter deciding that the placer claim was not valid. Clipper Mining Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 637, 194 U. S. 220, 48 L. Ed. 944. See, also, Upton v. Santa Rita Min. Co. (1907) 89 Pac. 275, 14 N. M. 96, 109.

Where an adverse suit by locators of a placer claim was prosecuted to judgment in their favor, and a copy thereof filed in the land office and a patent issued to them, such judgment was conclusive between the parties that the prior lode location within the boundaries of the placer claim was invalid. Mason v. Washington-Butte Mining Co. (1914) 214 Fed. 32, 130 C. C. A. 426.

A judgment in an adverse suit in favor of locators of certain placer claims held not to determine that there were not within the ground covered by the claims veins or lodes known to exist at the time of the placer claimants' application for a patent. Mason v. Washington-Butte Mining Co. (1914) 214 Fed. 32, 130 C. C. A. 426.

V. PATENT

53. **Issuance of patent on judgment.**—On the final rendition of the judgment in the adverse proceedings the successful party, without further notice, shall file a copy of the judgment with the register, together with the certificate of the surveyor general, showing the performance of the assessment work or improvements made, and the required description. The whole proceedings are thereupon certified to the general land office, and upon payment of the proper fees a patent shall issue according to the decision of the court. Gwillim v. Donnellan (1885) 5 Sup. Ct. 1110, 115 U. S. 45, 49, 29 L. Ed. 348; Wolverton v. Nichols (1886) 7 Sup. Ct. 289, 119 U. S. 485, 488, 30 L. Ed. 474;

Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 297, 34 L. Ed. 155; Perego v. Dodge (1884) 16 Sup. Ct. 971, 163 U. S. 160, 165, 41 L. Ed. 113; Del Monte Min., etc., Co. v. Last Chance Min., etc., Co. (1898) 18 Sup. Ct. 895, 171 U. S. 55, 77, 43 L. Ed. 72; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219, 221; Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451, 456; Healey v. Rupp (1906) 86 Pac. 1015, 37 Colo. 25, 28.

The certified copy of a judgment of the court in an action on an adverse claim proves the right of possession only and the applicant must still make the proof required by law to entitle him to patent. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 168, 41 L. Ed. 113; Duffield v. San Francisco Chemical Co. (D. C. 1912) 198 Fed. 942, 944. See, also, Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 48 L. Ed. 944; Id. (1902) 68 Pac. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89.

After judgment has been rendered in adverse proceedings, the successful party may file a certified copy of the judgment and upon performance of the statutory requirements shall receive a patent for the claim. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 582, 29 L. Ed. 273; Creede & C. C. Min., etc., Co. v. Uinta Tunnel Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 49 L. Ed. 501.

This section provides that the judgment in the adverse proceedings shall govern the rights of the parties in the land office. U. S. v. Marshall Min. Co. (1889) 9 Sup. Ct. 343, 129 U. S. 579, 584, 32 L. Ed. 734.

In proceedings brought by an adverse party, if the proof shows that several parties are entitled to receive a patent for separate and distinct portions of the claim, they must file a certificate with a description by the surveyor general as required. Bunker Hill, etc., Min., etc., Co. v. Empire State, etc., Min., etc., Co. (1901) 109 Fed. 538, 544, 48 C. C. A. 665.

Patent may issue upon judgment of the court when with full opportunity the court has found in favor of a party who has regularly proceeded with his application, and the land department cannot look behind such judgment, as the department is concluded by the action and judgment of the court. Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 36, 130 C. C. A. 426.

A judgment rendered in an action between two claimants for a mining claim in a suit not instituted in accordance with the provisions of this section can not in any way bind the land department or control its action, but the application must be decided upon the record as presented to the department. Allen v. Myers (1901) 1 Alaska, 114, 120. See Brandt v. Wheaton (1877) 52 Cal. 430.

It is doubted by the California court that the filing of a judgment roll would entitle a prevailing party to a patent in the face of evidence that an appeal had been taken or was being taken, or that proceedings for a new trial were pending. Lee Doon v. Tesh (1901) 63 Pac. 764, 131 Cal. 406, 408.

This section recognizes portions of claims as entitled to patent and permits the issue of separate patents on such portions as adverse parties may rightfully possess. Silver City, etc., Min. Co. v. Lowry (1899) 57 Pac. 11, 19 Utah, 334, 348.

54. **Effect.**—See, also, notes to § 4622, ante.

A patent conveying the legal title must prevail over all other claims. Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 581, 29 L. Ed. 273.

On the issue of a patent for a mining claim the legal title passes from the United States. U. S. v. Marshall Silver Min. Co. (1889) 9 Sup. Ct. 343, 129 U. S. 579, 587, 32 L. Ed. 734.

A party cannot remain silent for more than eight years after a decision against him, though erroneous, and then seek to correct such errors by a bill in chancery, either to obtain title to a mining claim or to contest the patent issued to another locator. Id.

The dignity and character of a patent is such that the patentee cannot be called upon to prove the regularity of the steps before the land department, nor can he be called upon to explain the irregularities or improprieties in the processes by which the patent was secured, where the government has not been injured or damaged. Id.

After patent is issued for a mining claim the question of the date or priority of location can only arise in seeking to apply the doctrine of relation in connection with a patent for the purpose of determining the ownership of minerals at the point of union or intersection of veins. Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806, 33 Mont. 46, 64.

The issuance of a mining patent is in effect an adjudication of all questions respecting matters which might have been the subject of an adverse claim, and on failure to adverse, the question of priority of title is conclusively presumed. Hickey v. Anaconda Copper Min. Co. (1905) 81 Pac. 806. 33 Mont. 46, 63. See Empire State-Idaho Min., etc., Co. v. Bunker Hill, etc., Co. (1902) 114 Fed. 417, 420, 52 C. C. A. 219.

When the rights of an adverse claimant have been determined according to this section and a patent issued pursuant to its provisions it furnishes the highest and best evidence of title which a party can obtain, and a patent issued without authority of law conveys no substantial title. Rose v. Richmond

Min. Co. (1882) 27 Pac. 1105, 17 Nev. 25, 61. See Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

55. **Extralateral rights.**—See, also, notes to § 4618, ante.

A patent granting on its face to a claimant the right to all veins, lodes, and deposits, the tops or apices of which lie inside the end lines of its surface as patented, settles the rights of all parties as to all such veins throughout their entire depth and wherever they may go, so long as they are within the end lines of the survey. Richmond Min. Co. v. Eureka Consol. Min. Co. (1880) 103 U. S. 839, 847, 26 L. Ed. 557.

56. **Cancellation of patent.**—See, also, notes to § 4622, ante.

If the officers of the land department have acted within the scope of their power and without fraud, the patent issued will not be canceled by the courts, unless there has been a gross mistake or violation of law. U. S. v. Marshall Silver Min. Co. (1889) 9 Sup. Ct. 343, 346, 129 U. S. 579, 32 L. Ed. 734. See, also, Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 259, 4 C. C. A. 303, appeal dismissed (1896) 17 Sup. Ct. 997, 41 L. Ed. 1180.

§ 4624. (Act April 26, 1882, c. 106, § 1.) Adverse claim; oath of claimant, before whom made.

The adverse claim required by section twenty-three hundred and twenty-six of the Revised Statutes may be verified by the oath of any duly-authorized agent or attorney-in-fact of the adverse claimant cognizant of the facts stated; and the adverse claimant, if residing or at the time being beyond the limits of the district wherein the claim is situated, may make oath to the adverse claim before the clerk of any court of record of the United States or of the State or Territory where the adverse claimant may then be, or before any notary public of such State or Territory. (22 Stat. 49.)

This was the first section of an act entitled "An act to amend section twenty-three hundred and twenty-six of the Revised Statutes, in regard to mineral lands, and for other purposes."

Section 2 of this act, providing for the making of affidavits of citizenship by applicants for mineral patents residing beyond the limits of the district where the claim is situated, is set forth ante, § 4617.

R. S. § 2326, mentioned in this act, is set forth ante, § 4623.

§ 4625. (Act March 3, 1881, c. 140.) Adverse claim; findings by jury; costs.

If, in any action brought pursuant to section twenty-three hundred and twenty-six of the Revised Statutes, title to the ground in controversy shall not be established by either party, the jury shall so find, and judgment shall be entered according to the verdict. In such case costs shall not be allowed to either party, and the claimant shall not proceed in the land-office or be entitled to a patent for the ground in controversy until he shall have perfected his title. (21 Stat. 505.)

This was an act entitled "An act to amend section twenty-three hundred and twenty-six of the Revised Statutes relating to suits at law affecting the title to mining claims."

R. S. § 2326, mentioned in said title and in the act, is set forth ante, § 4623.

Notes of Decisions

1. Purpose and object of statute.
2. Nature of proceedings.
3. Matters determinable.
4. Jurisdiction of federal courts.
5. Form of action and procedure in state courts.
6. Pleading and proof.
7. Proof of title required.
8. —— Neither party establishing title.
9. Dismissal or other termination of proceeding.
10. Jury trial.
11 Verdict.

1. **Purpose and object of statute.**—The object of this statute was to provide, in the case of total failure of proof of title, for an adjudication that neither party was entitled to the property, so that the applicant could not go forward with the proceedings in the land office simply because the adverse claimant had failed to make out his case, if he had also failed. Perego v. Dodge (1896) 16 Sup. Ct. 971, 974, 163 U. S. 160, 41 L. Ed. 113; Brown v. Gurney (1906) 26 Sup. Ct. 509, 511, 201 U. S. 184, 50 L. Ed. 717; Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 139.

It is not the intention of this section to change the methods of trial, but its manifest object is to provide for an adjudication and permit the party to receive his patent who is determined to be the rightful owner, and to deny it to

either if he has failed to make out his case. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 167, 41 L. Ed. 113.

The purpose of this amendment was to refer the whole proceedings, including the matter between the United States and the successful party, to the courts and to have their rights determined in the federal courts. Burke v. Bunker Hill Min., etc., Co. (C. C. 1891) 46 Fed. 644, 647.

This statute can have no application to trials on adverse claims filed prior to its enactment. Armstrong v. Lower (1882) 6 Colo. 393, 394.

2. Nature of proceedings.—See, also, notes to § 4623, ante.

The proceedings required to be commenced in a court of competent jurisdiction are merely in aid of the land department, and the object of this amendment was to secure that aid as much in cases where both parties fail to establish title as where judgment was rendered in favor of either, and the court or jury either in a case at law or a suit in equity may decide accordingly. Perego v. Dodge (1896) 16 Sup. Ct. 971, 163 U. S. 160, 167, 41 L. Ed. 113; Tonopah Fraction Min. Co. v. Douglass (C. C. 1903) 123 Fed. 936.

3. Matters determinable.—This act does not require the court, when one party is found entitled to a mining claim, to determine his right to a patent as against the United States. Doe v. Waterloo Min. Co. (1895) 70 Fed. 455, 17 C. C. A. 190, affirming decree (C. C. 1893) 55 Fed. 11.

Under this amendment not only the rights of the parties as between themselves, but the rights of the parties as between themselves, respectively, and the United States are to be conclusively determined. Burke v. Bunker Hill Min., etc., Co. (C. C. 1891) 46 Fed. 644, 647. See Jackson v. Roby (1883) 109 U. S. 440, 444, 3 Sup. Ct. 301, 27 L. Ed. 990; Chambers v. Harrington (1884) 111 U. S. 350, 4 Sup. Ct. 428, 28 L. Ed. 452; Wolverton v. Nichols (1883) 119 U. S. 485, 7 Sup. Ct. 289, 30 L. Ed. 474; Doe v. Waterloo Min. Co. (C. C. 1890) 43 Fed. 219.

An adverse claimant has the right to be heard upon his claim and to have the right of possession declared to be either in himself or in the defendant or another. Wulf v. Manuel (1889) 23 Pac. 723, 9 Mont. 279, 284.

The ultimate result of a suit under this amendatory act is a finding that the plaintiff has the exclusive right and title, save only as to the legal title of the government, or that the defendant has the same title, or that neither the plaintiff nor the defendant has the title. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 363.

4. Jurisdiction of federal courts.—Under this amendment a suit brought in support of an adverse claim is regarded as a suit arising under the laws of the United States within the meaning of the statute giving jurisdiction to federal courts. Frank Gold, etc., Min. Co. v. Larimer Min., etc., Co. (C. C. 1881) 8 Fed. 724; Cheesman v. Shreeve (C. C. 1888) 37 Fed. 36; Strasburger v. Beecher (C. C. 1890) 44 Fed. 209, 213; Burke v. Bunker Hill Min., etc., Co. (C. C. 1891) 46 Fed. 644, 646. These cases are in effect overruled. See notes to § 4623 (R. S. § 2326) ante.

By this amendment the United States is made substantially, though not formally, a party to a suit to determine an adverse claim, and in such case the government is entitled to have its rights determined in the national courts. Burke v. Bunker Hill Min., etc., Co. (C. C. 1891) 46 Fed. 644, 647.

5. Form of action and procedure in state courts.—The form of the action and the mode of procedure are regulated by the same rules and controlled by the same statute that apply to ordinary actions in the state courts. Murray v. Polglase (1899) 59 Pac. 439, 23 Mont. 401, 413. See Wolverton v. Nichols (1883) 2 Pac. 308, 5 Mont. 89; Milligan v. Savery (1886) 9 Pac. 894, 6 Mont. 129, 130; Four Hundred Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240.

Under this act congress regulates the character of the finding and judgment though the form of action may be that prescribed by a state statute, and the state court adopts the provisions of this act as if they were a part and parcel of the state statute. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 375.

6. Pleading and proof.—In an action on an adverse claim the defendant must introduce evidence directly and affirmatively establishing his claim, and it cannot be said that either party has the burden of proof, and the defendant is not entitled to recover if the evidence is equally balanced, and the defendant, as well as the plaintiff, is required to establish his paramount claim or title; otherwise, a defendant who succeeds merely because the plaintiff fails might, by the production of the record, obtain title to a mining claim to which he was not in fact entitled. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 364. See Becker v. Pugh (1887) 13 Pac. 906, 9 Colo. 589.

In an action on an adverse claim where the plaintiff seeks to establish a claim paramount to that of the defendant who has made application for patent, it is doubtful if the defendant can have his title quieted, as the relief to be obtained in a suit at law is adequate and the determination of the controversy settles the rights of either or the rights of neither party, and the absolute right of either party to the premises in dispute is the only question to be determined, and more than

this ought not to be permitted in the pleadings, and a single material issue precludes a judgment on the pleadings. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 366. See Widmer v. Martin (1890) 25 Pac. 264, 87 Cal. 88; Rice v. Bush (1891) 27 Pac. 720, 16 Colo. 484; Horsky v. Moran (1893) 34 Pac. 360, 13 Mont. 250.

7. **Proof of title required.**—See, also, notes to § 4623, ante.

If no title to the ground in controversy be established by either party, the jury must so find and judgment be entered accordingly. Brown v. Gurney (1906) 26 Sup. Ct. 509, 201 U. S. 184, 50 L. Ed. 717; McGinnis v. Egbert (1884) 8 Colo. 41, 5 Pac. 652; Manning v. Strehlow (1888) 11 Colo. 451, 18 Pac. 625; Seymour v. Fisher (1891) 16 Colo. 188, 27 Pac. 240; San Miguel Consol. Gold Min. Co. v. Bonner (1905) 79 P. 1025, 33 Colo. 207; Fleming v. Daly (1899) 55 P. 946, 12 Colo. App. 439; Rosenthal v. Ives (1887) 2 Idaho, 244, 12 Pac. 904; Burke v. McDonald (1890) 33 Pac. 49, 2 Idaho (Hasb.) 679; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

Under this act a party claiming the right of possession of any part of the public domain, in an adverse suit, by virtue of a mining location, must establish such right by evidence of a compliance with the state and federal statutes relating to the location and holding of mining claims. Becker v. Pugh (1886) 9 Colo. 589, 13 Pac. 906; Bryan v. McCaig (1887) 10 Colo. 309, 15 Pac. 413; Duncan v. Eagle Rock Gold Mining & Reduction Co. (1910) 111 Pac. 588, 48 Colo. 569, 139 Am. St. Rep. 288.

Under this amendment each party to the suit on an adverse claim is required to establish his right to the ground in controversy and an adverse claimant must allege and prove every step necessary to establish his right to the mining claim in dispute, with the exception of the advertisement and the certificate of the surveyor general as to the amount of work done. Schultz v. Allyn (1897) 48 Pac. 960, 5 Ariz. 152, 160; Keppler v. Becker (1905) 80 Pac. 334, 9 Ariz. 234, 239.

A locator, in order to establish a valid mining location, must show compliance with the local rules and regulations of miners, as well as with federal and state statutes. Becker v. Pugh (1886) 13 Pac. 906, 9 Colo. 589, 590. See Sullivan v. Hense (1874) 2 Colo. 424; Consolidated Republican Mountain Min. Co. v. Lebanon Min. Co. (1886) 12 Pac. 212, 9 Colo. 343.

Under this amendment a recovery in a suit brought on an adverse claim cannot be maintained by proof of occupancy merely of the premises in dispute. Becker v. Pugh (1886) 13 Pac. 906, 9 Colo. 589, 590.

This act makes it necessary that a party claiming the right to the possession of any portion of the public domain in an adverse suit by virtue of a mining location must establish such right by evidence of a compliance with the State and Federal statutes relating to the location and holding of mining claims. Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451; Thomas v. Chisholm (1889) 21 Pac. 1019, 13 Colo. 105, 107.

Neither party is entitled to judgment unless his title is established. Becker v. Pugh (1892) 17 Colo. 243, 29 Pac. 173.

It is not enough that one claimant should show a superior right or title, as against the other, but one must show a clear right, as against the government, to a patent from the United States to the claim in dispute, or some part thereof, before either party can prevail in the action. Rosenthal v. Ives (1887) 2 Idaho, 244, 12 Pac. 904.

While the term "title" is used in this act, yet it must be assumed that the Government holds the title until patent issues, yet the Government considers the locator entitled to patent on proof of compliance with the statutory requirements. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 303.

While in an action under this statute each party is required to establish by appropriate proof his right or title to the mining claim in controversy, yet there are some matters of mere practice that need not be proved by evidence if admitted by the pleadings. Id.

8. —— **Neither party establishing title.**—The rule that a plaintiff in ejectment must recover upon the strength of his own title, or that otherwise the defendant is entitled to a judgment, does not prevail in actions under this section based on an adverse claim; but when a suit is brought on an adverse claim the title of both parties to the controversy has to be settled and the rights of the government against both parties are also to be determined, and the judgment must be that the plaintiff has title or that neither of them has title. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 363; Slothower v. Hunter (1906) 88 Pac. 36, 15 Wyo. 189, 198. See Jackson v. Roby (1883) 3 Sup. Ct. 301, 109 U. S. 440, 444, 27 L. Ed. 990.

Under this amendment, where neither party shows title to the ground in controversy, neither shall have judgment, but such cases are referred to a court for its determination for the guidance of the land office, and the jurisdiction of the court in such cases is based upon the prior proceedings in the land office. Providence Gold Min. Co. v. Burke (1899) 57 Pac. 641, 6 Ariz. 323, 330.

If neither party establishes his right to the claim in controversy, the court or jury must so find, and the proceedings in the Land Office are stayed un-

til title is perfected and a possessory title is all that is possible under the circumstances. Manning v. Strehlow (1888) 18 Pac. 625, 11 Colo. 451, 454.

If neither party establishes his right to the mining claim in controversy, judgment must be entered accordingly, and the result is the same if the defendant does not introduce any evidence and the plaintiff is nonsuited. Kirk v. Meldrum (1901) 65 Pac. 633, 28 Colo. 453, 459.

This amendment authorizes a finding against both parties in case neither one establishes his right to the ground in controversy. Mares v. Dillon (1904) 75 Pac. 963, 30 Mont. 117, 140.

If in an action under this amended act neither party established title to the disputed ground, the jury may so find, and judgment shall be entered accordingly, and neither party can recover his costs, and the claimant cannot proceed in the land office until he perfects his title. Iba v. Central Ass'n, etc. (1895) 40 Pac. 527, 42 Pac. 20, 5 Wyo. 355, 360.

9. Dismissal or other termination of proceeding.—See, also, notes § 4623, ante.

A judgment of nonsuit may be entered in adverse proceedings. Kirk v. Meldrum (1901) 65 Pac. 633, 28 Colo. 453; Cuenin v. Chloride Mining & Prospecting Co. (1914) 141 Pac. 463, 464, 57 Colo. 320.

The dismissal of an adverse proceeding for want of prosecution is not improper. Carnahan v. Connolly (1901) 68 Pac. 836, 17 Colo. App. 98.

This amendment does not prevent the court from directing a nonsuit. McWilliams v. Winslow (1905) 82 P. 538, 34 Colo. 341.

10. Jury trial.—This act does not absolutely require a jury trial in the proceedings. Perego v. Dodge (1896) 16 Sup. Ct. 971, 974, 163 U. S. 160, 41 L. Ed. 113; Providence Gold-Min. Co. v. Burke (1899) 57 P. 641, 6 Ariz. 323; Mares v. Dillon (1904) 75 P. 963, 30 Mont. 117. See Jordan v. Duke (1898) 53 Pac. 197, 6 Ariz. 55.

11. Verdict.—A verdict finding defendant guilty, is sufficient. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

§ 4626. (R. S. § 2327, as amended, Act April 28, 1904, c. 1796.) Description of vein claims on surveyed and unsurveyed lands.

The description of vein or lode claims upon surveyed lands shall designate the location of the claims with reference to the lines of the public survey, but need not conform therewith; but where patents have been or shall be issued for claims upon unsurveyed lands, the surveyors-general, in extending the public survey, shall adjust the same to the boundaries of said patented claims so as in no case to interfere with or change the true location of such claims as they are officially established upon the ground. Where patents have issued for mineral lands, those lands only shall be segregated and shall be deemed to be patented which are bounded by the lines actually marked, defined, and established upon the ground by the monuments of the official survey upon which the patent grant is based, and surveyors-general in executing subsequent patent surveys, whether upon surveyed or unsurveyed lands, shall be governed accordingly. The said monuments shall at all times constitute the highest authority as to what land is patented, and in case of any conflict between the said monuments of such patented claims and the descriptions of said claims in the patents issued therefor the monuments on the ground shall govern, and erroneous or inconsistent descriptions or calls in the patent descriptions shall give way thereto.

Act May 10, 1872, c. 152, § 8, 17 Stat. 94. Act April 28, 1904, c. 1796, 33 Stat. 545.

This section, as originally enacted, was as follows:

"The description of vein or lode claims, upon surveyed lands, shall designate the location of the claim with reference to the lines of the public surveys, but need not conform therewith; but where a patent shall be issued for claims upon unsurveyed lands, the surveyor-general, in extending the surveys, shall adjust the same to the boundaries of such patented claim, according to the plat or description thereof, but so as in no case to interfere with or change the location of any such patented claim."

It was amended to read as set forth here by Act April 28, 1904, c. 1796, last cited above.

Notes of Decisions

Lode claims.—This section expressly provides that lode mining claims need not conform to public surveys. State v. Ross (1909) 104 Pac. 216, 55 Wash. 242.

Monuments control.—The rule that

stakes and monuments on the ground will prevail over the calls of a location notice in case of a discrepancy applies in the case of patent descriptions. Cardoner v. Stanley Consol Min. & Mill. Co. (C. C. 1911) 193 Fed. 517.

§ 4627. (R. S. § 2328.) Pending applications; existing rights.

Applications for patents for mining-claims under former laws now pending may be prosecuted to a final decision in the General Land-Office; but in such cases where adverse rights are not affected thereby, patents may issue in pursuance of the provisions of this chapter; and all patents for mining-claims upon veins or lodes heretofore issued shall convey all the rights and privileges conferred by this chapter where no adverse rights existed on the tenth day of May, eighteen hundred and seventy-two.

Act May 10, 1872, c. 152, § 9, 17 Stat. 94.

Notes of Decisions

Scope and purpose.—A patent cannot be issued for a mining claim exceeding 300 feet in width although the original location was wider and was made under the act of July 26, 1866; Lakin v. Roberts (1893) 54 Fed. 461, 4 C. C. A. 438, affirming Lakin v. Dolly (C. C. 1891) 53 Fed. 333. See, also, Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 605, 116 U. S. 687, 29 L. Ed. 774.

This section does not reserve to the locator of a mining claim any of the provisions of the act of July 26, 1866, on the theory that such locator has a vested right which congress cannot limit or vary. Lakin v. Roberts (1893) 54 Fed. 461, 462, 4 C. C. A. 438.

A patent issued in accordance with the provisions of the act of May 10, 1872, to a mining claim located before the passage of that act, under the act of July 26, 1866, conveys the legal title to every vein or lode whose apex is within the exterior boundaries of the mining claim extended downward vertically, and is not subject to collateral attack in an action at law, either on the ground that there was a claim adverse to that patented when the act of May 10, 1872, was passed, or on the ground that adverse rights were affected by its issue. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116. And see, Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344; East Central Eureka Min. Co. v. Central Eureka Min. Co. (1907) 27 Sup. Ct. 258, 204 U. S. 266, 51 L. Ed. 476.

One who locates and procures a patent to a mining claim under the act of May 10, 1872 thereby renounces and abandons all rights and privileges which do not pertain to his specific location under the provisions of that act. New Dunderberg Min. Co. v. Old (1897) 79 Fed. 598, 25 C. C. A. 116.

§ 4628. (R. S. § 2329.) Conformity of placer-claims to surveys, limit of.

Claims usually called "placers," including all forms of deposit, excepting veins of quartz, or other rock in place, shall be subject to entry and patent, under like circumstances and conditions, and upon similar proceedings, as are provided for vein or lode claims; but where the lands have been previously surveyed by the United States, the entry in its exterior limits shall conform to the legal subdivisions of the public lands.

Act July 9, 1870, c. 235, § 12, 16 Stat. 217.

Building stone lands were opened to entry under the provisions of this section and sections 2330–2333, post, §§ 4629–4633, by Act Aug. 4, 1892, c. 375, § 1, post, § 4634.

Oil lands were opened to entry under the provisions of this section and sections 2330–2333, post, §§ 4629–4633, by Act Feb. 11, 1897, c. 216, post, § 4635.

Saline lands were opened to entry under the provisions of this section and sections 2330–2333, post, §§ 4629–4633, by Act Jan. 31, 1901, c. 186, post, § 4641.

Special provisions relating to placer-mining claims in Alaska were made by Act Aug. 1, 1912, c. 269, post, §§ 5054–5058.

Notes of Decisions

I. Placer claims

1. Definition.
2. Application of lode laws to placer claims.
3. Mineral character of lands.
4. Qualification of claimant.
5. Location and acquisition of claims.
6. Limitation on number.
7. Discovery.
8. Dimensions of claim.
9. Surface lines on existing locations.
10. Locations conforming to public surveys.
11. Possessory rights.

I. Placer claims—Cont'd
12. Marking boundaries.
13. Record of claim.
14. Description of claim.
15. Expenditure on claim.
16. Unpatented location.
17. Veins or lodes within placer limits.

II. Nature and forms of deposits secured by placer claim
18. Asphaltum.
19. Calcium phosphate.
20. Oil.
21. Sand.
22. Stone.

III. Application for placer patent
23. Designation of character of claim.
24. Equitable title.
25. Effect of rejection of application.

IV. Patent for placer claim
26. Consolidated claims.
27. Force and effect.

I. PLACER CLAIMS

1. Definition.—Claims usually called placers are expressly declared to include all forms of deposit except veins of quartz or other rock in place. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 401, 29 L. Ed. 423; Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 694, 29 L. Ed. 774; U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 678, 32 L. Ed. 571; Stevens v. Williams (C. C. 1879) Fed. Cas. No. 13,413; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 47; Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109, 115; Hawke v. Deffebach (1885) 22 N. W. 480, 4 Dak. 20, 26; Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 513; Bay v. Oklahoma Southern Gas, etc., Co. (1903) 73 Pac. 936, 13 Okl. 425, 429.

The term "placer claim" means ground within defined boundaries which contains mineral in its earth, sand, or gravel; ground that includes valuable deposits not in place—that is, not fixed in rock, but which are in a loose state, and may in most cases be collected by washing or amalgamation without milling. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 197, 128 U. S. 673, 32 L. Ed. 571. See, also, Gregory v. Pershbaker (1887) 73 Cal. 109, 14 Pac. 401.

By the term "veins or lodes" is meant lines or aggregations of metal imbedded in quartz, or other rock in place. The terms are found together in the statutes, and both are intended to indicate the presence of metal in rock. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

"Placers" are merely superficial deposits, occupying the beds of ancient rivers or valleys, washed down from some vein or lode. Northern Pacific R. Co. v. Soderberg (1903) 23 Sup. Ct. 367, 188 U. S. 532, 47 L. Ed. 575.

By the term "placer mining claim" is meant ground within well-defined boundaries containing mineral in its earth, sand, or gravel, ground that includes valuable deposits of mineral not in place, nor fixed in rock, but which are in a loose state, and that may usually be collected by washing or amalgamation without milling. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 836, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 484, 123 C. C. A. 548.

Placers are superficial deposits which occupy the beds of ancient rivers or valleys and may be held and worked in accordance with local mining laws adopted and enforced in the mining district where they are located. Strang v. Ryan (1873) 46 Cal. 33; Moxon v. Wilkinson (1876) 2 Mont. 421.

A placer claim is a place near the bank of a river where gold dust is found. It is a gravelly place where gold is found, especially by the side of a river or in the bed of a mountain torrent. Gregory v. Pershbaker (1887) 14 Pac. 401, 73 Cal. 109.

2. Application of lode laws to placer claims.—Placer claims may be entered upon similar proceedings as those provided for vein or lode claims. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 605, 116 U. S. 687, 29 L. Ed. 774; U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 678, 32 L. Ed. 571; Clipper Mining Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 635, 194 U. S. 220, 48 L. Ed. 944; Chrisman v. Miller (1905) 25 Sup. Ct. 468, 470, 197 U. S. 313, 49 L. Ed. 770; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710; Northern Pacific R. Co. v. Cannon (1893) 54 Fed. 252, 257, 4 C. C. A. 303 (appeal dismissed [1896] 17 Sup. Ct. 997, 41 L. Ed. 1180); Cascaden v. Bartolis (1906) 146 Fed. 739, 77 C. C. A. 496; Jones v. Wild Goose Mining & Trading Co. (1910) 177 Fed. 95, 100 C. C. A. 349, 29 L. R. A. (N. S.) 392; San Francisco Chemical Co. v. Duffield (C. C. A. 1912) 201 Fed. 830, 835; Duffield v. San Francisco Chemical Co. (C. C. 1913) 205 Fed. 480, 483; Bevis v. Markland (C. C. 1904) 130 Fed. 226; Overgaard v. Westerberg (1906) 3 Alaska, 168, 171; Cascaden v. Bortolis (1906) 3 Alaska, 200, 205; Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 P. 333, 11 Ariz. 241, 251; Zeiger v. Dowdy (Ariz. 1911) 114 Pac. 565; Carney v. Arizona Gold Min. Co. (1884) 2 Pac. 734, 65 Cal. 40, 41; McCann v. McMillan (1900) 62 Pac. 31, 129 Cal. 350, 354; Smith v. Union Oil Co. (1913) 135 Pac. 966, 166 Cal. 217; Suessenbach v. First Nat. Bank (1889) 41 N. W. 662, 5 Dak. 477, 499; Strickland v. Commercial Mining Co. (Or. 1909) 104 Pac.

965; Loney v. Scott (Or. 1910) 112 Pac. 172.

3. Mineral character of lands.—See, also, notes to § 4613, ante.

The applicant's claim to a patent is not affected by the fact that he was moved to make the application as much by the existence of timber on the land, as by the existence of gold. U. S. v. Iron Silver-Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571, affirming decree (C. C. 1885) 24 Fed. 568.

The finding of colors of gold, even though fairly good prospects of gold, in placer prospecting, is not sufficient to establish the mineral character of the ground and to sustain a mineral location thereof as against a prior entry under the homestead laws. Steele v. Tanana Mines R. Co. (1906) 148 Fed. 678, 78 C. C. A. 412.

It is essential to the validity of a mining claim that the ground be mineral in character. Zeiger v. Dowdy (1911) 114 Pac. 565, 13 Ariz. 331, 334. See Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 49 L. Ed. 770.

The mere fact that portions of the land contain particles of gold does not necessarily impress it with the character of mineral land, but the proof must show that it contains metal in such quantities as to make it available and valuable for mining purposes. Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207. See U. S. v. Reed (C. C. 1886) 28 Fed. 482; Ah Yew v. Choate (1864) 24 Cal. 562.

4. Qualification of claimant.—See, also, notes to § 4614, ante.

Placer claimants, in order to procure patents for mining claims, must, like locators of lode claims, be citizens, or must have declared their intention to become such. Lee Doon v. Tesh (1885) 6 Pac. 97, 8 Pac. 621, 68 Cal. 43, 49.

5. Location and acquisition of claims.—A placer mining claim may be located on lands on which lode claims have been located and abandoned. U. S. v. Iron Silver-Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 681, 32 L. Ed. 571.

The circumstances, conditions, and proceedings referred to are set forth in the preceding sections of the mining laws, and include discovery, citizenship, marking of the boundaries on the ground, and the performance of the representation work. Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 266, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

A placer location is a location in accordance with the statute of a tract of land for the mineral bearing or other valuable deposits upon it or within it that are not found within lodes or veins in rock in place, and is a claim of a tract of land for the sake of the loose deposits on or near its surface. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 204, 84 C. C. A. 651. See Clipper Min. Co. v. Eli Min., etc., Co. (1904) 194 U. S. 220, 228, 24 Sup. Ct. 632, 48 L. Ed. 944; San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 836, 120 C. C. A. 160.

The location and acquisition of placer mining ground is the same, whether the mineral it contains be gold, silver, quicksilver, or petroleum. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 541.

This section authorizes citizens of the United States to acquire title to placer mines and lands containing deposits of rock and other substances commercially valuable as commodities. Bevis v. Markland (C. C. 1904) 130 Fed. 226, 227.

Congress has always recognized the distinction between lodes or veins of quartz and placer claims and a possessor of the former could procure title many years before it was legal to grant a patent for the latter; but the act was amended by providing that placer claims, including all forms of deposit, excepting veins of quartz or other rock in place, should be subject to entry. Moxon v. Wilkinson (1876) 2 Mont. 421, 425; Montana Coal, etc., Co. v. Livingston (1898) 52 Pac. 780, 21 Mont. 59, 69.

This section contains no requirement as to the particular nature or character of any location authorized under this section, but groups them all under the general appellation of "placer claims." Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 514. And see Horst v. Shea (1899) 59 Pac. 364, 23 Mont. 390, 395.

The use of a placer claim for pasture and the cutting of wood therefrom does not defeat the right to the claim if sufficient mining work is done thereon. Richen v. Davis (Or. 1915) 148 P. 1130.

6. Limitation on number.—There is no limit to the number of placer claims a person may locate. Riverside Sand & Cement Mfg. Co. v. Hardwick (N. M. 1911) 120 P. 323.

7. Discovery.—See also, notes, to § 4615, ante.

A placer patent is void if the location on which it was based was made without discovery. Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 32 L. Ed. 168; McConaghy v. Doyle (1903) 75 Pac. 419, 32 Colo. 92, 99.

To justify the location of a placer claim there must be such a discovery of mineral as gives reasonable evidence of the fact that it is valuable for such mining. Creede & Cripple Creek, etc., Min., etc., Co. v. Uinta Tunnel, etc., Min., etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 349, 49 L. Ed. 501; Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 323, 49 L. Ed. 770; Steele v. Tanana Mines R. Co. (1906) 148 Fed. 678, 679, 78 C. C. A. 412;

Garibaldi v. Grillo (1912) 120 Pac. 425, 17 Cal. App. 540, 542. See Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 98 Am. St. Rep. 63; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211, 213.

While there must be some gold found within the limits of land located as a placer gold claim, it cannot be said in advance as a matter of law how much must be found in order to warrant the court or the jury in finding that there was in fact a discovery within the meaning of this section; but the question must be decided, not only with reference to the gold actually found within the limits of the claim located, but also with regard to its situation in relation to other known valuable deposits of placer gold and its conformity to the general geological features of such deposits. Lange v. Robinson (1906) 148 Fed. 799, 803, 79 C. C. A. 1; Charlton v. Kelley (1907) 156 Fed. 433, 436, 84 C. C. A. 295, 13 Ann. Cas. 518.

It is a sufficient discovery to justify the location of a placer gold mining claim in Alaska where the pay streak is known to be either upon or near the bed rock and where such rock is from 125 to 150 feet below the surface where an experienced miner washes a few pans of the sediment deposited along the sides of a creek and finds in each small particles or colors of gold, and where placer gold in paying quantities has been found upon the bed rock on a tributary to such creek within a mile or so of the claim located. Id.

In the absence of any intervening rights it is unimportant whether the discovery of mineral in the ground is made before or after the marking of its boundaries, and the performance of these two acts in the absence of a statute requiring notice of a location to be recorded perfects the location, but both are essential to the validity of a mining location under the statutes. Waskey v. Hammer (1909) 170 Fed. 31, 35, 95 C. C. A. 305. See Waskey v. Hammer (1912) 223 U. S. 85, 32 Sup. Ct. 187, 56 L. Ed. 359.

Discovery is the initial fact necessary to a mining claim and parties cannot go upon the public domain and acquire the right of possession by the mere performance of the acts prescribed for a location. Hall v. McKinnon (1911) 193 Fed. 572, 576, 113 C. C. A. 440.

The discovery of minerals is an essential thing to a valid mining location. Zeiger v. Dowdy (1911) 114 Pac. 565, 13 Ariz. 331, 334. See Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 675; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211, 213.

One discovery upon a placer claim, whether it be 20 acres or 160 acres, is sufficient to authorize a location thereof, but such discovery is not conclusive as to the mineral character of the entire tract, or that the entire tract can be acquired as appurtenant to the mineral deposits in a portion thereof. Miller v. Chrisman (1903) 73 Pac. 1083, 74 Pac. 444, 140 Cal. 440, 449, 98 Am. St. Rep. 63.

8. Dimensions of claim.—See, also, notes to § 4615, ante.

A placer mining claim, which unintentionally included a trifle more than the maximum permitted, is invalidated under this section by such a readjustment of its lines as to exclude the excess, which contains the only prior mineral discovery in the tract. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 188, 223 U. S. 85, 56 L. Ed. 359.

9. Surface lines on existing locations.—An association placer mining claim cannot be located over other prior claims, so as to include within its boundaries and appropriate a number of unlocated and noncontiguous fractions lying between such prior claim. Stenfjeld v. Espe (1909) 171 Fed. 825, 96 C. C. A. 497.

10. Locations conforming to public surveys.—See notes to § 4630, post.

Placer claims must conform to the lines of the public survey, where it is reasonably practicable, and otherwise it is sufficient if they conform as near as is reasonably practicable. Mitchell v. Hutchinson (1904) 76 P. 55, 142 Cal. 404; Strickland v. Commercial Min. Co. (1909) 104 Pac. 965, 55 Or. 48, 51.

The surveys for placer claims shall conform as nearly as possible to the congressional surveys and may include 20 acres of surface area; but when the location cannot conform to the regular subdivisions it may be made as upon unsurveyed lands. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 694, 29 L. Ed. 774.

11. Possessory rights.—See notes to § 4618, ante.

The locators of a placer mining claim in Alaska, who staked off their claim and marked the boundaries on the ground, showing a location 2 miles long and 660 feet wide, cannot hold such ground as against another locator who in good faith and peaceably, and neither clandestinely nor fraudulently, made an overlapping location, which did not interfere with the pedis possessio of the first locators, and on which a discovery was made before a discovery was made by such first locators. Hanson v. Craig (1909) 170 Fed. 62, 65, 95 C. C. A. 338, on rehearing, reversing Id. (1908) 161 Fed. 861, 863, 89 C. C. A. 55.

The construction of a dam or bulkhead across a canyon or ravine on unoccupied public lands for the purpose of impounding, and in and upon which the person so constructing such dam impounded and preserved a vast quanti-

ty of tailings, and over which he and his heirs exercised continuous acts of ownership, constitute sufficient acts of appropriation and location to confer the possessory right to such lands as a placer mining claim to the extent of the ground that was reserved and tailings covered, and that such acts constitute sufficient physical markings necessary to designate the ground or give notice to the world of the extent of the claim and to manifest the intention of the locator to claim and hold possession of the land for such purpose. Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 932–934.

While a valid placer location cannot be made of land in the actual adverse possession of another, a location will not be declared invalid because other persons, whose rights, if any, did not appear, had been working part of the ground. Riverside Sand & Cement Mfg. Co. v. Hardwick (N. M. 1911) 120 P. 323.

12. Marking boundaries.—See, also, notes to § 4620, ante.

The law requires the boundaries of a placer claim to be distinctly marked on the ground, though the claim is coextensive with a legal subdivision of land surveyed under the government system. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215; White v. Lee (1889) 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115. But see Kern Oil Co. v. Crawford (1903) 76 Pac. 1111, 143 Cal. 298, 3 L. R. A. (N. S.) 993; Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 514.

13. Record of claim.—See, also, notes to § 4620, ante.

Neither this nor any other section of the mining laws requires a record of a placer claim. Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 514.

14. Description of claim.—See, also, notes to § 4620, ante.

In describing a placer location there must be a natural object or permanent monument by which the claim can be identified. Green v. Gavin (1909) 101 Pac. 931, 10 Cal. App. 330, 335. See Fuller v. Harris (D. C. 1887) 29 Fed. 814.

15. Expenditure on claim.—See, also, notes to § 4620, ante.

While the other sections of the mining statutes might indicate that the performance of the annual assessment work apply to lode locations only, yet this section removes all doubt and shows that the performance of annual work is required upon placer as well as lode claims. Carney v. Arizona Gold Min. Co. (1884) 2 Pac. 734, 65 Cal. 40, 41.

16. Unpatented location.—The fact that many years have elapsed since the original location of a placer claim and that no patent has been issued therefor does not affect its validity. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 224, 48 L. Ed. 944. See Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 16, 50 C. C. A. 79, 61 L. R. A. 230.

A valid location, though unpatented, is a grant and the estate enjoyed is in the nature of an estate in fee, and it consists of an appropriation of land by the locator to the exclusion of all others, and a junior locator of a placer claim can not be permitted to lay his lines across a similar claim already located. Stenfjeld v. Espe (1909) 171 Fed. 825, 828, 96 C. C. A. 497.

17. Veins or lodes within placer limits.—See, also, notes to § 4632, post.

No one may go upon a prior valid placer location to prospect for unknown lodes and acquire title to lode claims discovered and located as a result thereof within the placer limits, unless the placer owner has abandoned his claim, waives the trespass, or by his conduct is estopped to complain of it. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 230, 48 L. Ed. 944; Id. (1902) 68 Pac. 286, 29 Colo. 377, 64 L. R. A. 209, 93 Am. St. Rep. 89.

A person has no right to enter upon a valid existing placer claim for the purpose of discovering and locating and perform the necessary acts to perfect a lode location thereon. Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 485, 123 C. C. A. 548.

Veins of quartz or other rock in place known to exist within the limits of a placer claim are expressly excepted from placer locations and patents therefor. Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 Pac. 176, 26 Colo. 56, 59, 50 L. R. A. 289, 77 Am. St. Rep. 245.

The owner of a placer claim is entitled to all the mineral deposits contained therein, excepting the veins or lodes. Freezer v. Sweeney (1889) 21 Pac. 20, 8 Mont. 508, 515.

II. NATURE AND FORMS OF DEPOSITS SECURED BY PLACER CLAIM

18. Asphaltum.—Asphaltum in lodes or veins in rock in place may not be secured by means of placer claims. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 84 C. C. A. 651.

19. Calcium phosphate.—Ground containing blanket veins of calcium phosphate between strata of country rock cannot be secured by placer claim. San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548, reversing decree (D. C. 1912) 198 Fed. 942.

See, also, Thallmann v. Thomas (C. C. A. 1901) 111 Fed. 277, 49 C. C. A. 317; Webb v. American Asphaltum Min. Co. (C. C. A. 1907) 157 Fed. 203,

84 C. C. A. 651; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673.

20. Oil.—See, also, notes to § 4635, post.

Lands chiefly valuable for the deposits of petroleum contained therein are mineral lands within the meaning of the mining laws, and subject to location and entry as such, and may not be selected by a railroad company under its grant reserving and excepting "mineral lands." Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 320, 49 L. Ed. 770; Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230; Lange v. Robinson (1906) 148 Fed. 799, 803, 79 C. C. A. 1; Cates v. Producers & Consumers Oil Co. (C. C. 1899) 96 Fed. 7, 8; Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 676; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 572; Weed v. Snook (1904) 77 Pac. 1023, 144 Cal. 439, 440; Berentz v. Belmont Oil Min. Co. (1906) 84 Pac. 47, 148 Cal. 577, 582, 113 Am. St. Rep. 308; New England & Coalinga Oil Co. v. Congdon (1907) 92 Pac. 180, 152 Cal. 211, 213; McLemore v. Express Oil Co. (1910) 112 Pac. 59, 158 Cal. 559, 562, 139 Am. St. Rep. 147.

The title of the government to oil-bearing lands can only be acquired pursuant to the provisions of the mining laws relating to placer claims. Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 532; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 572.

21. Sand.—Building sand is a mineral; and hence land more valuable for the building sand it contains than for agriculture is mineral land, subject to placer locations. Loney v. Scott (1910) 112 Pac. 172, 57 Or. 378, 32 L. R. A. (N. S.) 466.

22. Stone.—See, also, notes to § 4633, post.

A stone quarry may be located and patented as a placer claim. Freezer v. Sweeney (1889) 8 Mont. 508, 21 Pac. 20.

Lands chiefly valuable for deposits of building stone, but containing no veins of quartz or rock in place, are subject to entry as placer claims. Johnston v. Harrington (1892) 31 Pac. 316, 5 Wash. 73, 78.

Lands containing a deposit of limestone devoid of ore cannot be entered as a mining claim. Wheeler v. Smith (1893) 32 Pac. 784, 5 Wash. 704.

III. APPLICATION FOR PLACER PATENT

23. Designation of character of claim.—An application for patent for a placer claim is not to be denied on the ground that the applicant in the location of his claim considered its accessibility to valuable timber or water advantageous to the operation of the claim and adding materially to its value as a location. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 684, 32 L. Ed. 571; U. S. v. Lavenson (D. C. 1913) 206 Fed. 755, 763.

The owner of a placer claim not being required by any law to designate in his application for a patent the particular use or character of his claim, the fact that he designated it in his location as a "placer mining or stone quarry claim," does not limit him to the stone quarry found within the claim, but he is entitled to all mineral deposits found therein. Freezer v. Sweeney (1889) 8 Mont. 508, 21 Pac. 20.

A patent of ground, designated therein as a "placer claim," is valid as a mineral patent, though the application for patent designated the claim as a "placer mining or stone quarry claim." Id.

24. Equitable title.—The locator of a placer claim who has complied with all the proceedings essential for the issuance of a patent is the equitable owner of the mining ground, and the government holds it in trust for him. Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 132 U. S. 260, 262, 33 L. Ed. 324.

25. Effect of rejection of application.—A judgment of the department rejecting an application for patent does not necessarily declare a placer location void, nor does such judgment affect the possessory rights of a locator. Beals v. Cone (1900) 62 Pac. 948, 27 Colo. 473, 483, 83 Am. St. Rep. 92; Clipper Min. Co. v. Eli Min., etc., Co. (1902) 68 Pac. 286, 29 Colo. 377, 382, 64 L. R. A. 209, 93 Am. St. Rep. 89.

IV. PATENT FOR PLACER CLAIM

26. Consolidated claims.—An application for a patent for a placer claim may contain and describe as a single tract any number of contiguous claims, without limit as to the number of acres, and a single patent may be issued covering the entire area. St. Louis Smelting & Ref. Co. v. Kemp (1881) 104 U. S. 636, 650, 26 L. Ed. 875.

27. Force and effect.—The fact that mining claims for which application for a patent was made were placer mining claims, instead of quartz mining claims, would not preclude the owner thereof from obtaining a single patent for several such claims purchased and owned by him, as the government could not be injured by any deception or false representation, since the price per acre for quartz mining claims is greater than that for placer claims. Peabody Gold Min. Co. v. Gold Hill Min. Co. (1901) 111 Fed. 817, 821, 49 C. C. A. 637.

The patentee of a placer mining claim takes it subject to the easement there-

in which had been acquired under the congressional enactment by the construction and use of a ditch used in diverting and carrying water while such claim was still a part of the public land, but such easement extended only to the maintenance and use of the ditch substantially as then constructed for the purpose of diverting and carrying the volume of water theretofore appropriated and gave no right to enlarge the ditches or to change its location or to use it in diverting and carrying a largely increased volume of water. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 70, 104 C. C. A. 136. See McGuire v. Brown (1895) 39 P. 1060, 106 Cal. 660, 30 L. R. A. 384; Vestal v. Young (1905) 82 P. 381, 147 Cal. 715; Clear Creek Land, etc., Co. v. Kilkenny (1894) 36 P. 819, 5 Wyo. 38.

In so far as the rights and incidents of riparian proprietorship are concerned, conveyances by the United States of public lands on nonnavigable streams and lakes, when not otherwise provided, have effect according to the law of the state in which they are situated. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136.

By the law of Colorado a conveyance by the United States of riparian land, even if it be a gold placer claim. does not carry any right to the unappropriated waters of the stream. Id.

A patent for a "placer" will pass a lode. Cranes Gulch Min. Co. v. Scherrer (1901) 66 P. 487, 134 Cal. 350, 86 Am. St. Rep. 279.

§ 4629. (R. S. § 2330.) Subdivisions of ten-acre tracts; maximum of placer locations.

Legal subdivisions of forty acres may be subdivided into ten-acre tracts; and two or more persons, or associations of persons, having contiguous claims of any size, although such claims may be less than ten acres each, may make joint entry thereof; but no location of a placer-claim, made after the ninth day of July, eighteen hundred and seventy, shall exceed one hundred and sixty acres for any one person or association of persons, which location shall conform to the United States surveys; and nothing in this section contained shall defeat or impair any bona-fide pre-emption or homestead claim upon agricultural lands, or authorize the sale of the improvements of any bona-fide settler to any purchaser.

Act July 9, 1870, c. 235, § 12, 16 Stat. 217.

See note to R. S. § 2329, ante, § 4628.

Notes of Decisions

1. Location of claims—Discovery and expenditure.
2. —— Description and form of claim.
3. —— Marking boundaries.
4. Record of claim.
5. Possession of claim.
6. —— Relocation.
7. Area and extent—Individual claims.
8. —— Association claims.
9. —— Location by dummies.
10. Consolidation of claims—Joint entry.
11. —— Sale of claims.
12. —— Patent.

1. Location of claims—Discovery and expenditure.—See, also, notes to § 4615, ante.

It is not necessary that a separate discovery and separate work should be made and performed on each of the 20 acres contained in a 160-acre placer claim. McDonald v. Montana Wood Co. (1894) 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616. See, also, Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440.

2. —— Description and form of claim.—The boundaries of a placer claim may be formed by side lines parallel to the center lines and by end lines at right angles thereto, where the marking of the claim is on the center line, and in such case the side lines may be located equidistant from the center line and embrace 20 acres. Loeser v. Gardiner (1902) 1 Alaska, 641, 646. See Erhardt v. Boaro (1885) 5 Sup. Ct. 560, 113 U. S. 527, 28 L. Ed. 1113; Mount Diablo Mill. & Mining Co. v. Callison (C. C. 1879) Fed. Cas. No. 9,886; Gleeson v. Martin White Min. Co. (1878) 13 Nev. 442.

A placer mining claim must be located upon surveyed land and described by legal subdivisions thereof, and if such legal subdivisions include other entered claims, these should be excluded from the patent proceedings involving such placer claim. Green v. Gavin (1909) 101 Pac. 931, 10 Cal. App. 330, 336.

3. —— Marking boundaries.—See, also, notes to § 4620, ante.

When a 160-acre placer claim is located by an association of persons, a separate marking on the ground of each 20-acre tract contained therein is unnecessary. McDonald v. Montana Wood Co. (1894) 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

4. Record of claim.—See, also, notes to § 4620, ante.

When a 160-acre placer claim is located by an association of persons, a separate recording of such 20-acre tract contained therein is unnecessary. McDonald v. Montana Wood Co. (1894) 14 Mont. 88, 35 Pac. 668, 43 Am. St. Rep. 616.

5. Possession of claim.—See, also, notes to § 4618, ante.

It is sufficient for persons locating a mining claim if they take and keep peaceable possession of an association placer claim in compliance with the statute and have a record of such location which contains the names of the locators, the date of the location, and a sufficient description of the claim by reference to natural objects and permanent monuments supplemented by the sinking of a shaft to bedrock, and where in the sinking of such shaft gold is discovered in the gravel, as against persons claiming and asserting a right to such claim by reason of a prior location in the absence of evidence of a discovery and where the evidences of prior possession were not shown to have been made by the persons asserting an interest in the claim. Cook v. Klonos (1908) 164 Fed. 529, 536, 90 C. C. A. 403. See Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144.

6. —— Relocation.—See, also, notes to § 4620, ante.

Mining claims are not open to relocation until the rights of former locators have come to an end, as two locations can not legally occupy the same ground at the same time. Stenfjeld v. Espe (1909) 171 Fed. 825, 827, 96 C. C. A. 497. See Porter v. Tonopah North Star Tunnel & Dev. Co. (C. C. 1904) 133 Fed. 756.

7. Area and extent—Individual claims.—This and the following section define the extent of placer claims. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 651, 26 L. Ed. 875; Poire v. Wells (1882) 6 Colo. 406, 412; Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 387, 109 C. C. A. 217. See Price v. McIntosh (1901) 1 Alaska, 286, 300, denying Rosenthal v. Ives (1887) 12 Pac. 904, 2 Idaho (Hasb.) 265.

8. —— Association claims.—An association of persons not exceeding eight in number may locate a placer mining claim not exceeding 160 acres in area. Hall v. McKinnon (1911) 193 Fed. 572, 113 C. C. A. 440. See, also, Cook v. Klonos (1908) 164 Fed. 529, 90 C. C. A. 403 (judgment modified on rehearing [1909] 168 Fed. 700, 94 C. C. A. 144); Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 109 C. C. A. 217. And see Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

A single placer claim, whether made by one person or association of persons, can not exceed 160 acres. Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 265, 57 L. Ed. 820, Ann. Cas. 1913E, 710; McDonald v. Montana Wood Co. (1894) 35 Pac. 668, 14 Mont. 88, 91, 43 Am. St. Rep. 616.

An association of persons may locate a tract as a mining claim which shall embrace as many individual claims of 20 acres each as there are individuals in the association, not exceeding 160 acres in all. Cook v. Klonos (1908) 164 Fed. 529, 534, 90 C. C. A. 403.

Where the location of an association placer mining claim is invalid for fraud on the part of some of the locators, if the work has been kept up and the law and district regulations complied with, locators who were not implicated in the fraud, but acted in good faith, may individually select and hold their proportionate part of the land within the limits of the association claim. Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144, modifying judgment on rehearing (1908) 164 Fed. 529, 90 C. C. A. 403. But see Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 109 C. C. A. 217.

It is the theory of the law that an association placer claim of 160 acres consists of 8 contiguous placer claims of not more than 20 acres each, and such a claim cannot be located wholly upon valid subsisting placer claims previously located and in the lawful possession of other persons for the ostensible purpose of locating triangular pieces of land lying between boundaries of such previously located placer claims. Stenfjeld v. Espe (1909) 171 Fed. 825, 827, 96 C. C. A. 497.

This section authorizes an association location of contiguous claims only and clearly implies that claims not contiguous may not be joined in a single location. Id.

Where a location is made by an association of locators the fraudulent and concealed conduct of one of the locators in the association claim should not invalidate the entire location, particularly where the location can be reduced without injury to innocent parties to the limit observed for the number of locators who have not participated in the fraud. Rooney v. Barnette (1912) 200 Fed. 705, 119 C. C. A. 116. See Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144.

The law is that the unit of an individual placer location is limited to 20 acres, and not more than 160 acres may be embraced within one location by an association of persons, of which there must be at least eight. Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116.

This section limits the aggregate that may be taken by any number of associated persons to 160 acres. Bay v. Oklahoma Southern Gas, etc., Co. (1903) 73 Pac. 936, 13 Okl. 425, 430.

9. —— Location by dummies.—See, also, notes to § 4630, post.

This section does not permit one person to enter more than 20 acres of placer ground by one location by the device of using the names of employés or friends as locators and himself paying the expenses of such location. Durant v. Corbin (C. C. 1899) 94 Fed.

382, 384. See Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531, 545.

It is contrary to the provisions of this and the following section to permit one person to cover more than 20 acres of placer ground by one location by the device of using tht names of his employés or friends as locators. Durant v. Corbin (C. C. 1899) 94 Fed. 382.

The government alone can complain of the fraud of locating by means of dummies. Riverside Sand & Cement Mfg. Co. v. Hardwick (1911) 120 Pac. 323, 16 N. M. 479, and cases cited.

10. Consolidation of claims—Joint entry.—Under this section two or more persons, or an association of persons, having contiguous claims of any size are permitted to make a joint entry thereof. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 653, 26 L. Ed. 875; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 265, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

According to the rules and regulations of the miners long before patents were issued, miners were in the habit of consolidating adjoining claims, whether they consisted of one or more original locations, into one for convenience and economy in working it, and this practice has been permitted and approved by the department. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 653, 26 L. Ed. 875.

As the statute permits two or more persons having contiguous claims to make a joint entry, it follows that a single person should be permitted to unite his entries which adjoin each other in one survey. Id.

The provisions of this section that two or more persons or association of persons having contiguous claims may make joint entry thereof is subject to the limitation that no location of a placer claim shall exceed 160 acres for any one person or association of persons. Cook v. Klonos (1908) 164 Fed. 529, 537, 90 C. C. A. 403.

Placer claims may be located and occupied jointly. Chapman v. Toy Long (C. C. 1876) Fed. Cas. No. 2,610.

There is no limitation to the number of claims that may be included in one patent. Poire v. Wells (1882) 6 Colo. 406; Same v. Leadville Imp. Co. (1882) 6 Colo. 413.

11. —— Sale of claims.—Neither this section nor the section following puts any limitation upon the sale of the ground located nor upon the number of locations which may be acquired by purchase, nor upon the number which may be included in a patent. St. Louis Smelting & Refining Co. v. Kemp (1881) 104 U. S. 636, 651, 26 L. Ed. 875.

The mining statutes contain numerous provisions assuming and recognizing the salable character of the locator's interest in a mining claim. Id.

12. —— Patent.—The limitation of 160 acres does not extend to a claim and the patent issued thereon, which may include ground located by others and added by purchase to the location of a claimant. St. Louis Smelting & Ref. Co. v. Kemp (1880) 104 U. S. 636, 648, 26 L. Ed. 875, overruling St. Louis Smelting & Refining Co. v. Kemp (C. C. 1879) Fed. Cas. No. 12,239a; Same v. Ray (C. C. 1879) Fed. Cas. No. 12,239b.

A patent for a placer mining claim, embracing several distinct mining locations made after 1870, and including more than 160 acres, is valid. Tucker v. Masser (1885) 5 S. Ct. 420, 113 U. S. 203, 28 L. Ed. 979, affirming Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875.

§ 4630. (R. S. § 2331.) Conformity of placer-claims to surveys; limitation of claims.

Where placer-claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required, and all placer-mining claims located after the tenth day of May, eighteen hundred and seventy-two, shall conform as near as practicable with the United States system of public-land surveys, and the rectangular subdivisions of such surveys, and no such location shall include more than twenty acres for each individual claimant; but where placer-claims cannot be conformed to legal subdivisions, survey and plat shall be made as on unsurveyed lands; and where by the segregation of mineral land in any legal subdivision a quantity of agricultural land less than forty acres remains, such fractional portion of agricultural land may be entered by any party qualified by law, for homestead or pre-emption purposes.

Act May 10, 1872, c. 152, § 10, 17 Stat. 94.

See note to R. S. § 2329, ante, § 4628.

Notes of Decisions

Limitations—Quantity of land located as placer.—The policy and object of this section is to limit the quantity of placer mineral land which may be located by one person to 20 acres, and while one person may obtain a patent

for more than this amount he can do so only by representing to the government that he is a purchaser of any excess from one or more bona fide locators whose locations were made in conformity with this limitation, and as showing his good faith in this particular he must present with his application for a patent authenticated abstracts of title showing its derivation from lawful locators. Cook v. Klonos (1908) 164 Fed. 529, 538, 90 C. C. A. 403; Mitchell v. Cline (1890) 24 P. 164, 84 Cal. 409, 415. See Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144.

The only limitation placed by law upon a placer mining claim located upon the unsurveyed public domain in Alaska is that it shall not exceed 20 acres in area. Price v. McIntosh (1901) 1 Alaska, 286.

A miners' rule, custom, or regulation cannot limit a placer mining claim to less than 20 acres, nor fix its unvarying form upon the unsurveyed public domain; and such a rule, custom, or regulation is void. Id.

It was the intention of the mining laws to permit persons to take a certain quantity of land fit for mining, but not to compel them to take such a quantity irrespective of its fitness for mining. Mitchell v. Hutchinson (1904) 76 P. 55, 142 Cal. 404, 407.

—— **Location by individual.**—This section limits placer claims to 20 acres for each individual claimant. St. Louis Smelting & Ref. Co. v. Kemp (1881) 104 U. S. 636, 651, 26 L. Ed. 875; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710; Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116; St. Louis Smelting & Refining Co. v. Kemp (C. C. 1879) Fed. Cas. No. 12,-239a; Poire v. Wells (1882) 6 Colo. 406, 412; Kirk v. Meldrum (1901) 65 P. 633, 28 Colo. 453. See, also, Horst v. Shea (1899) 59 P. 364, 23 Mont. 390, 396.

The prohibition of this section against the location of more than 20 acres for each individual claimant is direct and positive, and limits the amount of ground that each claimant may appropriate either individually or in an association claim at the time of the location. Cook v. Klonos (1908) 164 Fed. 529, 537, 90 C. C. A. 403. See Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144; Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 388, 109 C. C. A. 217; Rooney v. Barnette (1912) 200 Fed. 700, 704, 119 C. C. A. 116.

This section limits placer claims to 20 acres for each individual claimant. Hall v. McKinnon (1911) 193 Fed. 572, 574, 113 C. C. A. 440; Bay v. Oklahoma Southern Gas, etc., Min. Co. (1903) 73 P. 936, 13 Okl. 425, 430.

—— **Location by agents or dummies.**—Any scheme or device whereby one person is to acquire more than 20 acres in area constitutes a fraud upon the law, and consequently a fraud upon the government, and any such location is without legal support and void. Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 388, 109 C. C. A. 217; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 485, 123 C. C. A. 548. See Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531; Durant v. Corbin (C. C. 1899) 94 Fed. 382; Mitchell v. Cline (1890) 84 Cal. 409, 24 Pac. 164.

A single person cannot, by the use of the names of his friends, relatives, or employés as dummies, locate for his own benefit a greater area of placer mining ground than is allowed by law. Cook v. Klonos (1908) 164 Fed. 529, 538, 90 C. C. A. 403; Hall v. McKinnon (1911) 193 Fed. 572, 580, 113 C. C. A. 440. See Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144.

Where all the locators have knowledge of the concealed interest and are parties to the use of the names of the dummy locators the location is invalid. Cook v. Klonos (1908) 164 Fed. 529, 538, 90 C. C. A. 403. See Cook v. Klonos (1909) 168 Fed. 700, 94 C. C. A. 144.

Innocent locators, who were joined with dummies in good faith on their part in the location of excessive territory of a placer mining claim, are entitled to select 20 acres each, within the exterior boundaries of the associated claim, if they have continued to conform to the statutory and the local rules of the mining district. Cook v. Klonos (1909) 168 Fed. 700, 701, 94 C. C. A. 144.

Subsequent locations, made to protect a prior location, are not fraudulent, though made in whole or in part by persons having no intention of claiming the land or any interest therein for themselves. U. S. v. McCutchen (D. C. 1914) 217 Fed. 650.

An oil location of 160 acres, if made in good faith by eight locators for the benefit of eight other persons eligible to locate, is not fraudulent. Id.

Where persons locating mining claims formed a corporation, each owning stock in proportion to their claims, the location is not invalid, as in the case where persons merely lend their names to a corporation, in which they have no interest, to enable it to acquire a greater area of mining ground than is allowed. Borgwardt v. McKittrick Oil Co. (1913) 130 P. 417, 164 Cal. 650.

—— **Location by association.**—A placer claim located by three persons must be limited to 20 acres when it appears that they are all in the employ, and acting in the interest, of a single company. Cook v. Klonos (1909) 164 Fed. 529, 538, 90 C. C. A. 403; Gird v. California Oil Co. (C. C. 1894) 60 Fed. 531.

The unit of individual location under this section is 20 acres, and not more

than 160 acres may be embraced within one location by an association of persons, of whom there must be at least eight. Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 387, 109 C. C. A. 217. See Kirk v. Meldrum (1901) 65 P. 633, 28 Colo. 453, 460.

Five persons may, by means of proper association, under this section, make valid location of 100 acres in one claim, but five persons, by associating themselves together, cannot locate 100 acres in one claim by which one or two of the five can acquire thereby substantially all of the claims, leaving the others with proportionally a very small or nominal interest therein, but the interest of neither can exceed 20 acres. Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 388, 109 C. C. A. 217.

An association mining location is not invalidated by an agreement, made after the location and discovery of mineral, giving one person an interest in excess of 20 acres. Rooney v. Barnette (1912) 200 Fed. 700, 119 C. C. A. 116.

—— **Excessive location.**—An excessive location of a placer mining claim does not render the entire claim void, but it is void only as to such excess. Zimmerman v. Funchion (1908) 161 Fed. 859, 860, 89 C. C. A. 53; Jones v. Wild Goose Min., etc., Co. (1910) 177 Fed. 95, 98, 101 C. C. A. 349, 29 L. R. A. (N. S.) 392. See Jupiter Min. Co. v. Bodie Consol. Min. Co. (C. C. 1881) 11 Fed. 666; English v. Johnson (1860) 17 Cal. 108, 76 Am. Dec. 574; Thompson v. Spray (1887) 14 P. 182, 72 Cal. 528; Howeth v. Sullenger (1896) 45 P. 841, 113 Cal. 547; McElligott v. Krogh (1907) 90 P. 823, 151 Cal. 126; Patterson v. Hitchcock (1877) 3 Colo. 533; Taylor v. Parenteau (1897) 48 P. 505, 23 Colo. 368; McPherson v. Julius (1903) 95 N. W. 428, 17 S. Dak. 98; Hansen v. Fletcher (1894) 37 P. 480, 10 Utah, 266.

A person who has located a placer mining claim in attempted compliance with the mining rules and laws, and who is actually engaged in mining upon a certain portion of such claim, cannot be thrust out of the possession of his discovery and pay streak by another locator because the original location was for a greater extent or width of territory than prescribed by the statute. Atherton v. Fowler (1877) 96 U. S. 513, 515, 24 L. Ed. 732; McIntosh v. Price (1903) 121 Fed. 716, 718, 58 C. C. A. 136. See Eilers v. Boatman (1884) 4 Sup. Ct. 432, 111 U. S. 357, 28 L. Ed. 454; Haws v. Victoria Copper Min. Co. (1895) 16 Sup. Ct. 282, 160 U. S. 303, 317, 40 L. Ed. 436.

The unintentional inclusion in a placer mining claim of a trifle more than 20 acres is an irregularity which does not vitiate the location, but merely makes it necessary that the excess be excluded when it becomes known. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 223 U. S. 85, 90, 56 L. Ed. 359 (affirming Waskey v. Hammer [1909] 170 Fed. 31, 34, 95 C. C. A. 305); Richmond Min. Co. v. Rose (1885) 5 Sup. Ct. 1055, 114 U. S. 576, 29 L. Ed. 273; Zimmerman v. Funchion (1908) 161 Fed. 859, 89 C. C. A. 53; Pratt v. United Alaska Min. Co. (1900) 1 Alaska, 95.

Where local mining rules gave a locator of a placer claim 20 acres to be located 1,320 feet in length and 1,620 feet in width, a person who locates a claim of not exceeding the 20 acres, but by mistake makes the length less and the width greater than that prescribed, another location cannot be made within the excessive limits as to the width where the original locator is in actual possession of such excess and claiming the same under his mistaken location. McIntosh v. Price (1903) 121 Fed. 716, 718, 58 C. C. A. 136. See Walton v. Wild Goose Min., etc., Co. (1903) 123 Fed. 209, 218, 60 C. C. A. 155.

A locator in the actual possession of a placer mining claim which in fact exceeds the legal limit of 20 acres, but who is diligently working the same in good faith, is at liberty to elect what portion of the claim he will reject as excess, and another locator has no right to enter upon that part of the claim which is being so worked because of any alleged excess. McIntosh v. Price (1903) 121 Fed. 716, 58 C. C. A. 136.

A qualified person who makes an excessive location of a placer mining claim and then accepts an appointment as a deputy surveyor of the land department cannot thereafter change the boundaries and perfect a location by a new discovery. Waskey v. Hammer (1909) 170 Fed. 31, 35, 95 C. C. A. 305, affirmed in Waskey v. Hammer (1912) 32 Sup. Ct. 187, 223 U. S. 85, 56 L. Ed. 359.

Discovery on locations—Number.—But one discovery of mineral is required to support a placer location, whether it be of 20 acres by an individual or of 160 acres or less by an association of persons. Cook v. Klonos (1908) 164 Fed. 529, 537, 90 C. C. A. 403; Nome & Sinook Co. v. Snyder (1911) 187 Fed. 385, 388, 109 C. C. A. 217; Hall v. McKinnon (1911) 193 Fed. 572, 574, 113 C. C. A. 440; McDonald v. Montana Wood Co. (1894) 14 Mont. 88, 35 P. 668, 43 Am. St. Rep. 616.

A discovery of gold in a shaft sunk to a depth of 88 feet on a placer mining claim of 160 acres located by eight persons is sufficient to support the location of the entire tract. Hall v. McKinnon (1911) 193 Fed. 572, 575, 113 C. C. A. 440. See Kirk v. Meldrum (1901) 65 P. 633, 28 Colo. 453; McDonald v. Montana Wood Co. (1894) 35 P. 668, 14 Mont. 88, 43 Am. St. Rep. 616.

A placer claim is limited to 20 acres for each individual locator, and the

aggregate that may be located as one claim by an association of persons is limited to 160 acres, but when more than 20 acres is located as one claim, one discovery is sufficient for the entire claim, and, upon a valid location, the legal right of possession follows. Whiting v. Straup (Wyo. 1908) 95 P. 849.

Form of location.—The land department does not recognize a shoestring location of a placer mining claim, as it is the policy of the government to have entries of agricultural or mineral lands in compact form, and the public domain cannot for either purpose be cut into long and narrow strips, and no shoestring claim can receive the sanction of the department. Hanson v. Craig (1909) 170 Fed. 62, 65, 95 C. C. A. 338.

Valid placer mining claim locations may be made of the separate parcels and irregular or triangular tracts surrounded and bounded by prior valid placer claims, as the locators of such parcels have the right to assume that such land is vacant and unappropriated; and the locator of such an irregular placer parcel thus surrounded by other locations is not required to search the surrounding country to ascertain whether the locators of an association placer claim have not placed their posts a half mile distant from each other, with the intention and for the purpose of appropriating such segregated parcels and fractions of land lying between the boundaries of subsisting placer claims. Stenfjeld v. Espe (1909) 171 Fed. 825, 828, 96 C. C. A. 497.

Locations conforming to survey.—All placer claims within the division of Alaska may be located, surveyed, platted, and patented without regard to the public surveys, and need not conform thereto in any particular. Price v. McIntosh (1901) 1 Alaska, 286.

The term "further survey or plat," in this section, has reference to the survey and plat required on application for patent. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215, 224.

The law contemplates that placer claims will ordinarily be sold by legal subdivisions. Kern Oil Co. v. Crawford (1903) 76 P. 1111, 143 Cal. 298, 3 L. R. A. (N. S.) 993. See, also, Green v. Gavin (1909) 101 P. 931, 10 Cal. App. 330, 335.

Placer claims must conform to the lines of the public survey where it is reasonably practicable; otherwise, it is sufficient if they conform as near as practicable. Mitchell v. Hutchinson (1904) 76 P. 55, 142 Cal. 404.

The fact that portions of other claims already entered may be embraced in a placer location by conforming it to legal subdivisions does not make such conformity impracticable within the meaning of this section. Green v. Gavin (1909) 101 P. 931, 10 Cal. App. 330, 337.

—— **Marking boundaries.**—See, also, notes to § 4620, ante.

This section does not dispense with the requirement that the location of mining claims must be distinctly marked on the ground, so that its boundaries can be readily traced. Worthen v. Sidway (1904) 79 S. W. 777, 72 Ark. 215; Matlock v. Stone (1905) 91 S. W. 553, 77 Ark. 195, 200. But see Kern Oil Co. v. Crawford (1904) 76 P. 1111, 143 Cal. 298, 3 L. R. A. (N. S.) 993.

A placer location must be distinctly marked on the ground, so that its boundaries can be readily traced, though the claim is coextensive with a legal subdivision of land surveyed under the government system. White v. Lee (1889) 78 Cal. 593, 21 Pac. 363, 12 Am. St. Rep. 115.

The Colorado statute, requiring boundary stakes at the angle of a placer mine, does not conflict with this section, since the latter refers only to the plat and survey required to be filed on applications for patent, and has no reference to location. Saxton v. Perry (1910) 107 P. 281, 47 Colo. 263.

§ 4631. (R. S. § 2332.) What evidence of possession, etc., to establish a right to a patent.

Where such person or association, they and their grantors, have held and worked their claims for a period equal to the time prescribed by the statute of limitations for mining-claims of the State or Territory where the same may be situated, evidence of such possession and working of the claims for such period shall be sufficient to establish a right to a patent thereto under this chapter, in the absence of any adverse claim; but nothing in this chapter shall be deemed to impair any lien which may have attached in any way whatever to any mining-claim or property thereto attached prior to the issuance of a patent.

Act July 9, 1870, c. 235, § 13, 16 Stat. 217.
See note to R. S. § 2329, ante, § 4628.

Notes of Decisions

1. Purpose and application of section.
2. Adverse possession—Possession for period of limitation.
3. —— Period of limitation.
4. —— Continuity of possession.
5. Rights protected—Assignees and purchasers.
6. —— Liens.

7. Application for patent—Practice and proof.
8. —— Local customs and rules.
9. —— Compliance with requirements.
10. Adverse claims—Effect on possessory title.

1. Purpose and application of section.—This section provides an additional mode of acquiring a mining claim but does not enlarge the class who can acquire such claims. Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296, 302.

This section is not available in an action brought in support of an adverse claim unless the proof of possession is sufficient upon which to presume that all steps necessary to effect a location had been taken. Bismarck Mountain, etc., Min. Co. v. North Sunbeam, etc., Min. Co. (1908) 95 P. 14, 14 Idaho, 516, 531. See Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207.

This section was enacted to prevent an applicant from failing to obtain a patent for his mining claim because of defects in his claim, when he had held a long undisputed possession, and no one had opposed him; and the land office was accordingly authorized to omit some of the strict proof required from an ordinary applicant in consideration that there was no opposition to the application. McCowan v. McClay (1895) 40 P. 602, 16 Mont. 234, 241.

The words "such person or association," in this section, refer to the persons and associations which have been the subject of treatment in the preceding sections, and mean the persons and associations who have complied with the terms of the law and are applying for patent for mining claims. Id.

This section is to be construed in connection with the remaining federal mining statutes. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

2. Adverse possession—Possession for period of limitation.—Possession and working for the statutory period, before the adverse right exists, is equivalent to a location under the acts of congress; but on application for patent the applicant must show performance of the necessary assessment work and his citizenship. Altoona Quicksilver Min. Co. v. Integral Quicksilver Min. Co. (1896) 45 P. 1047, 114 Cal. 100; Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207; Humphreys v. Idaho Gold Mines, etc., Co. (1912) 120 P. 823, 21 Idaho, 126, 138, 40 L. R. A. (N. S.) 817; Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275. See, also, Belk v. Meagher (1881) 104 U. S. 279, 26 L. Ed. 735; Harris v. Equator Min., etc., Co. (C. C. 1881) 8 Fed. 863; Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296; McCowan v. McClay (1895) 40 P. 602, 16 Mont. 234; Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96, 122.

An adverse holding of mining claims for a period equal to the statute of limitation creates a good title as against any one except the government. Buffalo Zinc & Copper Co. v. Crump (1902) 69 S. W. 572, 70 Ark. 525, 91 Am. St. Rep. 87. See, also, Glacier Mountain Silver Min. Co. v. Willis (1888) 8 Sup. Ct. 1214, 127 U. S. 471, 32 L. Ed. 172; Four Hundred and Twenty Min. Co. v. Bullion Min. Co. (C. C. 1876) Fed. Cas. No. 4,989; Harris v. Equator Min. Co. (C. C. 1881) 8 Fed. 863; Francoeuer v. Newhouse (C. C. 1890) 43 Fed. 236; McGowan v. McClay (1895) 40 P. 602, 16 Mont. 234, 239 (distinguishing Glacier Mountain Silver Min. Co. v. Willis [1888] 8 Sup. Ct. 1214, 127 U. S. 471, 33 L. Ed. 172); Four Hundred Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240; Risch v. Wiseman (1900) 59 P. 1111, 36 Or. 484, 78 Am. St. Rep. 783.

This section makes the local statute of limitations for mining claims applicable for certain purposes to mining claims under the government. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 228, 175 U. S. 571, 44 L. Ed. 276; Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 727, 177 U. S. 505, 44 L. Ed. 864; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409; Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 717, 198 U. S. 443, 49 L. Ed. 1119; Reavis v. Fianza (1909) 30 Sup. Ct. 1, 2, 215 U. S. 16, 54 L. Ed. 72; Donnelly v. U. S. (1913) 33 Sup. Ct. 449, 228 U. S. 243, 57 L. Ed. 820, Ann. Cas. 1913E, 710.

An adverse possession under this section continued for a period equal to the time prescribed by the local statute of limitations will entitle the person so holding to a patent. Belk v. Meagher (1881) 104 U. S. 279, 286, 26 L. Ed. 735; Horst v. Shea (1899) 23 Mont. 390, 397.

A good and enforceable right may be secured if there is a peaceable entry made upon lands not inclosed or improved, though claimed by a prior locator. Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735.

Adverse possession of a mining claim cannot extend to a portion of a vein apexing outside the limits of the claim, and consequently no part thereof. Davis v. Shepherd (1903) 72 P. 57, 31 Colo. 141.

3. —— Period of limitation.—A mining claim in California is real estate, and the period of limitation as to actions for the recovery of real estate is five years. Melton v. Lambard (1876) 51 Cal. 258.

4. —— Continuity of possession.—The ultimate right of a locator to a patent depends entirely upon his keeping himself in and others out, and if he is not actually in possession he is in law out.

Belk v. Meagher (1881) 104 U. S. 279, 287, 26 L. Ed. 735.

A peaceable adverse entry, coupled with the right to hold the possession thereby acquired, operates as an ouster and breaks the continuity of the holding of the prior locator and deprives him of the title he might have acquired if he had kept possession for the requisite length of time. Id.

The fact that a prospector went upon a disputed area of a placer claim from time to time to prospect for gold and did sink shafts and run tunnels, and dug up the earth at different places within such area, but did not for any definite period or great length of time beyond 18 months or 2 years, mine in any definite locality, but shifted about from place to place, digging holes in different places, panning for colors, hoping to make discovery at some point, but making no discovery in paying quantities, and expending no large sum of money on such explorations, does not constitute such actual unbroken possession of any specifically defined locality as to constitute such actual, exclusive, and continuous adverse possession as to give title under this section against a record owner who has regularly performed his assessment work from year to year. Pacific Coal & Transportation Co. v. Pioneer Min. Co. (1913) 205 Fed. 577, 591, 123 C. C. A. 593.

A party cannot claim the benefit of this section where he fails to show that he has held and worked his claim for a period equal to the time prescribed by the local statute of limitations for mining claims. Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296, 301.

5. Rights protected—Assignees and purchasers.—This section approves the derivative right by purchase or assignment, and authorizes a patent to issue to purchaser or assignee. St. Louis Smelting & Ref. Co. v. Kemp (1881) 104 U. S. 636, 651, 26 L. Ed. 875.

Both congress and the courts have endeavored to protect rights of locators of mining claims and their assignees where locations have been made and held in good faith, and the mining laws are liberally construed with a view of doing justice to the prospector and miner acting in good faith. Bismarck Mtn. Gold Min. Co. v. North Sunbeam Gold Min. Co. (1908) 95 P. 14, 14 Idaho, 516, 532.

An interest obtained by a purchaser at a constable's sale prior to the time of the publication of notice is an adverse claim that is waived if not asserted. Butte Hardware Co. v. Frank (1901) 65 P. 1, 25 Mont. 344, 350. See Hamilton v. Southern Nevada Gold, etc., Co. (C. C. 1887) 33 Fed. 562.

This section clearly contemplates the buying and selling of mineral claims and it would be absurd to permit sales for the benefit of a vendee and then declare such sales proof of abandonment of all rights of the grantor. Butte Hardware Co. v. Frank (1901) 65 P. 1, 25 Mont. 344, 349.

6. —— Liens.—This section protects liens which may have attached in any way to any mining claim or property prior to the issuance of a patent, and a judgment creditor having a lien on an unpatented mining claim is not obliged to adverse the claim of the locator. Butte Hardware Co. v. Frank (1901) 65 P. 1, 25 Mont. 344.

7. Application for patent—Practice and proof.—A claimant, who has been in the open, exclusive adverse possession of a claim for a continuous period equal to that required by the local statute of limitations, is relieved of the necessity of making proof of posting and recording a notice of location, and such other proofs as are usually furnished by the county recorder, or, in other words, he is relieved of furnishing the evidence of record title. Humphreys v. Idaho Gold Mines Development Co. (Idaho, 1912) 120 P. 823. See, also, Harris v. Equator Min., etc., Co. (C. C. 1881) 8 Fed. 863.

Under this section it is not necessary for an applicant for patent for a mining claim to show the initiation of his right, but proof of possession and continuous working of the claim for a period equal to the local statute of limitations are sufficient in the absence of an adverse claim, and there can be no application of the doctrine of relation in such case. Hickey v. Anaconda Copper Min. Co. (1905) 81 P. 806, 33 Mont. 46, 65.

Possession of and working a mining claim for the statutory period, when proved in the land office or before the courts, give the possessor the status of a valid locator. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275.

8. —— Local customs and rules.—The right of possession of a mining claim under this section may be determined by local customs or rules of the miners in the mining districts, so far as the same are applicable or not inconsistent with the laws of the United States. Shoshone Min. Co. v. Rutter (1900) 20 Sup. Ct. 726, 177 U. S. 505, 508, 44 L. Ed. 864.

A controversy as to the right of possession under this section may not involve any question under the constitution or laws of the United States, but simply a determination of local rules and customs, or state statute, or only a mere matter of fact. Id.

9. —— Compliance with requirements.—Possession of a mining claim for the statutory period does not relieve the possessor from doing the annual assessment work required by law. Upton v. Santa Rita Min. Co. (N. M. 1907) 89 P. 275. See, also, Glacier Mountain, etc., Min. Co. v. Willis (1888)

8 Sup. Ct. 1214, 127 U. S. 471, 32 L. Ed. 172; Anthony v. Jillson (1890) 23 P. 419, 83 Cal. 296; Four Hundred Twenty Min. Co. v. Bullion Min. Co. (1874) 9 Nev. 240; Risch v. Wiseman (1900) 59 P. 1111, 36 Or. 484, 78 Am. St. Rep. 783.

One who asserts his right to a mineral claim by adverse possession must show compliance with the statute in the matter of discovery and the performance of the annual assessment work, and, before he can acquire a patent therefor, must also show that he has done the required amount of work on such claim to entitle him to a patent therefor. Humphreys v. Idaho Gold Mines Development Co. (1912) 120 P. 823, 21 Idaho, 126, 40 L. R. A. (N. S.) 817.

10. Adverse claims—Effect on possessory title.—This section merely authorizes a patent to issue to an applicant who has held possession for a period equal to the local statute of limitations, provided no one files an adverse claim in the land office, and does not give one a right to the claim merely because he has worked it for the statutory time without any adverse claim being made. McCowan v. McLay (1895) 16 Mont. 234, 40 Pac. 602. See, also, Upton v. Santa Rita Min. Co. (1907) 89 P. 275, 14 N. M. 96.

§ 4632. (R. S. § 2333.) Proceedings for patent for placer-claim, etc.

Where the same person, association, or corporation is in possession of a placer-claim, and also a vein or lode included within the boundaries thereof, application shall be made for a patent for the placer-claim, with the statement that it includes such vein or lode, and in such case a patent shall issue for the placer-claim, subject to the provisions of this chapter, including such vein or lode, upon the payment of five dollars per acre for such vein or lode claim, and twenty-five feet of surface on each side thereof. The remainder of the placer-claim, or any placer-claim not embracing any vein or lode-claim, shall be paid for at the rate of two dollars and fifty cents per acre, together with all costs of proceedings; and where a vein or lode, such as is described in section twenty-three hundred and twenty, is known to exist within the boundaries of a placer-claim, an application for a patent for such placer-claim which does not include an application for the vein or lode claim shall be construed as a conclusive declaration that the claimant of the placer-claim has no right of possession of the vein or lode claim; but where the existence of a vein or lode in a placer-claim is not known, a patent for the placer-claim shall convey all valuable mineral and other deposits within the boundaries thereof.

Act May 10, 1872, c. 152, § 11, 17 Stat. 94.

See note to R. S. § 2329, ante, § 4628.

Provisions relating to the annual assessment labor upon oil lands located as placer mining claims were made by Act Feb. 12, 1903, c. 548, post, § 4636.

Patents for lands located, etc., under the mining laws, containing petroleum, mineral oil, or gas, are not to be denied solely because of transfer, etc., thereof, before discovery of oil or gas thereon, by Act March 2, 1911, c. 201, post, § 4637.

Notes of Decisions

I. Placer and lode claims

1. Relative rights of placer and lode claimants.
2. Placer claim defined.
3. Regulation of placer claims.
4. Application of section to veins within placer limits.
5. Nature and coincidence of placer and lode claims.
6. Width of lode claim within placer limits.

II. Veins or lodes within placer claims

7. Known veins or lodes—Meaning.
8. What constitutes a vein or lode.
9. Time when vein or lode is known to exist.
10. Known vein or lode outside of placer limits—Effect.

III. Knowledge of vein or lode

11. What constitutes.
12. Theory or belief insufficient.
13. Burden of proof as to known vein.

IV. Application for placer patent

14. Showing as to existence of vein or lode.
15. Failure to include known veins or lodes—Waiver.
16. Vein or lode not known—Effect.
17. Existence of vein or lode as a question of fact.
18. Conclusiveness of application as to known vein.

V. Application for lode after placer patent

19. Proof of lode claim within placer limits.
20. Known lodes located after placer patent.

VI. Adverse proceedings
21. Pleading.

VII. Patent for placer claim
22. Extent and acreage.
23. Known lodes not acquired by placer patent.
24. Unknown lodes included in placer patent.
25. Patent for lode claim within placer limits—Effect.
26. Exceptions as to vein or lode—Extent.
27. Patents for placer and lode claims—Rights of patentees.
28. Presumptions and conclusiveness.
29. Vacation of patent because of known lodes.
30. Effect of subsequent discovery of vein or lode.

I. PLACER AND LODE CLAIMS

1. Relative rights of placer and lode claimants.—The statute excludes known lodes or veins of quartz from patents for placer claims. Mason v. Washington-Butte Mining Co. (1914) 214 Fed. 32, 130 C. C. A. 426; Haggin v. Lewis (C. C. 1894) 66 Fed. 199; Barnard Realty Co. v. Nolan (D. C. 1914) 215 Fed. 996.

The amount of land which may be taken up as a placer claim and the amount as a lode claim, and the price per acre to be paid when patents are obtained are different, and the rights conferred by the respective patents and the conditions upon which they are held are also different. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 32 L. Ed. 571.

The terms "vein or lode" and "vein or lode claim" is used indiscriminately and interchangeably throughout this section, and it follows that the term "vein or lode" is intended to be synonymous with the term "vein or lode claim" as used in the section. Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 830, 832.

2. Placer claim defined.—A placer claim differs from a lode claim in the amount of land which may be taken, the price per acre to be paid, the rights conferred by the respective patents, and the conditions upon which they are held. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 695, 29 L. Ed. 774; U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 680, 32 L. Ed. 571.

Placer mines are those in which the minerals are generally found in the softer material which covers the earth's surface and not among the rocks beneath. The method of mining such a claim is to take the soft earthy matter in which the particles of mineral are loosely mingled and separate them by filtration. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 695, 29 L. Ed. 774.

By the term "placer claim," as used in this section, is meant ground with defined boundaries which contains mineral in the earth, sand, or gravel; ground that includes valuable deposits not fixed in rock. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 679, 32 L. Ed. 571; Wheeler v. Smith (1893) 32 P. 784, 5 Wash. 704, 707.

A placer location is not a location of lodes or veins underneath the surface, but is simply a claim of a tract or parcel of ground for the sake of loose deposits of mineral near the surface. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 228, 48 L. Ed. 944.

A placer location is a claim of a tract of land for the sake of loose deposits of mineral on or near the surface. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 84 C. C. A. 651.

The last clause of this section evidently intends that any placer claim not embracing any vein or lode claim shall be considered as a placer claim, and not as a claim for veins or lodes. Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 830, 832.

3. Regulation of placer claims.—Placer claims were first regulated by the statute of July 9, 1870 (16 Stat. 217). St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 650, 26 L. Ed. 875.

This section makes specific provision for both placer and vein or lode claims falling within the same boundaries. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 695, 29 L. Ed. 774.

The validity of a placer mining location is not affected by the lapse of many years since its original location, without the issue of a patent therefor. Clipper Mining Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 633, 194 U. S. 220, 48 L. Ed. 944.

The purpose of this section is to place the location of placer claims on an equality, both in procedure and rights, with lode claims. Id.

The law provides a means by which the locator can pay the purchase price and convert his possessory title into a fee simple. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 500, 233 U. S. 250, 58 L. Ed. 943, L. R. A. 1915A, 1113.

This section was primarily intended for the benefit and protection of locators of placer claims. Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 256, 23 C. C. A. 156; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 346, 61 Am. St. Rep. 511.

The reservation did not apply to a claim on which payment had been made, and a certificate of purchase issued, before the passage of the act. Cranes Gulch Min. Co. v. Scherrer (1901) 66 P. 487, 134 Cal. 350, 86 Am. St. Rep. 279.

The purpose of this section is to require good faith on the part of a placer claimant, so that he may not, under cover of a large area of land acquired

as a placer claim, obtain title to quartz deposits also without making the proper claim therefor and the additional payment required by law for the lands containing them. Noyes v. Clifford (1908) 94 P. 842, 37 Mont. 138, 153.

4. Application of section to veins within placer limits.—This section has no application to lodes or veins within the boundaries of a placer claim, which have been previously located and are in the possession of the locator or of his assigns, as such locations are the property of the locator or of his grantees; but the section applies only to lodes or veins not taken up or located so as to become the property of others, and veins not thus owned and known to exist must be included in the application for a placer patent or they will be waived by the applicant. Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 552, 27 L. Ed. 1028; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 353, 32 L. Ed. 168; Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 36 L. Ed. 214; Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 63, 50 L. R. A. 289, 77 Am. St. Rep. 245; Clipper Min. Co. v. Eli Min., etc., Co. (1902) 68 P. 286, 29 Colo. 377, 383, 64 L. R. A. 209, 93 Am. St. Rep. 89; McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92, 102; Horsky v. Moran (1898) 53 P. 1064, 21 Mont. 345, 349.

Where no vein or lode is known to exist, the patent for a placer claim carries all veins or lodes within its boundaries which may be afterwards found to exist under its surface. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 606, 116 U. S. 687, 29 L. Ed. 774.

This section makes provision for the ownership of a mineral vein or lode having its apex within the area of a tract whose surface is valuable for placer mining. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 227, 48 L. Ed. 944.

This section is not in conflict with section 4615, ante, but is intended to refer to lode claims found only within the limits of a placer location, while the other section refers to lode locations generally, exclusive of those within the limits of a placer claim. Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 65, 50 L. R. A. 289, 77 Am. St. Rep. 245.

The owner of an unpatented placer claim, or another with his consent, can locate a lode claim within the boundaries of the placer claim. McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362.

5. Nature and coincidence of placer and lode claims.—This section provides that when one applies for a placer patent who is at the time in the possession of a vein or lode included within its boundaries, he must state such fact, and on payment of the sum required for a vein or lode and 25 feet on each side of it, and on payment of the sum required for the placer claim a patent will issue to him covering both the placer claim and the lode. Sullivan v. Iron Silver Min. Co. (1883) 3 S. Ct. 339, 109 U. S. 550, 552, 27 L. Ed. 1028; Reynolds v. Iron Silver Min. Co. (1886) 6 S. Ct. 601, 116 U. S. 687, 694, 29 L. Ed. 774; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 352, 32 L. Ed. 168; Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 132 U. S. 260, 261, 33 L. Ed. 324; Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 225, 48 L. Ed. 944; Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 830.

From this statute congress evidently considered that the vein of mineral-bearing quartz was more valuable than the surface or placer deposit, as indicated by the difference in price per acre and the quantity limited to each applicant. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 695, 29 L. Ed. 774; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 352, 32 L. Ed. 168.

In procuring a patent for a placer mine claim, where the claimant is also in possession of a lode or vein included within the boundaries of his placer claim, the patent shall cover both, if he makes this known, and pays $5 per acre for 25 feet on each side of his vein, and $2.50 per acre for the remainder of his placer claim. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 606, 116 U. S. 687, 29 L. Ed. 774.

A placer claim, not embracing any vein or lode claim, or that part of a placer claim not included also in a vein or lode claim, is to be paid for by the locator at a different price per acre from that including the vein or lode claim. Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 830.

6. Width of lode claim within placer limits.—A lode claim within the limits of a placer location, patented by a person other than the owner of the placer location, is limited to 25 feet of the surface on each side of the middle of the vein. Mt. Rosa Mining, Milling & Land Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245. See Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 29 L. Ed. 774; Campbell v. Same (C. C. 1893) 56 Fed. 133.

II. VEINS OR LODES WITHIN PLACER CLAIMS

7. Known veins or lodes—Meaning.—It is not enough that there are some indications, by outcroppings on the surface, of the existence of lodes or veins of rock in place of gold or silver to warrant their designation as "known"

veins or lodes, but to be such they must be clearly ascertained, and be of such extent as to render the land more valuable on that account and justify exploitation. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 199, 128 U. S. 673, 32 L. Ed. 571 (affirming decree [C. C. 1885] 24 Fed. 568); Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201; Migeon v. Montana Cent. Ry. Co. (1896) 77 Fed. 249, 23 C. C. A. 156 (affirming Montana Cent. Ry. Co. v. Migeon [C. C. 1895] 68 Fed. 811); McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92; Brownfield v. Bier (1895) 15 Mont. 403, 39 Pac. 461; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 61 Am. St. Rep. 511; Noyes v. Clifford (Mont. 1908) 94 P. 842. See, also, Thomas v. South Butte Min. Co. (1914) 211 Fed. 105, 107, 128 C. C. A. 33.

A vein or lode may be "known to exist," so as to except it from the grant, though it has not been located according to law. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 29 L. Ed. 774; Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 31 L. Ed. 466; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 32 L. Ed. 168; Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 36 L. Ed. 201. See, also, Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 27 L. Ed. 1028, reversing judgment Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 829.

The term "known vein" is not to be taken as synonymous with "located vein," and refers to a vein or lode, whose existence is known, as distinguished from one which has been appropriated by location. Noyes v. Mantle (1888) 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 S. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201; Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207; McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92; Horsky v. Moran (1898) 53 P. 1064, 21 Mont. 345, 349.

The statute does not except veins or lodes "claimed or known to exist," but only such as are known to exist, and it fixes the time at which such knowledge is to be had as that of the application for the patent, and not that of the date of the patent, to take the vein or lode out of its grant. Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 382, 31 L. Ed. 466.

In order to exclude veins or lodes from a grant of land included in a placer patent, it is not sufficient to show that the land in fact contained valuable minerals, but it must appear that at the time of the application it was known, or a reasonable inspection would have disclosed, rock in place bearing minerals sufficient to justify expenditure to extract them. Mason v. Washington-Butte Mining Co. (1914) 214 Fed. 32, 130 C. C. A. 426.

Float, outcroppings, lodes, and abandoned locations, separately or combined, do not constitute a "known lode" within the exclusion of placer mining law, but, to constitute a "known lode," it must be clearly ascertained and defined and sufficient to justify development at the time of the application for a placer patent. Barnard Realty Co. v. Nolan (D. C. 1914) 215 Fed. 996; Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

In a placer patent there are excepted and reserved by the terms of the particular statutes regulating placer claims, from the conveyance, any vein or lode within the placer claim known to exist at the date of the application for patent, and any prior or valid quartz location within such area is also excepted. Horsky v. Moran (1898) 53 P. 1064, 21 Mont. 345, 350.

8. What constitutes a vein or lode.—A lode or vein, within the meaning of this section, is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain. Iron Silver Min. Co. v. Cheesman (1886) 6 Sup. Ct. 481, 116 U. S. 529, 536, 29 L. Ed. 712; Same v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 404, 36 L. Ed. 201.

By "veins or lodes" is meant lines or aggregations of metal embedded in quartz or other rock in place, and both are intended to indicate the presence of metal in rock, although a lode may and often does contain more than one vein. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 679, 32 L. Ed. 571.

Not every crevice in the rocks, nor every outcropping on the surface, which suggests the possibility of mineral, or which may, on subsequent exploration, be found to develop ore of great value, can be adjudged a known vein or lode within the meaning of the statute. Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 404, 36 L. Ed. 201.

To establish that a lode was known to exist when a placer patent including it was applied for, it must be shown that the lode was clearly defined, would have justified development, and was more valuable than the surrounding ground for placer mining. Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

A quartz vein which contains so small a portion of gold, silver, etc., as to be of no value for mining purposes, is not a known vein, within this section.

Mutchmor v. McCarty (1906) 87 P. 85, 149 Cal. 603.

Neither this nor any other section of the mining law undertakes to define the meaning of the terms "vein" and "lode," or to indicate the extent or value of the minerals necessary to bring the lands within which they were found within the terms of the reservation. Noyes v. Clifford (1908) 94 Pac. 842, 37 Mont. 138, 148.

A quartz claimant is not required in all cases to show that a vein or lode within the limits of a placer claim was known to contain at the time of the application for placer patent ore of such extent and value that it could be extracted with profit without previous exploitation. Id.

The terms "vein" and "lode" are synonymous, and the same definition of such terms as used in section 4615 (R. S. § 2320) must also be applied to them as used in this section. Id.

A "vein or lode," within this section, is a body of mineral or mineral-bearing rock within defined boundaries in the general mass of the mountain, and a "known vein or lode" is one clearly ascertained, and of such extent as to render the land more valuable on that account and justify its exploitation and development. Id. See, also, Kift v. Mason (Mont. 1910) 112 P. 392.

9. Time when vein or lode is known to exist.—A vein or lode, to be excepted from a placer patent, must be known to exist at the date of the application for the placer claim, and not merely at the date of the patent therefor. Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 602, 124 U. S. 374, 31 L. Ed. 466; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201; Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 36 L. Ed. 214; Montana Cent. Ry. Co. v. Migeon (C. C. 1895) 68 Fed. 811; Mt. Rosa Mining, Milling & Land Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245; Brownfield v. Bier (1895) 15 Mont. 403, 39 Pac. 461; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 61 Am. St. Rep. 511; Washoe Copper Co. v. Junila (1911) 115 P. 917, 43 Mont. 178.

Whether a lode was known to exist within the limits of a placer patent must be determined as of the date of the placer application, and hence subsequent development is immaterial. Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

10. Known vein or lode outside of placer limits—Effect.—The discovery of a vein or lode 200 or 300 feet outside of the boundaries of a placer claim does not create any presumption of the possession of a vein or lode within those boundaries, nor that a vein or lode existed within them. Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 75, 132 U. S. 260, 33 L. Ed. 324 (affirming [1886] 9 Pac. 892, 6 Mont. 167); Washoe Copper Co. v. Junila (1911) 115 P. 917, 43 Mont. 178. See Butte & Boston Min. Co. v. Sloan (1895) 40 P. 217, 16 Mont. 97.

III. KNOWLEDGE OF VEIN OR LODE

11. What constitutes.—The knowledge must be that of the applicant for the placer patent, but he is chargeable with knowledge of what is known generally in the community, or what would be disclosed by a reasonable and fair inspection of the premises for the purpose of obtaining title from the government. Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 1134, 127 U. S. 348, 32 L. Ed. 168; Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201; Mason v. Washington-Butte Min. Co. (1914) 214 Fed. 32, 37, 130 C. C. A. 426; Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 815; Mutchmor v. McCarty (1906) 87 P. 85, 149 Cal. 603; Brownfield v. Bier (1895) 39 P. 461, 15 Mont. 403, 409; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 61 Am. St. Rep. 511; Washoe Copper Co. v. Junila (1911) 115 P. 917, 43 Mont. 178. See, also, Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 29 L. Ed. 774; Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 31 L. Ed. 466.

Knowledge of the existence of a vein or lode within the boundaries of a placer claim may be obtained from its outcrop within such boundaries, or from the developments of the placer claim previous to the application for a patent, or by the tracing of the vein from another lode, or from the general condition and developments of mining ground adjoining the placer claim, or from the information of others who have made the necessary explorations to ascertain the fact; but, however such knowledge may be acquired, it must be knowledge as distinguished from belief, whether based on examination or otherwise, in order to bring a case within the meaning of this section. Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 384, 31 L. Ed. 466.

It is not necessary to trace the knowledge of a vein or lode to the applicant for a patent for the placer claim, but a general knowledge of its existence is sufficient, though personal knowledge of the fact may not be possessed by the applicant. Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 353, 32 L. Ed. 168. See Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598. 124 U. S. 374. 31 L. Ed. 466; Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 132 U. S. 260. 262. 33 L. Ed. 324.

Under this section it requires stron-

ger evidence of a known vein or lode than is required by the same courts for the location of a valid claim under section 2320, at least between parties claiming the same land for different purposes. U. S. v. Iron Silver Min. Co. (1888) 128 U. S. 673, 9 Sup. Ct. 195, 32 L. Ed. 571; Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 814. See Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 368, 89 Am. St. Rep. 207; McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92, 98.

A person has no right to locate a placer claim until he has made such an inspection as to enable him to make affidavit that it is adapted to such mining and when such an examination will disclose the existence of a tunnel cutting a lode or vein, then such lode or vein is known to exist within the meaning of this section. Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 402, 36 L. Ed. 201; Montana Cent. R. Co. v. Migeon (C. C. 1894) 68 Fed. 811, 815.

An applicant for a placer patent must be held to know of the existence of a tunnel which runs 400 feet under the tract, and of certain veins which it intersects, and which are so distinctly marked as to be disclosed by a casual inspection. Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201.

An abandoned lode claim does not affect the validity of a subsequent placer patent, where no mineral was disclosed in any vein on the lode claim which would justify expenditure for the purpose of extraction. McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92.

The theory of the statute is that a vein or lode of quartz may exist in placer ground that is unknown; but if a discovery of any such vein or lode has been made within the placer boundaries, and in pursuance thereof a lode claim has been properly located, then the applicant for a placer patent will be presumed to know of the existence of such lode or vein. Mantle v. Noyes (1885) 5 P. 856, 5 Mont. 274, 289; Raunheim v. Dahl (1886) 9 P. 892, 6 Mont. 167, 169.

A mining claim properly located, owned, and held, and not abandoned or forfeited in any way, is known to exist within the meaning of the statute. Mantle v. Noyes (1885) 5 P. 856, 5 Mont. 274, 292.

12. Theory or belief insufficient.—On the question of the known existence of an existing vein or lode within the meaning of this statute, a wide difference is made between mere belief and knowledge, and these terms cannot be made synonymous and thereby incorporate new terms into the statute. Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 554, 27 L. Ed. 1028; Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 602, 124 U. S. 374, 31 L. Ed. 466; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 347, 61 Am. St. Rep. 511.

The existence of the vein or lode must be a matter of actual knowledge when the patent is applied for, and it cannot be excluded from the grant by evidence of subsequent discoveries, or of mere speculation or belief, based upon the fact that shafts in adjacent lands disclosed horizontal deposits which might extend under the tract in question. Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 557, 143 U. S. 431, 36 L. Ed. 214; Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156.

A mere belief, though entertained generally in a community, or by the placer patentee alone, of the existence of a horizontal vein or deposit, sometimes called a blanket vein, is not sufficient to prove that such vein is known to exist within the meaning of this section. Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 435, 36 L. Ed. 214; Migeon v. Montana Cent. R. Co. (1896) 77 Fed. 249, 23 C. C. A. 156; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 347, 61 Am. St. Rep. 511.

On an issue as to whether a lode was known to exist within the boundaries of a placer patent, evidence of annual labor on the lode claim and the good faith of the lode claimants is immaterial. Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

13. Burden of proof as to known vein.—A lode claimant within a placer patent has the burden of proving that the lode was known to exist when the placer patent was applied for, by clear and convincing evidence, which inspires confidence and produces conviction. Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

The burden of proof is on the claimant of a lode located within the limits of a prior placer patent to establish by clear and convincing testimony that the veins which he claims as exempt by operation of law from placer application are of a character which will render them known veins. McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92.

IV. APPLICATION FOR PLACER PATENT

14. Showing as to existence of vein or lode.—In an application for a placer claim it is a sufficient compliance with the statute to state in general terms the fact that a vein or lode is known to exist within the boundaries of such placer claim. Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 554, 27 L. Ed. 1028; Reynolds v. Same (1886) 6 Sup. Ct. 601, 116 U. S. 687, 696, 29 L. Ed. 774.

An applicant for a placer patent, who is at the time in possession of a

vein or lode within its boundaries, must state such fact in his application, and on payment of the sum required for a vein claim and 25 feet on each side thereof, and on payment of the required sum for the placer claim, a patent will issue covering both placer and lode claims. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 696, 29 L. Ed. 774; Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 382, 31 L. Ed. 466; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 352, 32 L. Ed. 168.

By this statute congress intended that an applicant for a placer patent with a vein or lode included within its boundaries should state that fact and upon payment of the required sum receive a patent for both. Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 382, 31 L. Ed. 466.

15. Failure to include known veins or lodes—Waiver.—This section applies only to veins or lodes not taken up or located so as to be the property of others, and if any claim or lode is not thus owned and is known to exist the applicant waives all right thereto unless it is claimed in his application. Sullivan v. Iron Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 552, 27 L. Ed. 1028; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 353, 32 L. Ed. 168; Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 434, 36 L. Ed. 214; Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 257, 23 C. C. A. 156; Mantle v. Noyes (1885) 5 P. 856, 5 Mont. 274, 288, 289; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 346, 61 Am. St. Rep. 511.

The applicant for a placer claim takes the surface land and the placer mine, and such lodes or veins of mineral matter within it as are unknown, but to such as were known to exist he obtains no right whatever by the patent unless expressly and specifically asked for. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 698, 29 L. Ed. 774.

This section applies to lodes or veins not taken up and located so as to become the property of others, and if they are not thus owned and are known to exist the applicant for the placer patent must include them or forfeit his right. Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 434, 36 L. Ed. 214.

As there is no necessary connection between the placer and the vein or lode this section provides that an applicant for a placer patent must include any vein or lode of which he is in possession, and if he does not he waives the right thereto, if it is known to exist. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 228, 48 L. Ed. 944; Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 255, 23 C. C. A. 156.

16. Vein or lode not known—Effect.—Where the existence of a vein or lode in a placer claim is not known at the time of application for a patent, title will be acquired under such patent to all veins or lodes within the placer boundaries. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 696, 29 L. Ed. 774; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 352, 32 L. Ed. 168; Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

If the vein or lode is not known at the time of the application for a placer patent such patent will convey all valuable mineral and other deposits thereafter found within the boundaries of the claim. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 680, 32 L. Ed. 571; Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 257, 23 C. C. A. 156.

Known veins are, by this section, exempted from patent applications on placers, but unknown veins are not, and the purpose of the section was to prevent title to known veins from being obtained by placer patents, and to protect a placer patentee in his title to all mineral and deposits within his boundaries not known to exist at the time of application for patent. McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92, 96.

A placer claimant is entitled to any vein or lode existing within the boundaries of his claim and not known to exist at the time of his application for placer patent. Raunheim v. Dahl (1886) 9 P. 892, 6 Mont. 167, 168.

17. Existence of vein or lode as a question of fact.—Whether a lode or vein exists within the boundaries of a placer claim at the time of making application for patent is a question of fact which the locator has a right to have tried as such. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 34 L. Ed. 155; Northern Pac. R. Co. v. Cannon (1893) 54 Fed. 252, 259, 4 C. C. A. 303 (appeal dismissed [1896] 17 Sup. Ct. 997, 41 L. Ed. 1180); Brownfield v. Bier (1895) 15 Mont. 403, 39 Pac. 461.

A "vein or lode" of mineral deposit, within the meaning of the statute, must be clearly ascertained, and of such extent as to render the lands more valuable and justify their exploitation; but the question as to whether a given vein is of this character is one of fact. Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201; McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92; Noyes v. Clifford (Mont. 1908) 94 P. 842.

18. Conclusiveness of application as to known vein.—An application for patent for a placer claim that does not include an application for a known vein or lode within the boundaries thereof will be construed as a conclusive dec-

laration that the applicant has no right of possession to such vein or lode. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 696, 29 L. Ed. 774; Noyes v. Mantle (1888) 8 Sup. Ct. 1132, 127 U. S. 348, 352, 32 L. Ed. 168; United States v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 681, 32 L. Ed. 571; Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 402, 36 L. Ed. 201; Migeon v. Montana, etc., R. Co. (1896) 77 Fed. 249, 256, 23 C. C. A. 156; Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 830.

Where a vein or lode is known to exist under the surface included in a placer patent, and is not in claimant's possession, and not mentioned in the claim on which the patent issues, the title to such vein or lode remains in the United States, unless previously conveyed to some one else, and does not pass to the patentee, who thereby acquires no interest in such vein or lode. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 606, 116 U. S. 687, 29 L. Ed. 774. See, also, Iron Silver Min. Co. v. Mike & Starr Gold & Silver Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 430, 36 L. Ed. 201.

Mineral deposits do not pass under a patent for placer lands subject to sale where such mineral deposits are known to exist. Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326; Van Ness v. Rooney (1911) 116 P. 392, 160 Cal. 131, 140; Loney v. Scott (1910) 112 P. 172, 57 Or. 378, 32 L. R. A. (N. S.) 466.

If an applicant for a placer patent is not in possession of a lode or vein within his boundaries, but such a vein is known to exist, then the application is construed as a conclusive declaration that the claimant has no right to the possession of such vein or lode. Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 346, 61 Am. St. Rep. 511; McCarthy v. Speed (1898) 77 N. W. 590, 11 S. D. 362, 368, 50 L. R. A. 184. See Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 31 L. Ed. 466.

V. APPLICATION FOR LODE AFTER PLACER PATENT

19. Proof of lode claim within placer limits.—To sustain a lode claim upon a placer location the proof must show that the vein or lode claim is a valuable lode deposit and was known to exist at the date of the application for the placer patent. McConaghy v. Doyle (1903) 75 P. 419, 32 Colo. 92, 97.

20. Known lodes located after placer patent.—An entry upon a prior valid placer mining location for the purpose of prospecting for unknown lodes, when made against the will of the placer locators, must be deemed a trespass, which can initiate no title to the lode claims thus located within the exterior boundaries of the placer claim. Clipper Min. Co. v. Eli Mining & Land Co. (1904) 24 Sup. Ct. 632, 635, 194 U. S. 220, 48 L. Ed. 944.

A vein known to exist within the boundaries of a placer claim at the date of an application for a patent, and not included in the application, may be located by an adverse claimant after the issuance of the patent. Mutchmor v. McCarty (1906) 87 P. 85, 149 Cal. 603. See, also, San Miguel Consol. Gold Min. Co. v. Bonner (1905) 79 P. 1025, 33 Colo. 207.

VI. ADVERSE PROCEEDINGS

21. Pleading.—An allegation that an application for a patent as placer ground was made before the location of a lode alleged to exist therein is sufficient, without alleging the date of such application. O'Keefe v. Cannon (C. C. 1892) 52 Fed. 898.

A judicial award of the right of possession to an adverse placer claimant as against a lode applicant does not preclude subsequent departmental inquiry upon the allegation of the lode claimant that the placer claim embraced known lodes, if this question was not in issue before the court. Clipper Min. Co. v. Ely Min., etc., Co. (1902) 68 P. 286, 29 Colo. 377, 383, 64 L. R. A. 209, 93 Am. St. Rep. 89. See Mt. Rosa Min., etc., Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245.

VII. PATENT FOR PLACER CLAIM

22. Extent and acreage.—See, also, notes to §§ 4629, 4630, ante.

A patent for a placer mining claim, embracing several distinct mining locations made after 1870, and including more than 160 acres, is valid. Tucker v. Masser (1885) 5 Sup. Ct. 420, 113 U. S. 203, 28 L. Ed. 979, affirming Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875.

The patent carries with it the title to the surface as well as the land beneath the surface. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 404, 29 L. Ed. 423.

23. Known lodes not acquired by placer patent.—If a vein or lode is claimed or known to exist within the described premises at the date of the patent then the same is expressly excluded from such patent. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 697, 29 L. Ed. 774; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 630; Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 333. See, also, Loney v. Scott (Or. 1910) 112 P. 172.

The patentee of a placer claim is not entitled to possession of a vein or lode within its boundaries if he knew of its existence at the time of applying for the patent and did not include such vein or lode in his application. Sullivan v. Iron

Silver Min. Co. (1883) 3 Sup. Ct. 339, 109 U. S. 550, 553, 27 L. Ed. 1028; Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 381, 382, 31 L. Ed. 466; Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 438, 36 L. Ed. 214.

When it is shown that the patentee of the placer claim knew that a certain vein or lode existed at the time he acquired title to the placer, this is sufficient proof that he acquired no title or interest in such vein by his patent. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 698, 29 L. Ed. 774; Noyes v. Clifford (1908) 94 P. 842, 37 Mont. 138, 142.

Limitations will not run against the right of a lode claimant within the boundaries of a placer patent to establish that the lode was known to exist at the time of the placer application, and therefore excluded therefrom. Barnard Realty Co. v. Nolan (D. C. 1914) 215 Fed. 996.

A judgment for plaintiff, in a suit to quiet title to a placer location as against conflicting lode claims, is not res judicata as against the United States and persons not parties who may relocate and relitigate the question whether they were known lodes at the time of the placer application. Id.

This section carves out from a patent to a placer claim all known lodes found therein at the date of application, together with 25 feet of the surface ground on each side of the lode, and where a known lode was not claimed by the placer applicant and is excluded from his final survey, it forms no part of his placer claim and the residue may properly be patented to him. Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 P. 333, 11 Ariz. 241, 252.

24. Unknown lodes included in placer patent.—A patent for a placer claim is restricted to any lodes or veins which are not known to exist or claimed at the date of the patent. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 697, 29 L. Ed. 774; Barnard Realty Co. v. Nolan (D. C. 1914) 215 Fed. 996; Loney v. Scott (1910) 112 P. 172, 57 Or. 378, 383, 32 L. R. A. (N. S.) 466.

A claimant to a placer mining location is entitled to the possession of a quartz lode within the boundaries of his claim, if it was not known to exist at the time of application for the patent. Mantle v. Noyes (1885) 5 Mont. 274, 5 Pac. 856 (affirmed in Noyes v. Mantle [1888] 127 U. S. 348, 8 Sup. Ct. 1132, 32 L. Ed. 168); Raunheim v. Dahl (1886) 6 Mont. 167, 9 Pac. 892; Montana Copper Co. v. Same (1886) 6 Mont. 131, 9 Pac. 894.

A patent to a placer claim conveys all minerals within the claim including veins or lodes not known to exist at the time of the application for the patent, and such a patent establishes prima facie title to all the land therein described and all ores and minerals lying within the boundaries thereof. Thomas v. South Butte Mining Co. (1914) 211 Fed. 105, 128 C. C. A. 33; Mason v. Washington-Butte Mining Co. (1914) 214 Fed. 32, 130 C. C. A. 426.

A patent for a placer claim conveys all valuable mineral and other deposits within its boundaries if the existence of such mineral or of a vein or lode is not known at the time. Iron Silver Min. Co. v. Sullivan (C. C. 1883) 16 Fed. 830. See Iron Silver Min. Co. v. Reynolds (1888) 8 Sup. Ct. 598, 124 U. S. 374, 31 L. Ed. 466.

25. Patent for lode claim within placer limits—Effect.—The fact that a patent is issued for a mineral lode located beneath the surface within the limits of land covered by a placer patent does not raise the conclusive presumption that the lode was known at the time the placer patent was issued. Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 766, 135 U. S. 286, 34 L. Ed. 155.

A quartz claim upon a patented placer claim depends for its ultimate validity and value upon the ability of the locator to prove that at the time application for the placer patent was made the placer claim contained such known vein or lode. Kift v. Mason (1910) 112 P. 392, 42 Mont. 232, 237. See Noyes v. Clifford (1908) 94 P. 842, 37 Mont. 138.

26. Exceptions as to vein or lode—Extent.—The statute excepts only such veins and lodes as are known to exist at the time the application is made for the patent and not at the date of the patent. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 680, 32 L. Ed. 571.

A patent cannot make exceptions with reference to a vein or lode broader than the statute itself. Id.

Where lodes are known to exist within the boundaries of a placer claim, they are excluded, and are open to location separately; but, if not known to exist when the placer claim is patented, they pass to the patentee. Clark Montana Realty Co. v. Ferguson (D. C. 1914) 218 Fed. 959.

This section provides for patent for placer claim that includes a known vein or lode, and on failure to apply for a patent for such known vein or lode the placer patentee acquires no right whatever to such vein or lode. Old Dominion Copper Min., etc., Co. v. Haverly (1907) 90 P. 333, 11 Ariz. 241, 251.

A reservation in a patent to a placer claim of "any vein or lode of quartz, or other rock in place, bearing gold, silver, cinnabar, lead, tin, copper, or other valuable deposits," claimed or known to exist within the premises, is authorized and valid. Clary v. Hazlitt (1885) 67 Cal. 286, 7 Pac. 701.

A placer patent conveys title to all minerals in the ground described ex-

cept lodes or veins known to exist at the date of location. Mutchmor v. McCarty (1906) 87 P. 85, 149 Cal. 603, 610.

A patent for a placer mining claim cannot include a vein or lode known to exist within its limits at the date of the application. Noyes v. Clifford (1908) 94 P. 842, 37 Mont. 138, 142.

If the lode or vein within the limits of a placer location is excepted from the patent to the placer claim, such lode or vein and 25 feet on either side thereof is open to exploitation and location by any citizen of the United States, for which purpose he is entitled to enter into possession thereof. Id.

27. Patents for placer and lode claims —Rights of patentees.—The title to a lode or vein known to exist within a placer claim but not stated as known remains in the United States, and the patentee has no such interest in it as authorizes him to disturb any one else in the peaceable possession and mining of such vein. Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 698, 29 L. Ed. 774; Montana Co. v. Clark (C. C. 1890) 42 Fed. 626, 630; Doe v. Waterloo Min. Co. (C. C. 1893) 54 Fed. 935, 938; Washoe Copper Co. v. Junila (1911) 115 P. 917, 43 Mont. 178, 182. See Noyes v. Clifford (1908) 94 P. 842, 37 Mont. 138; Washoe Copper Co. v. Junila (1911) 115 P. 917, 43 Mont. 178.

A patent for a placer claim will not convey the title to a known vein or lode within its boundaries unless such vein or lode is specifically applied and paid for. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 229, 48 L. Ed. 944.

A placer location confers neither title to nor possession of, nor withdraws from subsequent location by others, known lodes or veins of mineral in place within its limits. Mt. Rosa Mining, Milling & Land Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245. See, also, Reynolds v. Iron Silver Min. Co. (1886) 6 Sup. Ct. 601, 116 U. S. 687, 29 L. Ed. 774.

Since a placer patent confers no possession to known lodes or veins within its limits, a subsequent locator of a vein or lode within the limits of a placer claim is not a trespasser, as against the placer claimant, within the rule that a trespasser on a lawful possession can acquire no rights. Mt. Rosa Mining, Milling & Land Co. v. Palmer (1899) 56 P. 176, 26 Colo. 56, 50 L. R. A. 289, 77 Am. St. Rep. 245. See, also, Noyes v. Clifford (Mont. 1908) 94 P. 842.

28. Presumptions and conclusiveness.—A placer patent conclusively establishes the fact that the ground was placer ground. Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 132 U. S. 260, 33 L. Ed. 324; Butte & B. Min. Co. v. Sloan (1895) 16 Mont. 97, 40 Pac. 217; Washoe Copper Co. v. Junila (1911) 115 P. 917, 43 Mont. 178.

An action to quiet title is allowed where the application for patent is not resisted, as in case of the location of a lode claim within a placer claim, and where the lode claim was not known to exist at the time of the application for patent. Dahl v. Raunheim (1889) 10 Sup. Ct. 74, 132 U. S. 260, 261, 33 L. Ed. 324. See Iba v. Central Ass'n (1895) 40 P. 527, 42 P. 20, 5 Wyo. 355, 366.

All presumptions favor the validity of a placer patent, and that the patentee had fully complied with the law, and that at the time of his application there was no known vein in such claim. Montana, etc., R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 813.

29. Vacation of patent because of known lodes.—Failure of an applicant for a placer claim to state that he had made several lode locations and recorded certificates thereof is not ground for canceling the patent, though it excepted "lodes claimed or known to exist," the evidence showing that he had abandoned the lode locations, and that there were no "known lodes" at the time of the application. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 198, 128 U. S. 673, 32 L. Ed. 571.

Where the party obtaining a patent knows that the land is valuable for its lodes of mineral, and suppresses this fact, and falsely represents the contrary in his application and in his proofs, and thereby defrauds and deceives the land department, and thus obtains a patent, it is a fraud, and a court of equity may set it aside. U. S. v. Iron Silver Min. Co. (C. C. 1883) 16 Fed. 810.

30. Effect of subsequent discovery of vein or lode.—Where lodes or veins in quartz or other rock in place bearing gold or silver or other metal were not disclosed at the time of application for a patent for a placer claim, a subsequent discovery of lodes upon the ground and their successful working does not affect the good faith of the applicant, as that is to be determined by what was known to exist at the time of making application. U. S. v. Iron Silver Min. Co. (1888) 9 Sup. Ct. 195, 128 U. S. 673, 684, 685, 32 L. Ed. 571. See Sullivan v. Iron Silver Min. Co. (1892) 12 Sup. Ct. 555, 143 U. S. 431, 434, 36 L. Ed. 214; Iron Silver Min. Co. v. Mike & Starr, etc., Min. Co. (1892) 12 Sup. Ct. 543, 143 U. S. 394, 401, 36 L. Ed. 201.

The title to all veins and lodes within the boundaries of a placer claim passes to the placer patentee and any subsequent discovery inures to his benefit. Clipper Min. Co. v. Eli Min., etc., Co. (1904) 24 Sup. Ct. 632, 194 U. S. 220, 231, 48 L. Ed. 944.

§ 4633. (Act Aug. 4, 1892, c. 375, § 1.) Entry of building stone lands under placer mining laws.

Any person authorized to enter lands under the mining laws of the United States may enter lands that are chiefly valuable for building stone under the provisions of the law in relation to placer mineral claims, Provided, That lands reserved for the benefit of the public schools or donated to any States shall not be subject to entry under this act. (27 Stat. 348.)

This section and the section next following were parts of an act entitled "An act to authorize the entry of lands chiefly valuable for building stone under the placer mining laws."

Section 2 of that act amended Act June 3, 1878, c. 151, § 1, so as to read as set forth post, § 4671.

The placer mining laws were incorporated in R. S. §§ 2329–2333, ante, §§ 4628–4632.

The surveyed public lands in the public land States chiefly valuable for stone were authorized to be sold by Act June 3, 1878, c. 151, amended by section 2 of this act, post, § 4671.

The public lands ceded by the Shoshone and Bannock Indians of the Fort Hall Reservation, Idaho, were to be disposed of under the stone laws, by Act June 6, 1900, c. 813, § 5, 31 Stat. 676.

Notes of Decisions

Entry as placer claims.—A suit to restrain the removal of stone from an odd-numbered section within a railroad grant, before the mineral or nonmineral character of the land has been determined, cannot be defended on the ground of an entry, made by defendant after the suit was commenced, where such entry was not put in issue by proper plea. Northern Pac. Ry. Co. v. Soderberg (C. C. 1898) 86 Fed. 49.

The right granted necessarily carries with it the license to take what may be found in the course of exploration and apply it to the discoverer's own use, and one acting under this statute is not a trespasser. Sullivan v. Schultz (1899) 57 P. 279, 22 Mont. 541.

One who takes granite from the public domain, and shapes it for a tombstone, becomes the exclusive owner thereof, though he does not acquire the exclusive right to the land. Id.

Mineral and mineral lands include stone.—The word "mineral" is not synonymous with "metal," but in its general definition includes every variety of stone and rock. Northern Pac. Ry. Co. v. Soderberg (C. C. 1900) 104 Fed. 425, 43 C. C. A. 620, affirming (C. C. 1900) 99 Fed. 506.

Kinds of stone included.—Lands valuable solely or chiefly for granite quarries are mineral lands. Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 368, 188 U. S. 526, 47 L. Ed. 575.

§ 4634. (Act Aug. 4, 1892, c. 375, § 3.) Previous provisions not repealed.

Nothing in this act shall be construed to repeal section twenty-four of the act entitled "An act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one. (27 Stat. 348.)

See note to section 1 of this act, ante, § 4633.

Act March 3, 1891, c. 561, § 24, mentioned in this section, provided for forest reservations, and is set forth post, § 5121.

§ 4635. (Act Feb. 11, 1897, c. 216.) Entry of petroleum or other mineral oil lands under placer mining laws.

Any person authorized to enter lands under the mining laws of the United States may enter and obtain patent to lands containing petroleum or other mineral oils, and chiefly valuable therefor, under the provisions of the laws relating to placer mineral claims: Provided, That lands containing such petroleum or other mineral oils which have heretofore been filed upon, claimed, or improved as mineral, but not yet patented, may be held and patented under the provisions of this Act the same as if such filing, claim, or improvement were subsequent to the date of the passage hereof. (29 Stat. 526.)

This was an act entitled "An act to authorize the entry and patenting of lands containing petroleum and other mineral oils under the placer-mining laws of the United States."

The placer mining laws were incorporated in R. S. §§ 2329–2333, ante, §§ 4628–4632.

Agricultural entries upon oil and gas lands in the State of Utah were provided for by Act Aug. 24, 1912, c. 367, post, §§ 4638–4640.

Notes of Decisions

Oil lands located as placer claims.—By this statute lands containing oil and chiefly valuable therefor may be entered and patented under the laws relating to placer claims. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 470, 197 U. S. 313, 49 L. Ed. 770; Cates v. Producers & Consumers Oil Co. (C. C. 1899) 96 Fed. 7, 8; Weed v. Snook (1904) 77 P. 1023, 144 Cal. 439, 440; McLemore v. Express Oil Co. (1910) 112 P. 59, 158 Cal. 559, 139 Am. St. Rep. 147; Producers' Oil Co. v. Hanszen (1913) 61 So. 754, 759, 132 La. 691; Rives v. Gulf Refining Co. of Louisiana (1913) 62 So. 623, 133 La. 178; Bay v. Oklahoma Southern Gas, Oil & Mining Co, (1903) 73 P. 936, 13 Okl. 425. See, also, Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (affirming judgment [C. C. 1900] 104 Fed. 20, and decree affirmed [1903] 23 Sup. Ct. 692, 24 Sup. Ct. 860, 190 U. S. 301, 47 L. Ed. 1064); Pacific Land & Improvement Co. v. Elwood Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (decree affirmed [1903] 23 Sup. Ct. 698, 24 Sup. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073); Burke v. Southern P. R. Co. (1914) 34 Sup. Ct. 907, 910, 234 U. S. 669, 58 L. Ed. 1527.

The location and sale of oil land is governed by the mineral laws of the United States applicable to the location and sale of placer mining claims; and a location made under the law is a mining claim before patent in every sense of the word, and for the purpose of a lien law it does not cease to be a mining claim because a patent transfers the fee to the locator. Berentz v. Belmont Oil Mining Co. (1906) 84 P. 47, 148 Cal. 577, 582, 13 Am. St. Rep. 308.

Lands containing petroleum or other mineral oils or a deposit of natural gas may be located as placer claims under this statute. New England & Coalinga Oil Co. v. Congdon (1907) 92 P. 180, 152 Cal. 211, 213; Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1, 19, 129 Am. St. Rep. 1093.

The laws governing the location of placer claims on the public domain apply with equal force to the location of oil claims. Wolfskill v. Smith (Cal. App. 1907) 89 P. 1001.

Confirmation of existing entries.—This statute recognizes, approves, and confirms the location of oil lands made prior to the time of its enactment. Cates v. Producers' & Consumers' Oil Co. (C. C. 1899) 96 Fed. 7, 8.

Location of oil claims—Lands chiefly valuable for oil.—All lands containing petroleum are not subject to entry under the mineral laws, but only such as are "chiefly valuable therefor," and this is a subject of proof and if oil is found in such limited quantities that it cannot be worked at a profit, then such land cannot be said to be chiefly valuable for oil. Bay v. Oklahoma, Southern Gas, Oil & Mining Co. (1903) 73 P. 936, 13 Okl. 425.

Persons claiming the right to make mineral locations on land within reservations classed as agricultural must show that the land claimed contains petroleum or other mineral oils and is chiefly valuable therefor. Id.

—— Asphaltum located as oil claim.—Asphaltum in lodes or veins in rock in place cannot be secured under this act. Webb v. American Asphaltum Min. Co. (1907) 157 Fed. 203, 84 C. C. A. 651. See San Francisco Chemical Co. v. Duffield (1912) 201 Fed. 830, 120 C. C. A. 160; Duffield v. San Francisco Chemical Co. (1913) 205 Fed. 480, 123 C. C. A. 548; Duffield v. San Francisco Chemical Co. (D. C. 1912) 198 Fed. 942.

—— Discovery.—See, also, notes to § 4615, ante.

A person can not make a valid location upon oil lands based upon mere surface indications without an actual discovery where another person is in possession of the same land actually engaged in working and developing the same in the way of drilling for oil under an attempted location of the same. Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 679; Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 572. Miller v. Chrisman (1903) 73 P. 1083, 74 P. 444, 140 Cal. 440, 446, 98 Am. St. Rep. 63; Weed v. Snook (1904) 77 P. 1023, 144 Cal. 439, 440.

Discovery is essential for a valid location. Weed v. Snook (1904) 77 P. 1023, 144 Cal. 439; McLemore v. Express Oil Co. (1910) 112 P. 59, 158 Cal. 559, 139 Am. St. Rep. 147; Smith v. Union Oil Co. (1913) 135 P. 966, 166 Cal. 217; Whiting v. Straup (Wyo. 1908) 95 P. 849.

A discovery under this act, as well as in placer mining, must be sufficient to justify a prudent man in the expenditure of money and labor in exploitation for petroleum. Chrisman v. Miller (1905) 25 Sup. Ct. 468, 197 U. S. 313, 49 L. Ed. 770; Cook v. Johnson (1908) 3 Alaska, 506; Miller v. Chrisman (1903) 73 P. 1083, 74 P. 444, 140 Cal. 440, 98 Am. St. Rep. 63.

Mere indications of the presence of oil on a claim are not sufficient to answer the requirements of the statute,

as an actual discovery of oil within the limits of the claim is an essential condition to the making of a valid location of any unappropriated lands of the United States. Nevada Sierra Oil Co. v. Home Oil Co. (C. C. 1899) 98 Fed. 673, 675, 679. See Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 572; New England & Coalinga Oil Co. v. Congdon (1907) 92 P. 180, 152 Cal. 211, 213; Bay v. Oklahoma Southern Gas, etc., Min. Co. (1903) 73 P. 936, 13 Okl. 425, 437.

A location on oil lands under the statute relating to placer mining claims is void where no discovery of oil or other mineral had been made, and where such alleged locators did not continue in the actual possession of any part of the premises, and such occupancy did not prevent others if done peaceably from making locations under the mining laws. Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568, 573. See New England & Coalinga Oil Co. v. Congdon (Cal. 1907) 92 P. 180.

This statute authorizes any person believing that public lands contain oil to lawfully enter thereon and make locations of 20-acre tracts and commence searching for such oil; but the discovery of mineral is essential for a valid location, and the locator while searching for oil or mineral is not a trespasser upon the public lands of the United States. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 14, 50 C. C. A. 79, 61 L. R. A. 230.

Until some body or vein of oil, by drilling into the earth, has been discovered, from which oil can be brought to the surface, it is not sufficient to warrant a location under this statute. Bay v. Oklahoma Southern Gas, etc., Min. Co. (1903) 73 P. 936, 13 Okl. 425, 437.

A placer claim is limited to 20 acres to each individual locator, and 160 acres is the aggregate that may be located by an association of persons, but one discovery is sufficient for the entire claim even if it consists of more than 20 acres. Whiting v. Straup (1908) 95 P. 849, 17 Wyo. 1, 20, 129 Am. St. Rep. 1093.

Priority of location.—That a locator upon oil land may without actual possession be protected from a homestead entry of the land, his location must be valid and complete, for which discovery of oil is essential; and not having made such discovery, he is protected only while in possession, diligently prosecuting his work to a discovery, which means not the pursuit of capital to prosecute the work, or an attempted holding by cabin, lumber, or unused derrick, but the diligent continuous prosecution of the work, with the expenditure of whatever money may be necessary to the end in view; the laws as to assessment work having no application till the discovery is made. McLemore v. Express Oil Co. (Cal. 1910) 112 P. 59.

Contest with homestead entryman.—This act does not authorize or justify a person seeking to locate an oil claim to enter upon land held under an agricultural entry, for the purpose of exploiting such land for the purpose of testing its mineral value. McLemore v. Express Oil Co. (1910) 112 P. 59, 158 Cal. 559, 566, 139 Am. St. Rep. 147.

A mineral claimant who has not made a valid location prior to a homestead entry must contest the adverse homestead entry and secure its cancellation, and until this is done he cannot jointly occupy the land with the homesteader, as there cannot be two valid entries on the same land at the same time, nor can there be a valid mineral location and a valid homestead entry. Bay v. Oklahoma Southern Gas, etc., Min. Co. (1903) 73 P. 936, 13 Okl. 425, 435.

§ 4636. (Act Feb. 12, 1903, c. 548.) Assessment work on contiguous oil lands, located as placer mining claims, of same owner.

Where oil lands are located under the provisions of title thirty-two, chapter six, Revised Statutes of the United States, as placer mining claims, the annual assessment labor upon such claims may be done upon any one of a group of claims lying contiguous and owned by the same person or corporation, not exceeding five claims in all: Provided, That said labor will tend to the development or to determine the oil-bearing character of such contiguous claims. (32 Stat. 825.)

This was an act entitled "An act defining what shall constitute and providing for assessments on oil mining claims."

The entry of lands containing petroleum or other mineral oils, under the laws relating to placer mineral claims, was authorized by Act Feb. 11, 1897, c. 216, ante, § 4635.

Notes of Decisions

Assessment work defined.—Since assessment work in mining law means the annual labor required to hold a right to an unpatented claim, and not work necessary to discover mineral to complete a location, the term used in this act should be construed as having the same meaning, and hence work neces-

sary to effect a discovery of an oil claim cannot be done on a contiguous location claimed by the same person. Smith v. Union Oil Co. (1913) 135 P. 966, 166 Cal. 217.

§ 4637. (Act March 2, 1911, c. 201, § 1.) Patents for oil or gas lands, located or claimed under mining laws, not to be denied because of transfer before discovery thereon of oil or gas.

In no case shall patent be denied to or for any lands heretofore located or claimed under the mining laws of the United States containing petroleum, mineral oil, or gas solely because of any transfer or assignment thereof or of any interest or interests therein by the original locator or locators, or any of them, to any qualified persons or person, or corporation, prior to discovery of oil or gas therein, but if such claim is in all other respects valid and regular, patent therefor not exceeding one hundred and sixty acres in any one claim shall issue to the holder or holders thereof, as in other cases: Provided, however, That such lands were not at the time of inception of development on or under such claim withdrawn from mineral entry. (36 Stat. 1015.)

This was an act entitled "An act to protect the locators in good faith of oil and gas lands who shall have effected an actual discovery of oil or gas on the public lands of the United States, or their successors in interest."

Another section (§ 2) was added to this act by Act Aug. 25, 1914, c. 287, post, § 4637a.

The entry of lands containing petroleum or other mineral oils, under the laws relating to placer mineral claims, was authorized by Act Feb. 11, 1897, c. 216, ante, § 4635.

§ 4637a. (Act March 2, 1911, c. 201, § 2, as amended, Act Aug. 25, 1914, c. 287.) Agreements, with applicants for patents for oil or gas lands included in order of withdrawal, as to disposition of oil or gas, or proceeds thereof, pending determination of title thereto; money accruing from lands within Naval Petroleum Reserves to be set aside as Navy Petroleum Fund.

Where applications for patents have been or may hereafter be offered for any oil or gas land included in an order of withdrawal upon which oil or gas has heretofore been discovered, or is being produced, or upon which drilling operations were in actual progress on October third, nineteen hundred and ten, and oil or gas is thereafter discovered thereon, and where there has been no final determination by the Secretary of the Interior upon such applications for patent, said Secretary, in his discretion, may enter into agreements, under such conditions as he may prescribe with such applicants for patents in possession of such land or any portions thereof, relative to the disposition of the oil or gas produced therefrom or the proceeds thereof, pending final determination of the title thereto by the Secretary of the Interior, or such other disposition of the same as may be authorized by law. Any money which may accrue to the United States under the provisions of this Act from lands within the Naval Petroleum Reserves shall be set aside for the needs of the Navy and deposited in the Treasury to the credit of a fund to be known as the Navy Petroleum Fund, which fund shall be applied to the needs of the Navy as Congress may from time to time direct, by appropriation or otherwise. (36 Stat. 1015. 38 Stat. 708.)

This section was added by amendment to Act March 2, 1911, c. 201, by Act Aug. 25, 1914, c. 287, cited above.

§ 4638. (Act Aug. 24, 1912, c. 367, § 1.) Public lands in Utah, withdrawn or classified as oil lands, open to entries under the homestead and desert land laws, to selection by the State under grants of Congress or the Carey Act, and to withdrawal under the Reclamation Act; reservation of oil and gas; limitation of desert land entries; previous entries validated.

From and after the passage of this Act unreserved public lands

of the United States in the State of Utah, which have been withdrawn or classified as oil lands, or are valuable for oil, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection by the State of Utah under grants made by Congress and under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the reclamation Act, and to disposition in the discretion of the Secretary of the Interior under the law providing for the sale of isolated or disconnected tracts of public lands, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the oil and gas in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: Provided, That those who have initiated nonmineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as oil lands, may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act. (37 Stat. 496.)

This section and the two sections next following were an act entitled "An act to provide for agricultural entries on oil and gas lands."

The homestead laws are set forth ante, under chapter 5, of this Title.

The desert land laws are set forth post, under chapter 6B, of this Title.

Act Aug. 18, 1894, known as the Carey Act, mentioned in this act, is Act Aug. 18, 1894, c. 301, § 4, post, § 4685.

The Reclamation Act, mentioned in this act, is Act June 17, 1902, c. 1093, post, §§ 4700–4708.

The law providing for the sale of isolated or disconnected tracts of public lands, mentioned in this act, is R. S. § 2455, as amended, post, § 5110.

§ 4639. (Act Aug. 24, 1912, c. 367, § 2.) Applications for oil lands in Utah under this act.

Any person desiring to make entry under the homestead laws or the desert-land law, and the State of Utah desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, or under grants made by Congress, and the Secretary of the Interior in withdrawing under the reclamation Act lands classified as oil lands, or valuable for oil, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act. (37 Stat. 496.)

See notes to section 1 of this act, ante, § 4638.

§ 4640. (Act Aug. 24, 1912, c. 367, § 3.) Patent for oil lands in Utah; reservation of oil and gas; damages caused by prospecting or removal of oil and gas.

Upon satisfactory proof of full compliance with the provisions of the laws under which entry is made and of this Act the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the oil and gas in the lands so patented, together with the right to prospect for, mine, and remove the same upon rendering compensation to the patentee for all damages that may be caused by prospecting for and removing such oil or gas. The reserved oil and gas deposits in such lands shall be disposed of only as shall be hereafter expressly directed by law. (37 Stat. 496.)

See notes to section 1 of this act, ante, § 4638.

§ 4640a. (Act July 17, 1914, c. 142, § 1.) Lands withdrawn or classified as containing phosphate, etc., oil, gas, etc., minerals, subject to appropriation, etc., entry, or purchase under nonmineral land laws, to obtain title with reservation to United States of deposits on account of which lands were so withdrawn, classified, etc.

Lands withdrawn or classified as phosphate, nitrate, potash, oil, gas, or asphaltic minerals, or which are valuable for those deposits, shall be subject to appropriation, location, selection, entry, or purchase, if otherwise available, under the nonmineral land laws of the United States, whenever such location, selection, entry, or purchase shall be made with a view of obtaining or passing title with a reservation to the United States of the deposits on account of which the lands were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same; but no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres: Provided, That all applications to locate, select, enter, or purchase under this section shall state that the same are made in accordance with and subject to the provisions and reservations of this Act. (38 Stat. 509.)

This and the two following sections were an act entitled "An act to provide for agricultural entry of lands withdrawn, classified, or reported as containing phosphate, nitrate, potash, oil, gas, or asphaltic minerals," cited above.

§ 4640b. (Act July 17, 1914, c. 142, § 2.) Patents for lands located, entered, etc., with reservation to United States of deposits on account of which lands were withdrawn, classified, etc., as valuable; prospecting for, and mining and removing reserved deposits; disproving classification, and showing nonmineral character of lands.

Upon satisfactory proof of full compliance with the provisions of the laws under which the location, selection, entry, or purchase is made, the locator, selector, entryman, or purchaser shall be entitled to a patent to the land located, selected, entered, or purchased, which patent shall contain a reservation to the United States of the deposits on account of which the lands so patented were withdrawn or classified or reported as valuable, together with the right to prospect for, mine, and remove the same, such deposits to be subject to disposal by the United States only as shall be hereafter expressly directed by law. Any person qualified to acquire the reserved deposits may enter upon said lands with a view of prospecting for the same upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting, the measure of any such damage to be fixed by agreement of parties or by a court of competent jurisdiction. Any person who has acquired from the United States the title to or the right to mine and remove the reserved deposits, should the United States dispose of the mineral deposits in lands, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the minerals therefrom, and mine and remove such minerals, upon payment of damages caused thereby to the owner of the land, or upon giving a good and sufficient bond or undertaking therefor in an action instituted in any competent court to ascertain and fix said damages: Provided, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, select, enter, or purchase, under the land laws of the United States, lands which have been withdrawn or classified as phosphate, nitrate, potash, oil, gas,

or asphaltic mineral lands, with a view of disproving such classification and securing patent without reservation, nor shall persons who have located, selected, entered, or purchased lands subsequently withdrawn, or classified as valuable for said mineral deposits, be debarred from the privilege of showing, at any time before final entry, purchase, or approval of selection or location, that the lands entered, selected, or located are in fact nonmineral in character. (38 Stat. 509.)

See note to preceding section.

§ 4640c. (Act July 17, 1914, c. 142, § 3.) Persons having located, entered, etc., under nonmineral land laws, lands subsequently withdrawn, classified, etc., as valuable for phosphate, etc., oil, gas, etc., minerals, to receive patents with reservation to United States of deposits on account of which lands were so withdrawn, classified, etc.

Any person who has, in good faith, located, selected, entered, or purchased, or any person who shall hereafter locate, select, enter, or purchase, under the nonmineral land laws of the United States, any lands which are subsequently withdrawn, classified, or reported as being valuable for phosphate, nitrate, potash, oil, gas, or asphaltic minerals, may, upon application therefor, and making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which patent shall contain a reservation to the United States of all deposits on account of which the lands were withdrawn, classified, or reported as being valuable, together with the right to prospect for, mine, and remove the same. (38 Stat. 510.)

See note to § 4640a, ante.

§ 4640d. (Act Jan. 11, 1915, c. 9.) Locations heretofore, under placer-mining laws, of lands having deposits of phosphate rock, valid; patents thereon.

Where public lands containing deposits of phosphate rock have heretofore been located in good faith under the placer-mining laws of the United States and upon which assessment work has been annually performed, such locations shall be valid and may be perfected under the provisions of said placer-mining laws, and patents whether heretofore or hereafter issued thereon shall give title to and possession of such deposits: Provided, That this Act shall not apply to any locations made subsequent to the withdrawal of such lands from location, nor shall it apply to lands included in an adverse or conflicting lode location unless such adverse or conflicting location is abandoned. (38 Stat. 792.)

This was an act entitled "An act validating locations of deposits of phosphate rock heretofore made in good faith under the placer-mining laws of the United States," cited above.

Entries made under the enlarged homestead laws in good faith, etc., were validated by Act March 4, 1915, c. 148, ante, § 4575.

§ 4641. (Act Jan. 31, 1901, c. 186.) Entry of saline lands under placer mining laws.

All unoccupied public lands of the United States containing salt springs, or deposits of salt in any form, and chiefly valuable therefor, are hereby declared to be subject to location and purchase under the provisions of the law relating to placer-mining claims: Provided, That the same person shall not locate or enter more than one claim hereunder. (31 Stat. 745.)

This was an act entitled "An act extending the mining laws to saline lands," cited above.

The placer mining laws were incorporated in R. S. §§ 2329–2333, ante, §§ 4628–4632.

The sale of saline lands in certain cases was authorized by Act Jan. 12, 1877, c. 18, § 1, post, § 4752.

Acts subsequent to the Revised Statutes, admitting new States to the Union, granted to several such States, respectively, saline lands within the State, as follows: Colorado, Act March 3, 1875, c. 139, § 11, 18 Stat. 476; North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889, c. 180, §§ 17, 19, 25 Stat. 681; Idaho, Act July 3, 1890, c. 656, §§ 11, 12, 26 Stat. 216; Wyoming, Act July 10, 1890, c. 664, §§ 11, 12, 14, 26 Stat. 224; Utah, Act July 16, 1894, c. 138, § 8, 28 Stat. 109.

Notes of Decisions

Policy of government.—It was the policy of the government to reserve salt springs and lands from sale. Morton v. Nebraska (1874) 88 U. S. (21 Wall.) 660, 667, 22 L. Ed. 639; (1846) 4 Op. Atty. Gen. 480, 484.

Acquisition under mining laws.—This act in effect prohibits the acquisition of public lands chiefly valuable for saline under any law other than the mineral land laws, and the selection of appropriate means for the enforcement of the prohibition devolves on the commissioner subject to the approval of the Secretary of the Interior. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296.

A regulation requiring applicants under nonmineral laws to support their applications by showing that the land is nonsaline is valid, and must be complied with. Id.

§ 4642. (R. S. § 2334.) Surveyor-general to appoint surveyors of mining-claims, etc.

The surveyor-general of the United States may appoint in each land-district containing mineral lands as many competent surveyors as shall apply for appointment to survey mining-claims. The expenses of the survey of vein or lode claims, and the survey and subdivision of placer-claims into smaller quantities than one hundred and sixty acres, together with the cost of publication of notices, shall be paid by the applicants, and they shall be at liberty to obtain the same at the most reasonable rates, and they shall also be at liberty to employ any United States deputy surveyor to make the survey. The Commissioner of the General Land-Office shall also have power to establish the maximum charges for surveys and publication of notices under this chapter; and, in case of excessive charges for publication, he may designate any newspaper published in a land-district where mines are situated for the publication of mining-notices in such district, and fix the rates to be charged by such paper; and, to the end that the Commissioner may be fully informed on the subject, each applicant shall file with the register a sworn statement of all charges and fees paid by such applicant for publication and surveys, together with all fees and money paid the register and the receiver of the land-office, which statement shall be transmitted, with the other papers in the case, to the Commissioner of the General Land-Office.

Act May 10, 1872, c. 152, § 12, 17 Stat. 95.

Notes of Decisions

Appointment and duties of mineral surveyors.—Within the limits of their authority the surveyors act instead of the surveyor general and in that sense they are his deputies, and the surveys which they make are government surveys. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 188, 223 U. S. 85, 56 L. Ed. 359. See, also, Round Mountain Min. Co. v. Round Mountain Sphinx Min. Co. (1914) 138 P. 71, 75, 36 Nev. 543; Fish & Hunter Co. v. New England Homestake Min. Co. (1912) 134 N. W. 798, 28 S. D. 588, 589.

A "land district," within this section, is a division of the state or territory, created by law, in which is located a land office for the disposition of the public lands therein. U. S. v. Smith (C. C. 1882) 11 Fed. 487, 491.

Deputy mineral surveyors are appointed without limitations for no particular time, are not required to keep an office, do not remain under the direction or supervision of the surveyor general, and are not obliged to perform any service either for the government or any individual, but are simply persons designated as having the requisite qualifications to make a proper survey of mining claims, and their work is done under special contract with the mineral claimant. Hand v. Cook (1907) 92 P. 8, 29 Nev. 518, 541.

Survey of mining claim.—See, also, notes to § 4622, ante.

The owner of a mining claim seeking a patent cannot be deprived of his property because of an error by the

government surveyor, where the error is cured by a resurvey, under the orders of the interior department. Basin Mining & Concentrating Co. v. White (1899) 55 P. 1049, 22 Mont. 147.

Expenses of survey.—While the mineral surveyors appointed under this section act only at the solicitation of the owners of mining claims and are paid by them, yet their charges must be within the rule fixed by, and their work done in conformity to, the regulations of the land office, and the work which they do is work of the government. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 223 U. S. 85, 56 L. Ed. 359.

The employment and amount of payment for services in surveying mining claims is subject to private contract between the applicant and the deputy surveyor. Fish & Hunter Co. v. New England Homestake Mining Co. (S. D. 1912) 134 N. W. 798, 28 S. D. 588, affirming judgment on rehearing Same v. New England Homestake Co. (S. D. 1911) 130 N. W. 841.

Location of mining claims by surveyors prohibited.—Mineral surveyors are within the statute prohibiting officers, clerks, and employés in the general land office from being interested in the purchase of public lands, and a location of a mining claim by a mineral surveyor is void. Waskey v. Hammer (1912) 32 Sup. Ct. 187, 188, 223 U. S. 85. 56 L. Ed. 359; Lavagnino v. Uhlig (1903) 71 P. 1046, 26 Utah, 1, 99 Am. St. Rep. 808, affirmed on another point in Lavagnino v. Uhlig (1905) 25 Sup. Ct. 716, 198 U. S. 443, 49 L. Ed. 1119. CONTRA, Hand v. Cook (Nev. 1907) 92 P. 3.

§ 4643. (R. S. § 2335.) Verification of affidavits, etc.

All affidavits required to be made under this chapter may be verified before any officer authorized to administer oaths within the land-district where the claims may be situated, and all testimony and proofs may be taken before any such officer, and, when duly certified by the officer taking the same, shall have the same force and effect as if taken before the register and receiver of the land-office. In cases of contest as to the mineral or agricultural character of land, the testimony and proofs may be taken as herein provided on personal notice of at least ten days to the opposing party; or if such party cannot be found, then by publication of at least once a week for thirty days in a newspaper, to be designated by the register of the land-office as published nearest to the location of such land; and the register shall require proof that such notice has been given.

Act May 10, 1872, c. 152, § 13, 17 Stat. 95.

In addition to the provisions of this section relating to affidavits required by this chapter, applicants for mineral patents, residing beyond the limits of the district wherein the claim is situated, may make any oath or affidavit for proof of citizenship, as required by R. S. § 2321, ante, § 4616, before the clerk of any court of record or before any notary public of any State or Territory, by Act April 26, 1882, c. 106, § 2, ante, § 4617.

Notes of Decisions

Notice of contest.—A railroad company is not entitled to any notice of an application for a mineral patent to lands lying within the boundaries of the grant excluding mineral lands, other than the general statutory notice to all persons who may claim an interest in the land, except that, in case it initiates a contest under this section to determine the character of the land, it is then entitled to personal notice of all subsequent proceedings; and, if it fail to initiate such contest, the question whether the lands are mineral or agricultural becomes a matter solely between the patentee and the government. Northern Pac. R. Co. v. Cannon (1893). 54 Fed. 252, 4 C. C. A. 303. affirming judgment (C. C. 1891) 46 Fed. 237, and appeal dismissed (1896) 17 Sup. Ct. 997, 41 L. Ed. 1180.

This section provides for a contest of lands, whether agricultural or mineral, and all persons have an opportunity to initiate a contest, and after initiating such a contest they are entitled to personal notice of all the proceedings thereafter taken, and a person not initiating a contest cannot complain that personal notice was not given. Eureka Consol. Min. Co. v. Richmond Min. Co. (C. C. 1877) Fed. Cas. No. 4,548.

Verification of affidavits.—The execution before an officer residing outside of the mining district of the affidavit that notice of an application for a patent to a mining claim had been posted on the land, though not a compliance with this section, is not a fatal defect which invalidates the entire proceeding before the land department, but is a mere irregularity which may be cured by the subsequent filing of a properly verified affidavit. El Paso Brick Co. v. McKnight (1914) 34 Sup. Ct. 498, 233 U. S. 250, 58 L. Ed. 943, L. R. A. 1915A, 1113.

This section expressly limits the general authority to verify affidavits to the particular affidavits required by the mining laws. U. S. v. Manion (D. C. 1890) 44 Fed. 800.

§ 4644. (R. S. § 2336.) Where veins intersect, etc.

Where two or more veins intersect or cross each other, priority of title shall govern, and such prior location shall be entitled to all ore or mineral contained within the space of intersection; but the subsequent location shall have the right of way through the space of intersection for the purposes of the convenient working of the mine. And where two or more veins unite, the oldest or prior location shall take the vein below the point of union, including all the space of intersection.

Act May 10, 1872, c. 152, § 14, 17 Stat. 96.

Notes of Decisions

1. Construction of section.
2. Application of section to locations and veins.
3. Veins.
4. Crossing and intersecting of veins—Dip and strike.
5. Ownership of ore at intersection—Priority of location.
6. Space of intersection—Meaning.
7. Ownership below intersection—Priority of location.
8. Right of way to junior locator.
9. Adverse proceedings.
10. Federal question.

1. Construction of section.—This section is not in conflict with section 4618, ante (R. S. § 2322), but supplements it. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 45 L. Ed. 1200; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 546; Wilhelm v. Silvester (1894) 101 Cal. 358, 35 Pac. 997.

If a lode on a junior location intersects, on its strike, within the boundaries of a senior location, a lode on the senior location, this section does not give to the junior locator the right to take all the ore in the first-mentioned lode within the boundaries of both the senior or junior location except at the space of intersection, and hence does not conflict with section 4618, ante, so as partially to repeal it. Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34.

This section is not intended to limit or define the rights of a person in mere possession of a tract of mining ground where there is more than one vein, or to prescribe the effect of a conveyance by a locator of a claim of a portion of his location containing one of such veins; but the object is to supplement the provisions of section 4618, ante, and the prescribed rules under which different locations by different proprietors should be held and to determine the rights of such proprietors in case of intersecting veins. Stinchfield v. Gillis (1895) 40 P. 98, 107 Cal. 84, 89.

This section does not purport to provide for the location of cross veins over territory included within a prior valid and subsisting location, but its purpose is to fix the rights of the claimants of such veins, to settle apparent conflicting rights between claimants of veins crossing or intersecting, and to provide easements for the benefit of such claimants. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 15, 50 L. R. A. 209, 83 Am. St. Rep. 17, overruling Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408.

There is nothing in the language of this section relating to the time or method of locating a claim, and it cannot in any way amend, modify, repeal, or otherwise affect the language of section 4618, ante, giving locators possessory title and the exclusive right of possession of the surface and of all veins, lodes, and ledges apexing within the surface lines. Nash v. McNamara (1908) 93 P. 405, 30 Nev. 114, 135, 16 L. R. A. (N. S.) 168, 133 Am. St. Rep. 694.

2. Application of section to locations and veins.—The provisions of this section apply to locations made under the act of 1872 (17 Stat. 91), as well as before. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 507, 45 L. Ed. 1200.

This section refers to a case where priority of title governs, and can have no application to a party who has no title. Wilhelm v. Silvester (1894) 35 P. 997, 101 Cal. 358, 363.

In case of a single vein discovery, the portion thereof appropriated by the first discoverer is wholly withdrawn from interference or claim by any other citizen until some default is made, but this rule does not apply to the location of cross lodes. Omar v. Soper (1888) 18 P. 443, 11 Colo. 380, 389, 7 Am. St. Rep. 246.

The provisions of this section apply to locations made under the act of May 10, 1872 (17 Stat. 91), as well as before, and refer to the intersecting or crossing of veins either upon their strike or dip, and the space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims, according to the facts in each particular case, and the section grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins, underneath the surface, which he owns or controls outside of such space of intersection. Lee v. Stahl (1889) 22 P. 436, 13 Colo. 174, 176; Calhoun Gold Mining Co. v. Ajax Gold Mining Co. (1899) 59 P. 607, 27 Colo. 1, 22, 50 L. R. A. 209, 83 Am. St. Rep. 17, overruling Branagan

v. Dulaney (1885) 8 P. 669, 8 Colo. 408.

3. Veins.—This section conforms to the custom among miners to regard and treat the vein as a unit and indivisible in point of width, in reference to the right to pursue it extralaterally beneath the surface. The reason of this is that the width of the vein usually is so irregular and its strike and dip depart so far from right lines that it is altogether impracticable and often impossible to continue the longitudinal bisection at the apex throughout the vein on its dip or downward course, and further for the reason that it conforms to the principle pervading the mining laws that priority of discovery and location gives the better right. The senior location takes the entire width of the vein on its dip, where the apex of the vein is partly within two or more adjacent lode mining claims. Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 19, 207 U. S. 1, 52 L. Ed. 65.

4. Crossing and intersecting of veins—Dip and strike.—Congress evidently intended, by the provisions of this section, to define the rights of locators where lodes or ledges intersect on their dip, as indicated by giving to the prior locator the vein below the point of union, and this expression would not apply at all to a union on the strike of two veins. Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34; Wilhelm v. Silvester (1894) 35 P. 997, 101 Cal. 358, 362.

This section impliedly recognizes the two kinds of intersections of quartz ledges where they intersect and unite in their horizontal extension or on their strike, and also where they intersect or unite on their dip or lateral in their downward course, and in the latter case the owner of each ledge has rights at the point of intersection entirely consistent with all the provisions of section 4618, ante. Id.

Veins may cross on both strike and dip. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 506, 45 L. Ed. 1200.

There may be a union of veins or lodes in their downward course partly on the strike and partly on the dip of such veins or lodes. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 546.

Veins which unite on the "dip," or in their downward course, are within the statute, but not veins which unite on the "strike," or on their horizontal extension. Lee v. Stahl (1889) 13 Colo. 174, 22 Pac. 436.

Congress did not intend to give the preference to a prior locator in case of veins uniting on the "strike" as well as on the dip, after the point of union is reached, without regard to adverse proceedings, and the words "below the point of union" in this section do not apply to a union of veins on the strike, but only on the dip. Id.

The words "interest" and "cross," as used in this section, are not strictly synonymous, and in using both terms it must be presumed that congress intended to provide for different conditions. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 16, 50 L. R. A. 209, 83 Am. St. Rep. 17.

5. Ownership of ore at intersection—Priority of location.—This section provides that where two or more veins intersect or cross each other the prior locator shall be entitled to all the mineral within the space of intersection. Empire State, etc., Min. & Dev. Co. v. Bunker Hill, etc., Min. & Con. Co. (1903) 121 Fed. 973, 977, 58 C. C. A. 311; United States Min. Co. v. Lawson (1904) 134 Fed. 769, 774, 67 C. C. A. 587; Hickey v. Anaconda Copper Min. Co. (1905) 81 P. 806, 33 Mont. 46, 68.

This section provides for the ownership of minerals where one vein or lode crosses or intersects another. Work Min. & Mill. Co. v. Doctor Jack Pot Mining Co. (1915) 222 Fed. 216, 137 C. C. A. 647, criticizing, Hall v. Equator Mining & Smelting Co. (C. C. —) Fed. Cas. No. 5,931; Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34, 56, 66.

This section gives to the prior locator, where veins unite, all ore or mineral within the space of intersection and the vein below the point of union, notwithstanding the provisions of section 4618, ante. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 504, 45 L. Ed. 1200.

By this section the prior locator is given the right to take all mineral at the point of intersection of his own and the vein of a junior locator. Tombstone Mill & Mining Co. v. Way Up Min. Co. (1883) 1 Ariz. 426. 25 Pac. 794. See, also, Colorado Cent. Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67 (rehearing denied [1893] 54 Fed. 262, 4 C. C. A. 313 and writ of error dismissed [1893] 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030); Little Josephine Min. Co. v. Fullerton (1893) 58 Fed. 521, 7 C. C. A. 340.

This section provides that at the space of intersection of two lodes the first locator shall have the ore and the junior locator shall have the right of way through the space to pursue and work his vein; and if there is a union of the two lodes the senior locator shall take the ore at the space of intersection and all of the vein below the point of intersection. Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34, 60, 63.

As between the owners of separate and intersecting veins, the ownerships of the mineral contained within the space of intersection is determined ac-

cording to the provisions of this section. Stinchfield v. Gillis (1892) 96 Cal. 33, 30 Pac. 839.

The rule that priority of title shall govern as to ownership of mineral contained within the space of intersection of two veins cannot be applied to a case where a claimant conveys a part of his mining claim to a third person, as in such case there is no prior location, and if an intersection takes place on the part of the claim conveyed the grantee takes all the mineral within the space of intersection. Stinchfield v. Gillis (1895) 107 Cal. 84, 40 Pac. 98.

In cases where this section does not apply and where there is no other law or mining custom applicable to the facts, a grantee of the surface ground must be held to take all the mineral at the point of intersection. Id.

This section has no application to a case where there is only one vein and no crossing or uniting. Omar v. Soper (1888) 11 Colo. 380, 18 Pac. 443, 7 Am. St. Rep. 246. See, also, Book v. Justice Min. Co. (C. C. 1893) 58 Fed. 106, 128.

The owner of a senior claim is entitled to the ore in the intersection of a vein apexing on his claim with a vein apexing on a junior claim. Esselstyn v. United States Gold Corp. (1915) 149 P. 93, 59 Colo. 294.

In case of cross veins, the prior locator is entitled to all the ore within the space of intersection of the claims; but the subsequent locator has a right of way through said space. If he takes ore from the space, he is liable in trespass. Pardee v. Murray (1882) 4 Mont. 234, 2 Pac. 16.

6. Space of intersection—Meaning.—The space of intersection, in determining the ownership of ore within such space, means either intersection of veins or conflicting claims, according to the facts in each particular case, and grants a right of way to the junior claimant for the convenient working of his mine through such space upon the veins which he owns or controls outside of that space; but this space upon the veins means the space underneath the surface. This construction harmonizes this and section 4618, ante, but limits this section to intersections consistent with the provisions of section 4618, ante. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 507, 45 L. Ed. 1200. See Pardee v. Murray (1882) 2 P. 16, 4 Mont. 234.

The "ore within the space of intersection" means the body of ore bounded by the foot and hanging walls of one lode extended in the general course of that lode and the foot and hanging walls of the intersecting lode extended upon its general course, and it is to this body of ore that this section relates. Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34, 63.

The term "space of intersection," as used in this section, refers to the intersection of the veins or lodes. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 17, 50 L. R. A. 209, 83 Am. St. Rep. 17, overruling Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408, and Lee v. Stahl (1889) 22 P. 436, 13 Colo. 174, 176.

7. Ownership below intersection—Priority of location.—This section clearly provides that the oldest or prior location shall take the vein below the point of union, and this applies to veins intersecting on their dip, as such an expression could not apply to the intersection of veins on the strike. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 182 U. S. 499, 506, 45 L. Ed. 1200; Little Josephine Min. Co. v. Fullerton (1893) 58 Fed. 521, 522, 7 C. C. A. 340; Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1893) 62 Fed. 945 947; Roxanna Gold Min., etc., Co. v. Cone (C. C. 1899) 100 Fed. 168, 171. See Watervale Min. Co. v. Leach (1894) 33 P. 418, 4 Ariz. 34; Wilhelm v. Silvester (1894) 35 P. 997, 101 Cal. 358.

If two or more veins unite the oldest or prior location is entitled to the vein below the point of union, including all the space of intersection; and in this respect this section is not in conflict with section 4618, ante. Consolidated Wyoming Gold Min. Co. v. Champion Min. Co. (C. C. 1894) 63 Fed. 540, 546; Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34; Wilhelm v. Silvester (1894) 35 P. 997, 101 Cal. 358.

By this section the first locator and patentee of a lode gets only such part of a cross and intersecting vein as lies within the space of intersection to the exclusion of the remainder of such lodes and veins lying within his own territory, and this section has a controlling effect over the prior section and limits the right of the first locator of a mining claim in and to cross and intersecting veins to the ore which may be found at the space of intersection. Hall v. Equator Mining & Smelting Co. (C. C. ——) Fed. Cas. No. 5,931; Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34, 65. See Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408; Lee v. Stahl (1886) 11 P. 77, 9 Colo. 208.

The provision of this section to the effect that where two or more veins unite the eldest or prior location shall take the vein below the point of union, including all the space of intersection, contemplates an inquiry and decision after patent, and in such case the inquiry and decision could only be had in a court of competent jurisdiction, and this rule obtains as to all subterranean rights. Argentine Min. Co. v. Terrible Min. Co. (1887) 7 Sup. Ct. 1356, 122 U. S. 478, 30 L. Ed. 1140;

Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 207 U. S. 1, 17, 52 L. Ed. 65.

While a patent is evidence of the patentee's priority of right to the ground described, it is not evidence that such right was initiated prior to the right of the patentee of an adjoining tract to the ground within his claim. Lawson v. United States Min. Co. (1907) 28 Sup. Ct. 15, 17, 207 U. S. 1, 52 L. Ed. 65.

On an issue as to whether plaintiff was the owner of a vein having its apex within his location, after the same had passed under the side lines of an adjoining claim, a defendant may show that both parties had the apex of separate veins within the boundaries of their claims, which veins, in descending, became united within the side lines of his own claim, giving him the right to hold all of the vein from the point of junction downward. Colorado Cent. Consol. Min. Co. v. Turck (1892) 50 Fed. 888, 2 C. C. A. 67, rehearing denied (1893) 54 Fed. 262, 4 C. C. A. 313, and writ of error dismissed (1893) 14 Sup. Ct. 35, 150 U. S. 138, 37 L. Ed. 1030.

In the case of parties owning veins which unite in their downward course the oldest patent will take the vein below the point of union, including the space of intersection. Hall v. Equator Mining & Smelting Co. (C. C. ——) Fed. Cas. No. 5,931.

By this section, where two quartz veins unite, the prior location takes the vein below the point of junction. Champion Min. Co. v. Consolidated Wyoming Gold Min. Co. (1888) 75 Cal. 78, 16 Pac. 513.

8. Right of way to junior locator.—The servitude imposed upon the senior location of a mining claim by this section, by giving a right of way to the junior location, whether that extends only through the space of the intersection of the veins or through the space of intersection of the claims, does not otherwise affect the exclusive rights given the senior location, or except therefrom the cross veins apexing therein. Calhoun Gold-Min. Co. v. Ajax Gold-Min. Co. (1901) 21 Sup. Ct. 885, 889, 182 U. S. 499, 45 L. Ed. 1200, affirming Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209 (overruling Branagan v. Dulaney [1885] 8 Colo. 408, 8 Pac. 669; Lee v. Stahl [1886] 9 Colo. 208, 11 Pac. 77; Morgenson v. Middlesex Mining & Milling Co. [1887] 11 Colo. 176, 17 Pac. 513; Lee v. Stahl [1889] 13 Colo. 174, 22 Pac. 436).

Where a vein of a junior locator crosses a senior location, the junior locator has a way of necessity through such senior location for the purpose of excavating and removing the mineral contained in such cross vein. Little Josephine Min. Co. v. Fullerton (1893) 58 Fed. 521, 7 C. C. A. 340; Watervale Min. Co. v. Leach (1893) 33 P. 418, 4 Ariz. 34, 63; Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408, 413; Lee v. Stahl (1886) 11 P. 77, 9 Colo. 208, 210; Morgenson v. Middlesex Min., etc., Co. (1887) 17 P. 513, 11 Colo. 176, 178. See Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17.

A junior locator is entitled to hold and follow the vein or lode apexing in his claim into disputed territory, except at the point of its intersection with another vein. Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 296, 7 C. C. A. 233; Branagan v. Dulaney (1885) 8 P. 669, 8 Colo. 408; Lee v. Stahl (1886) 11 P. 77, 9 Colo. 208; Id. (1889) 22 P. 436, 13 Colo. 174.

This section applies only to cross lodes and provides a right of way through the space of intersection which divides the two sections of the intersected vein or lode for the purpose of the convenient working of the mine. Empire State, etc., Min. & Dev. Co. v. Bunker Hill, etc., Min. & Con. Co. (1903) 121 Fed. 973, 977, 58 C. C. A. 311; Pardee v. Murray (1882) 4 Mont. 234, 279.

The fact that a junior locator has a right to follow and work his vein on its downward dip into a senior location, and to the point of intersection of the two veins, does not affect the senior locator's right to the possession of the entire surface of his claim. Oscamp v. Crystal River Min. Co. (1893) 58 Fed. 293, 296, 7 C. C. A. 233.

A subsequent locator holds his unpatented claim subject to the prior rights of a patentee, as prescribed in this section, and a grantor of a portion of his claim, in the absence of any reservation, holds the ungranted portion subordinate to the rights of his grantee in the grant conveyed. Stinchfield v. Gillis (1895) 40 P. 98, 107 Cal. 84, 89.

Where two veins or lodes cross each other or unite, this section authorizes a subsequent locator to cross or enter upon the territory of the prior locator of one of such veins or lodes. Omar v. Soper (1887) 18 P. 443, 11 Colo. 380, 389, 7 Am. St. Rep. 246.

9. Adverse proceedings.—The effect of the provisions of this section is to exclude a cross lode, except at the point of lode intersection, as not a subject of grant, and being thus exempt from the grant, the right to it is not lost by failure to "adverse." But this does not include the space of a lode intersection, and if a prior locator would secure this and other rights which he has by virtue of his prior location, he must adverse, whether his prior location was made under the act of 1866 or

1872. Lee v. Stahl (1886) 9 Colo. 208, 11 Pac. 77, overruled Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209. See, also, Lee v. Stahl (1889) 13 Colo. 174, 22 Pac. 436, overruled Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 27 Colo. 1, 59 Pac. 607, 83 Am. St. Rep. 17, 50 L. R. A. 209.

10. Federal question.—The effect of a deed on the right to mineral at the point of intersection of two veins does not involve a federal question. Gillis v. Stinchfield (1895) 16 Sup. Ct. 131, 132, 159 U. S. 658, 40 L. Ed. 295.

§ 4645. (R. S. § 2337.) Patents for non-mineral lands, etc.

Where non-mineral land not contiguous to the vein or lode is used or occupied by the proprietor of such vein or lode for mining or milling purposes, such non-adjacent surface-ground may be embraced and included in an application for a patent for such vein or lode, and the same may be patented therewith, subject to the same preliminary requirements as to survey and notice as are applicable to veins or lodes; but no location hereafter made of such non-adjacent land shall exceed five acres, and payment for the same must be made at the same rate as fixed by this chapter for the superficies of the lode. The owner of a quartz-mill or reduction-works, not owning a mine in connection therewith, may also receive a patent for his mill-site, as provided in this section.

Act May 10, 1872, c. 152, § 15, 17 Stat. 96.

Notes of Decisions

I. Mill site locations
1. Object and purpose of section.
2. Locations and rights of locators.
3. Possession of mill site.
4. Equitable title.

II. Application for patent for mill site
5. Mill site patented with lode claim.
6. Nonmineral character of land.
7. Proof of use as mill site.
8. Use of mill site for mining purposes.
9. Improvements on mill site.
10. Quantity of land.

III. Adverse claims
11. Mill site claims.

I. MILL SITE LOCATIONS

1. Object and purpose of section.—The object of this section is to permit title to land to be acquired for mill sites located on mineral lands which do not contain valuable mineral-bearing veins or deposits, and there is no reason for a distinction on account of the character of use, or the ownership or nonownership of a mine in connection with a mill site. Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207.

This section clearly recognizes a valid mill site as a mining possession. Hartman v. Smith (1887) 14 P. 648, 7 Mont. 19, 29.

2. Locations and rights of locators.—The location of a mill site operates as a grant, and it cannot be included in a subsequent town-site entry and patent. Hartman v. Smith (1887) 14 Pac. 648, 7 Mont. 19.

3. Possession of mill site.—It is a sufficient possession of a mill site location connected with a mining claim to maintain ejectment therefor that its corners are marked with painted posts, as is the custom in locating such mill sites, and that the claimant had a house and stable thereon, and had constructed tunnels to increase the flow of springs, and built a wagon road to his mines, thus indicating a present and continuous use. Valcalda v. Silver Peak Mines (1898) 86 Fed. 90, 29 C. C. A. 591, affirming Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886.

A receiver's certificate for the purchase money is admissible in evidence to show good faith. Id.

Where persons were grading on public land for a mill site, but had not complied with any of the provisions of the law for acquiring title thereto, they were not occupants of any land beyond the level space graded for the mill site, and had no right to gold found by others beyond the limits of such space. Burns v. Clark (1901) 66 P. 12, 133 Cal. 634, 85 Am. St. Rep. 233.

4. Equitable title.—A patentee of a mill site, on which he had erected a quartz mill, and who continues to occupy the site, and makes other valuable improvements, but by reason of a mistake in the survey the description in the patent does not cover the land occupied, has at least an equitable title that will prevail against one who, with notice, attempts to acquire the legal title. Garrard v. Silver Peak Mines (C. C. 1897) 82 Fed. 578, judgment affirmed (1899) 94 Fed. 983, 36 C. C. A. 603.

II. APPLICATION FOR PATENT FOR MILL SITE

5. Mill site patented with lode claim.—Where an application for a mill site is not made in good faith by the applicant for himself, he is not entitled to a patent thereto. Hamburg Min. Co. v. Stephenson (1883) 17 Nev. 449, 30 Pac. 1088.

An application for a mill site patent, not having embraced any noncontiguous

vein or lode, the applicant is not entitled to any of the benefits of this section. Id.

6. Nonmineral character of land.—Only nonmineral lands can be entered as a mill site. Burns v. Clark (1901) 66 P. 12, 133 Cal. 634, 85 Am. St. Rep. 233; Burns v. Schonfeld (1905) 81 P. 713, 1 Cal. App. 121, 124.

Under this section nonmineral lands, not contiguous to a lode claim and not exceeding 5 acres, can be appropriated by a lode claim holder for a mill site, and the expenditure of the required sum of money on the lode relieves the claimant from any additional expenditure on the mill site. Valcalda v. Silver Peak Mines (1898) 86 Fed. 90, 91, 29 C. C. A. 591; Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886, 890. See Hartman v. Smith (1887) 14 P. 648, 7 Mont. 19.

Where lands are placed on the market and at the time of entry or sale are not known to contain valuable deposits of coal, a nonmineral or agricultural entry is the only entry that can be made; and if time and development should discover mineral deposits of the greatest value in such lands, it is the good fortune of the entryman, of which the government can take no advantage; and if the government desires to retain to itself the possibilities of mineral deposits of value congress must legislate to that end. U. S. v. Kostelak (D. C. 1913) 207 Fed. 447, 453.

This section is a congressional recognition that land near, but not contiguous to, known veins or lodes may be nonmineral, and if it contains no known valuable mineral deposits it falls into the nonmineral or agricultural class, however rich in minerals are the adjoining lands. Id.

There is no presumption that a vein or minerals extend under lands 2 miles distant from the outcroppings, and a nonmineral or agricultural entryman will not be deprived of a good-faith entry because of the presence of outcroppings of veins or minerals 2 miles distant. Id.

A local rule or regulation permitting the location of mill sites without regard to the character of the land on which they are located is in conflict with the provision that mill sites can only be legally located on nonmineral lands. Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207.

This section does not entitle an independent mill owner to patent a mill site located on mineral lands. Id.

7. Proof of use as mill site.—What constitutes the use of land as a mill site for mining and milling purposes, so as to entitle a person to a patent, is a mixed question of law and fact. Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886, judgment reversed Valcalda v. Silver Peak Mines (1898) 86 Fed. 90, 29 C. C. A. 591; Hartman v. Smith (1887) 14 P. 648, 7 Mont. 19.

8. Use of mill site for mining purposes.—The term "mining purposes," as used in this section, may include any reasonable use for mining purposes which a quartz lode mining claim may require, and may consist in the use of a mill site in connection therewith, and if used in good faith for any mining purpose in connection with it is sufficient. Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886, 890; Hartman v. Smith (1887) 14 P. 648, 7 Mont. 19. See Valcalda v. Silver Peak Mines (1898) 86 Fed. 90, 93, 29 C. C. A. 591.

A mill site on which the locators have erected a cabin used for storing tools, and as an ore house for the ore taken from the mine, is used and occupied for mining or milling purposes within this section. Hartman v. Smith (1887) 7 Mont. 19, 14 Pac. 648. See, also, Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886, 890, affirmed (1898) 86 Fed. 90, 29 C. C. A. 591.

Any use in good faith for any mining purpose in connection with a quartz lode mining claim would be within the meaning of the statute, and it is not intended that it shall be used for such work as is done upon the mine itself because of the requirement of the nonmineral character of the land, and for the further reason that it must not be adjacent to the mining claim. Hartman v. Smith (1887) 14 P. 648, 7 Mont. 19, 28.

9. Improvements on mill site.—Under this section the owner of a quartz mill or reduction works may obtain title for the mill site on which his mill is built, and the owner of the quartz lode mining claim may obtain title to a mill site on nonmineral land not contiguous to the mining claim for either mining or milling purposes. Shafer v. Constans (1879) 3 Mont. 369, 372; Hartman v. Smith (1887) 14 P. 648, 7 Mont. 19, 26.

The applicant must have a mill or reduction works on the premises. Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207.

10. Quantity of land.—The quantity of land embraced in a mill site claim cannot exceed 5 acres and must be nonmineral in character. Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886, 890.

III. ADVERSE CLAIMS

11. Mill site claims.—Where an adverse is filed by a lode claimant against an application for patent on an existing mill-site location, the lode claimant must not only show that the lands in question contain minerals, but that they contain minerals of a quantity and quality that can be extracted at a profit, in order to entitle him to hold the lands as mineral lands. Cleary v. Skiffich (1901) 65 Pac. 59, 28 Colo. 362, 89

Am. St. Rep. 207. See, also, Durgan v. Redding (C. C. 1900) 103 Fed. 914.

When a suit is brought by the possessor of a mill site, as adverse claimant to an application for a placer patent by defendants, who are not in possession, the defendants must show that they have complied with the local customs and regulations; and, if they do not, the plaintiff in possession will recover judgment without showing that the land is nonmineral, as is apparently requisite for mill sites. Shafer v. Constans (1879) 3 Mont. 369.

§ 4646. (R. S. § 2338.) What conditions of sale may be made by local legislature.

As a condition of sale, in the absence of necessary legislation by Congress, the local legislature of any State or Territory may provide rules for working mines, involving easements, drainage, and other necessary means to their complete development; and those conditions shall be fully expressed in the patent.

Act July 26, 1866, c. 262, § 5, 14 Stat. 252.

Notes of Decisions

State laws for working mines.—This section permits any state or territory to provide rules for working mines for their complete development in the absence of necessary legislation by congress. Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1901) 21 Sup. Ct. 885, 890, 182 U. S. 499, 45 L. Ed. 1200, affirming (1899) 59 P. 607, 27 Colo. 1, 50 L. R. A. 209, 83 Am. St. Rep. 17; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 196 U. S. 119, 49 L. Ed. 409.

Mining easements.—This section authorizes a state to enact laws granting to an owner of ground, with a mining tunnel located thereon, the right to run the same through the claims of other parties, and providing for the payment of all "actual damages or injury done to the owner of the claims crossed" by such tunnel. Baillie v. Larson (C. C. 1905) 138 Fed. 177. But does not authorize state legislatures to pass unconstitutional laws. People v. Pitkin County District Court (1887) 11 Colo. 147, 17 Pac. 298.

By this section easements for working mines, drainage, etc., are excluded from the purview of the mining statute, leaving these matters for state regulation. Jacob v. Day (1896) 44 P. 243, 111 Cal. 571, 576.

An easement for a tail race essential in carrying off water and débris from the operation of a hydraulic mine is not an easement within the contemplation of this section. Id.

Nuisance not authorized.—The law does not authorize the deposit of tailings and débris from hydraulic mines in navigable streams, so as to obstruct navigation and flood and depreciate private lands. Woodruff v. North Bloomfield Gravel Min. Co. (C. C. 1884) 18 Fed. 753.

§ 4647. (R. S. § 2339.) Vested rights to use of water for mining, etc.; right of way for canals.

Whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; and the right of way for the construction of ditches and canals for the purposes herein specified is acknowledged and confirmed; but whenever any person, in the construction of any ditch or canal, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage.

Act July 26, 1866, c. 262, § 9, 14 Stat. 253.

Notes of Decisions

I. Construction and application of section
1. Purpose and application.
2. Grant of water rights.

II. Appropriation of waters
3. Right to appropriate waters.
4. Extent of right of appropriation of water.
5. What constitutes appropriation of water.
6. Presumption as to appropriation of waters.
7. Title by prescription.

III. Easements granted and protected
8. Rights of way for canals and ditches.
9. Rights of way for electric power companies.
10. Water rights determined by priority of appropriation.
11. Vested water rights protected.

III. Easements granted and protected —Cont'd

12. Water rights protected against other claimants.
13. Time of acquiring water rights.
14. Nature of water rights protected.
15. Change in water rights not permitted.

IV. Local laws and customs

16. State laws affecting water rights.
17. Local customs and regulation of miners.
18. Water right laws in force in Alaska.

V. Uses of water contemplated

19. Beneficial use sufficient.
20. Water rights limited by use.

VI. Riparian rights

21. Application to public lands.

VII. Abandonment or forfeiture of rights

22. Application of doctrine.

VIII. Adverse Claims

23. Water rights.

IX. Federal courts

24. Jurisdiction.

I. CONSTRUCTION AND APPLICATION OF SECTION

1. Purpose and application.—This section does not create rights, but is a recognition by Congress of a pre-existing right of possession, constituting a valid claim to its continuance. Broder v. Water Co. (1879) 101 U. S. 274, 25 L. Ed. 790; Sturr v. Beck (1890) 10 Sup. Ct. 350, 353, 133 U. S. 541, 33 L. Ed. 761; Krall v. U. S. (1897) 79 Fed. 241, 24 C. C. A. 543; U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376; Mohl v. Lamar Canal Co. (C. C. 1904) 128 Fed. 776; Hoge v. Eaton (C. C. 1905) 135 Fed. 411, 414; Jones v. Adams (1885) 6 P. 442, 19 Nev. 78, 88, 3 Am. St. Rep. 788; Twaddle v. Winters (1906) 85 P. 280, 29 Nev. 88 (affirmed on rehearing [1907] 89 Pac. 289, 29 Nev. 88); Carson v. Gentner (1898) 52 P. 506, 33 Or. 512, 519, 43 L. R. A. 130; Hough v. Porter (1908) 95 P. 732, 51 Or. 318 (rehearing denied [1909] 102 P. 728, 51 Or. 318); Davis v. Chamberlain (Or. 1908) 98 P. 154; Hough v. Porter (1909) 98 P. 1083, 51 Or. 318; Isaacs v. Barber (1894) 38 P. 871, 10 Wash. 124, 130, 30 L. R. A. 665, 45 Am. St. Rep. 772; Willey v. Decker (1903) 73 P. 210, 11 Wyo. 496, 521, 100 Am. St. Rep. 939. See, also, Atchison v. Peterson (1874) 87 U. S. 507, 22 L. Ed. 414; Basey v. Gallagher (1874) 87 U. S. 670, 22 L. Ed. 452; Forbes v. Gracey (1876) 94 U. S. 762, 24 L. Ed. 313; Jennison v. Kirk (1878) 98 U. S. 453, 25 L. Ed. 240; Eaton v. Hoge (1905) 141 Fed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487; Van Dyke v. Midnight Sun Min., etc., Co. (1910) 177 Fed. 85, 89, 100 C. C. A. 503. And see U. S. v. Rio Grande, etc., Irrigation Co. (1899) 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136; Reno Smelting, etc., Works v. Stevenson (1886) 21 P. 317, 20 Nev. 269, 275, 4 L. R. A. 60, 19 Am. St. Rep. 364.

The object of this section was to give the sanction of the United States to possessory rights which had previously rested solely upon local customs, laws, and decisions of the courts, and to prevent such rights from being lost on sale of the lands. Jennison v. Kirk (1878) 98 U. S. 453, 456, 25 L. Ed. 240; U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 126 C. C. A. 376 (overruling [D. C. 1913] 208 Fed. 821); Cruse v. McCauley (C. C. 1899) 96 Fed. 369, 374; Miocene Ditch Co. v. Jacobson (1905) 2 Alaska, 567; Broder v. Natoma Water & Mining Co. (1875) 50 Cal. 621; Smith v. Hawkins (1895) 110 Cal. 122, 42 Pac. 453; Jarvis v. State Bank (1896) 45 P. 505, 22 Colo. 309, 55 Am. St. Rep. 129; Isaacs v. Barber (1894) 10 Wash. 124, 38 Pac. 871, 45 Am. St. Rep. 772, 30 L. R. A. 665. See, also, Broder v. Natoma Water Co. (1879) 101 U. S. 274, 25 L. Ed. 790.

This section is to be read in connection with other provisions of the mining statutes and in the light of matters of public history relating to the mineral lands of the United States. Jenison v. Kirk (1878) 98 U. S. 453, 457, 25 L. Ed. 240.

An amplification of this section seems to have been made by Act May 11, 1898, c. 292. U. S. v. Portneuf-Marsh Valley Irr. Co. (D. C. 1913) 205 Fed. 416.

This section is not repealed by subsequent legislation. U. S. v. Utah Power & Light Co. (D. C. 1913) 208 Fed. 821.

The right to easements for needed irrigation reservoir purposes were natural rights existing prior to this act and the amendment made by the next section, which seem to grant, but in fact only recognize and confirm, such right. Edwards v. Roberts (1914) 144 P. 856, 26 Colo. App. 538.

This section was intended to protect persons in their rights to the use of water and not to enable contractors who construct ditches for an agreed compensation to acquire title to rights of way for such ditches. Crane Falls Power & Irr. Co. v. Snake River Irr. Co. (1913) 133 P. 655, 24 Idaho, 63.

This and the following section do not authorize one person to go on the private property of another to make an appropriation except by condemnation proceedings. Prentice v. McKay (1909) 98 P. 1081, 38 Mont. 114. See, also, Noteware v. Sterns (1871) 1 Mont. 311.

2. Grant of water rights.—The act of July 26, 1866, as amended July 9, 1870, gave to a person the right to construct and use a reservoir on public land, and the right was excepted in the patent issued to another. Farley v.

Spring Valley Min. & Irr. Co. (1881) 58 Cal. 142.

This and the following section do not operate to give the owner of a mill site, who has acquired a vested right to water for the operation of the mill, a superior title to the land on which the mill is situated, as against a claimant of a lode location in the land on which the mill is located. Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 89 Am. St. Rep. 207.

While this and the succeeding section protect vested water rights, yet it can neither grant nor protect a right appurtenant to that in connection with which the water was to be beneficially used; and while a vested right to the use of water for milling purposes carries with it the right of way for a ditch through which to divert water, yet it does not carry with it as an appurtenance a right to the land on which a mill is constructed. Id.

The rights which this and the following section recognize that one may acquire in government land for conducting and storing water, and subject to which the patentee shall take the land, spring from necessity only; so that no right is acquired by one turning water onto the land from an irrigation ditch, merely for convenience. Boglino v. Giorgetta (1904) 78 P. 612, 20 Colo. App. 338.

The right to the use of water for mining or other purposes, as permitted by this section, is not unrestricted, but it must be exercised within reasonable limits. Rio Grande Western R. Co. v. Telluride Power, etc., Co. (1897) 51 P. 146, 16 Utah, 125, 137. See Basey v. Gallagher (1874) 87 U. S. 670, 22 L. Ed. 452.

II. APPROPRIATION OF WATERS

3. Right to appropriate waters.—Proprietors have the right to appropriate water of a stream and convey it for mining purposes to points where it cannot be restored to the stream. Atchison v. Peterson (1874) 87 U. S. 507, 22 L. Ed. 414; Clark v. Allaman (1905) 80 P. 571, 71 Kan. 206, 240, 70 L. R. A. 971.

The doctrine of appropriation recognized by this section applies only to public lands and waters of the United States. Winters v. U. S. (1906) 143 Fed. 740, 74 C. C. A. 666. See, also, Cruse v. McCauley (C. C. 1899) 96 Fed. 369; U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, 126 (affirmed [1908] 161 Fed. 829, 88 C. C. A. 647); Carson v. Gentner (1898) 52 P. 506, 33 Or. 512, 43 L. R. A. 130.

As long as land belongs to the United States as a part of the public domain, the water flowing over the same in nonnavigable streams is subject to appropriation for the purposes recognized and acknowledged by the local laws, customs, or decisions of the courts, and the mere fact that a stream traversing such public lands may border at some point or for some space on a specific territory reserved by the government for some particular governmental use or purpose will not of itself destroy the public character of its waters. U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, decree affirmed (1908) Conrad Inv. Co. v. U. S. (1908) 161 Fed. 829, 88 C. C. A. 647.

The right to appropriate water includes the right to do that which is reasonably necessary to effectuate the diversion by the construction of a dam or other means of turning the water from its natural channel. Id.

The locator of a mining location is not entitled to the water flowing from a spring in a natural channel merely because the spring is within the exterior boundaries of his mining claim, in the absence of a proper appropriation of the water flowing from such spring. Campbell v. Goldfield Consol. Water Co. (1913) 136 P. 976, 978, 36 Nev. 458.

The provision as to prior appropriation of waters, has no application to waters running through the lands of individual owners, and as against them can confer no right to divert the waters of streams flowing through their lands. Curtis v. La Grande Hydraulic Water Co. (1890) 20 Or. 34, 23 Pac. 808, 25 Pac. 378, 10 L. R. A. 484.

A person locating on a mining stream is entitled to a reasonable and proper use of the channel and water, and equity will not restrain mining operations on the ground that some sand and tailings incident to such operations happen to be washed on the land of the lower proprietor. Carson v. Hayes (1901) 65 P. 814, 39 Or. 97, 104. See Atchison v. Peterson (1874) 87 U. S. 507, 22 L. Ed. 414; McCauley v. McKeig (1889) 21 P. 22, 8 Mont. 389.

An appropriation of water is a grant by the general government to a settler on public land of the right to its use from a nonnavigable stream, to the injury of all public land above the point of diversion, which may be within or beyond the boundaries of the settler's claim. Morgan v. Shaw (1906) 83 P. 534, 47 Or. 333.

The government has, by the provisions of this and the following sections, recognized the rights of appropriating water and taking the same from its natural channel. Lone Tree Ditch Co. v. Cyclone Ditch Co. (1902) 91 N. W. 352, 15 S. D. 519, 525; Stenger v. Tharp (1903) 94 N. W. 402, 17 S. D. 13, 20.

4. Extent of right of appropriation of water.—This section does not confer upon a person the right to enter upon the lands in the possession of another for the purpose of securing water thereon, but simply provides for protecting such rights in the use of water as may have vested and accrued by

priority of possession and are recognized and acknowledged by local customs, laws, and decisions. Taylor v. Abbott (1894) 37 P. 408, 103 Cal. 421, 423; McGuire v. Brown (1895) 39 P. 1060, 106 Cal. 660, 668, 30 L. R. A. 384. See, also, De Wolfskill v. Smith (1907) 89 P. 1001, 5 Cal. App. 175, 182.

This section recognizes and assents to the appropriation of water for mining and irrigation purposes, under laws of the states, in contravention of the common-law rule as to continuous flow, but it cannot be construed to confer upon any state the right to appropriate all the waters of streams tributary to a navigable water course, so as to destroy its navigability. United States v. Rio Grande Dam & Irrigation Co. (1889) 19 Sup. Ct. 770, 775, 174 U. S. 690, 43 L. Ed. 1136. See, also, Boquillas Land & Cattle Co. v. Curtis (1909) 29 Sup. Ct. 493, 494, 213 U. S. 339, 53 L. Ed. 822.

A mining company which has lawfully appropriated the waters of a stream for mining purposes may enjoin another mining company from sinking a shaft for the purpose of developing its own claim, where such shaft will or does in fact cut off and divert the waters of such stream. Copper King v. Wabash Min. Co. (C. C. 1902) 114 Fed. 991, 993.

An unreasonable monopoly of the waters upon public lands will not be sustained, where the party manifestly undertakes to control the same unfairly to prevent others from using them. Revenue Min. Co. v. Balderston (1905) 2 Alaska, 363.

The first appropriator of water on the public domain for purposes of mining is entitled to the exclusive use of so much thereof as is necessary to carry on his work. Id.

A subsequent appropriator of excess or waste waters upon the public domain for purposes of mining must not do so in a manner to injure the first appropriator's property therein or his use thereof. Id.

A prior appropriator of the waters of a public stream on the public domain to a beneficial use has the prior right to the continued use of the waters. Eglar v. Baker (1910) 4 Alaska, 142.

The locator of a placer mining claim and his grantees have the right to use the waters of a stream flowing through such claim in their mining operations on the claim, and such right is appurtenant to and will pass with a conveyance of the claim. Anderson v. Campbell (1913) 4 Alaska, 660.

The waters of a spring may be appropriated. Le Quime v. Chambers (1908) 98 P. 415, 15 Idaho, 405.

A state may change the common-law rule as to riparian rights and permit appropriation of waters, but cannot destroy the right to the use of water for government property. In re Willow Creek (Or. 1914) 144 P. 505 order modified on rehearing (Or. 1915) 146 P. 475.

The law applicable to the appropriation of surface streams and the vested rights protected by this section have no application to percolating waters arising in the land of an owner and carried through artificial drains constructed by him for the purpose of improving his property, or for his own convenience. Crescent Min. Co. v. Silver King Min. Co. (1898) 54 P. 244, 17 Utah, 444, 456, 70 Am. St. Rep. 810. See Willow Creek Irrig. Co. v. Michaelson (1900) 60 P. 943, 21 Utah, 248, 256, 51 L. R. A. 280, 81 Am. St. Rep. 687.

Water percolating from a mining claim, after passing into an underground artificial tunnel used in developing a mine, is not subject to appropriation by another while it remains in the tunnel upon the owner's land; but if allowed to flow out of such tunnel and away from the appropriator's land into a lake upon the public land the water is then subject to appropriation, but the appropriator would not thereby acquire an easement in the mining claim or a prescriptive right to have a continuous flow of the water from the tunnel into the lake. Id.

5. What constitutes appropriation of water.—Three elements are essential to constitute a valid appropriation of water on the public lands: First, an intention to apply it to some beneficial use; second, a diversion from the natural channel by means of a ditch, canal, or other structure; third, an application of it within a reasonable time to some useful purpose. McFarland v. Alaska Perseverance Mining Co. (1908) 3 Alaska, 308; Miocene Ditch Co. v. Campion Mining & Trading Co., Id., 572; Hoogendorn v. Nelson Gulch Mining Co. (1910) 4 Alaska, 216. See, also, Ketchikan Co. v. Citizens' Co. (1903) 2 Alaska, 120; Simmons v. Winters (1891) 27 P. 7, 21 Or. 35, 28 Am. St. Rep. 727; Oviatt v. Big Four Min. Co. (1901) 65 P. 811, 39 Or. 118, 126; Offield v. Ish (1899) 57 P. 809, 21 Wash. 277.

An appropriation of water and the damming of a stream so as to overflow lands on the public domain for the purpose of manufacturing flour and lumber, is an appropriation within this Act. Parkersville Drainage Dist. v. Wattier (1906) 86 P. 775, 48 Or. 332.

6. Presumption as to appropriation of waters.—In a controversy over a ditch for mining purposes it may be assumed that the water was appropriated and conducted by means of ditches between the termini thereof, in accordance with the custom of the district and the laws of the state. Gest v. Packwood (C. C. 1888) 34 Fed. 368, 371.

A placer mining location ex vi ter-

mini importe an appropriation of all waters covered by it, so far as such waters are necessary for working the claim, especially when the location covers both banks of the stream. Schwab v. Beam (C. C. 1898) 86 Fed. 41, denied in Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136.

The mere location of a placer mine crossed by a nonnavigable stream, in Alaska, does not vest the locator with such riparian ownership in the waters as to compel a court of equity to enjoin their subsequent appropriation and diversion for mining purposes. McFarland v. Alaska Perseverance Mining Co. (1907) 3 Alaska, 308.

7. Title by prescription.—So long as the title to land through which a stream flows remains in the United States, there can be no use of the waters of the stream which will ripen into a title by prescription, either against the government or its grantee. Union Mill & Mining Co. v. Ferris (C. C. 1872) Fed. Cas. No. 14,371.

III. EASEMENTS GRANTED AND PROTECTED

8. Rights of way for canals and ditches.—The statute was an unequivocal grant of the right of way for a canal to convey water for mining purposes, and confirmed to the owners of such canal all preexisting rights which the government had by its policy theretofore recognized; and accordingly a person taking title to land subsequent to the enactment of this statute took the title subject to any existing right of way. Broder v. Water Co. (1879) 101 U. S. 274, 275, 25 L. Ed. 790; Osgood v. El Dorado Water, etc., Min. Co. (1880) 56 Cal. 571, 581; Coffin v. Left Hand Ditch Co. (1882) 6 Colo. 443, 447; Carson v. Gentner (1898) 52 P. 506, 33 Or. 512, 519, 43 L. R. A. 130.

Vested rights in public lands to right of way for ditches, canals, or reservoirs for water purposes, under this and the following section, are not acquired until the actual completion of the work, so that the water can be applied to beneficial use. Bear Lake & River Waterworks & Irrigation Co. v. Garland (1896) 17 Sup. Ct. 7, 14, 164 U. S. 1, 41 L. Ed. 327; U. S. v. Rickey Land & Cattle Co. (C. C. 1908) 164 Fed. 496. See, also, Crane Falls Power & Irr. Co. v. Snake River Irr. Co. (1913) 133 P. 655, 24 Idaho, 63.

The provisions of this and the following section had no reference to ditches constructed by the government. Green v. Willhite (C. C. 1906) 160 Fed. 755; Green v. Wilhite (1908) 93 Pac. 971, 14 Idaho, 238.

A discoverer of percolating waters on public lands, by digging a well for the purpose of collecting the same for use, acquires an easement in the land for the maintenance of his well, and a right to the water, as against a subsequent locator of the land. Brosnan v. Harris (1901) 65 P. 867, 39 Or. 148, 87 Am. St. Rep. 649, 54 L. R. A. 628; Sullivan v. Northern Spy Min. Co. (1895) 40 Pac. 709, 11 Utah, 438. See, also, Deadwood Central R. Co. v. Barker (1901) 86 N. W. 619, 14 S. D. 558, 571; Crescent Min. Co. v. Silver King Min. Co. (1898) 54 P. 244, 17 Utah, 444, 456, 70 Am. St. Rep. 810.

The last clause of the section conferred no additional rights on owners of ditches subsequently constructed, but simply rendered them liable to parties on the public domain whose possessions might be injured by such construction. Jennison v. Kirk (1878) 98 U. S. 453, 460, 25 L. Ed. 240.

One who acquires a right to a water ditch and water right through public land, after the grant of a right of way to a railroad, takes it subject to the prior right of the railroad. Bybee v. Oregon & C. R. Co. (1891) 11 Sup. Ct. 641, 644, 139 U. S. 663, 35 L. Ed. 305.

One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the protection afforded vested ditch and water rights by this section as against subsequent purchasers from a railway company. San José Land & Water Co. v. San José Ranch Co. (1903) 23 Sup. Ct. 487, 490, 189 U. S. 177, 47 L. Ed. 765.

Congress by this section, granted the right of way over public land for ditches used in appropriating and applying waters for beneficial uses, including mining. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136.

By this section ditches for mining purposes are declared to be real property, and the laws relative to the sale and transfer of real estate apply to the transfer of such ditches. Gest v. Packwood (C. C. 1888) 34 Fed. 368, 371.

An appropriation of a right of way for a flume, made upon railroad land, subsequently forfeited to the government, is effective, so far as the government is concerned; and a homesteader whose settlement is begun before the forfeiture, but subsequent to the location and construction of the flume, takes subject to the burden of such flume. Maffet v. Quine (C. C. 1899) 95 Fed. 199, denying rehearing (C. C. 1899) 93 Fed. 347.

A right of way for a flume to conduct water for mining purposes is an easement fully protected by this section of the statute. Rockwell v. Graham (1885) 10 P. 284, 9 Colo. 36, 37.

This and the following section operate as a grant of the right of way for the construction of irrigating canals or ditches over any lands owned by the United States and unoccupied in 1866,

whenever the right to build such ditch should accrue under the local customs, laws, or decisions of courts, and such right continued so long as title remained in the government, subject only to payment of damages to the possessory right of the occupying claimant. Tynon v. Despain (1896) 22 Colo. 240, 43 Pac. 1039.

A person is not entitled to an easement over any public lands for a reservoir used in connection with water rights, under this and the following section, until he has first acquired a vested and accrued water right. Nippel v. Forker (1899) 56 P. 577, 26 Colo. 74.

This and the next succeeding section provides that the right of way for the construction of ditches and canals for the use of water for mining and other purposes are protected, and all patents granted and all preemptions or homesteads allowed shall be subject to any vested or accrued water rights, or rights to ditches or reservoirs used in connection with such rights. Boglino v. Giorgetta (1904) 78 P. 612, 20 Colo. App. 338, 344.

This and the following section operate as a grant of the right of way for the construction of a reservoir for the irrigation of lands owned by the United States and unoccupied in 1866 whenever the right to such reservoir shall have accrued under the local customs, laws, or decisions of courts. Edwards v. Roberts (1914) 144 P. 856, 26 Colo. App. 538.

This section vests in the person the right of way for a ditch when he accepts the offer of donation therein made by the government by constructing the ditch. Welch v. Garrett (1897) 51 P. 405, 5 Idaho, 639, 641. See McDougal v. Lame (1901) 64 P. 864, 39 Or. 212, 216.

This section does not confer title to a right of way for segments of canals merely because the claimants constructed them. Crane Falls Power & Irr. Co. v. Snake River Irr. Co. (1913) 133 P. 655, 24 Idaho, 63.

Such title as is conferred on an owner of water rights to land occupied by ditches located on the public domain by this section does not vest until the completion of the ditch, and unreasonable delay in its completion forfeits all claim to such right of way. Id.

Unless one has a vested and accrued water right, he is not entitled to an easement over public lands for the construction of ditches under this section. Crane Falls Power & Irr. Co. v. Snake River Irr. Co. (1913) 133 P. 655, 24 Idaho, 63. See, also, Clear Creek Land & Ditch Co. v. Kilkenny (1894) 36 Pac. 819, 5 Wyo. 38.

Under this and the following section, one who completes a ditch across public lands for irrigation purposes, and who is in possession when another makes his homestead entry thereon, acquires a right of way across the lands, and the homesteader takes subject to such right of way. Cottonwood Ditch Co. v. Thom (1909) 101 P. 825, 39 Mont. 115, judgment affirmed on rehearing (1909) 104 P. 281, 39 Mont. 121. See, also, Rasmussen v. Blust (1909) 122 N. W. 862, 85 Neb. 198.

One who constructs upon vacant public lands of the United States a system of reservoirs and ditches for the distribution of water appropriated by him for irrigation purposes, and secures the approval of his plan and appropriation by the state irrigation board, and uses such reservoirs and ditches before the lands are entered, has a vested right within this and the following section. Rasmussen v. Blust (1909) 122 N. W. 862, 85 Neb. 198.

Under this section one might construct his ditch for agricultural or other specified purposes across the public lands, and not be responsible for consequent damages to any one afterwards coming into possession of the land. Shoemaker v. Hatch (1878) 13 Nev. 261.

Where an irrigation company built its canal on government land after a person had filed his homestead entry on it, but before patent was issued to him, the patent was not subject to the rights of the company. Atkinson v. Washington Irr. Co. (Wash. 1906) 86 P. 1123; Baker v. Same, Id. 1125.

Priority of right is acquired by priority of possession taken for the purpose of constructing a ditch across public lands, the work of construction being completed within a reasonable time. Lynch v. Lower Yakima Irr. Co. (1913) 131 P. 829, 73 Wash. 173.

Land does not revert to the United States by the relinquishment of a desert land entry by one making a contemporaneous homestead entry, so as to give another the right to construct ditch through it under the federal laws. Clear Creek Land & Ditch Co. v. Kilkenny (1894) 5 Wyo. 38, 36 Pac. 819.

9. Rights of way for electric power companies.—See, also, notes to § 4944, post.

Rights of way for electric power companies can be acquired only by a grant from the Secretary of the Interior under Act May 14, 1896, c. 179, § 2, 29 Stat. 120, which, as to such companies, supersedes this section. U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 126 C. C. A. 376, overruling (D. C. 1913) 208 Fed. 821.

Defendant having obtained a right of way over public land for a pipe line to conduct water for power purposes under this act, such right was not affected by the subsequent incorporation of the land into a forest reserve. U. S. v. Utah Power & Light Co. (D. C. 1913) 208 Fed. 821.

10. Water rights determined by priority of appropriation.—The rule is

that the right to running waters on the public lands for mining purposes may be acquired by prior appropriation, as against parties not having the title of the government; and the right exercised within reasonable limits will be protected by the courts. Basey v. Gallagher (1874) 87 U. S. 670, 683, 22 L. Ed. 452; Howell v. Johnson (C. C. 1898) 89 Fed. 556, 558; McFarland v. Alaska Perseverance Min. Co. (1907) 3 Alaska, 308, 334; Osgood v. El Dorado Water, etc., Min. Co. (1880) 56 Cal. 571; Barnes v. Sabron (1875) 10 Nev. 217, 230.

To carry water to mining localities when they were not on the bank of a stream or lake became an important and necessary business in mining operations, and the first appropriator of water to be conveyed to such localities for mining or other beneficial purposes was recognized as having to the extent of actual use the better right. Jennison v. Kirk (1878) 98 U. S. 453, 458, 25 L. Ed. 240; McFarland v. Alaska Perseverance Min. Co. (1907) 3 Alaska 308, 330; Hill v. Lenormand (1888) 16 P. 266, 2 Ariz. 354, 358. See Jacob v. Day (1896) 44 P. 243, 111 Cal. 571, 578.

In order to establish any rights under this section it is necessary to prove priority of possession. Telluride Power Transmission Co. v. Rio Grande W. R. Co. (1900) 20 Sup. Ct. 245, 247, 175 U. S. 639, 44 L. Ed. 305; Butte City Water Co. v. Baker (1905) 25 Sup. Ct. 211, 212, 196 U. S. 119, 49 L. Ed. 409; Creede & C. C. M. & M. Co. v. Uinta T. M. & T. Co. (1905) 25 Sup. Ct. 266, 275, 196 U. S. 337, 49 L. Ed. 501. See, also, Telluride Power Transmission Co. v. Rio Grande W. R. Co. (1903) 23 Sup. Ct. 178, 182, 187 U. S. 569, 47 L. Ed. 307.

The first appropriator of any mine, or of water in the streams on public lands for mining purposes, has a better right than others to work the mines or use the water, and he is regarded, except as against the government, as the source of all title in all controversies relating to the property. Atchison v. Peterson (1874) 87 U. S. 507, 510, 22 L. Ed. 414; Basey v. Gallagher (1874) 87 U. S. 670, 681, 22 L. Ed. 452.

The owner of a mining claim and the owner of a water right enjoy their respective properties from the dates of their appropriations, the first in time being the first in right; but where both rights can be enjoyed without interference with, or material impairment of each other, such enjoyment is permitted. Jennison v. Kirk (1878) 98 U. S. 453, 461, 25 L. Ed. 240. See Barnes v. Sabron (1875) 10 Nev. 217, 230.

On the filing of a homestead entry on land, for which a patent is subsequently issued, riparian rights in a stream flowing over the land become vested and the waters thereof are no longer subject to the right of appropriation. Sturr v. Beck (1890) 10 Sup. Ct. 350, 353, 133 U. S. 541, 33 L. Ed. 761.

An increased appropriation of water for operating a placer mining claim, which is initiated and maintained by an unlawful trespass upon the lands of another in the nature of an unauthorized enlargement of an existing ditch, creates no right as against the owner of the property on which such trespass is committed. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 70, 104 C. C. A. 136.

Where parties contesting the right to appropriate water, both based upon placer locations, the claim of the one first making the appropriation is superior. Schwab v. Beam (C. C. 1898) 86 Fed. 41, 44. See Thorndyke v. Alaska Perseverance Min. Co. (1908) 164 Fed. 657, 90 C. C. A. 473; Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 69, 104 C. C. A. 136.

The riparian rights of the owner of land acquired by settlement and entry under the public land laws accrue, at latest, at the time of his application for entry. Cruse v. McCauley (C. C. 1899) 96 Fed. 369.

Priority of appropriation gives priority of right. The origin of all rights possible to be acquired in the waters must be traced to the first act of appropriation by the water claimant. If these rights spring into existence after rights have become vested in others, the water rights are subordinate to the rights of the others already vested. Miocene Ditch Co. v. Jacobson (1905) 2 Alaska, 567.

Appropriation of the use of water for mining and irrigation, under established customs is a vested right, and all after-acquired rights or titles are subject thereto. Hill v. Lenormand (1888) 16 Pac. 266, 2 Ariz. 354.

By this section all rights to the use of water acquired by prior appropriation for mining or other purposes were confirmed. Id.

Water rights acquired by appropriation after the passage of the act of 1866 are valid, and will be protected as against one who afterwards obtains title to the land from the United States. De Necochea v. Curtis (1889) 80 Cal. 397, 20 Pac. 563, 22 Pac. 198.

The waters of a spring may be appropriated, and such appropriation will be recognized and protected. Le Quime v. Chambers (1908) 98 P. 415, 15 Idaho, 405.

The statute merely confirmed to landowners the rights and privileges they had formerly enjoyed, which had been held to be governed as to running waters in the Pacific coast states, not by the principles of the common law, but by prior appropriations. Jones v. Adams (1885) 19 Nev. 78, 6 Pac. 442, 3 Am. St. Rep. 788.

Settlers on public land, by appropriating water for irrigation, acquire a right

thereto against subsequent settlers. Davis v. Chamberlain (Or. 1908) 98 P. 154.

The rights of parties must be determined by priority of location as between water rights for mining or other purposes and pre-emption rights. Driskill v. Rebbe (1908) 117 N. W. 135, 22 S. D. 242, 252. See Scott v. Toomey (1896) 67 N. W. 838, 8 S. D. 639.

The prior appropriator of the flow of any water over the public lands of the United States has, by a local custom which is recognized by the United States, a vested right therein, which cannot be defeated by one who, having consented to such appropriation, subsequently files a homestead entry and obtains a patent for the land. Thorpe v. Tenem Ditch Co. (1889) 1 Wash. St. 566, 20 Pac. 588.

The right acquired by prior appropriation on the public domain is held to be founded in grant from the United States as owner of the land and water. Willey v. Decker (1903) 73 P. 210, 11 Wyo. 496. See, also, Coffin v. Left Hand Ditch Co. (1882) 6 Colo. 443; Thomas v. Guiraud, Id. (1883) 530; Smith v. Deniff (1900) 60 P. 398, 24 Mont. 20, 81 Am. St. Rep. 408; Jones v. Adams (1882) 28 P. 64, 17 Nev. 78; Reno Smelting, etc., Works v. Stevenson (1889) 21 P. 317, 20 Nev. 269, 4 L. R. A. 60, 19 Am. St. Rep. 364; Moyer v. Preston (1896) 44 P. 845, 6 Wyo. 308, 71 Am. St. Rep. 914.

II. Vested water rights protected.—This section protects priority of possession in rights to the use of water for mining, agricultural, manufacturing, or other purposes, where such rights have vested and are recognized by the local customs, laws, and decisions. Kansas Pac. R. Co. v. Dunmeyer (1885) 5 Sup. Ct. 566, 572, 113 U. S. 629, 28 L. Ed. 1122; Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 228, 175 U. S. 571, 44 L. Ed. 276; Lux v. Haggin (1886) 4 P. 919, 10 P. 674, 69 Cal. 255; Jacob v. Lorenz (1893) 33 P. 119, 98 Cal. 332, 335; McGuire v. Brown (1895) 39 P. 1060, 106 Cal. 660, 30 L. R. A. 384; Smith v. Hawkins (1895) 42 P. 453, 110 Cal. 122, 125; Crane Falls Power & Irrigation Co. v. Snake River Irrigation Co. (1913) 133 P. 655, 24 Idaho, 63; Meng v. Coffey (1903) 93 N. W. 713, 67 Neb. 500, 60 L. R. A. 910, 108 Am. St. Rep. 697; Crawford Co. v. Hathaway (1903) 93 N. W. 781, 67 Neb. 325, 60 L. R. A. 889, 108 Am. St. Rep. 647; Carson v. Gentner (1898) 52 P. 506, 33 Or. 512, 43 L. R. A. 130; Brosnan v. Harris (1901) 65 P. 867, 39 Or. 148, 87 Am. St. Rep. 649, 54 L. R. A. 628; Parkersville Drainage Dist. v. Wattier (1906) 86 P. 775, 48 Or. 332. See, also, Miocene Ditch Co. v. Jacobsen (1906) 146 Fed. 680, 77 C. C. A. 106; Union Mill & Mining Co. v. Ferris (C. C. 1872) Fed. Cas. No. 14,371; Ison v. Nelson Min. Co. (C. C. 1891) 47 F. 199; Scott v. Toomey (1896) 8 S. D. 639, 67 N. W. 838.

One who has acquired a right to the water of a stream flowing through the public lands by prior appropriation, in accordance with the laws of the state, is protected in such right by this and the following section, as against subsequent appropriators, though the latter withdraw the water within the limits of a different state. Bean v. Morris (1911) 31 Sup. Ct. 703, 704, 221 U. S. 485, 55 L. Ed. 821; Bean v. Morris (1908) 159 Fed. 651, 86 C. C. A. 519 (affirmed [1911] 31 Sup. Ct. 703, 221 U. S. 485, 55 L. Ed. 821); Howell v. Johnson (C. C. 1898) 89 Fed. 556; Morris v. Bean (C. C. 1903) 123 Fed. 618; Anderson v. Bassman (C. C. 1905) 140 Fed. 14, 20.

When a water right and a ditch right connected therewith are acquired while the lands embracing the point of diversion and a portion of the ditch are public lands, those rights are not affected by the subsequent location, entry, and patenting of such lands. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136.

Where the waters of a stream are appropriated in connection with a placer mining claim the owner of the claim is entitled to have them continue without diminution subject to the reasonable use of riparian owners higher up the stream. Schwab v. Beam (C. C. 1898) 86 Fed. 41, 43.

The law merely confirms to the owners of mining claims, ditches, and water rights on the public lands of the United States the same rights which were previously accorded to them by the local customs, laws, and decisions of the courts. Titcomb v. Kirk (1876) 51 Cal. 288. See, also, Imperial Water Co. No. 5 v. Holabird (1912) 197 Fed. 4, 116 C. C. A. 526.

Water rights become private property when acquired. Thayer v. California Development Co. (1912) 128 P. 21, 164 Cal. 117.

A corporation which constructed a ditch for conveying water for mining purposes by actual appropriation and user of government lands before their sale in private ownership had a vested, possessory title thereto under this section. Happy Valley Land & Water Co. v. Nelson (1915) 147 P. 966, 169 Cal. 694.

This and the following section are a recognition of the legality of water rights given by local customs and laws, and the lands granted to railroads continued subject to the rights and easements given by such customs and laws, including rights of way for irrigating ditches. Tynon v. Despain (1896) 23 Colo. 240, 43 Pac. 1039.

Vested rights to the use of water for mining and other purposes are protected by this section and such rights are not lost by nonuser alone, short of the period for the limitation of action to recover the real property. Dodge

v. Marden (1879) 7 Or. 456, 457, 458. See Lewis v. McClure (1881) 8 Or. 273, 274.

The right to a ditch which was constructed and in actual use across unoccupied public land, and was used continually thereafter as an irrigation ditch, became a vested right within the statute as against one subsequently deriving title to a right of way across the land by grant from the government and not in position to dispute such water right. Chicago, B. & Q. R. Co. v. McPhillamey (Wyo. 1911) 118 P. 682.

Under this and the following section, land occupied as a reservoir site under a state permit at the time the land is selected and granted to the state is, when leased by the state, subject to vested and accrued water, ditch, and reservoir rights. Bucknum v. Johnson (1912) 127 P. 904, 21 Wyo. 26.

12. Water rights protected against other claimants.—It is only vested and accrued rights to the use of water which are reserved by the operation of this and the following section that without these provisions would vest in the homestead claimant. McGuire v. Brown (1895) 39 P. 1060, 106 Cal. 660, 667, 30 L. R. A. 384.

The purchaser of a mine from a patentee takes the title to such mine subject to any vested water rights or ditches existing prior to the patent for such mine. Jacob v. Day (1896) 44 P. 243, 111 Cal. 571, 579.

Where the water rights under which one claimed title were located prior to any settlement on the lands by others, he is entitled to priority. Driskill v. Rebbe (S. D. 1908) 117 N. W. 135.

13. Time of acquiring water rights.—The rights of miners who have worked and developed mines, and who have constructed canals and ditches to be used in mining operations in regions where artificial water is a necessity, are rights which the government recognized and encouraged, and which it was bound to protect before the passage of the act of 1866. Broder v. Water Co. (1879) 101 U. S. 274, 276, 25 L. Ed. 790; U. S. v. Rio Grande Irrig. Co. (1899) 19 Sup. Ct. 770, 174 U. S. 690, 43 L. Ed. 1136; Van Dyke v. Midnight Sun Min., etc., Co. (1910) 177 Fed. 85, 89, 100 C. C. A. 503; Mohl v. Lamar Canal Co. (C. C. 1904) 128 Fed. 776, 779; Isaacs v. Barber (1894) 38 P. 871, 10 Wash. 124, 131, 30 L. R. A. 665, 45 Am. St. Rep. 772.

This act is prospective in its operation, and does not in any manner qualify or limit the effect of an estate granted before its passage. Natoma Water & Mining Co. v. Bugbey (1877) 96 U. S. 165, 167, 168, 24 L. Ed. 621; Union Mill & Mining Co. v. Ferris (C. C. 1872) Fed. Cas. No. 14,371; Ison v. Nelson Min. Co. (C. C. 1891) 47 Fed. 199. See, also, Union Mill & Mining Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370.

Act July 26, 1866, conferred rights to waters appropriated for agricultural purposes, and operates to confirm such rights, initiated and maintained prior to the passage of the act. Cave v. Crafts (1878) 53 Cal. 135.

It is not necessary that the right for which protection is claimed should have vested before the passage of the act. Jacob v. Lorenz (1893) 98 Cal. 332, 33 Pac. 119.

14. Nature of water rights protected.—This and the following section recognize and protect vested water rights used for mining purposes, but they do not give a right or easement to deposit mining débris on the lands of another. In re Helena, etc., Smelting, etc., Co. (C. C. 1891) 48 Fed. 609, 610.

This section makes a clear distinction between the discharge of superfluous water encountered in quartz and drift mines and the water conveyed through ditches and flumes for the purpose of operating a hydraulic mine, and vested rights in the latter are protected by this section. Jacob v. Day (1896) 44 P. 243, 111 Cal. 571, 577.

15. Change in water rights not permitted.—An appropriator of water on public land has no right to go upon the land after its entry by another as a homestead, but before the claimant has made final proof, to change the point of diversion and construct new ditches. McGuire v. Brown (1895) 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384. See, also, Wood v. Etiwanda Water Co. (1898) 54 P. 726, 122 Cal. 152.

The owners of a right of way for a ditch located on public land before patent have no right by reason of such easement to change the location of the ditch without the consent of the patentee. Vestal v. Young (1905) 82 P. 381, 147 Cal. 715.

This and the next succeeding section fully protect vested water rights and the right to maintain a dam in a stream as originally maintained, but give them no right to construct and maintain a new dam in such manner as to place a greater servitude than was originally borne by the lands of the riparian owner. Greeley Irrig. Co. v. Von Trotha (1910) 108 P. 985, 48 Colo. 12, 18.

Where lands have been withdrawn from the public domain by entry, if a ditch and its uses were a burden thereon by grant from the government at the time of the entry, such burden cannot be added to in favor of a third person. Campbell v. Flannery (1905) 79 P. 702, 32 Mont. 119, motion for rehearing denied (1905) 80 P. 240, 32 Mont. 119.

IV. LOCAL LAWS AND CUSTOMS

16. State laws affecting water rights.—This statute recognizes, so far as the

United States is concerned, the validity of local customs and decisions in respect to the appropriation of water. U. S. v. Rio Grande Irrig. Co. (1899) 19 Sup. Ct. 770, 174 U. S. 690, 704, 43 L. Ed. 1136; Gutierres v. Albuquerque Land & Irrigation Co. (1903) 23 Sup. Ct. 338, 341, 188 U. S. 545, 47 L. Ed. 588.

Under this and the following section, patentee of public lands in a state acquires only such riparian rights as are given by the laws of the state. Empire Water & Power Co. v. Cascade Town Co. (1913) 205 Fed. 123, 123 C. C. A. 355, reversing decree in part Cascade Town Co. v. Empire Water & Power Co. (C. C. 1910) 181 Fed. 1011.

A state by its statute cannot take from a private individual the water rights granted him by the general government. Howell v. Johnson (C. C. 1898) 89 Fed. 556, 559.

The waters of a nonnavigable stream, flowing through the public lands, are a part of the public domain, and the right to their use may be sold or granted by the general government separate from the rest of the estate. Howell v. Johnson (C. C. 1898) 89 Fed. 556. See, also, Bean v. Morris (1908) 159 Fed. 651, 654, 86 C. C. A. 519; Cruse v. McCauley (C. C. 1899) 96 Fed. 369; Morris v. Bean (C. C. 1903) 123 Fed. 618; Morris v. Bean (C. C. 1906) 146 Fed. 423.

One who diverts water from a flowing stream for a beneficial purpose may have the use of it so long as he conforms to the law regulating such matters, but he has no contract with or grant from the government, federal or state, in respect to his privilege. Mohl v. Lamar Canal Co. (C. C. 1904) 128 Fed. 776. See Eaton v. Hoge (1905) 141 Fed. 64, 72 C. C. A. 74, 5 Ann. Cas. 487; Hoge v. Eaton (C. C. 1905) 135 Fed. 411, 414; Lamar Canal Co. v. Amity Land & Irrig. Co. (1899) 58 P. 600, 26 Colo. 370, 77 Am. St. Rep. 261.

Under this section, as well as the following section, the question to be determined is what appropriation is required by the usage, customs, laws, and decisions of the courts in order to bring it within the provisions of these sections. Deadwood Central R. Co. v. Barker (1901) 86 N. W. 619, 14 S. D. 558, 573.

17. Local customs and regulation of miners.—This section recognizes the customary law with respect to the use of water which had grown up among occupants of public land, and that law may be shown by evidence of local customs or by the legislation of the state or territory, or by decisions of the courts. Basey v. Gallagher (1874) 87 U. S. (20 Wall.) 670, 683, 684, 22 L. Ed. 452; Howell v. Johnson (C. C. 1898) 89 Fed. 556, 558; Isaacs v. Barber (1894) 38 P. 871, 10 Wash. 124, 130, 30 L. R. A. 665, 45 Am. St. Rep. 772. See, also, Jennison v. Kirk (1878) 98 U. S. 453, 458, 25 L. Ed. 240; Price v. McIntosh (1901) 6 P. 442, 1 Alaska, 286, 292; Jones v. Adams (1885) 19 Nev. 78, 87, 3 Am. St. Rep. 788.

Local customs, regulations, and laws are paramount in determining a right to the diversion and use of water from public streams, and this section is in recognition of this right, without intending to create any new, other, or different rights than such as existed at the time of its adoption. Broder v. Water Co. (1879) 101 U. S. 274, 5 L. Ed. 790; U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, 127, affirmed (1908) 161 Fed. 829, 88 C. C. A. 647. See, also, Mohl v. Lamar Canal Co. (C. C. 1904) 128 Fed. 776.

In the arid regions of the Western states and territories it has been the custom of the people to divert from their natural channels the waters of the streams upon the public lands and appropriate the same for the purpose of mining and other useful and beneficial uses, and these customs have been tacitly assented to by the federal government and encouraged by the express legislative policy of the different states, and are recognized as if they were rights which had been vested by the most distinct expression of the will of the lawmakers. Van Dyke v. Midnight Sun Min., etc., Co. (1910) 177 Fed. 85, 90, 100 C. C. A. 503; Irwin v. Phillips (1855) 5 Cal. 140, 63 Am. Dec. 113.

From 1848 to 1866 the regulations and customs of miners, as enforced and molded by the courts and sanctioned by state legislation, constituted the law governing property in mines and in water on the public mineral lands. Jennison v. Kirk (1878) 98 U. S. 453, 458, 25 L. Ed. 240. See Gillis v. Downey (1898) 85 Fed. 483, 486, 29 C. C. A. 28; Northmore v. Simmons (1899) 97 Fed. 386, 389, 38 C. C. A. 211.

It is not sufficient to prove simply the priority of possession to satisfy the provisions of this section, but it is still necessary to prove that the possessory right to the use of water was recognized and acknowledged by the local customs, laws, and decisions. Telluride Power, etc., Co. v. Rio Grande, etc., R. Co. (1900) 20 Sup. Ct. 245, 175 U. S. 639, 645, 44 L. Ed. 305.

Water rights depend on local laws, and in determining whether one has a water right and its extent and character, local customs, laws, and decisions of courts are controlling. In re Helena & L. Smelting & Reduction Co. (C. C. 1891) 48 Fed. 609, 611.

To bring a right of way for a ditch or canal within a reservation in a patent for public lands in pursuance of this section, it is not necessary that a local custom in the immediate vicinity be shown, but it is sufficient if such custom is established with reference to the

state as whole. Maffet v. Quine (C. C. 1899) 93 Fed. 347. See Maffet v. Quine (C. C. 1899) 95 Fed. 199.

A prior appropriator of the water of a stream, all of which he claims he has used, and needs for irrigation, is entitled to the whole as against a patentee of land through which the stream flows, though no custom to that effect is shown. Drake v. Earhart (1890) 2 Idaho, 716, 23 Pac. 541.

There is little difference between customs of miners and mining laws up to the point where the miner seeks a patent, and the mining statutes contain no extra conditions to the possessory right, but only require discovery and marking the claim upon the ground. Upton v. Larkin (1888) 17 P. 728, 7 Mont. 449, 456. See Jennison v. Kirk (1878) 98 U. S. 453, 25 L. Ed. 240.

Courts do not take judicial knowledge of the local customs which entitle prior possessors to a right to use water for mining purposes, etc. Lewis v. McClure (1880) 8 Or. 273.

One claiming the right to use water from a nonnavigable stream for irrigation purposes by reason of prior appropriation need not allege or prove that such prior appropriation was in accordance with any local custom. Brown v. Baker (1901) 65 P. 799, 39 Or. 66, rehearing denied (1901) 66 P. 193, 39 Or. 66.

18. Water right laws in force in Alaska.—This section is in force in Alaska. Revenue Min. Co. v. Balderston (1905) 2 Alaska, 363; Madigan v. Kougarok Mining Co. (1906) 3 Alaska, 63, 69 (overruling Ketchikan Co. v. Citizens' Co. [1903] 2 Alaska, 120); McFarland v. Alaska Perservance Mining Co. (1907) 3 Alaska, 308.

V. USES OF WATER CONTEMPLATED

19. Beneficial use sufficient.—The right to possession and use of water for mining purposes is not dependent on proof that it is used for mining and milling purposes, but possession and appropriation of the water to a beneficial use is sufficient, and proof of use for domestic purposes is sufficient. Silver Peak Mines v. Valcalda (C. C. 1897) 79 Fed. 886, 890, affirmed (1898) 86 Fed. 90, 29 C. C. A. 591.

Every use of water for purposes of legitimate mining sanctioned by local custom and law is recognized as a right and protected as such, as well as the ditch by which the use of the water is made practicable, and this includes the use of water and the construction of a ditch to aid in carrying off the tailings, but a tail race from a hydraulic mine across unappropriated land is a vested right protected by this section. Jacob v. Day (1896) 44 P. 243, 111 Cal. 571, 576.

20. Water rights limited by use.—This section recognizes the right of prior appropriation, and this right is limited in quantity and quality by the uses for which the appropriation is made. A different use of the water subsequently does not affect the right. The appropriation does not confer such an absolute right to the body of the water diverted that the owner can allow it to run to waste and prevent others from using it for mining or other legitimate purposes, nor does it confer such a right that it can insist upon the flow of the water without deterioration in quality where such deterioration does not defeat nor impair the uses to which the water is applied. Atchison v. Peterson (1874) 20 Wall. 507, 513, 22 L. Ed. 414; Bosey v. Gallagher (1874) 20 Wall. 670, 683, 22 L. Ed. 452; U. S. v. Bennett (1913) 207 Fed. 524, 125 C. C. A. 186.

The right of each proprietor is limited and qualified by the precisely equal right of every other riparian proprietor, and this right determines reasonable use. Union Mill & Mining Co. v. Ferris (C. C. 1872) Fed. Cas. No. 14,371; Same v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370.

Under this section an appropriator of water cannot be required to change his system of husbandry or make other use of his land which would require less water in the interest of a later appropriator. U. S. v. Bennett (1913) 207 Fed. 524, 125 C. C. A. 186.

The use of water for irrigation is not for a natural want, as in the case of quenching thirst, and water cannot be diverted to such purpose so as to destroy or render useless or materially affect the application of the water by other riparian proprietors. Union Mill & Mining Co. v. Ferris (C. C. 1872) Fed. Cas. No. 14,371.

In the exercise of his common right, every proprietor may consume so much water as is necessary for his household and domestic purposes and for watering his stock. Union Mill & Mining Co. v. Dangberg (C. C. 1873) Fed. Cas. No. 14,370.

A subsequent appropriator of excess or waste waters upon the public domain for purposes of mining must not do so in a manner to injure the first appropriator's property therein or his use thereof. Revenue Min. Co. v. Balderston (1905) 2 Alaska, 363.

An unreasonable monopoly of the waters upon public lands will not be sustained, where the party manifestly undertakes to control the same unfairly to prevent others from using them. Id.

The first appropriator of water on the public domain for purposes of mining is entitled to the exclusive use of so much thereof as is necessary to carry on his work. Id.

VI. RIPARIAN RIGHTS

21. Application to public lands.—The common-law rule as to the rights of

riparian owners does not apply to the use of water for mining purposes. Atchison v. Peterson (1874) 87 U. S. 507, 511, 22 L. Ed. 414; Jennison v. Kirk (1878) 98 U. S. 453, 458, 25 L. Ed. 240; Jones v. Adams (1885) 6 P. 442, 19 Nev. 78, 87, 3 Am. St. Rep. 788; Isaacs v. Barber (1894) 38 P. 871, 10 Wash. 124, 130, 30 L. R. A. 665, 45 Am. St. Rep. 772.

The government being the sole proprietor of all the public lands, there is no occasion of the application of the common-law doctrine of riparian proprietorship, but when riparian rights have once attached to a private owner they cannot be taken away. Atchison v. Peterson (1874) 87 U. S. 507, 512, 22 L. Ed. 414; Lone Tree Ditch Co. v. Cyclone Ditch Co. (1902) 91 N. W. 352, 15 S. D. 519, 526. See Lux v. Haggin (1886) 4 P. 919, 10 P. 674, 69 Cal. 255; Hammond v. Rose (1888) 19 P. 466, 11 Colo. 524, 526, 7 Am. St. Rep. 258; Drake v. Erhardt (1891) 23 P. 541, 2 Idaho (Hasb.) 750; Reno Smelting, etc., Reduction Works v. Stevenson (1889) 21 P. 317, 20 Nev. 269, 4 L. R. A. 60, 19 Am. St. Rep. 364; Stenger v. Thorp (1903) 94 N. W. 402, 17 S. D. 13, 22; Driskill v. Rebbe (1908) 117 N. W. 135, 22 S. D. 242, 252; Moyer v. Preston (1896) 44 P. 845, 6 Wyo. 308, 71 Am. St. Rep. 914.

The doctrines of the common law as to the rights of riparian owners respecting the use of running waters are applied in a very limited extent to the necessities of miners on the mineral lands of the public domain; the rule in force is that the prior appropriation gives the better right to running waters both in quantity and quality as may be necessary for the uses to which the water is applied. Atchison v. Peterson (1874) 87 U. S. 507, 511, 22 L. Ed. 414; Basey v. Gallagher (1874) 87 U. S. 670, 681, 22 L. Ed. 452.

The locators of a placer mining claim in Alaska acquire no riparian rights in or to the waters of a stream, but they have the right to appropriate such of the unappropriated waters of the stream as are needed for the working of their mining claim. Van Dyke v. Midnight Sun Mining & Ditch Co. (1910) 177 Fed. 85, 100 C. C. A. 503.

A person's riparian rights, as a homestead claimant of public lands, in the waters of a creek flowing partly through his land, are subject to an appropriation thereof by another, made long before the homestead right accrued. South Yuba Water & Mining Co. v. Rosa (1889) 80 Cal. 333, 22 Pac. 222.

One who has made an appropriation of the waters of a stream for irrigation acquires a prior right thereto, as against a riparian owner who obtained a patent from the United States after such appropriation, and before Act July 9, 1870. Hammond v. Rose (1888) 11 Colo. 524, 19 Pac. 466, 7 Am. St. Rep. 258.

VII. ABANDONMENT OR FORFEITURE OF RIGHTS

22. Application of doctrine.—Abandonment as applied to the doctrine of appropriation of water for mining purposes is an intentional relinquishment of a known right, and this intention must be ascertained from conduct and declarations. Mallett v. Uncle Sam Min. Co. (1865) 1 Nev. 188, 204, 90 Am. Dec. 484; Oviatt v. Big Four Min. Co. (1901) 65 P. 811, 39 Or. 118, 122. See Wimer v. Simmons (1895) 39 P. 6, 27 Or. 1, 13, 50 Am. St. Rep. 685.

The water rights for mining and other purposes obtained under this and the following section may become extinguished by an act of abandonment, but such act must show an intent to forsake. Dodge v. Marden (1879) 7 Or. 456; Oviatt v. Big Four Min. Co. (1901) 65 P. 811, 39 Or. 118, 122.

The rules of a mining district requiring a diligent and continuous prosecution of the location and development of mining claims to prevent a forfeiture or an abandonment of an appropriation of water from a natural water course is sufficiently complied with where the original appropriator at once commenced work on his mining claims and continued the same for four years, and where his grantee continued the work for the next succeeding four years and up to the time of the alleged forfeiture or abandonment by driving a tunnel 2,500 feet in length, making an upraise of 920 feet, building a 50-stamp mill, with building space for another, and constructing the necessary buildings for its large operations, cleaning out ditches, repairing flumes, excavating for and constructing pipe lines, and spending in these and other improvements on the group of mining claims about $500,000. Thorndyke v. Alaska Perseverance Min. Co. (1908) 164 Fed. 657, 664, 90 C. C. A. 473.

A placer mining location ex vi termini imports an appropriation of all waters covered by it, so far as such waters are necessary for working the claim, especially when the location covers both banks of the stream, and there can be no abandonment of the water as distinguished from the land or of the land as distinguished from the water. Schwab v. Beam (C. C. 1898) 86 Fed. 41.

Where a patent issues for a mining claim, if the owner finds mining unprofitable, and holds the property for sale as a mill site, or a site for an electric power plant or some manufacturing establishment, he does not thereby lose the water right which he had as a miner. Schwab v. Beam (C. C. 1898) 86 Fed. 41. See, also, Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136.

Owner of an irrigation ditch over public land does not acquire the fee but only a conditional easement, which will be defeated by his failure to use

it for irrigation. Crane Falls Power & Irr. Co. v. Snake River Irr. Co. (1913) 133 P. 655, 24 Idaho, 63.

Rights acquired under this section are not forfeited by failure to comply with Act March 3, 1891, granting the right of way to canal and ditch companies for irrigation purposes. Cottonwood Ditch Co. v. Thom (1909) 104 P. 281, 39 Mont. 121, affirming judgment on rehearing (1909) 101 P. 825, 39 Mont. 115.

The failure of an irrigator to file a map in the land office and secure the approval of the Secretary of the Interior does not destroy the privileges protected by this and the following section. Rasmussen v. Blust (1909) 122 N. W. 862, 85 Neb. 198, reversing judgment (1909) 120 N. W. 184, 83 Neb. 678.

The water rights for mining and other purposes, secured under this and the following section, are rights belonging to real property, and cannot be lost by nonuser alone short of the period for the limitation of actions to recover real property. Dodge v. Marden (1879) 7 Or. 456.

VIII. ADVERSE CLAIMS

23. Water rights.—Where a patent is authorized to be issued to a party in possession of water rights for mining purposes and any contest arises as to such rights, the statute leaves such contest to the ordinary tribunals which are to determine the relative rights of the parties without reference to the construction of the statute, and these tribunals are guided by the laws, regulations, and customs of the mining districts in which the controversy arises. Blackburn v. Portland Gold Min. Co. (1900) 20 Sup. Ct. 222, 175 U. S. 571, 588, 44 L. Ed. 276.

The owner of a water right under this section is not compelled to adverse an application for a patent for a mining claim. Creede & Cripple Creek, etc., Co. v. Uinta Tunnel, etc., Co. (1905) 25 Sup. Ct. 266, 196 U. S. 337, 359, 49 L. Ed. 501.

IX. FEDERAL COURTS

24. Jurisdiction.—The mere fact that in the process of litigation a construction of a mining statute of the United States may become necessary is not alone sufficient to justify a removal of the case from a state to a federal court. Little York Gold Washing, etc., Co. v. Keyes (1877) 96 U. S. 199, 24 L. Ed. 656.

The questions of priority of possession of a water right, and of conformity to local customs, laws, and decisions, do not constitute federal questions, under this section, which will give jurisdiction to a federal court, but are merely preliminary to or the possible basis of a federal question. Telluride Power-Transmission Co. v. Rio Grande W. Ry. Co. (1900) 20 Sup. Ct. 245, 246, 175 U. S. 639, 44 L. Ed. 305, dismissing appeal (1897) 51 Pac. 146, 16 Utah, 125.

A suit based upon an allegation that the defendant, in operating its quartz mill, by means of a water right claimed by it, has poured over the complainant's lands a quantity of tailings and débris, only questions the defendant's right to so use the land, and does not involve any right secured by this and the following section; and hence the cause is not removable to a federal court. In re Helena & Livingston Smelting & Reduction Co. (C. C. 1891) 48 Fed. 609.

Under this section the question whether one using a water right for the operation of his quartz mill has a right to pollute the water of the stream is purely a question of local law, and cannot be made the ground of a removal to a federal court. In re Helena & Livingston Smelting & Reduction Co. (C. C. 1891) 48 Fed. 609. See, also, Trafton v. Nougues (C. C. 1877) Fed. Cas. No. 14,134; Los Angeles Farming & Milling Co. v. Hoff (C. C. 1891) 48 Fed. 340.

One who has acquired a right to the use of water from a stream flowing through the public land for domestic or irrigation purposes, in accordance with the laws of the state, is protected therein by this and the following section, and the jurisdiction of a federal court to determine the conflicting rights of parties is not affected by the fact that their lands and their points of diversion of the water are in different states. Anderson v. Bassman (C. C. 1905) 140 Fed. 14.

See, also, notes under §§ 991, 1010, 1214, 1533.

§ 4648. (R. S. § 2340.) Patents, pre-emptions, and homesteads subject to vested and accrued water-rights.

All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section.

Act July 9, 1870, c. 235, § 17, 16 Stat. 218.

Notes of Decisions

Construction and application of section.—See, also, notes to § 4647, ante.

The provisions of this and the preceding section had no reference to

ditches or canals constructed by the government. Green v. Willhite (C. C. 1906) 160 Fed. 755; Green v. Wilhite (1908) 93 Pac. 971, 14 Idaho, 238.

The provisions of the mining acts must be considered and construed together; and those acts merely confirm to the owners of mining claims, ditches, and water rights on the public lands of the United States the same rights which were previously accorded to them by the local customs, laws and decisions of the courts. Titcomb v. Kirk (1876) 51 Cal. 288. See, also, Coffin v. Left Hand Ditch Co. (1882) 6 Colo. 443; Thomas v. Guiraud, Id. (1883) 530.

The vested and accrued water rights to which patents are made subject mean the vested and accrued rights as between locators, and not as between a locator and the government. Cave v. Tyler (1901) 65 P. 1089, 133 Cal. 566, 568.

This and the preceding section operate as a grant of the right of way for the construction of a reservoir for the irrigation of lands owned by the United States and unoccupied in 1866 whenever the right to such reservoir shall have accrued under the local customs, laws, or decisions of courts. The right to easements for needed irrigation reservoir purposes were natural rights existing prior to these sections, which only recognize and confirm such right. Edwards v. Roberts (1914) 144 P. 856, 26 Colo. App. 538.

Patents subject to water rights and easements.—Patents must be subject to vested and accrued water rights for mining and other purposes. Sturr v. Beck (1890) 10 Sup. Ct. 350, 353, 133 U. S. 541, 550, 33 L. Ed. 761; Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136; Anderson v. Bassman (C. C. 1905) 140 Fed. 14; Hill v. Lenormand (1888) 16 P. 266, 2 Ariz. 354, 358; Osgood v. El Dorado Water, etc., Min. Co. (1880) 56 Cal. 571, 581; Farley v. Spring Valley Min. & Irr. Co. (1881) 58 Cal. 142; South Yuba Water & Mining Co. v. Rosa (1889) 80 Cal. 333, 22 Pac. 222; De Necochea v. Curtis (1889) 80 Cal. 397, 20 Pac. 563, 22 Pac. 198; McGuire v. Brown (1895) 106 Cal. 660, 39 Pac. 1060, 30 L. R. A. 384; Nippel v. Forker (1899) 56 P. 577, 26 Colo. 74; Drake v. Earhart (1890) 2 Idaho, 716, 23 P. 541; Welch v. Garrett (1897) 51 P. 405, 5 Idaho, 639, 641; Cottonwood Ditch Co. v. Thom (1909) 101 P. 825, 39 Mont. 115 (judgment affirmed on rehearing [1909] 104 P. 281, 39 Mont. 121); Dodge v. Marden (1879) 7 Or. 456; Brosnan v. Harris (1901) 65 P. 867, 39 Or. 148, 87 Am. St. Rep. 649, 54 L. R. A. 628; Parkersville Drainage Dist. v. Wattier (1906) 86 P. 775, 48 Or. 332; Driskill v. Rebbe (S. D. 1908) 117 N. W. 135; Sullivan v. Northern Spy Min. Co. (1895) 40 P. 709, 11 Utah, 438, 443, 30 L. R. A. 186; Willey v. Decker (1903) 73 P. 210, 11 Wyo. 496, 520, 100 Am. St. Rep. 939. See, also, Wood v. Etiwanda Water Co. (1898) 54 P. 726, 122 Cal. 152; Hammond v. Rose (1888) 11 Colo. 524, 19 Pac. 466, 7 Am. St. Rep. 258; Tynon v. Despain (1896) 22 Colo. 240, 43 Pac. 1039; Jarvis v. State Bank (1896) 22 Colo. 309, 45 Pac. 505, 55 Am. St. Rep. 129; Boglino v. Giorgetta (1904) 78 P. 612, 20 Colo. App. 338; Prentice v. McKay (1909) 98 P. 1081, 38 Mont. 114; Rasmussen v. Blust (1909) 122 N. W. 862, 85 Neb. 198 (reversing judgment [1909] 120 N. W. 184, 83 Neb. 678); Scott v. Toomey (1896) 8 S. D. 639, 67 N. W. 838; Lynch v. Lower Yakima Irr. Co. (1913) 131 P. 829, 73 Wash. 173; Bucknum v. Johnson (1912) 127 P. 904, 21 Wyo. 26.

A patent containing a clause making it subject to any vested and accrued water rights for mining or other purposes, and subject also to the right of the proprietor of a vein or lode to extract and remove the ore therefrom, passes the entire title as against any subsequent locator of a mining claim and no legal rights can be acquired against a patentee by a subsequent location of a mining claim. Pacific Coast Min., etc., Co. v. Spargo (C. C. 1883) 16 Fed. 348, 349. See Atchison v. Peterson (1883) 20 Wall. (87 U. S.) 507, 22 L. Ed. 414; Basey v. Gallagher (1883) 20 Wall. (87 U. S.) 670, 22 L. Ed. 452; Union Mill & Min. Co. v. Dangberg (C. C. 1897) 81 Fed. 73; Howell v. Johnson (C. C. 1898) 89 Fed. 556; Osgood v. El Dorado Water, etc., Min. Co. (1880) 56 Cal. 571; Himes v. Johnson (1882) 61 Cal. 259; Woolman v. Garringer (1872) 1 Mont. 535.

A patentee of public land over which a stream flows acquires all the rights in the waters of such stream possessed by the United States at the time the patent took effect, which is by relation the date of the application for entry. Such rights include the right to the use of the waters for the irrigation of the land to a reasonable extent, which cannot be taken away by any state law or custom, except for public purposes. The patentee cannot, however, enjoin the appropriation of water from the stream by others under such state law, without showing that such appropriation will result in damage to him in the use and enjoyment of the land covered by the patent. Cruse v. McCauley (C. C. 1899) 96 Fed. 369.

The owner of an easement has no right to change the location of his ditch without patentee's consent. Vestal v. Young (1905) 82 P. 381, 147 Cal. 715.

A right of way for a flume to conduct water for mining purposes is an easement, within the protection of this and the preceding section. Rockwell v. Graham (1885) 9 Colo. 36, 10 Pac. 284.

A patent or certificate from the state issued since this amendatory act is held subject to such vested and accrued water rights as were acquired under the preceding section. Barnes v. Sabron (1875) 10 Nev. 217, 233.

Where an irrigation company built its canal on government land after another had filed his homestead entry on it, but before patent was issued to him, the patent was not subject to the rights of the company. Atkinson v. Washington Irr. Co. (Wash. 1906) 86 P. 1123; Baker v. Same, Id. 1125.

Patents burdened by easements.—An appropriator of water is a licensee of the government so long as the land continues to be a part of the public domain, but after patent the land is burdened by the easement granted by the United States to the appropriator, who holds his rights against the land under an express grant, and the person holding rights by such appropriation differs from one who holds water rights by prescription. Smith v. Hawkins (1895) 110 Cal. 122, 42 Pac. 453; Oliver v. Agasse (1901) 64 P. 401, 132 Cal. 297, 300. See Jacob v. Day (1896) 44 P. 243, 111 Cal. 571; North Fork Water Co. v. Edwards (1898) 54 P. 69, 121 Cal. 662; Tuolumne Consol. Min. Co. v. Maier (1901) 66 P. 863, 134 Cal. 583.

A patent for lands in the Columbia river district may be properly granted subject to any vested and accrued water rights for mining and other purposes and subject to the right of way for the construction of ditches and canals where such rights have accrued under the local laws. Maffet v. Quine (C. C. 1899) 93 Fed. 347, 348. See Id. (C. C. 1899) 95 Fed. 199.

A patent issued for a mining claim is subject to the easements as provided by this section. Oliver v. Agasse (1901) 64 P. 401, 132 Cal. 297, 298.

Rights as against government.—This and the preceding section create no title as against the government in a person taking possession of public land for the purpose of procuring water, or digging ditches for canals, without the performance of any work thereon. Bear Lake & River Waterworks & Irrigation Co. v. Garland (1896) 17 Sup. Ct. 7, 12, 164 U. S. 1, 41 L. Ed. 327. See Sullivan v. Northern Spy Min. Co. (1895) 40 P. 709, 11 Utah, 438, 30 L. R. A. 186.

This and the preceding section recognize the right of a prior appropriator of water on the public domain, even as against the United States and its grantees, where the appropriation is authorized by the statute of the state where the appropriation is made. Howell v. Johnson (C. C. 1898) 89 Fed. 556, 558. See, also, Bean v. Morris (1908) 159 Fed. 651, 86 C. C. A. 519 (affirmed [1911] 31 Sup. Ct. 703, 704, 221 U. S. 485, 55 L. Ed. 821).

Loss or destruction of water rights.—The right of one who appropriates percolating waters on public lands by digging a well is subject to the right of a subsequent locator of land to sink a well, though it dries up the first. Sullivan v. Northern Spy Min. Co. (1895) 11 Utah, 438, 40 Pac. 709.

§ 4649. (R. S. § 2341.) Mineral lands in which no valuable mines are discovered open to homesteads.

Wherever, upon the lands heretofore designated as mineral lands, which have been excluded from survey and sale, there have been homesteads made by citizens of the United States, or persons who have declared their intention to become citizens, which homesteads have been made, improved, and used for agricultural purposes, and upon which there have been no valuable mines of gold, silver, cinnabar, or copper discovered, and which are properly agricultural lands, the settlers or owners of such homesteads shall have a right of preemption thereto, and shall be entitled to purchase the same at the price of one dollar and twenty-five cents per acre, and in quantity not to exceed one hundred and sixty acres; or they may avail themselves of the provisions of chapter five of this Title, relating to "Homesteads."

Act July 26, 1866, c. 262, § 10, 14 Stat. 253.

Notes of Decisions

Homestead entries.—Under this section homestead entries are restricted to lands containing no valuable mines. Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 331.

§ 4650. (R. S. § 2342.) Mineral lands, how set apart as agricultural lands.

Upon the survey of the lands described in the preceding section the Secretary of the Interior may designate and set apart such portions of the same as are clearly agricultural lands, which lands shall

thereafter be subject to pre-emption and sale as other public lands, and be subject to all the laws and regulations applicable to the same.

Act July 26, 1866, c. 262, § 11, 14 Stat. 253.

§ 4651. (R. S. § 2343.) Additional land districts and officers; power of the President to provide.

The President is authorized to establish additional land-districts, and to appoint the necessary officers under existing laws, wherever he may deem the same necessary for the public convenience in executing the provisions of this chapter.

Act July 26, 1866, c. 262, § 7, 14 Stat. 252.

§ 4652. (R. S. § 2344.) Provisions of this chapter not to affect certain rights.

Nothing contained in this chapter shall be construed to impair, in any way, rights or interests in mining property acquired under existing laws; nor to affect the provisions of the act entitled "An act granting to A. Sutro the right of way and other privileges to aid in the construction of a draining and exploring tunnel to the Comstock lode, in the State of Nevada," approved July twenty-five, eighteen hundred and sixty-six.

Act July 9, 1870, c. 235, § 17, 16 Stat. 218. Act May 10, 1872, c. 152, § 16, 17 Stat. 96.

Notes of Decisions

Rights acquired under prior laws.—Priority of location and not priority of entry determines priority of title, and where a locator's rights accrued prior to the act of May 10, 1872 (17 Stat. 91), they are saved by this section, and it is not necessary for such locator to adverse another claim. Lee Doon v. Tesh (1885) 6 P. 97, 8 P. 621, 68 Cal. 43, 46; Lee v. Stahl (1886) 11 P. 77, 9 Colo. 208, 210; Calhoun Gold Min. Co. v. Ajax Gold Min. Co. (1899) 59 P. 607, 27 Colo. 1, 16, 50 L. R. A. 209, 83 Am. St. Rep. 17. See, also, Hall v. Equator Mining & Smelting Co. (C. C.) Fed. Cas. No. 5,931.

The provisions of this section seem to be limited to the rights acquired under the act of July 26, 1866 (14 Stat. 251), and under the act of July 9, 1870 (16 Stat. 217). Gregory v. Pershbaker (1887) 14 P. 401, 73 Cal. 109, 116.

The mining laws were not intended to impair the rights of quartz miners in cases where the locations were made prior to May 10, 1872. Wilhelm v. Silvester (1894) 35 P. 997, 101 Cal. 358, 361.

This section operates to reserve out of a grant rights acquired prior to the passage of the act of May 10, 1872 (17 Stat. 91), and it secures the protection of such rights at the time of the issuance of the patent to persons availing themselves of the adverse procedure. Lee v. Stahl (1889) 22 P. 436, 13 Colo. 174, 178.

Alien's rights.—See, also, notes to § 4614, ante.

A person claiming a mining location under the act of July 26, 1866 (14 Stat. 251), but who was not a citizen of the United States and had not declared his intention to become such, did not acquire any vested right to be preserved by this section. Lee Doon v. Tesh (1885) 6 P. 97, 8 P. 621, 68 Cal. 43, 49.

§ 4653. (R. S. § 2345.) Mineral lands in certain States excepted.

The provisions of the preceding sections of this chapter shall not apply to the mineral lands situated in the States of Michigan, Wisconsin, and Minnesota, which are declared free and open to exploration and purchase, according to legal subdivisions, in like manner as before the tenth day of May, eighteen hundred and seventy-two. And any bona-fide entries of such lands within the States named since the tenth day of May, eighteen hundred and seventy-two, may be patented without reference to any of the foregoing provisions of this chapter. Such lands shall be offered for public sale in the same manner, at the same minimum price, and under the same rights of pre-emption as other public lands.

Act Feb. 18, 1873, c. 159, 17 Stat. 465.

Mineral lands in Missouri and Kansas were excepted from the provisions of the mineral land laws by Act May 5, 1876, c. 91, post, § 4654.

Mineral lands in Alabama were excepted from the provisions of the mineral land laws by Act March 3, 1883, c. 118, post, § 4655.

The public lands in Alabama were to be reclassified, to determine their

character as mineral or agricultural, and all lands so reclassified as agricultural were to be subject to homestead entry as such, by Act March 27, 1906, c. 1347, §§ 1, 2, post, §§ 4656, 4657.

Notes of Decisions

Public policy as to grants to states.—It has been the practice of congress to determine and declare by legislative act, in each case, and not by any settled policy whether or not mineral lands shall be reserved from the grant to a state. Sweet v. U. S. (1915) 228 Fed. 421, 143 C. C. A. 3.

Construction of statute.—This section declares the statutory law of the United States as it applied to mining on December 1, 1873. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 99, 115 U. S. 392, 29 L. Ed. 423.

§ 4654. (Act May 5, 1876, c. 91.) Mineral lands in Missouri and Kansas; disposal as agricultural lands.

Within the States of Missouri and Kansas deposits of coal, iron, lead, or other mineral be, and they are hereby, excluded from the operation of the act entitled "An act to promote the development of mining resources of the United States" approved May tenth, eighteen hundred and seventy-two and all lands in said States shall be subject to disposal as agricultural lands. (19 Stat. 52.)

This was an act entitled "An act to exclude the States of Missouri and Kansas from the provisions of the act of Congress entitled 'An act to promote the development of the mining resources of the United States,' approved May tenth, eighteen hundred and seventy-two."

Act May 10, 1872, c. 152, 17 Stat. 91, mentioned in this act, was incorporated into the Revised Statutes in sections 2319–2328, 2331, 2333–2337, 2344, ante, §§ 4614–4616, 4618–4620, 4622, 4623, 4626, 4627, 4630, 4632, 4642–4645, 4652.

Notes of Decisions

Public policy in grants to states.—It has been the practice of congress to declare by legislative act, in each case, and not by any settled public policy, whether or not mineral lands shall be reserved from the grant to a state. Sweet v. U. S. (1915) 228 Fed. 421, 143 C. C. A. 3.

Construction of statute.—By this act deposits of coal, iron, lead, or other minerals in Missouri and Kansas were excluded from the operation of Act May 10, 1872, ante, § 4614. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 29 L. Ed. 423.

§ 4655. (Act March 3, 1883, c. 118.) Mineral lands in Alabama; disposal as agricultural lands.

Within the State of Alabama all public lands, whether mineral or otherwise, shall be subject to disposal only as agricultural lands: Provided however, that all lands which have heretofore been reported to the General Land Office as containing coal and iron shall first be offered at public sale. (22 Stat. 487.)

This was part of an act entitled "An act to exclude the public lands in Alabama from the operation of the laws relating to mineral lands."

The latter part of the act, relating to pending homestead entries, is omitted as temporary merely.

Provisions for the reclassification of public lands in Alabama and for homestead entries upon lands designated thereby as agricultural, were made by Act March 27, 1906, c. 1347, §§ 1, 2, post, §§ 4656, 4657.

Coal lands in Alabama withheld from homestead entry under this act may be entered under the homestead laws, subject to the provisions of Act June 22, 1910, c. 318, post, §§ 4666–4668, by Act April 23, 1912, c. 87, post, § 4670.

Notes of Decisions

Patent obtained by fraud.—The government has a clear right to have annulled a patent obtained by fraud and perjury, and in violation of law, and this act does not waive or renounce that right. U. S. v. Pratt Coal & Coke Co. (C. C. 1883) 18 Fed. 708.

§ 4656. (Act March 27, 1906, c. 1347, § 1.) Reclassification of lands in Alabama, as agricultural or mineral lands.

The Secretary of the Interior be, and he is hereby, authorized to reclassify the public lands of Alabama, so as to determine which of said lands are in fact agricultural lands and which mineral lands,

veyed to the corporation, which paid all the expenses will be canceled, especially where it appears that other members of the corporation had previously taken the benefit of the statute, and that the lands originally entered and purchased by them were then held and owned by the corporation, and were in excess of 320 acres. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640, reversing (C. C. 1889) 37 Fed. 180.

Under this section persons cannot lawfully associate themselves together to enter tracts of 160 acres in each in severalty, for the purpose of holding it for the joint benefit of all in equal shares, and the United States may maintain an action to cancel patents issued to such persons. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640. See U. S. v. Portland Coal & Coke Co. (C. C. 1908) 173 Fed. 566, 569.

16. —— Persons limited to single entry.—No doubt exists as to the restrictions imposed upon the entry and purchase of vacant coal lands, and an association of persons is authorized to purchase not exceeding 320 acres, and only one entry can be made by the same person or association of persons, and no association of persons any member of which shall have taken the benefit of such sections shall enter or hold any other coal land. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; U. S. v. Allen (C. C. 1910) 180 Fed. 855, 860.

A corporation is a person and can make but one entry. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 169, 34 L. Ed. 640; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 181, 56 L. Ed. 149.

The legislation of Congress subsequent to the coal land laws indicates that Congress in prohibiting more than one entry contemplated the distinction between an entry made by one for himself with the full power of disposal after entry, and an entry made ostensibly for himself but in reality for another. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 390, 53 L. Ed. 230.

The coal land laws do not permit more than one coal entry by a single qualified entryman. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 184, 56 L. Ed. 149.

One person cannot lawfully make a coal entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit of the law, or in the interest of a person or an association where neither has had such benefits, but is seeking, through entry made or to be made by others, to acquire a greater quantity of land than is permitted by law. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 225 U. S. 219, 224, 56 L. Ed. 1063.

17. Entry by legal subdivisions.—This act does not permit an entry of unsurveyed coal lands as the entry permitted is only by legal subdivisions. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 180, 56 L. Ed. 149.

Under the coal land laws the terms "location," "claim," "purchase," and "entry," have acquired well and defined meanings. (1909) 27 Op. Atty. Gen. 412, 417.

18. Payment of price.—There is no requirement that the payment shall accompany the application. (1910) 28 Op. Atty. Gen. 448.

By an entry the entryman became the equitable owner, though it was afterwards necessary to amend his entry to describe the land before he received a patent. Baldwin Star Coal Co. v. Quinn (1909) 105 Pac. 1101, 46 Colo. 590.

19. Purchase without declaratory statement.—An entry under this section is a purchase with no elements of preemption.—U. S. v. Yankee Fuel Co. (D. C. 1912) 195 Fed. 850.

20. Proceedings to compel entry.—The rights of persons seeking to purchase coal lands from the United States must be measured by their second application, where, instead of pursuing any remedy in the courts growing out of the rejection by the Land Department of their original application, they acquiesced in that decision for more than a year and a half. Plested v. Abbey (1913) 33 Sup. Ct. 503, 228 U. S. 42, 57 L. Ed. 724.

Persons making application to purchase coal lands, filing their declaratory statement and tendering the statutory price per acre for the land cannot, on refusal of the local officers to permit the land to be entered at the statutory price because of a reappraisement made by the Secretary of the Interior, begin proceedings in a court either to restrain such local officers from otherwise disposing of the land or to compel them to accept the application and permit the purchase and entry at the statutory price. Plested v. Abbey (1913) 33 Sup. Ct. 503, 228 U. S. 42, 48, 57 L. Ed. 724. See U. S. v. Hitchcock (1903) 23 Sup. Ct. 698, 190 U. S. 316, 324, 47 L. Ed. 1074.

21. Entry by one person for another under agreement.—This statute does not limit the dominion which the purchaser has over the land after its purchase or restrict his power of alienation, but it does denounce any prior agreement whereby one person is acting for another in the purchase. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 391, 53 L. Ed. 230; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 183, 56 L. Ed. 149; Olson v. U. S.

(1904) 133 Fed. 849, 852, 67 C. C. A. 21. See U. S. v. Budd (1892) 12 Sup. Ct. 575, 144 U. S. 154, 36 L. Ed. 384.

The entry provided for is the cash entry made by applying to purchase the land and contemporaneously therewith making payment for the same, which entry excludes the right of a qualified person to make entry in his own name with the money and for the benefit of a disqualified person. U. S. v. Forrester (1908) 29 Sup. Ct. 132, 134, 211 U. S. 399, 53 L. Ed. 245; U. S. v. Allen (C. C. 1910) 180 Fed. 855.

There is nothing in this or the following sections to prevent individuals from making entries with the intention of conveying to a corporation or to any one else; but the act can be nullified if individuals or corporations are permitted to acquire more land than they are entitled to enter directly by employing dummies to make entries for their benefit. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149; U. S. v. Wells (1912) 192 Fed. 870, 872, 113 C. C. A. 194.

The statute imposes no limitation on the right of a purchaser who has acquired coal lands to sell the same, but the absence of such limitation to sell after acquisition will not prevent the enforcing of the express prohibition against more than one entry by the same person, as the right to sell what has been lawfully acquired does not imply authority to unlawfully acquire, in violation of an express prohibition. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 389, 53 L. Ed. 230; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 183, 56 L. Ed. 149.

Nothing in the law precludes a contract by which one party agrees to pay for the land and another agrees to do the required work. Lipscomb v. Nichols (1882) 6 Colo. 290.

22. **Fraudulent entry.**—A corporation, which has taken land obtained by entry with notice of fraud in its acquisition, cannot defend a suit by the government for cancellation of the patents by showing that stockholders purchased its stock in good faith and in ignorance of the defect in the title to the land. Wilson Coal Co. v. U. S. (1911) 188 Fed. 545, 110 C. C. A. 343.

Where one who has notice of the infirmity of his own title to land obtained from the government unites with others to form a corporation and subscribes for nearly all of the stock, conveying the land in payment of his subscription, the corporation is affected with notice of the circumstances impairing the title and cannot claim protection against a suit for cancellation of the patents as a bona fide purchaser without notice. Id.

A prior sale by the entryman is not sufficient of itself to establish fraud. Anthracite Mesa Coal Min. Co. v. U. S. (1903) 38 Ct. Cl. 56.

23. **Combinations and conspiracy.**—A conspiracy to acquire coal lands from the United States by fraudulent means is a violation of the criminal statute, and a charge of such a conspiracy can be predicated upon acts made criminal after the enactment of the statute. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 393, 53 L. Ed. 230. See U. S. v. Hirsch (1879) 100 U. S. 33, 25 L. Ed. 539; Dealy v. U. S. (1894) 14 Sup. Ct. 680, 152 U. S. 539, 38 L. Ed. 545; Hyde v. Shine (1905) 25 Sup. Ct. 760, 199 U. S. 62, 50 L. Ed. 90.

Where a number of persons joined in a conspiracy to obtain title for the benefit of themselves as an association to coal lands in excess of the quantity allowed by law, by means of individual entries, and united with others in forming a corporation to which it was agreed the title should be conveyed by the entrymen when obtained from the government, the transaction was not purged of its fraudulent character by the fact that, after using the funds of the corporation to pay for the lands the entrymen repudiated the agreement and retained the title in themselves. Wilson Coal Co. v. U. S. (1911) 188 Fed. 545, 110 C. C. A. 343.

Persons who employed dummies to make coal entries for the benefit of a corporation to be formed, and committed an overt act in furtherance of such arrangement, were properly charged with conspiracy. U. S. v. Wells (1912) 192 Fed. 870, 113 C. C. A. 194, writ of certiorari denied Wells v. U. S. (1912) 32 Sup. Ct. 842, 225 U. S. 714, 56 L. Ed. 1269.

In a prosecution for conspiracy to obtain excessive coal entries by means of dummy entrymen, it is not essential to the government's case that the entrymen be shown to have been co-conspirators. Id.

Persons cannot lawfully associate themselves together to enter tracts of 160 acres each in severalty, but to be held for the joint benefit of all in equal shares, and patents issued on entries made under such an agreement will be canceled at suit of the United States. U. S. v. Portland Coal & Coke Co. (C. C. 1908) 173 Fed. 566.

A pooling scheme made between different entrymen and embracing more than 320 acres of coal lands, whereby each member of the combination agrees to hold each and every tract for the benefit of all, though the legal title is to remain in the several individuals, is unlawful. U. S. v. Allen (C. C. 1910) 180 Fed. 855, 860.

Where two persons were engaged in an unlawful combination to procure title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law, that only two claims aggregating 320 acres were actually patented to them, would not make the patents valid; the unlawful com-

veyed to the corporation, which paid all the expenses will be canceled, especially where it appears that other members of the corporation had previously taken the benefit of the statute, and that the lands originally entered and purchased by them were then held and owned by the corporation, and were in excess of 320 acres. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640, reversing (C. C. 1889) 37 Fed. 180.

Under this section persons cannot lawfully associate themselves together to enter tracts of 160 acres in each in severalty, for the purpose of holding it for the joint benefit of all in equal shares, and the United States may maintain an action to cancel patents issued to such persons. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640. See U. S. v. Portland Coal & Coke Co. (C. C. 1908) 173 Fed. 566, 569.

16. —— Persons limited to single entry.—No doubt exists as to the restrictions imposed upon the entry and purchase of vacant coal lands, and an association of persons is authorized to purchase not exceeding 320 acres, and only one entry can be made by the same person or association of persons, and no association of persons any member of which shall have taken the benefit of such sections shall enter or hold any other coal land. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; U. S. v. Allen (C. C. 1910) 180 Fed. 855, 860.

A corporation is a person and can make but one entry. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 169, 34 L. Ed. 640; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 181, 56 L. Ed. 149.

The legislation of Congress subsequent to the coal land laws indicates that Congress in prohibiting more than one entry contemplated the distinction between an entry made by one for himself with the full power of disposal after entry, and an entry made ostensibly for himself but in reality for another. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 390, 53 L. Ed. 230.

The coal land laws do not permit more than one coal entry by a single qualified entryman. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 184, 56 L. Ed. 149.

One person cannot lawfully make a coal entry in the interest of another who has had the benefit of the law, or in the interest of an association where it or any of its members has had the benefit of the law, or in the interest of a person or an association where neither has had such benefits, but is seeking, through entry made or to be made by others, to acquire a greater quantity of land than is permitted by law. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 225 U. S. 219, 224, 56 L. Ed. 1063.

17. Entry by legal subdivisions.—This act does not permit an entry of unsurveyed coal lands as the entry permitted is only by legal subdivisions. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 180, 56 L. Ed. 149.

Under the coal land laws the terms "location," "claim," "purchase," and "entry," have acquired well and defined meanings. (1909) 27 Op. Atty. Gen. 412, 417.

18. Payment of price.—There is no requirement that the payment shall accompany the application. (1910) 28 Op. Atty. Gen. 448.

By an entry the entryman became the equitable owner, though it was afterwards necessary to amend his entry to describe the land before he received a patent. Baldwin Star Coal Co. v. Quinn (1909) 105 Pac. 1101, 46 Colo. 590.

19. Purchase without declaratory statement.—An entry under this section is a purchase with no elements of preemption.—U. S. v. Yankee Fuel Co. (D. C. 1912) 195 Fed. 850.

20. Proceedings to compel entry.—The rights of persons seeking to purchase coal lands from the United States must be measured by their second application, where, instead of pursuing any remedy in the courts growing out of the rejection by the Land Department of their original application, they acquiesced in that decision for more than a year and a half. Plested v. Abbey (1913) 33 Sup. Ct. 503, 228 U. S. 42, 57 L. Ed. 724.

Persons making application to purchase coal lands, filing their declaratory statement and tendering the statutory price per acre for the land cannot, on refusal of the local officers to permit the land to be entered at the statutory price because of a reappraisement made by the Secretary of the Interior, begin proceedings in a court either to restrain such local officers from otherwise disposing of the land or to compel them to accept the application and permit the purchase and entry at the statutory price. Plested v. Abbey (1913) 33 Sup. Ct. 503, 228 U. S. 42, 48, 57 L. Ed. 724. See U. S. v. Hitchcock (1903) 23 Sup. Ct. 698, 190 U. S. 316, 324, 47 L. Ed. 1074.

21. Entry by one person for another under agreement.—This statute does not limit the dominion which the purchaser has over the land after its purchase or restrict his power of alienation, but it does denounce any prior agreement whereby one person is acting for another in the purchase. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 391, 53 L. Ed. 230; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 183, 56 L. Ed. 149; Olson v. U. S.

(1904) 133 Fed. 849, 852, 67 C. C. A. 21. See U. S. v. Budd (1892) 12 Sup. Ct. 575, 144 U. S. 154, 36 L. Ed. 384.

The entry provided for is the cash entry made by applying to purchase the land and contemporaneously therewith making payment for the same, which entry excludes the right of a qualified person to make entry in his own name with the money and for the benefit of a disqualified person. U. S. v. Forrester (1908) 29 Sup. Ct. 132, 134, 211 U. S. 399, 53 L. Ed. 245; U. S. v. Allen (C. C. 1910) 180 Fed. 855.

There is nothing in this or the following sections to prevent individuals from making entries with the intention of conveying to a corporation or to any one else; but the act can be nullified if individuals or corporations are permitted to acquire more land than they are entitled to enter directly by employing dummies to make entries for their benefit. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149; U. S. v. Wells (1912) 192 Fed. 870, 872, 113 C. C. A. 194.

The statute imposes no limitation on the right of a purchaser who has acquired coal lands to sell the same, but the absence of such limitation to sell after acquisition will not prevent the enforcing of the express prohibition against more than one entry by the same person, as the right to sell what has been lawfully acquired does not imply authority to unlawfully acquire, in violation of an express prohibition. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 389, 53 L. Ed. 230; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 183, 56 L. Ed. 149.

Nothing in the law precludes a contract by which one party agrees to pay for the land and another agrees to do the required work. Lipscomb v. Nichols (1882) 6 Colo. 290.

22. **Fraudulent entry.**—A corporation, which has taken land obtained by entry with notice of fraud in its acquisition, cannot defend a suit by the government for cancellation of the patents by showing that stockholders purchased its stock in good faith and in ignorance of the defect in the title to the land. Wilson Coal Co. v. U. S. (1911) 188 Fed. 545, 110 C. C. A. 343.

Where one who has notice of the infirmity of his own title to land obtained from the government unites with others to form a corporation and subscribes for nearly all of the stock, conveying the land in payment of his subscription, the corporation is affected with notice of the circumstances impairing the title and cannot claim protection against a suit for cancellation of the patents as a bona fide purchaser without notice. Id.

A prior sale by the entryman is not sufficient of itself to establish fraud. Anthracite Mesa Coal Min. Co. v. U. S. (1903) 38 Ct. Cl. 56.

23. **Combinations and conspiracy.**—A conspiracy to acquire coal lands from the United States by fraudulent means is a violation of the criminal statute, and a charge of such a conspiracy can be predicated upon acts made criminal after the enactment of the statute. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 393, 53 L. Ed. 230. See U. S. v. Hirsch (1879) 100 U. S. 33, 25 L. Ed. 539; Dealy v. U. S. (1894) 14 Sup. Ct. 680, 152 U. S. 539, 38 L. Ed. 545; Hyde v. Shine (1905) 25 Sup. Ct. 760, 199 U. S. 62, 50 L. Ed. 90.

Where a number of persons joined in a conspiracy to obtain title for the benefit of themselves as an association to coal lands in excess of the quantity allowed by law, by means of individual entries, and united with others in forming a corporation to which it was agreed the title should be conveyed by the entrymen when obtained from the government, the transaction was not purged of its fraudulent character by the fact that, after using the funds of the corporation to pay for the lands the entrymen repudiated the agreement and retained the title in themselves. Wilson Coal Co. v. U. S. (1911) 188 Fed. 545, 110 C. C. A. 343.

Persons who employed dummies to make coal entries for the benefit of a corporation to be formed, and committed an overt act in furtherance of such arrangement, were properly charged with conspiracy. U. S. v. Wells (1912) 192 Fed. 870, 113 C. C. A. 194, writ of certiorari denied Wells v. U. S. (1912) 32 Sup. Ct. 842, 225 U. S. 714, 56 L. Ed. 1269.

In a prosecution for conspiracy to obtain excessive coal entries by means of dummy entrymen, it is not essential to the government's case that the entrymen be shown to have been co-conspirators. Id.

Persons cannot lawfully associate themselves together to enter tracts of 160 acres each in severalty, but to be held for the joint benefit of all in equal shares, and patents issued on entries made under such an agreement will be canceled at suit of the United States. U. S. v. Portland Coal & Coke Co. (C. C. 1908) 173 Fed. 566.

A pooling scheme made between different entrymen and embracing more than 320 acres of coal lands, whereby each member of the combination agrees to hold each and every tract for the benefit of all, though the legal title is to remain in the several individuals, is unlawful. U. S. v. Allen (C. C. 1910) 180 Fed. 855, 860.

Where two persons were engaged in an unlawful combination to procure title in behalf of a single association to an area of coal lands in excess of the limits prescribed by law, that only two claims aggregating 320 acres were actually patented to them, would not make the patents valid; the unlawful com-

bination making the proceeding illegal from the beginning. Id.

Where defendant conspired to obtain large tracts of coal land by procuring others to enter the land in separate parcels as cash purchasers and pay for it with money furnished by defendants, and to hold the land in secret trust for them, whereby defendants expected to obtain title to land which they could not have obtained in their own names, the transaction was illegal, and the title acquired by the entrymen was subject to vacation in equity. U. S. v. Robbins (D. C. 1907) 157 Fed. 999. See, also, U. S. v. Doughten (C. C. 1911) 186 Fed. 226; Arnold v. Weil (D. C. 1907) 157 Fed. 429.

A conspiracy to secure the title to coal lands from the United States through a homestead entry may constitute a conspiracy to defraud the United States, although such lands are not subject to lawful homestead entry, where the title is secured by means of false proofs. U. S. v. Lonabaugh (D. C. 1907) 158 Fed. 314, judgment reversed Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56.

Where two or more persons enter into an unlawful combination to secure coal entries on behalf of a single association, the fact that only two claims, aggregating 320 acres, are actually patented, does not make such patents valid, as the unlawful combination renders illegal the entire proceedings. Kennedy v. Lonabaugh (1911) 19 Wyo. 352. See, also, notes to § 10201, post.

24. —— **Proof.**—Under an indictment charging certain residents of the state of New York with forming a conspiracy to obtain an excessive amount of coal lands in the state of Wyoming, it is not necessary to aver or prove as an essential step in the conspiracy that any of the defendants were physically present in the state of Wyoming, or that they were personally acquainted with each other prior to the date the entry applications were verified by them in the state of New York, and they are indictable in the state of Wyoming, if the conspiracy was made there, although the first overt act was committed in the state of New York, and the fact that they were indictable in the latter state does not preclude an indictment in the state of Wyoming. U. S. v. Wells (1912) 192 Fed. 870, 873, 113 C. C. A. 194.

25. **Cancellation of entry for fraud.**—Persons conspiring to make a fraudulent entry of coal lands under this and the following sections are not, on the cancellation of the entry, entitled to the repayment of the purchase money, as in such case the entry was not "erroneously allowed," but was canceled because of the fraud. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 225 U. S. 219, 224, 56 L. Ed. 1063.

26. **Entry by one for benefit of another.**—Restrictions of this section forbid individuals and associations from acquiring public coal land in excess of the quantities prescribed, whether directly by entries in their own name or indirectly by entries for their benefit in the names of others. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 225 U. S. 219, 224, 56 L. Ed. 1063. See U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 53 L. Ed. 230; U. S. v. Forrester (1908) 29 Sup. Ct. 132, 211 U. S. 399, 53 L. Ed. 245; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149.

An entry of coal lands by a person qualified to make it, is not invalid because made in part for the benefit of others who are also qualified to make the entry. U. S. v. Home Coal & Coke Co. (1912) 200 Fed. 910, 119 C. C. A. 206.

27. **Entry for benefit of corporation.**—Coal entries may be made on behalf of a corporation, provided the corporation and each of the persons in whose interest the entry was directly or indirectly made possessed the requisite qualification. U. S. v. Colorado Anthracite Co. (1912) 32 Sup. Ct. 617, 225 U. S. 219, 225, 56 L. Ed. 1063.

28. **Transfer after entry.**—The statute imposes no limitation on the right of a purchaser acquiring coal lands from the United States to sell or dispose of the same after he has become the owner. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 389, 53 L. Ed. 230; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 183, 56 L. Ed. 149.

Persons acquiring coal lands pursuant to statutes and thereafter obtaining a patent for the same are at liberty thereafter to dispose of the same as they see fit. Wilson Coal Co. v. U. S. (1911) 188 Fed. 545, 547, 110 C. C. A. 343.

Under this and the following sections of this act, one who has perfected an entry of coal land can sell or dispose of it as he pleases, and an individual or corporation can purchase as many entries made by others as he or it pleases, regardless of the entryman's intent to sell at the time of entry. Ireland v. Henkle (C. C. 1910) 179 Fed. 993. See, also, U. S. v. Keitel (D. C. 1907) 157 Fed. 396 (reversed [1908] 29 Sup. Ct. 123, 211 U. S. 370, 53 L. Ed. 230); Pereles v. Weil (D. C. 1907) 157 Fed. 419.

29. **Entry under soldiers' additional homestead law.**—Public lands known to be chiefly valuable for their deposits of coal are subject to acquisition only under this section, and not under the soldiers' additional homestead law. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296.

30. Corporations may purchase from entrymen.—A purchase of coal lands from the United States, made by one authorized by law, for the benefit and at the expense of a corporation, under a previous agreement to convey when the patent should issue, is legal, though the corporation could not by law have purchased, some of its members having exercised their full rights to buy such public lands, as such previous contract is not prohibited under the statute relative to coal lands. U. S. v. Trinidad Coal & Coking Co. (C. C. 1889) 37 Fed. 180.

31. Patent.—The rule that a patent is the only complete legal title under the land laws applies to coal lands. Hawley v. Diller (1900) 20 Sup. Ct. 986, 178 U. S. 476, 487, 44 L. Ed. 1157.

32. —— Validity.—A patent issued for land reserved from sale by law is void for want of authority. Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 279, 30 L. Ed. 170.

33. —— Cancellation of patent.—One holding a voidable patent to public lands cannot protect himself against the process of the government by forming a corporation in which he is the dominant factor and conveying to it the premises which he has acquired in violation of law. U. S. v. Allen (C. C. 1910) 180 Fed. 855.

A corporation organized by a person holding voidable patents for coal lands for the purpose of taking over such lands is not a bona fide purchaser for value without notice to the extent of precluding the government from canceling the patent, and the fact that innocent parties may have acquired some of the stock of the corporation will not prevent a prosecution by the government. Id.

34. —— Suit to cancel patent.—The United States may maintain a suit in equity in its own name and behalf to set aside and cancel a patent to a tract of land on the ground that it was known coal land within the meaning of this section and of which fact the applicant had knowledge at the time of his application. McLaughlin v. U. S. (1882) 2 Sup. Ct. 802, 107 U. S. 526, 27 L. Ed. 806; Western Pac. R. Co. v. U. S. (1883) 2 Sup. Ct. 802, 108 U. S. 510, 513, 27 L. Ed. 806; Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 278, 30 L. Ed. 170; U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 170, 34 L. Ed. 640; Northern Pac. R. Co. v. Sanders (1892) 49 Fed. 129, 135, 1 C. C. A. 192.

The government need not offer to return the purchase price as a condition of obtaining relief. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640 (reversing [C. C. 1889] 37 Fed. 180); In re Alaskan Coal Lands (1910) 28 Op. Atty. Gen. 448, 453.

Where patents are sought to be set aside for fraud, the testimony must be clear and convincing and the burden of proof rests on the government. Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182.

Formation of defendant foreign corporation, of same name as another, and with same officers, to hold its assets, held immaterial, in government's suit to vacate patents to coal lands fraudulently obtained by other company. U. S. v. Exploration Co. (D. C. 1915) 225 Fed. 854.

35. Conclusiveness of decisions of department.—The rights of persons seeking to purchase coal lands must be measured by their second application, where, instead of invoking and pursuing any remedy in the courts which they might have had, growing out of the rejection by the Land Department of their original application, they acquiesced in that decision for more than 1½ years, and then made an entirely new application. Plested v. Abbey (1913) 33 Sup. Ct. 503, 228 U. S. 42, 57 L. Ed. 724.

The local land officers in the matter of entry and sale of coal lands are under the control of, and their acts are subject to review by, the Commissioner of the General Land Office and ultimately subject to the review of the Secretary of the Interior, and they are not to be called upon to put a court in possession of their views and defend their instructions from the commissioner and convert a contest by the Land Department into one before a court. Id.

A finding of land officers in proceedings resulting in the issuance of patents on commuted homestead entries, that such lands were agricultural and not coal lands, is not conclusive against the government in a suit to cancel the patents as fraudulently procured by misrepresenting their character. Washington Securities Co. v. U. S. (1914) 34 S. Ct. 725, 234 U. S. 76, 58 L. Ed. 1220, affirming decree (1912) 194 Fed. 59, 114 C. C. A. 79.

Where the findings of the Land Department in relation to an entry of coal lands and the issuance of a patent therefor are sought to be set aside on the ground that the department erred in the decision of a mixed question of law and fact, the facts as laid before and found by the department must be shown with particularity so that the court may determine whether the law has been misconstrued. Durango Land & Coal Co. v. Evans (1897) 80 Fed. 425, 429, 25 C. C. A. 523.

Where fraud is charged as ground for annulling a decision of the land department, it must be shown that the alleged false testimony or forged documents affected the decision and led to a result which otherwise would not have been reached. Id.

The findings of the land department on questions of fact are conclusive. Durango Land & Coal Co. v. Evans (1897) 80 Fed. 425, 25 C. C. A. 523, appeal dismissed (1898) 19 Sup. Ct. 875, 43 L. Ed. 1178. See, also, U. S. v. Primrose Coal Co. (D. C. 1914) 216 Fed. 553.

See, also, notes to § 699, ante.

§ 4660. (R. S. § 2348.) Pre-emption of coal lands.

Any person or association of persons severally qualified, as above provided, who have opened and improved, or shall hereafter open and improve, any coal mine or mines upon the public lands, and shall be in actual possession of the same, shall be entitled to a preference-right of entry, under the preceding section, of the mines so opened and improved: Provided, That when any association of not less than four persons, severally qualified as above provided, shall have expended not less than five thousand dollars in working and improving any such mine or mines, such association may enter not exceeding six hundred and forty acres, including such mining improvements.

Act March 3, 1873, c. 279, § 2, 17 Stat. 607.

Notes of Decisions

Mineral character of land.—See, also, notes to § 4659, ante.

Actual disclosure of coal within its boundaries is not essential to constitute a tract of public land coal lands, but they are to be deemed such if the adjacent disclosures and other surrounding or external conditions are such as to induce practical coal men to invest in such lands as valuable for coal mining. Diamond Coal & Coke Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 58 L. Ed. 936. See, also, Colorado Coal & Iron Co. v. U. S. (1887) 8 Sup. Ct. 131, 123 U. S. 307, 31 L. Ed. 182.

Single entry only permitted.—Persons entitled, under this and the following section, to a preferential right of entry of coal lands, are prevented by the section, prohibiting the making of more than one entry by the same person, from entering such lands apparently for themselves, but in fact as agents for a person who is himself disqualified because he has already purchased the full quantity permitted by law. U. S. v. Forrester (1908) 29 Sup. Ct. 132, 133, 211 U. S. 399, 53 L. Ed. 245; Same v. Herr (1908) 29 Sup. Ct. 134, 211 U. S. 404, 53 L. Ed. 251. See, also, U. S. v. Keitel (1908) 29 Sup. Ct. 123, 125, 211 U. S. 370, 53 L. Ed. 230, reversing (D. C. 1907) 157 Fed. 396.

This act confines every qualified entry to one entry, and every association of persons, not less than four, and under certain conditions to 640 acres. U. S. v. Munday (1911) 32 Sup. Ct. 53, 56, 222 U. S. 175, 56 L. Ed. 149, reversing (C. C. 1911) 186 Fed. 375. See, also, Diamond Coal Co. v. U. S. (1914) 34 Sup. Ct. 507, 233 U. S. 236, 241, 58 L. Ed. 936.

Meaning of preference right.—This right of preference is not in and of itself the equivalent of an entry uncontrolled by the prohibition which the statute expresses, but is merely a preference given to make the statutory entry of a particular tract of coal land in preference to others. U. S. v. Forrester (1908) 29 Sup. Ct. 132, 211 U. S. 399, 403, 53 L. Ed. 245.

The preference which this section allows is but a right within the time limited to make the entry authorized by the preceding section, and it cannot be held that the obtaining of such mere right of preference authorizes the making not only of an entry which the statute permits, but also one which the statute forbids. Id.

This section gives a mere preference right by taking the steps enumerated therein for the acquisition of coal lands. U. S. v. Forrester (1908) 29 Sup. Ct. 132, 211 U. S. 399, 403, 53 L. Ed. 245. See, also, Atchison, T. & S. F. Ry. Co. v. Richter (N. M. 1915) 148 P. 478.

The word "pre-emption," which has been defined as the preference right of one to purchase before another, may be broad enough to include coal entries under this section, but is not used in that sense in act March 3, 1891 (§ 5113, post). U. S. v. Yankee Fuel Co. (D. C. 1912) 195 Fed. 850. See, also, Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30.

Good faith of applicant—Ownership of coal taken in developing claim.—A qualified individual or association who enters on public lands in search of coal deposits in an honest effort to open them when found, intending to purchase the land, is not a trespasser, and is entitled to such coal as is extracted as an incident to the reasonable prosecution of the work. Ghost v. U. S. (1909) 168 Fed. 841, 94 C. C. A. 253.

Opening and improvement of coal mine.—A qualified person or corporation, who has opened and improved a

coal mine upon public lands, is entitled to a preference right of entry. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 59, 137 U. S. 160, 34 L. Ed. 640; Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30; Ghost v. U. S. (1909) 168 Fed. 841, 94 C. C. A. 253, U. S. v. Allen (C. C. 1910) 180 Fed. 855; Pereles v. Weil (D. C. 1907) 157 Fed. 419.

Declaratory statement—Oath.—A notary public is not authorized to administer an oath in support of the claim to a preference right to purchase coal land. U. S. v. Manion (D. C. 1890) 44 Fed. 800.

§ 4661. (R. S. § 2349.) Pre-emption claims of coal-land to be presented within sixty days, etc.

All claims under the preceding section must be presented to the register of the proper land-district within sixty days after the date of actual possession and the commencement of improvements on the land, by the filing of a declaratory statement therefor; but when the township plat is not on file at the date of such improvement, filing must be made within sixty days from the receipt of such plat at the district office; and where the improvements shall have been made prior to the expiration of three months from the third day of March, eighteen hundred and seventy-three, sixty days from the expiration of such three months shall be allowed for the filing of a declaratory statement, and no sale under the provisions of this section shall be allowed until the expiration of six months from the third day of March, eighteen hundred and seventy-three.

Act March 3, 1873, c. 279, § 3, 17 Stat. 607.

Notes of Decisions

Declaratory statement—Oath.—Notaries public are not authorized to administer oaths to affidavits required by the rules and regulations prescribed by the commissioner of the general land office; and perjury cannot, therefore, be assigned upon an affidavit made before a notary public by a person in support of his claim to a preference right to purchase coal land. U. S. v. Manion (D. C. 1890) 44 Fed. 800.

—— **Time of filing.**—Under this section a declaratory statement or notice of preference right must be filed in the proper land office within 60 days after the date of actual possession and commencement of improvements. Ghost v. U. S. (1909) 168 Fed. 841, 844, 94 C. C. A. 253.

—— **Effect on ownership.**—An entryman of coal lands who has filed a declaratory statement has such a possessory right as renders unlawful an entry on the land by a railroad corporation prior to condemnation proceedings. Atchison, T. & S. F. Ry. Co. v. Richter (N. M. 1915) 148 P. 478.

One who files a "coal declaratory statement" on public lands, and enters into possession thereunder, becomes the owner of all building stone taken from such land in developing the claim, even though the statement is not filed in good faith. Johnston v. Harrington (1892) 5 Wash. 73, 31 Pac. 316.

§ 4662. (R. S. § 2350.) Only one entry allowed.

The three preceding sections shall be held to authorize only one entry by the same person or association of persons; and no association of persons any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof; and no member of any association which shall have taken the benefit of such sections shall enter or hold any other lands under their provisions; and all persons claiming under section twenty-three hundred and forty-eight shall be required to prove their respective rights and pay for the lands filed upon within one year from the time prescribed for filing their respective claims; and upon failure to file the proper notice, or to pay for the land within the required period, the same shall be subject to entry by any other qualified applicant.

Act March 3, 1873, c. 279, § 4, 17 Stat. 607.

R. S. § 2348, mentioned in this section, is set forth ante, § 4660.

Notes of Decisions

1. Construction and application of section.
2. Single entry only permitted.
3. Extent of prohibition against more than one entry.

4. Entries in Alaska.
5. Entry by agent prohibited.
6. Entries by officers of corporation or by dummies.
7. Conspiracy to enter.
8. Disqualified associations.
9. Disqualified corporations.
10. Time for making proof and payment.
11. —— Entries in Alaska.

1. Construction and application of section.—This section cannot be construed to permit the doing by indirection of that which the statute expressly declares shall not be done. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 388, 53 L. Ed. 230.

The construction of this statute in a civil case may be applied in a criminal case subsequently arising. Id.

The right to sell coal lands lawfully acquired neither directly nor indirectly implies the authority to unlawfully acquire such coal lands in violation of an express statute. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 389, 53 L. Ed. 230. See U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149. Same v. Hill (D. C. 1914) 217 Fed. 841.

2. Single entry only permitted.—A combination or scheme by means of which each member would have a legal right to compel his fellow members to hold each and every tract for the benefit of all and to have an accounting of all profits derived from the mining operations on each several tract, although the legal title be retained by the individual members in severalty, thus enabling the combination to acquire coal lands in excess of 320 acres, is a violation of the provision of this section authorizing one entry only by the same person or association of persons. U. S. v. Portland Coal, etc., Co. (C. C. 1908) 173 Fed. 566; In re Coal Lands in Alaska (1909) 27 Op. Atty. Gen. 412. See U. S. v. Trinidad Coal, etc., Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; Same v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 53 L. Ed. 230.

A private corporation is subject to the restrictions imposed by this section. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 61, 137 U. S. 160, 34 L. Ed. 640.

The express command of this section limiting the preceding sections to authorize only one entry by the same person or association of persons, thereby prohibits more than one entry by the same person, and as the right to purchase coal lands did not exist except as conferred by this statute, it follows that the express provision excluding the right to do a particular act, is, in form and substance, a prohibition against the doing of such act. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 388, 53 L. Ed. 230. See U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149.

There is nothing in the statute to prevent a corporation from lawfully acquiring by purchase any quantity of coal land, the title to which or the preference right to purchase which have been lawfully acquired by others. Pereles v. Weil (D. C. 1907) 157 Fed. 419.

When a person has entered as much coal land as the statutes of the United States permit, a contract whereby another person is to enter additional coal land, obtain the title, and then convey it to the first, is contrary to public policy. Johnson v. Leonhard (1889) 1 Wash. St. 564, 20 Pac. 591.

3. Extent of prohibition against more than one entry.—The prohibition cannot be read out of the statute and thereby cause it to be inoperative by permitting a disqualified person to enter by an agent coal lands which he himself is prohibited from doing. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 388, 53 L. Ed. 230.

The absence of a limitation on the power to sell coal lands after properly acquiring them affords no ground for saying that the express prohibition of the statute against more than one entry by the same person should not be enforced according to its plain meaning. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 389, 53 L. Ed. 230; Same v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149.

The construction of this statute as to its limitations on the right of entry is not based upon the question of public policy alone, but upon the express prohibition to the effect that one person is permitted to make but one entry. Id.

It is definitely settled that the prohibitions in this section apply to all entries for coal lands whether or not there has been a prior location and possession by the entryman under the preceding sections. U. S. v. Allen (C. C. 1910) 180 Fed. 855.

The limitation in this section prohibiting any other person from making more than one coal land entry is part of the amendments of the coal-mining laws making them applicable to Alaska. U. S. v. Doughten (C. C. 1911) 186 Fed. 226, 232.

A contract by which one party agrees to furnish money to pay for coal lands, while another is to do the required work, is not contrary to law. Lipscomb v. Nichols (1882) 6 Colo. 290.

It is not unlawful to furnish money to a claimant of coal lands to procure a patent. The statutory prohibition is against acquiring title for the benefit of others. Walsh v. Hastings (1894) 20 Colo. 243, 38 Pac. 324.

4. Entries in Alaska.—The restriction to one entry by the same person, made by this section, governing entries of coal lands under the three preceding sections, which relate solely to surveyed lands, and which were expressly extended to Alaska by Act June 6, 1900, post, § 5070, was made applicable to entries on unsurveyed coal lands

in Alaska by Act April 28, 1904, post, § 5071, enacted solely to provide for the sale of such lands, and continuing in force in Alaska all the coal land laws of the United States not in conflict with its provisions. U. S. v. Munday (1911) 32 Sup. Ct. 53, 56, 222 U. S. 175, 56 L. Ed. 149, reversing judgment (C. C. 1911) 186 Fed. 375. See, also, U. S. v. Doughten (C. C. 1911) 186 Fed. 226.

5. Entry by agent prohibited.—The prohibition against more than one entry of coal lands by the same person prevents a qualified person from entering such lands apparently for himself, but in fact as the agent for a person who is himself disqualified because he has already purchased the full quantity permitted by law. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; Same v. Keitel (1908) 29 Sup. Ct. 123, 127, 211 U. S. 370, 53 L. Ed. 230 (reversing order [D. C. 1907] 157 Fed. 396); Same v. Forrester (1908) 29 Sup. Ct. 132, 134, 211 U. S. 399, 53 L. Ed. 245; Same v. Herr (1908) 29 Sup. Ct. 134, 211 U. S. 404, 53 L. Ed. 251; Id. (1908) 29 Sup. Ct. 135, 211 U. S. 406, 53 L. Ed. 252; U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149, reversing judgment (C. C. 1911) 186 Fed. 375.

6. Entries by officers of corporation or by dummies.—Entries made by officers, stockholders, and employés of a private corporation in their individual names, but for the benefit of the corporation, of vacant coal lands are fraudulent and in violation of this section of the statute. U. S. v. Trinidad Coal, etc., Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 166, 34 L. Ed. 640.

Patents for over 900 acres of coal lands obtained by members and employés of a private corporation pursuant to a scheme whereby the title was conveyed to the corporation, which paid all the expenses attending the entries and purchases from the government, will be canceled at the suit of the United States, especially where it appears that other members of the corporation had previously taken the benefit of the statute, and that the lands originally entered and purchased by them were then held and owned by the corporation, and were in excess of 320 acres. U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640, reversing (C. C. 1889) 37 Fed. 180.

A corporation cannot procure its officers, stockholders, and employés to make individual entries of coal land for the benefit of the corporation, and where it pays all the expenses of such entries, as it cannot be permitted to do indirectly that which it is prohibited from doing directly. U. S. v. Trinidad Coal, etc., Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 167, 34 L. Ed. 640; Same v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 392, 53 L. Ed. 230. See U. S. v. Robbins (D. C. 1907) 157 Fed. 999, 1000.

A corporation that has made one coal location in Alaska is disqualified from making any other or additional location, and being thus disqualified it cannot make a second location through another person acting for its use and benefit, and the coal land laws, as applied to Alaska, prevents any qualified person from making a coal land location or entry apparently for himself, but in fact as an agent for a corporation, and for the purpose of enabling such corporation to hold a larger area of coal lands than it could lawfully locate for itself. U. S. v. Munday (1911) 32 Sup. Ct. 53, 222 U. S. 175, 56 L. Ed. 149. See U. S. v. Doughten (C. C. 1911) 186 Fed. 226, 230.

7. Conspiracy to enter.—See, also, notes to § 10201, post.

A conspiracy to procure various persons as agents to enter public coal lands in behalf of the conspirators, ostensibly for the benefit of the persons making the entry, but in reality for the use and benefit of the conspirators, is a conspiracy to defraud the government within the meaning of the statute prohibiting a conspiracy to defraud the United States in any manner or for any purpose. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 393, 53 L. Ed. 230. See U. S. v. Trinidad Coal, etc., Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640; Same v. Robbins (D. C. 1907) 157 Fed. 999, 1000.

Where defendants employed dummies to make coal entries on public lands for the benefit of a corporation to be formed, and the defendants committed an overt act in furtherance of such arrangement, they were properly charged with conspiracy. U. S. v. Wells (1912) 192 Fed. 870, 113 C. C. A. 194, writ of certiorari denied Wells v. U. S. (1912) 32 Sup. Ct. 842, 225 U. S. 714, 56 L. Ed. 1269.

Any agreement, the purpose of which is to evade these provisions and to secure indirectly lands which could not be secured directly thereunder, constitutes a conspiracy to defraud the Unites States. U. S. v. Lonabaugh (D. C. 1907) 158 Fed. 314, judgment reversed Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56.

Where a number of persons entered into an agreement to obtain title to a large tract of coal lands from the United States and to vest such title in a company organized by them for the purpose, and to procure third persons to make individual entries secured by false testimony, the parties to the agreement furnished the money to pay for the lands, and, when final receipts were obtained, they took the same, paid small sums to the entrymen, and took deeds from them to the company, such agreement was a conspiracy to defraud the United States. U. S. v. Lonabaugh (D.

C. 1907) 158 Fed. 314, judgment reversed Lonabaugh v. U. S. (1910) 179 Fed. 476, 103 C. C. A. 56. See, also, U. S. v. Trinidad Coal & Coking Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 34 L. Ed. 640.

8. Disqualified associations.—This section expressly limits the right of entry by a person or association of persons, and expressly provides that no association of persons, any member of which shall have taken the benefit of this statute, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions of the statute. U. S. v. Keitel (1908) 29 Sup. Ct. 123, 211 U. S. 370, 387, 34 L. Ed. 640; Same v. Lonabaugh (D. C. 1907) 158 Fed. 314, 317.

This section authorizes an association of persons to enter not exceeding 320 acres, but it provides that only one entry can be made by the same person or association, and that "no association or persons, any member of which shall have taken the benefit of such sections, either as an individual or as a member of any other association, shall enter or hold any other lands under the provisions thereof." U. S. v. Trinidad Coal, etc., Co. (1890) 11 Sup. Ct. 57, 137 U. S. 160, 166, 34 L. Ed. 640.

An association cannot evade this statute by using for its own benefit the names of its members and employés to obtain from the government vacant coal lands which it could not regularly obtain upon entries made in its own name, and which it was forbidden to enter by reason of some of its members having previously taken the benefit of the statute. Id.

9. Disqualified corporations.—The entrymen of coal lands cannot be held to be agents or tools of a corporation not in existence at the time the entries are made within the meaning of this section. Ireland v. Henkle (C. C. 1910) 179 Fed. 993, 994.

10. Time for making proof and payment.—Under the regulations adopted a claimant has one year from and after the expiration of the period allowed for filing the declaratory statement within which to make proof and payment. Ghost v. U. S. (1909) 168 Fed. 841, 845, 94 C. C. A. 253.

11. —— Entries in Alaska.—Under this section coal claimants are required to make their applications for patent, submit proofs, and pay for the land within one year from the date of the filing of their declaratory statements, but such claimants in Alaska are allowed three years in which to complete the purchase. In re Alaskan Coal Lands (1909) 27 Op. Atty. Gen. 412, 413.

§ 4663. (R. S. § 2351.) Conflicting claims.

In case of conflicting claims upon coal-lands where the improvements shall be commenced, after the third day of March, eighteen hundred and seventy-three, priority of possession and improvement, followed by proper filing and continued good faith, shall determine the preference-right to purchase. And also where improvements have already been made prior to the third day of March, eighteen hundred and seventy-three, division of the land claimed may be made by legal subdivisions, to include, as near as may be, the valuable improvements of the respective parties. The Commissioner of the General Land-Office is authorized to issue all needful rules and regulations for carrying into effect the provisions of this and the four preceding sections.

Act March 3, 1873, c. 279, § 5, 17 Stat. 608.

Notes of Decisions

Priority of possession.—In case of conflicting claims to public coal lands priority of possession and improvement, followed by proper filing and continuous good faith, determines the right to purchase. Ghost v. U. S. (1909) 168 Fed. 841, 94 C. C. A. 253.

Rules and regulations.—Rules and regulations of the commissioner of the general land office under this section do not have the force of United States statutes relating to perjury. U. S. v. Manion (D. C. 1890) 44 Fed. 800.

§ 4664. (R. S. § 2352.) Rights reserved.

Nothing in the five preceding sections shall be construed to destroy or impair any rights which may have attached prior to the third day of March, eighteen hundred and seventy-three, or to authorize the sale of lands valuable for mines of gold, silver, or copper.

Act March 3, 1873, c. 279, § 6, 17 Stat. 608.

Notes of Decisions

Construction and application of section.—See notes to §§ 4659–4663, ante.

§ 4665. (Act March 3, 1909, c. 270.) Rights of entrymen under nonmineral land laws of lands subsequently classified as coal lands; disposal of coal deposits under coal-land laws.

Any person who has in good faith located, selected, or entered under the nonmineral land laws of the United States any lands which subsequently are classified, claimed, or reported as being valuable for coal, may, if he shall so elect, and upon making satisfactory proof of compliance with the laws under which such lands are claimed, receive a patent therefor, which shall contain a reservation to the United States of all coal in said lands, and the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal, but no person shall enter upon said lands to prospect for, or mine and remove coal therefrom, without previous consent of the owner under such patent, except upon such conditions as to security for and payment of all damages to such owner caused thereby as may be determined by a court of competent jurisdiction: Provided, That the owner under such patent shall have the right to mine coal for use on the land for domestic purposes prior to the disposal by the United States of the coal deposit: Provided further, That nothing herein contained shall be held to affect or abridge the right of any locator, selector, or entryman to a hearing for the purpose of determining the character of the land located, selected, or entered by him. Such locator, selector or entryman who has heretofore made or shall hereafter make final proof showing good faith and satisfactory compliance with the law under which his land is claimed shall be entitled to a patent without reservation unless at the time of such final proof and entry it shall be shown that the land is chiefly valuable for coal. (35 Stat. 844.)

This was an act entitled "An act for the protection of the surface rights of entrymen."

Notes of Decisions

Surface entry.—This act authorizes an entry of the surface under the nonmineral laws, the coal being reserved. U. S. v. Kostelak (D. C. 1913) 207 Fed. 447.

Mineral character of lands.—See notes to § 4659, ante.

Homestead entries.—See notes to § 4591, ante.

§ 4665a. (Act April 14, 1914, c. 55.) New or supplemental patents, without reservation, for lands patented with reservation of coal deposits, subsequently classified as noncoal.

That the Secretary of the Interior be, and he is hereby, authorized and directed in cases where patents for public lands have been issued to entrymen under the provisions of the Acts of Congress approved March third, nineteen hundred and nine, and June twenty-second, nineteen hundred and ten, reserving to the United States all coal deposits therein, and lands so patented are subsequently classified as noncoal in character, to issue new or supplemental patents without such reservation. (38 Stat. 335.)

This was an act entitled "An act to authorize the issuance of unqualified patents to public lands in certain cases," cited above.

Act March 3, 1909, c. 270, mentioned in this section, is set forth ante, § 4665.

Act June 22, 1910, also mentioned in this section, is set forth post, § 4668.

§ 4666. (Act June 22, 1910, c. 318, § 1.) Coal lands subject to homestead or desert-land entry, to selection under Carey Act, and to withdrawal under Reclamation Act, with reservation of coal, etc.; limitation and conditions of entries; application of act to prior nonmineral entries.

From and after the passage of this Act unreserved public lands of the United States exclusive of Alaska which have been with-

drawn or classified as coal lands, or are valuable for coal, shall be subject to appropriate entry under the homestead laws by actual settlers only, the desert-land law, to selection under section four of the Act approved August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and to withdrawal under the Act approved June seventeenth, nineteen hundred and two, known as the Reclamation Act, whenever such entry, selection, or withdrawal shall be made with a view of obtaining or passing title, with a reservation to the United States of the coal in such lands and of the right to prospect for, mine, and remove the same. But no desert entry made under the provisions of this Act shall contain more than one hundred and sixty acres, and all homestead entries made hereunder shall be subject to the conditions, as to residence and cultivation, of entries under the Act approved February nineteenth, nineteen hundred and nine, entitled "An Act to provide for an enlarged homestead:" Provided, That those who have initiated non-mineral entries, selections, or locations in good faith, prior to the passage of this Act, on lands withdrawn or classified as coal lands may perfect the same under the provisions of the laws under which said entries were made, but shall receive the limited patent provided for in this Act. (36 Stat. 583.)

This section and the two sections next following were an act entitled "An act to provide for agricultural entries on coal lands."

Act March 3, 1877, c. 107, the desert-land law, mentioned in this act, is set forth post, §§ 4674–4680.

Act Aug. 18, 1894, c. 301, § 4, the Carey Act, also mentioned in this act, is set forth post, § 4685.

Act June 17, 1902, c. 1093, the Reclamation Act, also mentioned in this act, is set forth post, §§ 4700–4708.

Act Feb. 19, 1909, c. 160, providing for an enlarged homestead, also mentioned in this act, is set forth ante, §§ 4563–4568.

This act was supplemented by provisions for the selection of coal lands by the several States, and for their sale under the laws providing for the sale of isolated or disconnected tracts of public lands, by Act April 30, 1912, c. 99, post, § 4669.

Coal lands in Alabama, withheld from homestead entry under Act March 3, 1883, c. 118, ante, § 4655, may be entered as homesteads, subject to the provisions of this act, by Act April 23, 1912, c. 87, post, § 4670.

§ 4667. (Act June 22, 1910, c. 318, § 2.) Applications for entry, etc., under act.

Any person desiring to make entry under the homestead laws or the desert-land law, any State desiring to make selection under section four of the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and the Secretary of the Interior in withdrawing under the Reclamation Act lands classified as coal lands, or valuable for coal, with a view of securing or passing title to the same in accordance with the provisions of said Acts, shall state in the application for entry, selection, or notice of withdrawal that the same is made in accordance with and subject to the provisions and reservations of this Act. (36 Stat. 584.)

§ 4668. (Act June 22, 1910, c. 318, § 3.) Patents for lands, with reservation of coal, etc.; disposal of coal deposits; prospecting for coal; damages from mining to surface owners; mining by owners for domestic use; right to disprove classification as coal lands.

Upon satisfactory proof of full compliance with the provisions of the laws under which entry is made, and of this Act, the entryman shall be entitled to a patent to the land entered by him, which patent shall contain a reservation to the United States of all the coal in the lands so patented, together with the right to prospect for, mine, and remove the same. The coal deposits in such lands shall be subject to disposal by the United States in accordance with the provisions of the coal-land laws in force at the time of such disposal.

Any person qualified to acquire coal deposits or the right to mine and remove the coal under the laws of the United States shall have the right, at all times, to enter upon the lands selected, entered, or patented, as provided by this Act, for the purpose of prospecting for coal thereon upon the approval by the Secretary of the Interior of a bond or undertaking to be filed with him as security for the payment of all damages to the crops and improvements on such lands by reason of such prospecting. Any person who has acquired from the United States the coal deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the coal therefrom, and mine and remove the coal, upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: Provided, That the owner under such limited patent shall have the right to mine coal for use upon the land for domestic purposes at any time prior to the disposal by the United States of the coal deposits: Provided further, That nothing herein contained shall be held to deny or abridge the right to present and have prompt consideration of applications to locate, enter, or select, under the land laws of the United States, lands which have been classified as coal lands with a view of disproving such classification and securing a patent without reservation. (36 Stat. 584.)

Where patents with reservations have been issued under this section, and the land is subsequently classified as noncoal, the Secretary of the Interior is authorized to issue new or supplemental patents without such reservations, by Act April 14, 1914, c. 55, ante, § 4665a.

Notes of Decisions

Surface entry.—Under this statute the surface may be entered under nonmineral laws and the coal underneath the surface may be reserved, or the land department is authorized to withdraw such lands from nonmineral or agricultural entry, and if it is believed the geological conditions are such that valuable deposits may exist therein, the department can maintain such withdrawal until time and development determine. U. S. v. Kostelak (D. C. 1913) 207 Fed. 447, 453.

§ 4669. (Act April 30, 1912, c. 99.) Selection of coal lands by States; sale of coal lands in isolated or disconnected tracts; reservation of coal thereon, and right to prospect and mine it.

From and after the passage of this Act unreserved public lands of the United States, exclusive of Alaska, which have been withdrawn or classified as coal lands or are valuable for coal shall, in addition to the classes of entries or filings described in the Act of Congress approved June twenty-second, nineteen hundred and ten, entitled "An Act to provide for agricultural entries on coal lands," be subject to selection by the several States within whose limits the lands are situate, under grants made by Congress, and to disposition, in the discretion of the Secretary of the Interior, under the laws providing for the sale of isolated or disconnected tracts of public lands, but there shall be a reservation to the United States of the coal in all such lands so selected or sold and of the right to prospect for, mine, and remove the same in accordance with the provisions of said Act of June twenty-second, nineteen hundred and ten, and such lands shall be subject to all the conditions and limitations of said Act. (37 Stat. 105.)

This was an act to supplement Act June 22, 1910, c. 318, mentioned therein, set forth ante, §§ 4666–4668.

The laws providing for the sale of isolated or disconnected tracts of public lands, referred to in this act, were contained in R. S. § 2455, as amended, post, § 5110.

§ 4670. (Act April 23, 1912, c. 87.) Coal lands in Alabama opened to agricultural entry.

Unreserved public lands containing coal deposits in the State of Alabama which are now being withheld from homestead entry under the provisions of the Act entitled "An Act to exclude the public lands in Alabama from the operations of the laws relating to mineral lands," approved March third, eighteen hundred and eighty-three, may be entered under the homestead laws of the United States subject to the provisions, terms, conditions, and limitations prescribed in the Act entitled "An Act to provide for agricultural entries on coal lands," approved June twenty-second, nineteen hundred and ten. (37 Stat. 90.)

This was an act entitled "An act extending the operation of the act of June twenty-second, nineteen hundred and ten, to coal lands in Alabama."

Act March 3, 1883, c. 118, mentioned in this section, is set forth ante, § 4655.

Act June 22, 1910, c. 318, also mentioned in this section, is set forth ante, §§ 4666–4668.

CHAPTER SIX A

Timber and Stone Lands

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes the provisions of Act June 3, 1878, c. 151, 20 Stat. 89, entitled "An act for the sale of timber lands in the states of California, Oregon, Nevada, and in Washington Territory," as amended by Act Aug. 4, 1892, c. 375, § 2, 27 Stat. 348.

Sec.
4671. Sale of timber and stone lands.
4672. Applications for purchase of timber and stone lands; false swearing; penalty.
4673. Publication of application for purchase; proofs; entry and patent; regulations.

§ 4671. (Act June 3, 1878, c. 151, § 1, as amended, Act Aug. 4, 1892, c. 375, § 2.) Sale of timber and stone lands.

Surveyed public lands of the United States within the public land States, not included within military, Indian, or other reservations of the United States, valuable chiefly for timber, but unfit for cultivation, and which have not been offered at public sale according to law, may be sold to citizens of the United States, or persons who have declared their intention to become such, in quantities not exceeding one hundred and sixty acres to any one person or association of persons, at the minimum price of two dollars and fifty cents per acre; and lands valuable chiefly for stone may be sold on the same terms as timber lands: Provided, That nothing herein contained shall defeat or impair any bona-fide claim under any law of the United States, or authorize the sale of any mining claim, or the improvements of any bona-fide settler, or lands containing gold, silver, cinnabar, copper, or coal, or lands selected by the said States under any law of the United States donating lands for internal improvements, education, or other purposes: And provided further, That none of the rights conferred by the act approved July twenty-sixth, eighteen hundred and sixty-six, entitled "An act granting the right of way to ditch and canal owners over the public lands, and for other purposes", shall be abrogated by this act; and all patents granted shall be subject to any vested and accrued water rights, or rights to ditches and reservoirs used in connection with such water rights, as may have been acquired under and by the provisions of said act; and such rights shall be expressly reserved in any patent issued under this act. (20 Stat. 89. 27 Stat. 348.)

This was the first section of an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," cited above.

This section, as originally enacted, began with the words, "That surveyed public lands of the United States within the States of California, Oregon and Nevada and in Washington Territory," etc. It was amended by Act Aug. 4, 1892, c. 375, § 2, cited above, by striking out the words "States of California, Oregon and Nevada and in Washington Territory," and inserting in lieu thereof the words "public land States," thus making the act applicable to timber lands in all the public land States, which was the purpose of the amending act, expressed therein.

Act July 26, 1866, c. 262, 14 Stat. 251, mentioned in this section was incorporated into R. S. §§ 2338, 2339, 2341-2343, 2477, 4646, 4647, 4649-4651, 4919.

Building-stone lands are subject to entry under the placer-mining laws by Act Aug. 4, 1892, c. 375, § 1, ante, § 4633.

Sections 2 and 3 of this act are set forth post, §§ 4672, 4673.

Section 4 of this act made punishable the unlawful cutting, destruction, or removal of timber on public lands, and provided for prosecutions therefor. It was superseded by the provisions relating to the same subject of Crim. Code, § 49, post, § 10216.

Section 5 of the act, providing for relief from certain prosecutions for cutting, etc., timber on public lands, on payment for the timber, etc., is set forth post, § 4988.

Section 6 of the act repealed all acts, etc., inconsistent with the provisions of this act.

Notes of Decisions

Scope, purpose, and application of act.—The timber and stone act, as originally enacted, related solely to public lands within particular states, but the amendment caused the act to apply to surveyed public lands of the United States within the public land states. U. S. v. Biggs (1909) 29 Sup. Ct. 181, 182, 211 U. S. 507, 53 L. Ed. 305; Same v. Price Trading Co. (1901) 109 Fed. 239, 48 C. C. A. 331; Stubbs v. U. S. (1901) 111 Fed. 366, 49 C. C. A. 392; Morgan v. Same (1906) 148 Fed. 189, 78 C. C. A. 323 (writ of certiorari denied U. S. v. Morgan [1906] 27 Sup. Ct. 784, 203 U. S. 595, 51 L. Ed. 333); Dwinnell v. Same (1911) 186 Fed. 754, 108 C. C. A. 624; Freezer v. Sweeney (1889) 21 P. 20, 8 Mont. 508, 513. See, also, Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 368, 188 U. S. 526, 47 L. Ed. 575; Weyerhaeuser v. Hoyt (1911) 31 Sup. Ct. 300, 219 U. S. 380, 55 L. Ed. 258; Daniels v. Wagner (1913) 205 Fed. 235, 125 C. C. A. 93; Jones v. U. S. (C. C. 1888) 35 Fed. 561 (decree reversed U. S. v. Jones [1888] 9 Sup. Ct. 669, 131 U. S. 1, 33 L. Ed. 90); Montgomery v. Same (C. C. 1888) 36 Fed. 4; Northern Pac. R. Co. v. Soderberg (C. C. 1900) 99 Fed. 506, 507; U. S. v. Schlierholz (D. C. 1904) 133 Fed. 333; Garfield v. U. S. (1908) 31 App. D. C. 338.

This statute was an attempt to widely distribute and popularize the ownership of these lands. Hoover v. Salling (1901) 110 Fed. 43, 49 C. C. A. 26; Robnett v. U. S. (1909) 169 Fed. 778, 781, 95 C. C. A. 244.

Lands not offered for sale.—Lands which have been offered for sale but not sold by the United States, and which were thereafter withdrawn from sale because they were situated within the limits of a land grant are to be considered as "lands which have not been offered for sale according to law," within this act. U. S. v. Budd (C. C. 1890) 43 Fed. 630.

Lands subject to entry.—This act only requires that no valuable deposits of gold, silver, cinnabar, copper, or coal exists on the land as deponent verily believes. U. S. v. Primrose Coal Co. (D. C. 1914) 216 Fed. 553.

Limitation on acreage.—This act provides that timber lands may be sold to citizens in quantities not exceeding 160 acres to any one person or association of persons, and a person cannot justify the cutting of timber on the public domain by claiming he had purchased more than 160 acres. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230.

Timber and stone entries are subject to the 320-acre limitation. Shenk v. Aumiller (D. C. 1914) 217 Fed. 969.

Disposal of timber lands.—Public land covered by a heavy growth of timber, which constitutes its chief value, is subject to entry under this act, although it would have been fit for cultivation after the removal of the timber. U. S. v. Budd (1892) 12 Sup. Ct. 575, 579, 144 U. S. 154, 36 L. Ed. 384; Thayer v. Spratt (1903) 23 Sup. Ct. 576, 578, 189 U. S. 346, 47 L. Ed. 845 (affirming judgment Whitney v. Same [1901] 64 P. 919, 25 Wash. 62, 87 Am. St. Rep. 738); U. S. v. Budd (C. C. 1890) 43 Fed. 630; Emmons v. U. S. (C. C. 1911) 189 Fed. 414; Johnson v. Bridal Veil Lumbering Co. (1893) 33 Pac. 528, 24 Or. 182.

Disposal of stone lands.—See, also, notes to § 4633, ante.

The right to purchase is exhausted by purchase of 160 acres. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230.

The act places stone lands in a class separate and distinct from other mineral lands and seems to indicate that the word "mineral," as used in prior statutes, had a limited definition and included metalliferous minerals only.

Northern Pac. R. Co. v. Soderberg (C. C. 1900) 99 Fed. 506, 507. See Northern Pac. R. Co. v. Soderberg (1900) 104 Fed. 425, 43 C. C. A. 620.

This act shows an intention by congress to prohibit the acquisition of stone lands under the mineral land laws. Wheeler v. Smith (1893) 5 Wash. 704, 32 Pac. 784.

Agricultural entry.—The fact that land is "unfit for cultivation," and "valuable chiefly for timber," within this act, does not prevent a homestead entry of such land. Johnson v. Bridal Veil Lumbering Co. (1893) 24 Or. 182, 33 Pac. 528.

Improvements of settler protected.—An abandoned and dilapidated cabin, and the remnant of an abandoned fence, are not "improvements" contemplated by this section. U. S. v. Budd (C. C. 1890) 43 Fed. 630.

§ 4672. (Act June 3, 1878, c. 151, § 2.) Applications for purchase of timber and stone lands; false swearing; penalty.

Any person desiring to avail himself of the provisions of this act shall file with the register of the proper district a written statement in duplicate, one of which is to be transmitted to the General Land Office, designating by legal subdivisions the particular tract of land he desires to purchase, setting forth that the same is unfit for cultivation, and valuable chiefly for its timber or stone; that it is uninhabited; contains no mining or other improvements, except for ditch or canal purposes, where any such do exist, save such as were made by or belong to the applicant, nor, as deponent verily believes, any valuable deposit of gold, silver, cinnabar, copper, or coal; that deponent has made no other application under this act; that he does not apply to purchase the same on speculation, but in good faith to appropriate it to his own exclusive use and benefit; and that he has not, directly or indirectly, made any agreement or contract, in any way or manner, with any person or persons whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself; which statement must be verified by the oath of the applicant before the register or the receiver of the land-office within the district where the land is situated; and if any person taking such oath shall swear falsely in the premises, he shall be subject to all the pains and penalties of perjury, and shall forfeit the money which he may have paid for said lands, and all right and title to the same; and any grant or conveyance which he may have made, except in the hands of bona-fide purchasers, shall be null and void. (20 Stat. 89.)

Notes of Decisions

1. Filing and effect of application.
2. Showing as to qualifications of entryman.
3. Showing as to good faith.
4. Verification by oath of applicant.
5. False swearing.
6. Forgery.
7. Conspiracy.
8. Prior agreement of applicant to sell.
9. Contract of sale after application.
10. Bona fide purchasers from entrymen.
11. Forfeiture or cancellation of entry.
12. Recovery of money on cancellation of entry.

1. Filing and effect of application.—The presentation of a verified application for the purchase of public land is not the filing of a mere initial paper in the form of a pleading setting forth facts thereafter to be established upon hearing, but the application is rather in the nature of preliminary proof. Williamson v. U. S. (1908) 28 Sup. Ct. 163, 176, 207 U. S. 425, 52 L. Ed. 278; Ballinger v. U. S. (1909) 33 App. D. C. 302.

An entry under this statute of lands within the indemnity limits under the grant to a railroad company, which have been withdrawn and suspended from entry and sale, gives the entryman the beneficial interest and equitable title as against the company, where it had filed its selection of land, but which had not been approved by the Secretary of the Interior. Hoyt v. Weyerhaeuser (1908) 161 Fed. 324, 88 C. C. A. 404.

The statement is simply an initial paper upon which the machinery of the Land Office is to be set in motion, and it is not accepted as proof, nor does it perform the office of proof. Robnett v. U. S. (1909) 169 Fed. 778, 782, 95 C. C. A. 244.

To acquire title the things prescribed by law must be observed, and the things inhibited must not be done. McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

An application to purchase is against the United States of no greater force than a claim initiated by settlement,

and the power of regulation and disposition of lands conferred upon Congress only ceases when all the preliminary acts prescribed for the acquisition of the title, including the payment of the price, have been performed. U. S. v. Braddock (C. C. 1892) 50 Fed. 669.

An applicant to purchase who complies with the statutory requirements, but whose tender of the purchase money is refused, acquires no vested interest in the land, and the government may withdraw it from sale. U. S. v. Braddock (C. C. 1892) 50 Fed. 669, following The Yosemite Valley Case (1872) 15 Wall. 77, 21 L. Ed. 82.

One whose application to enter land under this act has been received by the local land officers has a superior equitable right to a subsequent applicant, though by mistake of such officers the first application was noted on the tracts and plat book as relating to other land. U. S. v. Wesely (C. C. 1911) 189 Fed. 276.

An application to purchase lands under this act is in effect the inauguration of a proceeding through which land is acquired from the government, in which the government is an interested party. U. S. v. Long (D. C. 1911) 184 Fed. 184.

2. Showing as to qualifications of entryman.—The fact that one who is actually qualified to make an entry, by having declared his intention to become a citizen of the United States, erroneously states in his application to purchase such land that he is a citizen, no statement on the subject being required, is immaterial, and does not invalidate his entry. Lewis v. Shaw (C. C. 1895) 70 Fed. 289.

3. Showing as to good faith.—See also, notes to § 4673, post.

A married woman may purchase though she procured the money from husband. Hoover v. Salling (1901) 110 Fed. 43, 49 C. C. A. 26.

Where an applicant to purchase land under this act truthfully swears in his preliminary statement that he has no contract to sell the land to another, he is not required to again swear to such facts on making final proof. U. S. v. Kettenbach (1913) 208 Fed. 209, 125 C. C. A. 409.

Deception in the final proof cannot be established as tending to show fraudulent motive in the original application. U. S. v. Kettenbach (C. C. 1909) 175 Fed. 463, 467. See U. S. v. Kettenbach (1913) 208 Fed. 209, 125 C. C. A. 409.

4. Verification by oath of applicant.—The provisions in reference to the oath are similar to those in the former preemption act. Hafeman v. Gross (1905) 26 Sup. Ct. 80, 82, 199 U. S. 342, 50 L. Ed. 220.

This section does not require that applicant's initial statement shall be based on a personal examination of the lands, nor that he shall state from his personal knowledge that the land is unfit for cultivation. Hoover v. Salling (1901) 110 Fed. 43, 49 C. C. A. 26 (reversing decree [C. C. 1900] 102 Fed. 716); Robnett v. U. S. (1909) 169 Fed. 778, 95 C. C. A. 244. See, also, Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278. But see Ballinger v. U. S. (1909) 33 App. D. C. 302.

Statements in the blank forms furnished by the land department that the applicant had personally examined the land applied for and that he knew from his own personal knowledge that it was unfit for cultivation, uninhabited, etc., are improper. Robnett v. U. S. (1909) 169 Fed. 778, 95 C. C. A. 244.

The courts will take judicial notice of the qualification of the receiver of the land office to administer oaths. U. S. v. Eddy (C. C. 1905) 134 Fed. 114.

The act only requires that no mineral exists on the land as deponent verily believes. U. S. v. Primrose Coal Co. (D. C. 1914) 216 Fed. 553.

5. False swearing.—See, also, notes to § 10295, post.

The applicant's oath is false, and constitutes perjury where he has made an agreement to sell the land, whether written or oral; its enforceability being immaterial. Boren v. U. S. (1906) 144 Fed. 801, 75 C. C. A. 531.

Regulations of the land department, requiring evidence to be in the form of depositions under oath, are in furtherance of the purposes of the statute and valid, and false swearing in either the preliminary statement or in such depositions constitutes perjury. Van Gesner v. U. S. (1907) 153 Fed. 46, 82 C. C. A. 180.

A false averment in the affidavit of an entryman under this section is punishable as perjury. Nickell v. U. S. (1908) 161 Fed. 702, 88 C. C. A. 562, judgment affirmed (1909) 167 Fed. 741, 93 C. C. A. 229, writ of certiorari denied (1909) 29 Sup. Ct. 699, 214 U. S. 517, 53 L. Ed. 1064. See, also, Hawley v. Diller (1900) 20 Sup. Ct. 986, 178 U. S. 476, 44 L. Ed. 1157; London v. U. S. (1909) 171 Fed. 82, 96 C. C. A. 186; U. S. v. Eddy (C. C. 1905) 134 Fed. 114.

In a charge of false swearing under this section it is necessary to allege that the act of swearing falsely was willfully done. U. S. v. Eddy (C. C. 1905) 134 Fed. 114, 116.

A person who induces another to make a verified application for the purchase of timberlands under this act, and to make a false oath at the time of the final entry as to the good faith of such applicant, is guilty of subornation of perjury. U. S. v. Brace (D. C. 1907) 149 Fed. 869, 871. See U. S. v. Budd (1892) 12 Sup. Ct. 575, 144 U. S. 154, 36 L. Ed. 384.

The facts stated in a verified ap-

plication, including the fact that the application is not made for the purpose of sale, must not only be true when made, but must also be true when the land is paid for and the applicant receives his certificate of purchase or receiver's receipt. U. S. v. Brace (D. C. 1907) 149 Fed. 869. See, also, Mery v. Brodt (1898) 53 Pac. 818, 121 Cal. 332. But see Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

6. **Forgery.**—Preliminary sworn application for purchase is not a writing in support of or in relation to a claim, within Cr. Code, § 29, post, § 10193. U. S. v. Byron (D. C. 1915) 223 Fed. 798.

7. **Conspiracy.**—See, also, notes to § 10201, post.

The crime of conspiracy is consummated when the false swearing is done in the application, and the prohibition of the statute applies only to the condition of things existing at that time; and affidavits subsequently filed in the land department, though false, are inadmissible to show motive. Williamson v. U. S. (1908) 28 Sup. Ct. 163, 176, 207 U. S. 425, 52 L. Ed. 278; U. S. v. Biggs (1909) 29 Sup. Ct. 181, 211 U. S. 507, 53 L. Ed. 305; Dwinnell v. U. S. (1911) 186 Fed. 754, 108 C. C. A. 624.

The indictment is not fatally defective for failure to show that the precise piece or pieces of land to be acquired had been agreed on by the alleged conspirators at the time the conspiracy was formed or for failure to allege the persons to be suborned or the particular time and place of such subornation. Williamson v. U. S. (1908) 28 Sup. Ct. 163, 171, 207 U. S. 425, 52 L. Ed. 278; Dwinnell v. U. S. (1911) 186 Fed. 754, 108 C. C. A. 624.

A conspiracy to induce entrymen who have made application under the timber and stone act to agree to convey after patent, is not one to defraud the United States. U. S. v. Biggs (1909) 29 Sup. Ct. 181, 184, 211 U. S. 507, 53 L. Ed. 305 (affirming judgment [D. C. 1907] 157 Fed. 264); Same v. Freeman (1909) 29 Sup. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; Same v. Sullenberger (1909) 29 Sup. Ct. 186, 211 U. S. 522, 53 L. Ed. 311.

The government may prove that the lands were not valuable for the timber upon them, but were chiefly valuable for grazing purposes. Van Gesner v. U. S. (1907) 153 Fed. 46, 82 C. C. A. 180.

To constitute a conspiracy to defraud the government of public lands subject to entry under this act it is not essential that a patent for the lands be issued and delivered. U. S. v. Black (1908) 160 Fed. 431, 87 C. C. A. 383. See Ex parte Black (D. C. 1906) 147 Fed. 832.

An entryman having made an affidavit that he sought to purchase the land for his own benefit and not for speculation cannot escape punishment for conspiracy on the ground that his preexisting contract of sale related to the timber only. Nickell v. U. S. (1908) 161 Fed. 702, 88 C. C. A. 562, judgment affirmed on rehearing (1909) 167 Fed. 741, 93 C. C. A. 229, writ of certiorari denied (1909) 29 Sup. Ct. 699, 214 U. S. 517, 53 L. Ed. 1034.

In a prosecution for conspiracy to defraud by suborning persons to commit perjury in making entries under this act evidence of acts of the alleged perjurers committed long after they had sworn to and filed their statements, and that subsequent to such filing they had agreed with defendant D. for a money consideration to file a relinquishment of their applications at such a time as he could manage to take it up with scrip, together with a relinquishment so filed, was inadmissible to show motive. Dwinnell v. U. S. (1911) 186 Fed. 754, 108 C. C. A. 624.

Allegations in their final proofs that the purchases were made for the entrymen alone are admissible as bearing on the question of good faith. Worden v. U. S. (1913) 204 Fed. 1, 122 C. C. A. 315.

An agreement to acquire title to timberland by procuring persons to make application, and the procuring of a large number of persons pursuant to the agreement to make application, the entire expense being paid by the parties to the agreement, and each applicant to be paid a stated amount for his trouble, is sufficient to show that the entries were fraudulent, though no express agreement was made with the applicants that the entries should be made for the benefit of another. U. S. v. Smith (C. C. 1910) 181 Fed. 545, decree affirmed Linn & Lane Timber Co. v. U. S. (1912) 196 Fed. 593, 116 C. C. A. 267, amended on rehearing (C. C. A. 1913) 203 Fed. 394. See, also, U. S. v. Clark (C. C. 1904) 129 Fed. 241; Same v. Belts (C. C. 1911) 192 Fed. 708.

8. **Prior agreement of applicant to sell.**—The act does not in any respect limit the dominion which the purchaser has over the land after its purchase from the government or restrict his power of alienation, but it only denounces a prior agreement, the acting for another in the purchase. U. S. v. Budd (1892) 12 Sup. Ct. 575, 577, 144 U. S. 154, 36 L. Ed. 384 (affirming [C. C. 1890] 43 Fed. 630); Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278; Olson v. Same (1904) 133 Fed. 849, 67 C. C. A. 21; U. S. v. Wells (1912) 192 Fed. 870, 113 C. C. A. 194; Same v. Kettenbach (1913) 208 Fed. 209, 125 C. C. A. 409; Same v. Barber Lumber Co. (C. C. 1909) 172 Fed. 948 (decree affirmed [1912] 194 Fed. 24, 114 C. C.

A. 44); Same v. Kettenbach (C. C. 1909) 175 Fed. 463; Same v. Brace (D. C. 1907) 149 Fed. 869.

Any citizen of the United States may purchase lands under this act, where such purchase is for his own exclusive use and benefit, notwithstanding at the time of such purchase he may have in contemplation a future sale for a profit; but any previous agreement by him, by which directly or indirectly "the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself," is in violation of the act, although such agreement may have been in parol and within the statute of frauds. Olson v. U. S. (1904) 133 Fed. 849, 67 C. C. A. 21.

An entryman under this act, who has acquired his holding in good faith, may alienate his interest prior to the issuing of a final certificate; the only agreement prohibited being a prior agreement to enter the land for another. Worden v. U. S. (1913) 204 Fed. 1, 122 C. C. A. 315.

A lumber company located in the vicinity of land subject to entry could properly advertise that it wished to buy timber, loan money to entrymen, purchase incomplete entries, and pay money required on final proofs, so long as there was no prior agreement or understanding that it was to get the land. Id.

Fraud which will vitiate a purchase under this act, so far as purchase for speculation is concerned, is an agreement to purchase for another, made prior to the entryman's original application to purchase. U. S. v. Kettenbach (1913) 208 Fed. 209, 125 C. C. A. 409. And see McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

The fact that a lumber company lent money without security to persons to enable them to enter and pay for land in the expectation that when the entrymen obtained title it would be enabled to buy the timber by reason of the fact that it had the only mill in the vicinity, does not render the entries invalid for fraud, where there was no agreement for the sale prior to the entries, but each man was free to keep the timber or to sell it to others; nor are such entries invalid as made on "speculation" because the persons making them did so with the intention of selling the timber for their own benefit. U. S. v. Detroit Timber & Lumber Co. (C. C. 1903) 124 Fed. 393, decree reversed (1904) 131 Fed. 668, 67 C. C. A. 1, which is affirmed (1906) 26 Sup. Ct. 282, 200 U. S. 321, 50 L. Ed. 499.

9. Contract of sale after application.—An entryman who has made an application under this act, in good faith, and for his exclusive use and benefit, is not prohibited from subsequently agreeing to convey the land covered by his application to another, and to perfect his entry for the purpose, after patent, of fulfilling his contract, by the provision of the statute. U. S. v. Biggs (1909) 29 Sup. Ct. 181, 182, 211 U. S. 507, 53 L. Ed. 305 (affirming judgment [D. C. 1907] 157 Fed. 264); Same v. Freeman (1909) 29 Sup. Ct. 185, 211 U. S. 525, 53 L. Ed. 311; Same v. Sullenberger (1909) 29 Sup. Ct. 186, 211 U. S. 522, 53 L. Ed. 311. See Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 460, 52 L. Ed. 278.

An applicant for the purchase of land has the right after he has made his initial application and before final proof to contract to sell the title thereafter to be acquired, and the intending purchaser may lawfully advance to him the money with which to make final proof in order that he may comply with his contract. U. S. v. Barber Lumber Co. (C. C. 1909) 172 Fed. 948 (decree affirmed [1912] 194 Fed. 24, 114 C. C. A. 44); Same v. Kettenbach (C. C. 1909) 175 Fed. 463. See, also, Williamson v. U. S. (1908) 28 Sup. Ct. 163, 207 U. S. 425, 52 L. Ed. 278.

10. Bona fide purchasers from entrymen.—Purchasers from an entryman before the issue of a patent are not bona fide purchasers who are protected against the cancellation of a fraudulent entry under this act. Hawley v. Diller (1900) 20 Sup. Ct. 986, 989, 178 U. S. 476, 44 L. Ed. 1157 (affirming Diller v. Hawley [1897] 81 Fed. 651, 26 C. C. A. 514, which reversed decree Hawley v. Diller [C. C. 1896] 75 Fed. 946); McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

While the assignee of certificates of entry under this act did not become clothed with the legal title, and therefore did not come within the provision of this section for the protection of bona fide purchasers, he acquired an equitable interest which could not be taken from him by cancellation of the certificates without notice thereof. Thayer v. Spratt (1903) 23 Sup. Ct. 576, 578, 189 U. S. 346, 47 L. Ed. 845.

A purchaser of the property of a lumber company is not charged with the knowledge of the wrongful character, as against the federal government, of certain conveyances of standing timber, which might have been gained by a searching investigation of the books and papers turned over by the lumber company as evidence of its titles, where there were no circumstances disclosed which cast suspicion upon those titles. U. S. v. Detroit Timber & Lumber Co. (1906) 26 Sup. Ct. 282, 284, 200 U. S. 321, 50 L. Ed. 499.

A bona fide purchaser of standing timber from the holders of receivers' final receipts for the purchase price of lands entered under this act, cannot, upon avoidance for the fraud of the entrymen of the patents afterwards is-

sued, be required to account to the federal government for the timber which it has paid for and cut and removed in reliance upon its purchase. Id.

The doctrine of relation operates to protect the bona fide purchaser of timber lands from the patentees against the consequences of the wrongful conduct of the entryman. U. S. v. Detroit Timber & Lumber Co. (1906) 26 Sup. Ct. 282, 286, 200 U. S. 321, 50 L. Ed. 499, affirming decree (1904) 131 Fed. 668, 67 C. C. A. 1.

A purchaser from the patentees for value, and without notice of any fraud on the part of the entrymen, is a bona fide purchaser within this act and as such is entitled to protection, although such purchaser may have acquired an interest in the lands under a contract for the standing timber before the patents issued; since, by the doctrine of relation, the patents, when issued, became operative as of the date of the entries. U. S. v. Detroit Timber & Lumber Co. (1906) 26 Sup. Ct. 282, 286, 200 U. S. 321, 50 L. Ed. 499. See, also, U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861.

The title of a bona fide purchaser of lands after the issue of a patent is superior to the equitable claim of the United States to avoid the patent and the title under it for fraud or error in its issuance. U. S. v. Detroit Timber & Lumber Co. (1904) 131 Fed. 668, 67 C. C. A. 1, reversing decree (C. C. 1903) 124 Fed. 393, and decree affirmed (1906) 26 Sup. Ct. 282, 200 U. S. 321, 50 L. Ed. 499.

A purchaser of timber lands after receivers' final receipts have issued is entitled to protection as a bona fide purchaser against the cancellation, for the original frauds of the entrymen, of the patents afterwards issued unless he is shown to have had actual notice of such fraud. U. S. v. Clark (1905) 138 Fed. 294, 70 C. C. A. 584, affirming judgment (C. C. 1903) 125 Fed. 774, 778, and decree affirmed (1906) 26 Sup. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

While the United States is entitled to cancel fraudulent land entries as against the entrymen and innocent purchasers prior to the issuance of a patent to the land, during which time the legal title remains in the government, after the entry is confirmed and title vested by the issuance of a patent, the government cannot repudiate the same and recover the land for such fraud, as against an innocent purchaser for value. Id.

One buying land which has been entered under the timber and stone act is not chargeable with notice of fraud in the entries, of which he had no actual knowledge such as will render the patents subject to cancellation in a suit against him. U. S. v. Barber Lumber Co. (1912) 194 Fed. 24, 114 C. C. A. 44 (affirming decree [C. C. 1909] 172 Fed. 948).

No action lies by the United States against bona fide purchasers from a patentee for value without notice of fraud. U. S. v. Koleno (1915) 226 Fed. 180, 141 C. C. A. 178.

Although, in a suit to cancel a patent to land entered as timber land, it appears that the land was not in fact unfit for cultivation, and chiefly valuable for its timber, and therefore not subject to entry as timber land, yet, if the patent does not show that the government, in issuing it, relied upon the representation that it was timber land, the title will be protected in the hands of a bona fide purchaser. U. S. v. Scholl (C. C. 1891) 45 Fed. 758.

The rights of a bona fide purchaser from one who has entered lands under this act are not affected by a subsequent cancellation of the entry. Lewis v. Shaw (C. C. 1895) 70 Fed. 289.

Where an entryman of public lands sold the land to defendant's vendor after the issuance of the entryman's final certificate, who thereafter sold the land to defendant before the issuance of patents, which were subsequently issued to the original entryman, the fact that defendant purchased before the issuance of the patent did not deprive him of the rights of a bona fide purchaser for value. U. S. v. Clark (C. C. 1903) 125 Fed. 774, judgment affirmed (1905) 138 Fed. 294, 70 C. C. A. 584, which is affirmed (1906) 26 Sup. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

A person with knowledge of fraudulent entries of land under this act cannot be a bona fide purchaser of such lands; neither can a corporation formed by him, and the stock of which is owned by himself and the members of his family. U. S. v. Smith (C. C. 1910) 181 Fed. 545, 554.

11. Forfeiture or cancellation of entry.—Failure to give notice to transferees of an entryman of an order of the secretary of the interior to send to him the papers in proceedings for the cancellation of the entry is immaterial, if they had an opportunity to be heard before the secretary while the case was in his hands. Hawley v. Diller (1900) 20 Sup. Ct. 986, 989, 178 U. S. 476, 44 L. Ed. 1157, affirming decree Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514.

The cancellation of a certificate of entry under this act is not conclusive as against a transferee who had no notice and no opportunity to be heard upon the question of the original validity of such entry, but he is left free to prove the validity of the entry by any means other than the certificate. Thayer v. Spratt (1903) 23 Sup. Ct. 576, 578, 189 U. S. 346, 47 L. Ed. 845, affirming judgment Whitney v. Same (1901) 64 Pac. 919, 25 Wash. 62, 87 Am. St. Rep. 738.

The land department is authorized to cancel an entry where the evidence is sufficient to justify the inference that there was some prior understanding, though not directly shown, between the entryman and others, that his acts should inure to their benefit, and that he

applied to purchase the land on a speculation, and not in good faith to appropriate it to his own exclusive use and benefit. Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514, reversing decree Hawley v. Diller (C. C. 1896) 75 Fed. 946.

Proceedings by the land department to cancel an entry for misrepresentations of the entryman, without notice to a bona fide purchaser, are void. Lewis v. Shaw (C. C. 1893) 57 Fed. 516, 517. See, also, Lewis v. Shaw (C. C. 1895) 70 Fed. 289.

Land regularly entered under this act as chiefly valuable for timber and stone is not subject to forfeiture in the hands of a bona fide purchaser. Hawley v. Diller (C. C. 1896) 75 Fed. 946, decree reversed Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514.

12. Recovery of money on cancellation of entry.—Hearings before the land department in proceedings to cancel timber and stone entries for fraud, and the cancellation thereof, constitute due process of law, so that a claim of forfeiture of money paid, as provided by this act, in a suit by the entryman's assignee to recover the money from the United States, was not objectionable as a taking of property without due process of law. Emmons v. U. S. (C. C. 1909) 175 Fed. 514.

Cancellation of timber and stone entries by the land department for fraud on the government is conclusive of such fact, in a suit to recover from the United States the moneys advanced by the entrymen. Id.

The conditions imposed on the fraudulent claimant, to wit, the pains and penalties of perjury and the forfeiture of money paid, are distinct, and not one dependent on the other, so that it was not essential that fraudulent claimants should have been convicted of perjury before a forfeiture of the moneys paid could be imposed. Emmons v. U. S. (C. C. 1909) 175 Fed. 514. See, also, Mery v. Brodt (1898) 53 P. 818, 121 Cal. 332.

§ 4673. (Act June 3, 1878, c. 151, § 3.) Publication of application for purchase; proofs; entry and patent; regulations.

Upon the filing of said statement, as provided in the second section of this act, the register of the land office shall post a notice of such application, embracing a description of the land by legal subdivisions, in his office, for a period of sixty days, and shall furnish the applicant a copy of the same for publication, at the expense of such applicant, in a newspaper published nearest the location of the premises, for a like period of time; and after the expiration of said sixty days, if no adverse claim shall have been filed, the person desiring to purchase shall furnish to the register of the land-office satisfactory evidence, first, that said notice of the application prepared by the register as aforesaid was duly published in a newspaper as herein required; secondly, that the land is of the character contemplated in this act, unoccupied and without improvements, other than those excepted, either mining or agricultural, and that it apparently contains no valuable deposits of gold, silver, cinnabar, copper, or coal; and upon payment to the proper officer of the purchase-money of said land, together with the fees of the register and the receiver, as provided for in case of mining claims in the twelfth section of the act approved May tenth, eighteen hundred and seventy-two, the applicant may be permitted to enter said tract, and, on the transmission to the General Land Office of the papers and testimony in the case, a patent shall issue thereon: Provided, That any person having a valid claim to any portion of the land may object, in writing, to the issuance of a patent to lands so held by him, stating the nature of his claim thereto; and evidence shall be taken, and the merits of said objection shall be determined by the officers of the land-office, subject to appeal, as in other land cases. Effect shall be given to the foregoing provisions of this act by regulations to be prescribed by the Commissioner of the General Land Office. (20 Stat. 90.)

The second section of this act, referred to in this section, is set forth ante, § 4672.

Act May 10, 1872, c. 152, § 12, mentioned in this section, was incorporated into R. S. § 2334, ante, § 4642.

Notes of Decisions

1. Regulations.
2. Showing as to good faith of applicant.
3. Contest—Preference right of entry.
4. Effect of entry.
5. Judicial control of decision on application for purchase.

6. Patent—Issuance.
7. —— Estate conveyed by patent.
8. —— Void patent.
9. —— Cancellation of patent.
10. —— Effect of departmental decisions.
11. —— Patentee as trustee.

1. Regulations.—The authority of the commissioner of the general land office to prescribe regulations does not embrace the power to require an applicant to make oath on final hearing of his bona fides and of the absence of contract or agreement in respect to the title. Williamson v. U. S. (1908) 28 Sup. Ct. 163, 177, 207 U. S. 425, 52 L. Ed. 278; Robnett v. Same (1909) 169 Fed. 778, 95 C. C. A. 244.

Regulations requiring evidence to be in the form of depositions are valid. Van Gesner v. U. S. (1907) 153 Fed. 46, 82 C. C. A. 180.

2. Showing as to good faith of applicant.—The omission from this section of any reiteration of the requirements of the statute regarding a speculative purpose on the part of the applicant, his bona fides, and his intent to acquire the land for himself alone, is equivalent to an express declaration that these requirements shall not be exacted at the final hearing. Williamson v. U. S. (1908) 28 Sup. Ct. 163, 176, 207 U. S. 425, 52 L. Ed. 278; U. S. v. Biggs (1909) 29 Sup. Ct. 181, 184, 211 U. S. 507, 53 L. Ed. 305. See, also, Robnett v. U. S. (1909) 169 Fed. 778, 95 C. C. A. 244; Dwinnell v. Same (1911) 186 Fed. 754, 108 C. C. A. 624; U. S. v. Kettenbach (1913) 208 Fed. 209, 125 C. C. A. 409; Same v. Kettenbach (C. C. 1909) 175 Fed. 463. But see U. S. v. Brace (D. C. 1907) 149 Fed. 869.

3. Contest—Preference right of entry.—An agreement to convey interest after final proof under a previous homestead entry, which had been abandoned, is admissible on a contest. McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

A contestant who obtains a cancellation of the application to purchase does not acquire a preference right of entry under Act May 14, 1880. Howell v. Sappington (C. C. 1908) 165 Fed. 944.

4. Effect of entry.—See, also, notes to § 4672, ante.

One who makes his final proof and pays the purchase price of land applied for, and receives his final receipt or certificate, becomes the owner of the land, and it is then subject to the lien of a judgment against him. Budd v. Gallier (Or. 1907) 89 P. 638.

5. Judicial control of decision on application for purchase.—Decision of Secretary of Interior as to sufficiency of application for purchase of land under this section held not so arbitrary or discretionary as to be controllable by mandamus. U. S. ex rel. Ness v. Fisher (1912) 32 Sup. Ct. 356, 223 U. S. 683, 56 L. Ed. 610, affirming judgment Ballinger v. U. S. (1909) 33 App. D. C. 302. See, also, U. S. v. Ballinger (1909) 33 App. D. C. 211.

6. Patent—Issuance.—A sale by the register and receiver of the local land office is completed on payment of the price, and delivery of the certificate or receipt; and this need not be ratified or confirmed by the commissioner of the general land office; but it is the duty of such commissioner on receiving "the papers and testimony in the case," if it appears prima facie therefrom that the law has been complied with, to cause a patent to issue to the purchaser. Montgomery v. U. S. (C. C. 1888) 36 Fed. 4.

7. —— Estate conveyed by patent.—The patent conveys an estate in fee simple and all right, title, and interest which the United States had in the land at the time of the entry. Gilbert v. Auster (Wis. 1908) 116 N. W. 177.

8. —— Void patent.—Where, through mistake of local land officers, the first application to enter land under this act is noted on the tracts and plat book as covering another tract of land, and a subsequent applicant procures the first patent to the particular land, the patent is not absolutely void. U. S. v. Wesely (C. C. 1911) 189 Fed. 276.

A patent for land shown by the records of the general land office, and decided by its officers, to be of unsurveyed land is void. Garfield v. U. S. (1908) 31 App. D. C. 338.

9. —— Cancellation of patent.—See, also, notes to § 4672, ante.

To entitle the United States to the cancellation of patents on the ground of fraudulent entries under this act, the testimony must be clear, unequivocal, and convincing. U. S. v. Booth-Kelly Lumber Co. (1913) 203 Fed. 423, 121 C. C. A. 533; Same v. Budd (C. C. 1890) 43 Fed. 630; Same v. Clark (C. C. 1903) 125 Fed. 774, judgment affirmed (1905) 138 Fed. 294, 70 C. C. A. 584, which is affirmed (1906) 26 Sup. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

A decree canceling patents for timber lands, as made on fraudulent entries, will not be disturbed, where evidence of defendants is outweighed by inferences drawn from their conduct. Booth-Kelly Lumber Co. v. U. S. (1915) 35 Sup. Ct. 659, 237 U. S. 481, 59 L. Ed. 1058, affirming decree U. S. v. Booth-Kelly Lumber Co. (1913) 203 Fed. 423, 121 C. C. A. 533.

Patents procured from the United States by fraud are not void but voidable, and the government may elect to rescind the patent or ratify and sue for damages. U. S. v. Koleno (1915) 226 Fed. 180, 141 C. C. A. 178.

Where the United States sues for the cancellation of a patent because

the land granted thereby was not of the character contemplated by the act on which the patent is based, and not because of any fraud or misconduct on the part of the patentee, it is essential to the recovery of the land that the purchase money should be refunded. U. S. v. Budd (C. C. 1890) 43 Fed. 630.

A timber-land patent will not be canceled on the ground that the lands are not in fact timber lands, when the evidence merely renders it doubtful whether they can properly be so classed. U. S. v. Meeker (C. C. 1892) 50 Fed. 146.

The rule that one who alleges fraud must prove it by satisfactory evidence, which is more than a bare preponderance, and sufficient to overcome the presumption of fact in favor of the honesty of the transaction, applies as well to suits in equity as to actions at law, and with especial force to suits by the United States to cancel patents to lands which have been issued in conformity to the prescribed rules and regulations of the land department. U. S. v. Detroit Timber & Lumber Co. (C. C. 1903) 124 Fed. 393, decree reversed (1904) 131 Fed. 668, 67 C. C. A. 1, which is affirmed (1906) 26 Sup. Ct. 282, 200 U. S. 321, 50 L. Ed. 499.

The patent cannot be canceled where the entryman concealed immaterial facts in order to obtain the patent to the receipt of which he was undoubtedly entitled. U. S. v. Kettenbach (C. C. 1909) 175 Fed. 463, reversed in part (1913) 208 Fed. 209, 125 C. C. A. 409.

Title to land entered under this act having passed to an entryman by prior patent, though another had made prior application to enter and made final proof, his application, by mistake of the local land officers, having been noted on the tracts and plat book as covering another tract of land, the question of the real ownership was open in the proper courts, in a suit by the United States to set aside such patent. U. S. v. Wesely (C. C. 1911) 189 Fed. 276.

10. —— Effect of departmental decisions.—Where a decision of the Secretary of the Interior directing that certain fraudulent stone and timber claims be passed to patent was brought about by false and fraudulent proof and affidavits, such determination was no bar to suit by the government to vacate the patents. Linn & Lane Timber Co. v. U. S. (1915) 35 Sup. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees (1912) 196 Fed. 593, 116 C. C. A. 267, and (1913) 203 Fed. 394, 121 C. C. A. 498, and U. S. v. Smith (C. C. 1910) 181 Fed. 545.

Whether application to purchase was speculative is a question of fact, as to which land department's finding was conclusive. McGoldrick Lumber Co. v. Kinsolving (1915) 221 Fed. 819, 137 C. C. A. 377.

Where the land department, after full investigation, has determined that land sought to be acquired under the timber and stone act was subject to entry thereunder, and accepted the applications and issued patents therefor, such findings of fact are conclusive and the decision of the department final. U. S. v. Primrose Coal Co. (D. C. 1914) 216 Fed. 553.

11. —— Patentee as trustee.—Title to land entered under this act having passed to an entryman by prior patent, though another had made prior application to enter and make final proof, his application, by mistake of the local land officers, having been noted on the tracts and plat book as covering another tract of land, the question of the real ownership was open in the proper courts, in a suit by one claiming under the first applicant to declare a trust. U. S. v. Wesely (C. C. 1911) 189 Fed. 276.

Where one has fraudulently obtained a patent to land under the timber act, one who has made a valid location of the land as a mining claim may bring suit against the patentee to have his title declared to be held in trust for plaintiff, and for a conveyance by defendant to plaintiff. Mery v. Brodt (1898) 53 P. 818, 121 Cal. 332.

CHAPTER SIX B

Desert and Arid Lands, and Irrigation and Reclamation

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes the provisions of the desert-land laws, the Carey Act and acts amendatory thereof and supplementary thereto, granting lands to States for reclamation, and the National Reclamation or Irrigation Act and the acts amendatory thereof and supplementary thereto, providing for the reclamation of arid lands by the United States.

Sec.

DESERT LANDS

4674. Sale of desert lands; use of water; declaration; patent; quantity purchasable by one person.
4675. Desert lands defined.
4676. States in which act to apply.
4677. Irrigation plan to be filed.
4678. Expenditures on and cultivation of land required; patent.
4679. Issue of patent on making proofs; limit of individual holding; additional proofs; cancellation of entries.
4680. Act to apply in Colorado; resident citizens only entitled to enter.
4681. Desert-land entries restricted to surveyed lands; preference of persons in possession of lands prior to survey.
4682. Assignments of desert-land entries restricted.
4683. Time to complete irrigation works and make final proofs under desert-land entries extended.
4684. Further extension of time for final proof in desert-land entries to be granted by the Secretary of the Interior; affidavit for extension; limit of extension.
4684a. Further extension of time for final proof in desert-land entries, on showing of compliance with requirements and prospect of making final proof.
4684b. Desert-land entry, after expenditures to effect reclamation, without prospect of securing water sufficient, may be perfected as homestead entry.
4684c. Election to perfect desert-land entry by payment and proof of improvements and use of land for agricultural purposes; time for final proof.
4684d. Springs, streams, and water holes on arid public lands; discovery, development, etc.; signboards, etc.; showing location; appliances for drawing water from; maps and reports of, and information as to.
4684e. Injuring, destroying, defacing, etc., signposts, or filling up, fouling, etc., springs, etc.; punishment.
4684f. Rules and regulations.

GRANTS OF DESERT LANDS TO STATES FOR RECLAMATION (THE CAREY ACT)

4685. (1) Contracts by United States with public-land States for donation of arid lands.
(2) Map showing plan of irrigation; regulations for reservation.
(3) States may contract for reclamation and settlement.
(4) Patents to States or assigns; limit of amount to one person; disposal of funds derived from sale.
4686. Liens for expenses of reclamation of arid lands.
4687. When time limit for reclamation begins to run; failure to reclaim; restoration to public domain.
4688. Additional arid lands made available to State of Idaho for reclamation.
4689. Additional arid lands made available to states of Idaho and Wyoming for reclamation.
4690. Provisions for grants of arid lands to states for reclamation extended to territories of New Mexico and Arizona.
4691. Additional arid lands made available to State of Nevada for reclamation.
4692. Additional arid lands made available to State of Colorado for reclamation.
4693. Provisions for grants of arid lands to States for reclamation extended to desert lands within part of former Ute Indian Reservation in State of Colorado.
4694. Restriction of lands to be included under provisions of act.
4695. Temporary withdrawal from settlement or entry of lands for which application under Carey Act is proposed.

Sec.

STATE IRRIGATION DISTRICTS INCLUDING PUBLIC LANDS

4695a. Public entered lands and lands subject to entry within state irrigation districts subject to state laws relating to irrigation districts, etc.; rights of entrymen under public land laws; lands excepted.

4695b. Apportionment of cost of construction, etc., of canals, ditches, etc.; lien of charges and enforcement thereof; effect of withdrawal of public lands.

4695c. Maps, plats, and plans of irrigation districts; approval.

4695d. Entry of approval of maps, etc., on records by registers and receivers.

4695e. Sale of lands for taxes and assessments.

4695f. Patents to purchasers or assigns.

4695g. Notices required by irrigation district laws delivered to registers and receivers, etc.

4695h. Disposition of money from sale of lands.

RECLAMATION OF ARID LANDS BY THE UNITED STATES

4696. Surveys in arid regions; reservations for reservoir sites, etc.; opening lands reserved to homestead entries.

4697. Repeal in part of Act Oct. 2, 1888, c. 1069; entries on arid lands; reservation of reservoir sites.

4698. Reservoir sites to include only necessary land.

4699. Reservoir sites to be open to use for right of way; occupancy and control by states.

4700. Receipts from public lands in certain States and Territories appropriated as reclamation fund; insufficiency of proceeds of other public lands for support of agricultural colleges to be supplied from other moneys.

4701. Surveys for and location and construction of irrigation works; reports to Congress.

4702. Withdrawal from entry of lands required for works and lands susceptible of irrigation; lands to be irrigated subject to entry under homestead laws; commutation provisions not applicable.

4703. Contracts for irrigation works; public notice of lands irrigable, limit of entry, charges, etc.; eight hours to be a day's work; no Mongolian labor to be employed.

4704. Requirements to be performed by entryman; sale of water rights to landowners; payments, and forfeiture for nonpayment; disposition of receipts; commissions of registers and receivers.

4705. Use of reclamation fund for reservoirs and irrigation works; transfer of management of irrigation works to landowners; title to and management of reservoirs, etc.

4706. Acquisition of rights or property for purposes of act; condemnation proceedings.

4707. Irrigation laws of States and Territories, and rights to waters of interstate streams, not affected by act; extent of right to use of water acquired under act.

4708. Execution of provisions of act and regulations therefor.

4709. Provisions of Reclamation Act extended to State of Texas.

4710. Advances to reclamation fund from Treasury; aggregate amount; limitation to payment for work performed; reimbursement; examination and approval of projects; no portion of appropriation to be expended on new projects.

4711. Certificates of indebtedness to provide funds for advances; disposal; aggregate amount; exemption from taxation; appropriation for expenses.

4712. Repayment of advances from annual receipts of reclamation fund.

4713. Money advanced to reclamation fund to be devoted to completion of work on projects heretofore begun; no other projects to be begun until recommended by the Secretary of the Interior and approved by direct order of the President.

4713a. Payments of construction charges by entryman; installments; time for making entry and for initial payment.

4713b. Payments where land or entry was previously subject to terms and conditions of reclamation law; installments.

4713c. Penalties for failure to pay installments of construction charges; actions for amounts in default.

4713d. Increase of construction charges to be made only by agreement with majority of applicants and entrymen to be affected thereby; payment thereof in additional installments.

4713e. Payment of operation and maintenance charges by entrymen; transfer of care, operation, and maintenance to water users' association or irrigation district; excess or deficit of charges collected.

4713f. Penalties for failure to pay operation and maintenance

Sec.
charges; actions for amounts in default.
4713g. Water users' association or irrigation district as fiscal agent to collect annual payments and charges.
4713h. Regulations of use of water, and requirements as to reclamation and cultivation of irrigable area.
4713i. Increase of construction charges for lands in private ownership or not subject to reclamation law.
4714. Entries of lands reserved for irrigation not to be made until unit of acreage is established and water is ready to be delivered; lands relinquished to be subject to settlement and entry under reclamation law.
4714a. Charges for water service prior to public notice of construction charges, etc.
4714b. Private lands within reclamation projects; owners required to agree to dispose of excess.
4714c. Entries under reclamation projects in excess of one farm unit; reduction in area; restriction on taking by assignment prior to final payment of all charges for land held.
4714d. Acceptance of act by persons whose land or entry was previously subject to reclamation law; time for filing notice of acceptance.
4714e. Acts and regulations for carrying provisions of act into effect.
4714f. Expenditures for carrying out purposes of reclamation law to be made only out of annual appropriations therefor; estimates for appropriations; payment of appropriations out of reclamation fund.
4714g. No work or expenditure beyond construction charge fixed by public notice without agreement to repay cost by applicants, and entrymen affected.
4714h. Relinquishment of homestead entry of land withdrawn from irrigation project, and selection and entry in lieu thereof of farm unit within project as established.
4715. Withdrawal from entry of town-sites under irrigation projects; survey and subdivision.
4716. Appraisement and sale of lots; expenses, and disposition of proceeds.
4717. Public reservations in town-sites.
4718. Water rights for towns and cities; charges for water supply.
4719. Lease of surplus water power; disposition of proceeds; longer term of lease in connection with Rio Grande project.
4719a. Reservation of tracts for country parks, public playgrounds, and community centers within reclamation projects.
4719b. Water service to lands set apart under this act; cost to be part of construction charges against remaining lands of project.
4719c. Contract with organization of landowners within project to maintain and use lands reserved for purposes prescribed.
4719d. Disposition of lands not contracted for in accordance with preceding section; application of proceeds thereof.
4720. Subdivision of lands to be irrigated into lesser areas than forty acres; farm units; survey and entry of subdivisions.
4721. Other entry allowed, on relinquishment of former entry on lands acquired under Reclamation Act.
4722. Disposal of town-sites previously set apart, within or in vicinity of reclamation project; expenses, and disposition of proceeds.
4723. Settlers previously allowed to establish themselves on certain town-sites to have right to purchase lots built upon; limitation on size of town-sites not to apply; withdrawal and disposal of larger town-sites authorized; expenses, and disposition of proceeds.
4724. Desert-land entries within exterior limits of land withdrawal or irrigation project; time allowed to make improvements or reclaim land; rights of entryman on abandonment or completion of irrigation project.
4725. Reappraisement of unsold lots in town sites within reclamation projects.
4726. Manner of payment for town lots sold.
4727. Assignment of completed homestead entries within reclamation projects; patents to assignees.
4728. Issuance of patents to homestead entrymen within reclamation projects; issuance of final water-right certificates; conditions prerequisite to issuance.
4729. Patents and water-right certificates to reserve to the United States, a lien for sums due or to become due; forfeiture upon default in payment; right of redemption; sale after failure to redeem; bid of United States.
4730. Certificate of final payment; limitation of amount of land acquired or held by one person be-

Sec.
fore payment in full of all charges; excess acquired by descent may be held two years; forfeiture of excess holdings.
4731. Appointment of agents to receive payments due on reclamation entries or water rights; copies of records of entries admissible as evidence.
4732. Jurisdiction of district courts to enforce provisions of this act.
4732a. Provisions of Act June 23, 1910, c. 357, and Act Aug. 9, 1912, c. 278, authorizing issuance of patents on reclamation entries, extended to lands within Flathead irrigation project; lien reserved on land patented to include sums due United States on account of Indian price of land.
4733. Assignment of desert-land entries within reclamation projects.
4734. Patents to desert-land entrymen within reclamation projects; proof required.
4734a. Entry for farm unit on lands withdrawn from entry.
4735. Leaves of absence to homestead entrymen on lands proposed to be irrigated, until water is turned on.
4736. Homestead entries made prior to June 25, 1910, within reclamation projects not subject to contest for failure to maintain residence or to improve before water is available; re-establishment of residence.
4737. Withdrawal of notices of lands irrigable under reclamation act, limit of acreage, charges, etc.; modification or abrogation of water-right applications or contracts.
4738. Contracts for excess storage or carrying capacity provided under reclamation law, with irrigation systems under Carey Act, for distribution of water to individual users; restriction of use of water; charges.
4739. Co-operation with irrigation districts, etc., or water users, for construction or use of reservoirs, canals, etc.; title to and management of works; limitation of water to be furnished; right to control waters of streams in States not affected.
4740. Proceeds of contracts to be covered into reclamation fund.
4741. Use of earth, stone, and timber from public lands and forest reserves for construction of irrigation works.
4742. Disposition of proceeds of sales of material used and other property, and of moneys refunded in connection with operations.
4743. Expenditure from reclamation fund for rent of offices for Reclamation Service.
4744. Purchase of books, etc., needed in surveys and examinations for irrigation works.
4745. Assignments of pay by employés of Reclamation Service.
4746. Sale of lands acquired under reclamation acts; appraisement; notice of sale.
4747. Conveyance to purchaser; limitation of amount.
4748. Proceeds of sale to be covered into reclamation fund and credited to project for which land was acquired.
4749. Change of levels of lakes, etc., in Oregon and California, in carrying out irrigation projects; disposition of lands acquired.
4750. Construction of dams in or across Yellowstone River in Montana in carrying out irrigation projects.

DESERT LANDS

§ 4674. (Act March 3, 1877, c. 107, § 1.) Sale of desert lands; use of water; declaration; patent; quantity purchasable by one person.

It shall be lawful for any citizen of the United States, or any person of requisite age "who may be entitled to become a citizen, and who has filed his declaration to become such" and upon payment of twenty five cents per acre—to file a declaration under oath with the register and the receiver of the land district in which any desert land is situated, that he intends to reclaim a tract of desert land not exceeding one section, by conducting water upon the same, within the period of three years thereafter, Provided however that the right to the use of water by the person so conducting the same, on or to any tract of desert land of six hundred and forty acres shall depend upon bona fide prior appropriation: and such right shall not exceed the amount of water actually appropriated, and necessarily used for the purpose of irrigation and reclamation: and all surplus water over and above such actual appropriation and use, together with the water of all lakes, rivers and other sources of

water supply upon the public lands and not navigable, shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes subject to existing rights. Said declaration shall describe particularly said section of land if surveyed, and, if unsurveyed, shall describe the same as nearly as possible without a survey. At any time within the period of three years after filing said declaration, upon making satisfactory proof to the register and receiver of the reclamation of said tract of land in the manner aforesaid, and upon the payment to the receiver of the additional sum of one dollar per acre for a tract of land not exceeding six hundred and forty acres to any one person, a patent for the same shall be issued to him. Provided, that no person shall be permitted to enter more than one tract of land and not to exceed six hundred and forty acres which shall be in compact form. (19 Stat. 377.)

This section and the two sections next following were an act entitled "An act to provide for the sale of desert lands in certain States and Territories," cited above.

Five further sections, numbered as sections 4–8 of this act, were added to it by amendment by Act March 3, 1891, c. 561, § 2, 26 Stat. 1096.

The right to make entry of desert lands under this act as amended was restricted to surveyed public lands of the character contemplated thereby, assignments of such entries were restricted, and the time to complete the irrigating works and make final proofs thereunder was extended, by Act March 28, 1908, c. 112, post, §§ 4681–4683.

Second desert-land entries, by persons whose former entries had been lost, forfeited, or abandoned, were provided for by Act March 26, 1908, c. 103, 35 Stat. 48, which was superseded by similar provisions applying to both desert-land and homestead entries, of Act Feb. 3, 1911, c. 34, ante, § 4556.

The aggregate quantity of land which any person could acquire under all of the land laws was limited to 320 acres by Act Aug. 30, 1890, c. 837, § 1, ante, § 4558, but this limitation is to be construed to include only agricultural lands and not mineral lands, by Act March 3, 1891, c. 561, § 17, ante, § 4559.

Notes of Decisions

I. Desert land entries

1. Purpose and effect of act.
2. Qualifications of entrymen.
3. Land subject to entry.
4. Effect of entry.
5. Fraudulent entries.
6. Assignment of entry.
7. Entryman's right of possession.
8. Purchase price.
9. Recovery of payments.

II. Water rights

10. Application and effect of statute.
11. Power of government to reserve waters.
12. Effect of act as reservation and dedication to public.
13. Effect of local customs.
14. Waters subject to appropriation.
15. Appropriation of waters and priorities.
16. Local legislation affecting appropriation of waters.
17. Extent of rights.

III. Patent

18. Reclamation sufficient.

IV. Land department and officers

19. Determination conclusive.

I. DESERT LAND ENTRIES

1. Purpose and effect of act.—This act was enacted to facilitate the reclamation of desert lands by private entrymen. U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371. See, also, Williams v. U. S. (1891) 11 Sup. Ct. 457, 458, 138 U. S. 514, 34 L. Ed. 1026; Connor v. Same (1914) 214 Fed. 522, 131 C. C. A. 68.

As a portion of the purchase money must be paid when the incipient steps are taken to acquire title, it would seem that the design of this act is to give the party such a title as cannot be taken from him, provided he so complies with the act as to be finally entitled to his patent. Green v. Willhite (C. C. 1906) 160 Fed. 755.

Where the title to land passed from the government prior to the desert land act, the rights of the holder of the land are not affected thereby. In re Willow Creek (Or. 1914) 144 P. 505, order modified on rehearing (Or. 1915) 146 P. 475.

2. Qualifications of entrymen.—Corporations are not permitted to make desert land entries. Salina Stock Co. v. U. S. (1898) 85 Fed. 339, 29 C. C. A. 181.

3. Land subject to entry.—A valid entry may be made on desert land, though located within a railroad grant. U. S. v. Ingram (1899) 19 Sup. Ct. 177, 178, 172 U. S. 327, 43 L. Ed. 465.

One in possession of desert land open to filing may surrender the possession to another, and file a relinquishment, and the latter, taking possession, may file thereon, and obtain a patent on complying with the law. Moore v. Groftholdt (1909) 103 P. 149, 10 Cal. App. 714.

Desert land so far reclaimed by a former entryman that in one year it pro-

duced 200 tons of hay is not subject to desert land entry after the relinquishment of the land by such entryman. Fisher v. Ballinger (1911) 36 App. D. C. 511.

4. Effect of entry.—Where, pending appeal from an order of a local land office rejecting a desert land entry, a patent for the same land is issued to a homestead entryman, the patent is void as issued for land previously appropriated. Anderson v. Woodward (Colo. 1914) 140 P. 198.

5. Fraudulent entries.—The desert land laws do not permit entries by persons acting as dummies for others, or by persons who have no intention to reclaim the land, but intend to relinquish it to others, to be held temporarily for speculation. Chaplin v. U. S. (1912) 193 Fed. 879, 114 C. C. A. 93 (writ of certiorari denied [1912] 32 Sup. Ct. 838, 225 U. S. 705, 56 L. Ed. 1266); Altschul v. Rogers (1912) 126 P. 1048, 22 Idaho, 512.

The mere fact that an individual, reclaiming and purchasing desert lands with his own money, intends from the beginning to transfer them to a corporation when the title is perfected, does not render his acquisition unlawful, when there was no prior conspiracy whereby he became the mere agent of the corporation for the purpose of procuring title for it. U. S. v. Mackintosh (1898) 85 Fed. 333, 29 C. C. A. 176.

An entry of desert land made at the expense of an association (subsequently incorporated), in the name of persons living at a great distance from it, who paid none of the purchase money, and after the ditches were dug these persons were taken, solely at the corporation's expense, to view the land, for the purpose of enabling them to make final proofs, and after the title was perfected, they conveyed it to the corporation, the entry was fraudulent, and the patent should be canceled. Salina Stock Co. v. U. S. (1898) 85 Fed. 339, 29 C. C. A. 181.

6. Assignment of entry.—An agreement, by one holding land under this act, to convey title to same after patent shall have been obtained, does not conflict with any of the provisions of said act. Arnold v. Christy (Ariz. 1893) 33 Pac. 619.

An entry of land under the desert land act is assignable during the life of the entryman, and on his death descends to his heirs, and a patent obtained by a purchaser of the entry from the entryman's widow is good. Phillips v. Carter (1902) 67 P. 1031, 135 Cal. 604, 87 Am. St. Rep. 152. See, also, U. S. v. Hammers (1911) 31 S. Ct. 593, 221 U. S. 220, 55 L. Ed. 710.

7. Entryman's right of possession.—Desert land, duly entered as such and paid for, is reserved from entry under other laws relative to public lands, and gives to the proposed purchaser the right of possession for three years. Sallee v. Corder (1885) 67 Cal. 174, 7 Pac. 455.

8. Purchase price.—This act fixed $1.25 per acre as the price of desert lands. U. S. v. Healey (1895) 16 Sup. Ct. 247, 160 U. S. 136, 40 L. Ed. 369; Healey v. U. S. (1894) 29 Ct. Cl. 115.

The law in force at the time of the entry governs the price to be paid. U. S. v. Healey (1895) 16 Sup. Ct. 247, 248, 160 U. S. 136, 40 L. Ed. 369.

9. Recovery of payments.—Where a settler on public land could by the payment of the statutory price have acquired a valid title thereto, he cannot recover his initial payment on voluntarily abandoning his entry. U. S. v. Ingram (1899) 19 Sup. Ct. 177, 179, 172 U. S. 327, 43 L. Ed. 465.

The government is bound to refund the purchase money paid in mutual mistake of fact, and an action for money had and received will lie. Nelson v. U. S. (1900) 35 Ct. Cl. 427.

The payment of money to a receiver is payment to the government. Slocum v. U. S. (1900) 35 Ct. Cl. 485.

II. WATER RIGHTS

10. Application and effect of statute.—By this act, so far as it extended, congress recognized and assented to the appropriation of water in contravention of the common-law rule as to continuous flow. U. S. v. Rio Grande Dam & Irrigation Co. (1899) 19 Sup. Ct. 770, 776, 174 U. S. 690, 43 L. Ed. 1136.

Territorial as well as state legislation with respect to the regulation of the use of public waters was authorized by the desert land act. Gutierres v. Albuquerque Land & Irrigation Co. (1903) 23 Sup. Ct. 338, 188 U. S. 545, 47 L. Ed. 588.

Acts of congress relating to the appropriation of water for irrigation apply only to cases arising between citizens, and not to water appropriated to a public use in the exercise of the government's authority over Indians. U. S. v. Morrison (C. C. 1901) 203 Fed. 364.

It is probable that this act abrogated the common-law rule as to the doctrine of riparian rights so far as applicable to irrigation of land acquired since the date of the act. Hough v. Porter (Or. 1908) 95 P. 732.

Any one acquiring title to the public domain after this act accepted title with knowledge of the law in force at the time and subject thereto. Hough v. Porter (1908) 95 P. 732, 51 Or. 318 (rehearing denied [1909] 102 P. 728, 51 Or. 318); Id. (1909) 98 P. 1083, 51 Or. 318.

This act does not affect rights giving rise to the doctrine of riparian rights for domestic and stock requirements. Id.

11. Power of government to reserve waters.—The general government has power to reserve waters on the public domain and exempt them from appropriation under state laws. Winters v. U. S. (1908) 28 Sup. Ct. 207, 212, 207 U. S. 564, 52 L. Ed. 340; Conrad Inv. Co. v. U. S. (1908) 161 Fed. 829, 88 C. C. A. 647.

12. Effect of act as reservation and dedication to public.—The legal effect of the language of this act, that "there shall be and remain and be held free for the appropriation and use of the public for irrigation," etc., constitutes a reservation and dedication to the public of all interests, riparian or otherwise, held at the time by the government, so far as such interests affect the use for irrigation and other purposes. Hough v. Porter (1908) 95 P. 732, 51 Or. 318 (rehearing denied [1909] 102 P. 728, 51 Or. 318); Id. (1909) 98 P. 1083, 51 Or. 318.

13. Effect of local customs.—At the time of the passage of this act the manner of using the waters of streams for the purposes therein enumerated was a matter of common knowledge, and the use by the public as there reserved necessarily had reference to the usual mode of appropriations for the purposes specified, making such methods by implication a part of the act. Hough v. Porter (1908) 95 P. 732, 51 Or. 318 (rehearing denied [1909] 102 P. 728, 51 Or. 318); Id. (1909) 98 P. 1083, 51 Or. 318. See, also, Gutierres v. Albuquerque Land & Irrig. Co. (1903) 23 Sup. Ct. 338, 188 U. S. 545, 47 L. Ed. 588; Bean v. Morris (1911) 31 Sup. Ct. 703, 704, 221 U. S. 485, 55 L. Ed. 821.

14. Waters subject to appropriation. A portion of the waters of a river having been impliedly reserved for the benefit of Indians cultivating a reservation, by the treaties, grantees of public lands outside of the reservation could not acquire the exclusive right to appropriate all the waters of the river for irrigation under this act. Winters v. U. S. (1906) 143 Fed. 740, 74 C. C. A. 666.

Desert land act applies only to waters of the United States. Id.

Waters running through a gulch, and derived from melting snows and spring water, are subject to appropriation. Borman v. Blackmon (1911) 118 P. 848, 60 Or. 304.

15. Appropriation of waters and priorities.—In the procurement of title to lands under this act the inception of the title to the water located for such purposes must depend on bona fide prior appropriation. Hough v. Porter (1908) 95 P. 732, 51 Or. 318 (rehearing denied [1909] 102 P. 728, 51 Or. 318); Id. (1909) 98 P. 1083, 51 Or. 318.

Under this act no limit is fixed as to the time a right to acquire a water right may be exercised, except that he who first diverts and applies it to a beneficial use is given the better right thereto. Id.

Where a person files on land under this act and makes an affidavit that they are desert in character and unreclaimed, he cannot assert a right to water for irrigation as initiated before such entry. Id.

Rights under appropriations of surplus waters remaining after domestic and stock demands of riparian owners on lands entered after this act vest in the order of time in which the water has been diverted to a beneficial use. Id.

All lands settled upon and to which title was acquired after this act were accepted with full knowledge and with implied understanding that the first to divert and apply waters thereon for the purposes specified in the act should have the superior right thereto, to the extent intended and applied. Hough v. Porter (1908) 95 P. 732, 51 Or. 318 (rehearing denied [1909] 102 P. 728, 51 Or. 318); Id. (1909) 98 P. 1083, 51 Or. 318. See, also, Boquillas Land & Cattle Co. v. Curtis (1909) 29 Sup. Ct. 493, 494, 213 U. S. 339, 53 L. Ed. 822.

This law conditions the right to make a preliminary entry on the making of a declaration under oath of an intention to reclaim the land by conducting water thereon, and conditions the right to make final entry on the making of satisfactory proof of reclamation by that means, and a preliminary desert entry, even of riparian lands, is not regarded as in itself an appropriation of water. Snyder v. Colorado Gold Dredging Co. (1910) 181 Fed. 62, 104 C. C. A. 136.

A party entitled to divert water from streams coursing the public domain is also entitled to do that which is reasonably necessary to effectuate such diversion by the construction of a dam or other means of turning the water from its natural channel. U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, 128, affirmed (1908) 161 Fed. 829, 88 C. C. A. 647.

Where one enters land on which is situated a spring and an artesian well constructed prior to the entry, for the purpose of increasing the flow, and the water was used for watering stock, and the one who made the well thereafter sold his interest in said well to the entryman, and she made application of the water to the land so entered by her for growing crops thereon, her appropriation is valid. Youngs v. Regan (1911) 118 P. 499, 20 Idaho, 275.

16. Local legislation affecting appropriation of waters.—Power to authorize irrigation corporations organized under local laws to take and divert surplus public waters over and above

the needs of prior appropriators was not denied to the legislature by the proviso in this act, that surplus water on the public domain shall remain and be held free for the appropriation and use of the public for irrigation, mining and manufacturing purposes, subject to existing rights. Gutierres v. Albuquerque Land & Irrigation Co. (1903) 23 Sup. Ct. 338, 342, 188 U. S. 545, 47 L. Ed. 588, affirming judgment Albuquerque Land & Irrigation Co. v. Gutierrez (1900) 61 Pac. 357, 10 N. M. 177. See, also, Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 661, 190 U. S. 452, 47 L. Ed. 1134 (dissenting opinion).

17. Extent of rights.—This act provides that the right to the use of water shall not exceed the amount of water actually appropriated and necessarily used for the purpose of irrigation and reclamation. San Joaquin & Kings River C. & I. Co. v. Stanislaus County (C. C. 1911) 191 Fed. 875.

Under this act, while a riparian owner is entitled, as against a subsequent appropriator, to water reasonably essential for his domestic use and for his stock, he is entitled to water for irrigation only to the extent of his prior appropriation. Hough v. Porter (1908) 95 Pac. 732, 51 Or. 318 (rehearing denied [1909] 102 Pac. 728, 51 Or. 318); Id. (1909) 98 Pac. 1083, 51 Or. 318; Hedges v. Riddle (1912) 127 P. 548, 63 Or. 257.

III. PATENT

18. Reclamation sufficient.—It is a sufficient reclamation to entitle the purchaser to a patent under the desert land act that he has acquired a right to sufficient water to irrigate the land, and has constructed main ditches sufficient to carry it over the accessible parts of the tract, for purposes of cultivation in the ordinary manner, though he has not actually used and cultivated the land. U. S. v. Mackintosh (1898) 85 Fed. 333, 29 C. C. A. 176.

The desert land act does not require an entryman to irrigate or conduct water upon such parts of the tract entered as are incapable of profitable cultivation, nor beyond the portion cultivated, which must, however, equal one-eighth of the entire tract. Connor v. U. S. (C. C. A. 1914) 214 Fed. 522.

IV. LAND DEPARTMENT AND OFFICERS

19. Determination conclusive.—See, also, notes to § 699, ante.

A decision by the register of the local land office that a particular tract is desert land, so as to be subject to purchase under this act is not reviewable by the courts, in the absence of fraud. U. S. v. Mackintosh (1898) 85 Fed. 333, 29 C. C. A. 176.

§ 4675. (Act March 3, 1877, c. 107, § 2.) Desert lands defined.

All lands exclusive of timber lands and mineral lands which will not, without irrigation, produce some agricultural crop, shall be deemed desert lands, within the meaning of this act, which fact shall be ascertained by proof of two or more credible witnesses under oath, whose affidavits shall be filed in the land office in which said tract of land may be situated. (19 Stat. 377.)

See notes to section 1 of this act, ante, § 4674.

§ 4676. (Act March 3, 1877, c. 107, § 3.) States in which act to apply.

This act shall only apply to and take effect in the States of California, Oregon and Nevada, and the Territories of Washington, Idaho, Montana, Utah, Wyoming, Arizona, New Mexico and Dakota, and the determination of what may be considered desert land shall be subject to the decision and regulation of the Commissioner of the General Land Office. (19 Stat. 377.)

See notes to section 1 of this act, ante, § 4674.

§ 4677. (Act March 3, 1877, c. 107, § 4, as amended, Act March 3, 1891, c. 561, § 2.) Irrigation plan to be filed.

At the time of filing the declaration hereinbefore required, the party shall also file a map of said land, which shall exhibit a plan showing the mode of contemplated irrigation, and which plan shall be sufficient to thoroughly irrigate and reclaim said land, and prepare it to raise ordinary agricultural crops, and shall also show the source of the water to be used for irrigation and reclamation. Persons entering or proposing to enter separate sections, or fractional parts of sections, of desert lands, may associate together in the construction of canals and ditches for irrigating and reclaiming all of

said tracts, and may file a joint map or maps showing their plan of internal improvements. (26 Stat. 1096.)

This section and the three sections next following were added to Act March 3, 1877, c. 107, as sections 4, 5, 7, and 8 thereof, by Act March 3, 1891, c. 561, § 2, 26 Stat. 1096.

Section 6, also added to this act by Act March 3, 1891, c. 561, § 2, provided that existing claims under Act March 3, 1877, c. 107, should not be affected by the amendment, but might be perfected under the original act, or under the later act, at the option of the claimant, and also repealed all acts and parts of acts in conflict with the amending act. It is omitted as temporary merely.

Colorado was included by the amending act. See section 8, post, § 4680.

Notes of Decisions

Purpose of section.—These provisions clearly mean that the entryman can make no entry except a bona fide entry with intention to reclaim the land. Chaplin v. U. S. (1912) 193 Fed. 879, 114 C. C. A. 93, writ of certiorari denied (1912) 32 Sup. Ct. 838, 225 U. S. 705, 56 L. Ed. 1266. See, also, U. S. v. Rio Grande Dam & Irrigation Co. (1899) 19 Sup. Ct. 770, 776, 174 U. S. 690, 43 L. Ed. 1136.

§ 4678. (Act March 3, 1877, c. 107, § 5, as amended, Act March 3, 1891, c. 561, § 2.) Expenditures on and cultivation of land required; patent.

No land shall be patented to any person under this act unless he or his assignors shall have expended in the necessary irrigation, reclamation, and cultivation thereof, by means of main canals and branch ditches, and in permanent improvements upon the land, and in the purchase of water rights for the irrigation of the same, at least three dollars per acre of whole tract reclaimed and patented in the manner following: Within one year after making entry for such tract of desert land as aforesaid the party so entering shall expend not less than one dollar per acre for the purposes aforesaid: and he shall in like manner expend the sum of one dollar per acre during the second and also during the third year thereafter, until the full sum of three dollars per acre is so expended. Said party shall file during each year with the register proof, by the affidavits of two or more credible witnesses, that the full sum of one dollar per acre has been expended in such necessary improvements during such year, and the manner in which expended, and at the expiration of the third year a map or plan showing the character and extent of such improvements. If any party who has made such application shall fail during any year to file the testimony aforesaid the lands shall revert to the United States, and the twenty-five cents advanced payment shall be forfeited to the United States, and the entry shall be canceled. Nothing herein contained shall prevent a claimant from making his final entry and receiving his patent at an earlier date than hereinbefore prescribed, provided that he then makes the required proof of reclamation to the aggregate extent of three dollars per acre: Provided, That proof be further required of the cultivation of one-eighth of the land. (26 Stat. 1096.)

See notes to section 4 of this act, ante, § 4677.

Notes of Decisions

Assignment of entry.—A desert land entry is assignable, and an agreement by the entryman to sell the land to another after title has been obtained from the United States does not invalidate the entry. Sanders v. Dutcher (Cal. 1914) 143 P. 599.

Reclamation improvements.—This act does not require an entryman to irrigate or conduct water upon such parts of the tract entered as are incapable of profitable cultivation, nor beyond the portion cultivated, which must, however, equal one-eighth of the entire tract. Connor v. U. S. (C. C. A. 1914) 214 Fed. 522.

An applicant for public land under the desert land act is not required to perform the required reclamation improvements herself, but may employ others to do the required work. Sanders v. Dutcher (Cal. 1914) 143 P. 599.

Patent—Cancellation.—To authorize the cancellation of a patent to desert lands for fraud, which would result also in the forfeiture of the amount paid for the land, the proof of fraud must be clear, unequivocal, and convincing. Connor v. U. S. (C. C. A. 1914) 214 Fed. 522.

§ 4679. (Act March 3, 1877, c. 107, § 7, as amended, Act March 3, 1891, c. 561, § 2.) Issue of patent on making proofs; limit of individual holding; additional proofs; cancellation of entries.

At any time after filing the declaration, and within the period of four years thereafter, upon making satisfactory proof to the register and the receiver of the reclamation and cultivation of said land to the extent and cost and in the manner aforesaid, and substantially in accordance with the plans herein provided for, and that he or she is a citizen of the United States, and upon payment to the receiver of the additional sum of one dollar per acre for said land, a patent shall issue therefor to the applicant or his assigns; but no person or association of persons shall hold by assignment or otherwise prior to the issue of patent, more than three hundred and twenty acres of such arid or desert lands but this section shall not apply to entries made or initiated prior to the approval of this act. Provided, however, That additional proofs may be required at any time within the period prescribed by law, and that the claims or entries made under this or any preceding act shall be subject to contest, as provided by the law, relating to homestead cases, for illegal inception, abandonment, or failure to comply with the requirements of law, and upon satisfactory proof thereof shall be canceled, and the lands, and moneys paid therefor, shall be forfeited to the United States. (26 Stat. 1096.)

See notes to section 4 of this act, ante, § 4677.

The period of four years prescribed by this section was extended to five years as to pending entries where the time for final proof had not expired prior to Jan. 1, 1894, by Act Aug. 4, 1894, c. 208, 28 Stat. 226. That provision is omitted as temporary merely.

Notes of Decisions

Price.—The law in force at the time of the entry governs. U. S. v. Healey (1895) 16 Sup. Ct. 247, 160 U. S. 136, 40 L. Ed. 369.

Assignment of entry.—The use of the words "assignors" and "assigns" in the amendment to Desert Land Act evidenced the intention of Congress to remove the restrictions of the earlier act upon the assignment of a desert land entry, and was not merely in recognition of the right that every entryman has under the public land laws of the United States to make an assignment after he has acquired the equitable title to the land embraced within his entry. U. S. v. Hammers (1911) 31 Sup. Ct. 593, 596, 221 U. S. 220, 55 L. Ed. 710.

The law requires a bona fide entry with intention to reclaim the land, though the entry may be assigned. Chaplin v. U. S. (1912) 193 Fed. 879, 114 C. C. A. 93, writ of certiorari denied (1912) 32 Sup. Ct. 838, 225 U. S. 705, 56 L. Ed. 1266.

A desert land entry is assignable during the life of the entryman, and on his death descends to his heirs; and a patent obtained by a purchaser of the entry from the entryman's widow is good. Phillips v. Carter (1902) 67 Pac. 1031, 135 Cal. 604, 87 Am. St. Rep. 152.

A desert land entry is assignable, and an agreement by the entryman to sell the land to another after title has been obtained from the United States does not invalidate the entry. Sanders v. Dutcher (Cal. 1914) 143 P. 599.

Fraudulent entries.—It was not the intention of Congress to offer the desert lands to entry to persons who are to be dummies for others, or to persons who have no intention to reclaim the land, but whose intention is to hold temporarily merely for purposes of speculation or for the benefit of some other person. Chaplin v. U. S. (1912) 193 Fed. 879, 114 C. C. A. 93 (writ of certiorari denied [1912] 32 Sup. Ct. 838, 225 U. S. 705, 56 L. Ed. 1266); Altschul v. Rogers (1912) 126 Pac. 1048, 22 Idaho, 512.

Patent—Cancellation.—To authorize the cancellation of a patent for fraud, the proof of fraud must be clear, unequivocal, and convincing. Connor v. U. S. (C. C. A. 1914) 214 Fed. 522.

—— **Patentee as trustee.**—Where complainants acquired title to certain desert land through errors of law by land department in holding a prior entry under which defendant claimed invalid, defendant was entitled to a decree that complainants held the land in trust and for a transfer. Sanders v. Dutcher (Cal. 1914) 143 P. 599.

§ 4680. (Act March 3, 1877, c. 107, § 8, as amended, Act March 3, 1891, c. 561, § 2.) Act to apply in Colorado; resident citizens only entitled to enter.

The provisions of the act to which this is an amendment, and the amendments thereto, shall apply to and be in force in the State of Colorado, as well as the States named in the original act; and no person shall be entitled to make entry of desert land except he be a resident citizen of the State or Territory in which the land sought to be entered is located. (26 Stat. 1096.)

See notes to section 4 of this act, ante, § 4677.

Entries on affidavits made before a United States court commissioner or any officer authorized to administer oaths were validated by Act Aug. 4, 1894, c. 211, 28 Stat. 227.

The administration of oaths by United States court commissioners in preliminary affidavits and final proofs was provided for by Act March 2, 1895, c. 174, ante, §§ 4547–4549.

All entries under the desert-land laws, in which final proof and payments had been made and certificates had been issued, and to which there were no adverse claims originating prior to any final entry and which had been sold or incumbered prior to March 1, 1898, and after final entry, to bona fide purchasers or incumbrancers, for a valuable consideration, were, unless, upon an investigation by a government agent, fraud on the part of the purchasers should be found, to be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance, by Act March 3, 1891, c. 561, § 7, post, § 5113, notwithstanding a proviso in said act authorizing the Commissioner of the General Land Office to suspend entries on the public lands for correction of clerical errors; and, after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land, there being no pending contest or protest against the validity of the entry, the entryman was to be entitled to a patent for the land entered by him, by said act.

All persons, duly qualified to make entry under the desert-land laws, who had occupied any lands in the Algodones land grant with the intention of entering the same under the desert-land laws, were entitled, within a certain time, to make their entries, by Act Jan. 14, 1901, c. 12, § 2, 31 Stat. 730. That provision is omitted as special, and temporary merely.

The undisposed-of lands on the abandoned Fort Buford military reservation were subject to entry under the desert-land laws, by Act May 19, 1900, c. 484, 31 Stat. 180. That provision is omitted, also, as special.

§ 4681. (Act March 28, 1908, c. 112, § 1.) Desert-land entries restricted to surveyed lands; preference of persons in possession of lands prior to survey.

From and after the passage of this Act the right to make entry of desert lands under the provisions of the Act approved March third, eighteen hundred and seventy-seven, entitled "An Act to provide for the sale of desert lands in certain States and Territories," as amended by the Act approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber-culture laws, and for other purposes," shall be restricted to surveyed public lands of the character contemplated by said Acts, and no such entries of unsurveyed lands shall be allowed or made of record: Provided, however, That any individual qualified to make entry of desert lands under said Acts who has, prior to survey, taken possession of a tract of unsurveyed desert land not exceeding in area three hundred and twenty acres in compact form, and has reclaimed or has in good faith commenced the work of reclaiming the same, shall have the preference right to make entry of such tract under said Acts, in conformity with the public land surveys, within ninety days after the filing of the approved plat of survey in the district land office. (35 Stat. 52.)

This section and the two sections next following were an act entitled "An act limiting and restricting the right of entry and assignment under the desert-land law and authorizing an extension of time within which to make final proof."

Act March 3, 1877, c. 107, as amended by Act March 3, 1891, c. 561, § 2, mentioned in this section, is ante, §§ 4674–4680.

§ 4682. (Act March 28, 1908, c. 112, § 2.) Assignments of desert-land entries restricted.

From and after the date of the passage of this Act no assignment of an entry made under said Acts shall be allowed or recognized, except it be to an individual who is shown to be qualified to make entry under said Acts of the land covered by the assigned entry, and such assignments may include all or part of an entry; but no assignment to or for the benefit of any corporation or association shall be authorized or recognized. (35 Stat. 52.)

Provisions applicable to Imperial County, California, only, authorizing completion of desert-land entries by assignees in good faith, and by holders in good faith of second desert-land entries, were made by Act June 25, 1910, c. 437, 36 Stat. 867.

§ 4683. (Act March 28, 1908, c. 112, § 3.) Time to complete irrigation works and make final proofs under desert-land entries extended.

Any entryman under the above Acts who shall show to the satisfaction of the Commissioner of the General Land Office that he has in good faith complied with the terms, requirements, and provisions of said Acts, but that because of some unavoidable delay in the construction of the irrigating works, intended to convey water to the said lands, he is, without fault on his part, unable to make proof of the reclamation and cultivation of said land, as required by said Acts, shall, upon filing his corroborated affidavit with the land office in which said land is located, setting forth said facts, be allowed an additional period of not to exceed three years, within the discretion of the Commissioner of the General Land Office, within which to furnish proof as required by said Acts of the completion of said work. (35 Stat. 52.)

Previous provisions for extension of time for making final proofs under entries of desert lands in certain cases were made by Act Aug. 4, 1894, c. 208, 28 Stat. 226.

A further extension of time to make final proof on desert-land entries in the counties of Benton, Yakima, and Klickitat, in the State of Washington, was authorized by Act Feb. 28, 1911, c. 180, 36 Stat. 960.

The Secretary of the Interior was authorized to grant an additional extension of time for making final proof to desert-land entrymen by Act April 30, 1912, c. 101, post, § 4684, and Act March 4, 1915, c. 147, § 5, post, § 4684a. See, also, §§ 4684b and 4684c, post.

§ 4684. (Act April 30, 1912, c. 101.) Further extension of time for final proof in desert-land entries to be granted by the Secretary of the Interior; affidavit for extension; limit of extension.

The Secretary of the Interior may, in his discretion, in addition to the extension authorized by existing law, grant to any entryman under the desert-land laws a further extension of the time within which he is required to make final proof: Provided, That such entryman shall, by his corroborated affidavit filed in the land office of the district where such land is located, show to the satisfaction of the Secretary that because of unavoidable delay in the construction of irrigation works intended to convey water to the land embraced in his entry he is, without fault on his part, unable to make proof of the reclamation and cultivation of said lands as required by law within the time limited therefor; but such extension shall not be granted for a period of more than three years, and this Act shall not affect contests initiated for a valid existing reason: Provided, That the total extension of the statutory period for making final proof that may be allowed in any one case under this Act, and any other existing statutes of either general or local

application, shall be limited to six years in the aggregate. (37 Stat. 106.)

This was an act entitled "An act authorizing the Secretary of the Interior to grant further extension of time within which to make proof on desert-land entries."

Provisions for extension of time to make final proof on desert-land entries were made by Act March 28, 1908, c. 112, § 3, ante, § 4683, and Act March 4, 1915, c. 147, § 5, post, § 4684a.

Desert-land entries may be commuted under certain conditions prescribed by Act March 4, 1915, c. 147, § 5, post, §§ 4684b, 4684c.

§ 4684a. (Act March 4, 1915, c. 147, § 5.) Further extension of time for final proof in desert-land entries, on showing of compliance with requirements and prospect of making final proof.

The Secretary of the Interior may, in his discretion, extend the time within which final proof is required to be submitted upon any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, such extension not to exceed three years from the date of allowance thereof: Provided, That the entryman or his duly qualified assignee has, in good faith, complied with the requirements of law as to yearly expenditures and proof thereof, and shall show, under rules and regulations to be prescribed by the Secretary of the Interior, that there is a reasonable prospect that, if the extension is granted, he will be able to make the final proof of reclamation, irrigation, and cultivation required by law: Provided further, That the foregoing shall apply only to cases wherein an extension or further extension of time may not properly be allowed under existing law. (38 Stat. 1161.)

This section and the two following sections were provisions of the deficiency appropriation act for the fiscal year 1915, cited above.

§ 4684b. (Act March 4, 1915, c. 147, § 5.) Desert-land entry, after expenditures to effect reclamation, without prospect of securing water sufficient, may be perfected as homestead entry.

Where it shall be made to appear to the satisfaction of the Secretary of the Interior, under rules and regulations to be prescribed by him, with reference to any lawful pending desert-land entry made prior to July first, nineteen hundred and fourteen, under which the entryman or his duly qualified assignee under an assignment made prior to the date of this Act, has, in good faith, expended the sum of $3 per acre in the attempt to effect reclamation of the land, that there is no reasonable prospect that, if the extension allowed by this Act or any existing law were granted, he would be able to secure water sufficient to effect reclamation of the irrigable land in his entry or any legal subdivision thereof, the Secretary of the Interior may, in his discretion, allow such entryman or assignee five years from notice within which to perfect the entry in the manner required of a homestead entryman. (38 Stat. 1161.)

See note to preceding section.

§ 4684c. (Act March 4, 1915, c. 147, § 5.) Election to perfect desert-land entry by payment and proof of improvements and use of land for agricultural purposes; time for final proof.

Any desert-land entryman or his assignee entitled to the benefit of the last preceding paragraph may, if he shall so elect within sixty days from the notice therein provided, pay to the receiver of the local land office the sum of 50 cents per acre for each acre embraced in the entry, and thereafter perfect such entry upon proof that he has upon the tract permanent improvements conducive to the agricultural development thereof of the value of not less than $1.25 per acre, and that he has, in good faith, used the land for agricultural purposes for three years and the payment to the receiver, at the time of final proof, of the sum of 75 cents per acre: Provided, That

in such case final proof may be submitted at any time within five years from the date of the entryman's election to proceed as provided in this section, and in the event of failure to perfect the entry as herein provided, all moneys theretofore paid shall be forfeited and the entry canceled. (38 Stat. 1162.)

See note to § 4684a, ante.

§ 4684d. (Act Aug. 21, 1916, c. 360, § 1.) Springs, streams, and water holes on arid public lands; discovery, development, etc.; signboards, etc.; showing location; appliances for drawing water from; maps and reports of, and information as to.

That the Secretary of the Interior be, and he is hereby, authorized and empowered, in his discretion in so far as the authorization made herein will permit, to discover, develop, protect, and render more accessible for the benefit of the general public, springs, streams, and water holes on arid public lands of the United States; and in connection therewith to erect and maintain suitable and durable monuments and signboards at proper places and intervals along and near the accustomed lines of travel and over the general area of said desert lands, containing information and directions as to the location and nature of said springs, streams, and water holes, to the end that the same may be more readily traced and found by persons in search or need thereof; also to provide convenient and ready means, apparatus, and appliances by which water may be brought to the earth's surface at said water holes for the use of such persons; also to prepare and distribute suitable maps, reports, and general information relating to said springs, streams, and water holes, and their specific location with reference to lines of travel. (39 Stat.)

This section, and the two sections next following, were part of an act entitled "An act providing for the discovery, development, and protection of streams, springs, and water holes in the desert and arid public lands of the United States, for rendering the same more readily accessible, and for the establishment of and maintenance of signboards and monuments locating the same," cited above.

Section 2 of said Act Aug. 21, 1916, c. 360, made an appropriation of $10,000 to carry out the provisions of the act.

§ 4684e. (Act Aug. 21, 1916, c. 360, § 3.) Injuring, destroying, defacing, etc., signposts, or filling up, fouling, etc., springs, etc.; punishment.

Whoever shall willfully or maliciously injure, destroy, deface, or remove any of said monuments or signposts, or shall willfully or maliciously fill up, render foul, or in anywise destroy or impair the utility of said springs, streams, or water holes, or shall willfully or maliciously interfere with said monuments, signposts, streams, springs, or water holes, or the purposes for which they are maintained and used, shall be fined not more than $1,000 or imprisoned not more than three years, or both. (39 Stat.)

See note to preceding section.

§ 4684f. (Act Aug. 21, 1916, c. 360, § 4.) Rules and regulations.

The Secretary of the Interior is hereby authorized to perform any and all acts and make such rules and regulations as may be necessary for the purpose of carrying the provisions of this Act into full force and effect. (39 Stat.)

See note to § 4684d, ante.

GRANTS OF DESERT LANDS TO STATES FOR RECLAMATION (THE CAREY ACT)

§ 4685. (Act Aug. 18, 1894, c. 301, § 4.) (1) Contracts by United States with public-land States for donation of arid lands.

That to aid the public land States in the reclamation of the desert

lands therein, and the settlement, cultivation and sale thereof in small tracts to actual settlers, the Secretary of the Interior with the approval of the President, be, and hereby is, authorized and empowered, upon proper application of the State to contract and agree, from time to time, with each of the States in which there may be situated desert lands as defined by the Act entitled "An Act to provide for the sale of desert land in certain States and Territories," approved March third, eighteen hundred and seventy-seven, and the Act amendatory thereof, approved March third, eighteen hundred and ninety-one, binding the United States to donate, grant and patent to the State free of cost for survey or price such desert lands, not exceeding one million acres in each State, as the State may cause to be irrigated, reclaimed occupied, and not less than twenty acres of each one hundred and sixty-acre tract cultivated by actual settlers, within ten years next after the passage of this Act, as thoroughly as is required of citizens who may enter under the said desert land law.

Act March 3, 1877, c. 107, and Act March 3, 1891, c. 561, § 2, mentioned in this paragraph, are set forth ante, §§ 4674–4680. They enumerated the States in which desert lands were to be subject to sale, and defined desert lands.

(2) Map showing plan of irrigation; regulations for reservation.

Before the application of any State is allowed or any contract or agreement is executed or any segregation of any of the land from the public domain is ordered by the Secretary of the Interior, the State shall file a map of the said land proposed to be irrigated which shall exhibit a plan showing the mode of the contemplated irrigation and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops and shall also show the source of the water to be used for irrigation and reclamation, and the Secretary of the Interior may make necessary regulations for the reservation of the lands applied for by the States to date from the date of the filing of the map and plan of irrigation, but such reservation shall be of no force whatever if such map and plan of irrigation shall not be approved.

(3) States may contract for reclamation and settlement.

Any State contracting under this section is hereby authorized to make all necessary contracts to cause the said lands to be reclaimed, and to induce their settlement and cultivation in accordance with and subject to the provisions of this section; but the State shall not be authorized to lease any of said lands or to use or dispose of the same in any way whatever, except to secure their reclamation, cultivation and settlement.

(4) Patents to States or assigns; limit of amount to one person; disposal of funds derived from sale.

As fast as any State may furnish satisfactory proof according to such rules and regulations as may be prescribed by the Secretary of the Interior, that any of said lands are irrigated, reclaimed and occupied by actual settlers, patents shall be issued to the State or its assigns for said lands so reclaimed and settled: Provided, That said States shall not sell or dispose of more than one hundred and sixty acres of said lands to any one person, and any surplus of money derived by any State from the sale of said lands in excess of the cost of their reclamation, shall be held as a trust fund for and be applied to the reclamation of other desert lands in such State. (28 Stat. 422.)

This section, commonly known as the Carey Act, was part of the sundry civil appropriation act for the fiscal year 1895, cited above. The portion of the section omitted here provided an appropriation for the examination of the lands. It was amended by Act June 11, 1896, c. 420, § 1, post, § 4686, and again amended by Act March 3, 1901, c. 853, § 3, post, § 4687.

The provisions of this section and the amendments thereto, were extended

to the Territories of New Mexico and Arizona, by Act Feb. 18, 1909, § 1, post, § 4690.

Subsequent provisions made subject to the terms of this section and amendments thereto an additional one million acres of arid lands, in each of several states, as follows:

In the State of Idaho. Res. May 25, 1908, No. 28, post, § 4688.

In each of the States of Idaho and Wyoming. Act May 27, 1908, c. 200, § 1, post, § 4689.

In the State of Nevada. Act March 4, 1911, c. 285, § 1, post, § 4691.

In the State of Colorado. Res. Aug. 21, 1911, No. 7, post, § 4692.

The provisions of this section and amendments thereof were extended over and apply to desert lands within a portion of the former Ute Indian reservation in the State of Colorado, by Act Feb. 24, 1909, c. 178, post. §§ 4693, 4694.

The provisions of this section were made applicable to the lands in the former Fort Bridger Military Reservation, in Uinta County, Wyoming, by Act Feb. 16, 1911, c. 90, 36 Stat. 913.

Temporary withdrawal from settlement or entry of lands for which a state proposes to make application under this section was authorized by Act March 15, 1910, c. 96, post, § 4695.

State laws relating to irrigation and vested rights acquired thereunder, and rights of any State or of the Federal government, or of any landowner, proprietor, or user of water, in waters of interstate streams, were not affected by the Reclamation Act of June 17, 1902, c. 1093, by section 8 of that act, post, § 4707.

Notes of Decisions

Nature and purpose of grant.—The purpose of Congress in ceding desert lands within a state was, through the agency of the state government, to speedily have them reclaimed; but the grant is conditional, and did not take effect in præsenti. McKinney v. Big Horn Basin Development Co. (1909) 167 Fed. 770, 93 C. C. A. 258. See, also, U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371; Nelson Bennett Co. v. Twin Falls Land & Water Co. (Idaho, 1908) 93 P. 789; Pierson v. Loveland (Idaho, 1909) 102 P. 340; State v. Wright (1896) 17 Mont. 565, 44 Pac. 89; State v. Des Chutes Land Co. (1913) 129 P. 764, 64 Or. 167.

Under this act and the Idaho statutes, the state may contract for the construction of irrigation systems for the reclamation of arid lands. Idaho Irr. Co. v. Lincoln County (Idaho, 1915) 152 P. 1058.

Filing copies of contracts.—The Carey act agreements, when executed and approved by the president, form a part of the records of the general land office, and there is no necessity for filing copies of them in the returns office of the Department of Interior. (1912) 29 Op. Atty. Gen. 437.

Patent to state.—The government issues its patent to the state for segregated lands for which provision has been made for supplying sufficient water for their irrigation and reclamation and the state holds such title in trust for settlers and purchasers. Bothwell v. Bingham County (1913) 132 P. 972, 24 Idaho, 125.

Only actual settlers entitled to land.—Only actual settlers are entitled to obtain land and an oral agreement between an entryman and another that the entryman should file on such land, and should, after obtaining legal title, convey 40 acres thereof to the other person, is invalid as against public policy. McMillan v. Wright (1909) 105 P. 176, 56 Wash. 114.

State taxation.—Proceedings for acquisition of title to arid lands have reached the point where land may be taxed by the state when nothing remains to be done by the entryman in order to entitle him to a patent. Bothwell v. Bingham County (1915) 35 Sup. Ct. 702, 237 U. S. 642, 59 L. Ed. 1157, affirming judgment (1913) 132 P. 972, 24 Idaho, 125.

Jurisdiction of courts.—An action by a state to annul a contract for the reclamation of desert lands because of the contractor's failure to comply therewith is removable to the federal courts. State of Oregon v. Three Sisters Irr. Co. (C. C. 1907) 158 Fed. 346.

§ 4686. (Act June 11, 1896, c. 420, § 1.) Liens for expenses of reclamation of arid lands.

Under any law heretofore or hereafter enacted by any State, providing for the reclamation of arid lands, in pursuance and acceptance of the terms of the grant made in section four of an Act entitled "An Act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five," approved August eighteenth, eighteen hundred and ninety-four, a lien or liens is hereby authorized to be created by the State to which such lands are granted and by no other au-

thority whatever, and when created shall be valid on and against the separate legal subdivisions of land reclaimed, for the actual cost and necessary expenses of reclamation and reasonable interest thereon from the date of reclamation until disposed of to actual settlers; and when an ample supply of water is actually furnished in a substantial ditch or canal, or by artesian wells or reservoirs, to reclaim a particular tract or tracts of such lands, then patents shall issue for the same to such state without regard to settlement or cultivation: Provided, That in no event, in no contingency, and under no circumstances shall the United States be in any manner directly or indirectly liable for any amount of any such lien or liability, in whole or in part. (29 Stat. 413.)

This was a provision of the sundry civil appropriation act for the fiscal year 1897, cited above.

Act Aug. 18, 1894, c. 301, § 4, mentioned in this provision, is set forth ante, § 4685.

See notes to said Act Aug. 18, 1894, c. 301, § 4, ante, § 4685.

Notes of Decisions

Nature and extent of lien.—A lien is granted to one contracting with the state for the construction of canals and reclamation works for the irrigation of arid lands, and such lien extends to all lands that can be irrigated to the full extent of the price per acre for which such a one contracts to sell water rights, and the contractor or subcontractor performing work under such a one is entitled to the benefit of the lien to secure the payment to him for such work to the full extent of the title, interests, rights and claims of the one having the contract from the state, but the lien claimant cannot acquire any greater right than that possessed by the one having the contract with the state. Nelson Bennett Co. v. Twin Falls Land & Water Co. (Idaho, 1908) 93 P. 789. See, also, Continental & Commercial Trust & Savings Bank v. Corey Bros. Const. Co. (1913) 208 Fed. 976, 126 C. C. A. 64.

Transfer of lien.—The contractor's liens are alienable. State v. Des Chutes Land Co. (1913) 129 P. 764, 64 Or. 167.

§ 4687. (Act March 3, 1901, c. 853, § 3.) When time limit for reclamation begins to run; failure to reclaim; restoration to public domain.

Section four of the Act of August eighteenth, eighteen hundred and ninety-four, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," is hereby amended so that the ten years' period within which any State shall cause the lands applied for under said Act to be irrigated and reclaimed, as provided in said section as amended by the Act of June eleventh, eighteen hundred and ninety-six, shall begin to run from the date of approval by the Secretary of the Interior of the State's application for the segregation of such lands; and if the State fails within said ten years to cause the whole or any part of the lands so segregated to be so irrigated and reclaimed, the Secretary of the Interior may, in his discretion, continue said segregation for a period of not exceeding five years, or may, in his discretion, restore such lands to the public domain. (31 Stat. 1188.)

This section was part of the sundry civil appropriation act for the fiscal year 1902, cited above.

Act Aug. 18, 1894, c. 301, § 4, mentioned and amended in this section, is set forth ante, § 4685.

Notes of Decisions

State taxation of lands.—Proceedings for acquisition of title to arid lands have reached the point where land may be taxed by the state when nothing remains to be done by the entryman in order to entitle him to a patent. Bothwell v. Bingham County (1915) 35 Sup. Ct. 702, 237 U. S. 642. 59 L. Ed. 1157, affirming judgment (1913) 132 P. 972, 24 Idaho, 125.

§ 4688. (Res. May 25, 1908, No. 28.) Additional arid lands made available to State of Idaho for reclamation.

That an additional one million acres of arid lands within the

State of Idaho be made available and subject to the terms of section four of an Act of Congress entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and by amendments thereto, and that the State of Idaho be allowed, under the provisions of said Acts, said additional area, or so much thereof as may be necessary for the purposes and under the provisions of said Acts. (35 Stat. 577.)

Act Aug. 18, 1894, c. 301, § 4, and amendments thereto, mentioned in this section, are set forth ante, §§ 4685–4687.

An additional 1,000,000 acres within each of the states of Idaho and Wyoming were made available to those states respectively, in language similar to that of this joint resolution, by a provision of Act May 27, 1908, c. 200, § 1, post, § 4689.

§ 4689. (Act May 27, 1908, c. 200, § 1.) Additional arid lands made available to states of Idaho and Wyoming for reclamation.

Arid lands in Idaho, and Wyoming: That an additional one million acres of arid lands within each of the States of Idaho, and Wyoming be made available and subject to the terms of section four of an Act of Congress entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and by amendments thereto, and that the States of Idaho, and Wyoming be allowed under the provisions of said Acts said additional area or so much thereof as may be necessary for the purposes and under the provisions of said Acts. (35 Stat. 347.)

Act Aug. 18, 1894, c. 301, § 4, and amendments thereto, mentioned in this section, are set forth ante, §§ 4685–4687.

A similar provision, making 1,000,000 acres available to the state of Idaho, was made by Res. May 25, 1908, No. 28, ante, § 4688.

§ 4690. (Act Feb. 18, 1909, c. 150, § 1.) Provisions for grants of arid lands to states for reclamation extended to territories of New Mexico and Arizona.

All the provisions of section four of the Act of Congress approved August eighteenth, eighteen hundred and ninety-four, being chapter three hundred and one to Supplement to Revised Statutes of the United States, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," and the amendments thereto be, and the same are hereby, extended to the Territories of New Mexico and Arizona, and that said Territories upon complying with the provisions of said Act shall be entitled to have and receive all of the benefits therein conferred upon the States. (35 Stat. 638.)

Act Aug. 18, 1894, c. 301, § 4, and the amendments thereto, mentioned in this section, are set forth ante, §§ 4685–4687.

The Territories of Arizona and New Mexico were admitted into the Union under the provisions of Act June 20, 1910, c. 310, 36 Stat. 557, and Res. Aug. 21, 1911, No. 8, 37 Stat. 39.

§ 4691. (Act March 4, 1911, c. 285, § 1.) Additional arid lands made available to State of Nevada for reclamation.

An additional one million acres of arid lands within the State of Nevada is hereby made available and subject to the terms of section four of an Act of Congress entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and by amendments thereto, and the State of Nevada is allowed

under the provisions of said Acts said additional area, or so much thereof as may be necessary for the purposes and under the provisions of said Acts. (36 Stat. 1417.)

Act Aug. 18, 1894, c. 301, § 4, and amendments thereto, mentioned in this section, are set forth ante, §§ 4685–4687.

§ 4692. (Res. Aug. 21, 1911, No. 7.) Additional arid lands made available to State of Colorado for reclamation.

That an additional one million acres of arid lands within the State of Colorado be made available and subject to the terms of section four of an Act of Congress entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and by amendments thereto, and that the State of Colorado be allowed, under the provisions of said Acts, said additional area, or so much thereof as may be necessary for the purposes and under the provisions of said Acts. (37 Stat. 38.)

Act Aug. 18, 1894, c. 301, § 4, and amendments thereto, mentioned in this section, are set forth ante, §§ 4685–4687.

§ 4693. (Act Feb. 24, 1909, c. 178, § 1.) Provisions for grants of arid lands to States for reclamation extended to desert lands within part of former Ute Indian Reservation in State of Colorado.

That the provision of section four of "An Act making appropriation for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-five, and for other purposes," approved August eighteenth, eighteen hundred and ninety-four, and the amendments thereof, approved June eleventh, eighteen hundred and ninety-six, and March third, nineteen hundred and one, respectively, be, and are hereby, extended over and shall apply to the desert lands within the limits of all that portion of the former Ute Indian Reservation, not included in any national forest, in the State of Colorado, described and embraced in the Act entitled "An Act relating to lands in Colorado lately occupied by the Uncompahgre and White River Ute Indians," approved July twenty-eighth, eighteen hundred and eighty-two: Provided, That before a patent shall issue for any of the lands aforesaid under the terms of the Act approved August eighteenth, eighteen hundred and ninety-four, and amendments thereto, the State of Colorado shall pay into the Treasury of the United States the sum of one dollar and twenty-five cents per acre for the lands so patented, and the money so paid shall be subject to the provisions of section three of the Act of June fifteenth, eighteen hundred and eighty, entitled "An Act to accept and ratify the agreements submitted by the confederated bands of Ute Indians in Colorado for the sale of their reservation in said State, and for other purposes, and to make the necessary appropriation for carrying out same." (35 Stat. 644.)

This section and the section next following were an act entitled "An act to provide for the granting and patenting to the State of Colorado desert lands within the former Ute Indian Reservation in said State."

Act Aug. 18, 1894, § 4, and the amendments thereto, mentioned in this section, are set forth ante, §§ 4685–4687.

§ 4694. (Act Feb. 24, 1909, c. 178, § 2.) Restriction of lands to be included under provisions of act.

No lands shall be included in any tract to be segregated under the provisions of this Act on which the United States Government has valuable improvements, or which have been reserved for any Indian schools or farm purposes. (35 Stat. 645.)

§ 4695. (Act March 15, 1910, c. 96.) Temporary withdrawal from settlement or entry of lands for which application under Carey Act is proposed.

To aid in carrying out the purposes of section four of the Act of August eighteenth, eighteen hundred and ninety-four, entitled "An Act making appropriations for sundry civil expenses of the Government for the fiscal year ending eighteen hundred and ninety-five, and for other purposes," it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey preliminary to the filing of the maps and plats and application for segregation by the State or Territory: Provided, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made. (36 Stat. 237.)

This was an act entitled "An act authorizing the Secretary of the Interior to make temporary withdrawals of public lands for certain purposes."

Act Aug. 18, 1894, c. 301, § 4, mentioned in this act, is set forth ante, § 4685.

STATE IRRIGATION DISTRICTS INCLUDING PUBLIC LANDS

§ 4695a. (Act Aug. 11, 1916, c. 319, § 1.) Public entered lands and lands subject to entry within state irrigation districts subject to state laws relating to irrigation districts, etc.; rights of entry men under public land laws; lands excepted.

When in any State of the United States under the irrigation district laws of said State there has heretofore been organized and created or shall hereafter be organized and created any irrigation district for the purpose of irrigating the lands situated within said irrigation district, and in which irrigation district so created or to be created there shall be included any of the public lands of the United States, such public lands so situated in said irrigation district, when subject to entry, and entered lands within said irrigation district, for which no final certificates have been issued, which may be designated by the Secretary of the Interior in the approval by him of the map and plat of an irrigation district as provided in section three, are hereby made and declared to be subject to all the provisions of the laws of the State in which such lands shall be situated relating to the organization, government, and regulation of irrigation districts for the reclamation and irrigation of arid lands for agricultural purposes, to the same extent and in the same manner in which the lands of a like character held under private ownership are or may be subject to said laws: Provided, That the United States and all persons legally holding unpatented lands under entry made under the public land laws of the United States are accorded all the rights, privileges, benefits, and exemptions given by said State laws to persons holding lands of a like character under private ownership, except as hereinafter otherwise provided: Provided further, That this Act shall not apply to any irrigation district comprising a majority acreage of unentered land. (39 Stat.)

This section and the seven sections next following were an act entitled "An act to promote the reclamation of arid lands," cited above.

§ 4695b. (Act Aug. 11, 1916, c. 319, § 2.) Apportionment of cost of construction, etc., of canals, ditches, etc.; lien of charges and enforcement thereof; effect of withdrawal of public lands.

The cost of constructing, acquiring, purchasing, or maintaining the canals, ditches, reservoirs, reservoir sites, water, water right, rights of way, or other property incurred in connection with any irrigation project under said irrigation district laws shall be equitably apportioned among lands held under private ownership, lands legally covered by unpatented entries, and unentered public lands included in said irrigation district. Officially certified lists of the amounts of charges assessed against the smallest legal subdivision of said lands shall be furnished to the register and receiver of the land district within which the lands affected are located as soon as such charges are assessed; but nothing in this Act shall be construed as creating any obligation against the United States to pay any of said charges, assessments, or debts incurred.

That all charges legally assessed shall be a lien upon unentered lands and upon lands covered by unpatented entries included in said irrigation district; and said lien upon said land covered by unpatented entries may be enforced upon said unpatented lands by the sale thereof in the same manner and under the same proceeding whereby said assessments are enforced against lands held under private ownership: Provided, That in the case of entered unpatented lands the title or interest which such irrigation district may convey by tax sale, tax deed, or as a result of any tax proceeding shall be subject to the following conditions and limitations: If such unpatented land be withdrawn under the Act of Congress of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), known as the reclamation Act, or subject to the provisions of said Act, then the interest which the district may convey by such tax proceedings or tax deed shall be subject to a prior lien reserved to the United States for all the unpaid charges authorized by the said Act of June seventeenth, nineteen hundred and two, but the holder of such tax deed or tax title resulting from such district tax shall be entitled to all the rights and privileges in the land included in such tax title or tax deed of an assignee under the provisions of the Act of Congress of June twenty-third, nineteen hundred and ten (Thirty-sixth Statutes, page five hundred and ninety-two), and upon submission to the United States land office of the district in which the land is located of satisfactory proof of such tax title, the name of the holder thereof shall be indorsed upon the records of such land office as entitled to the rights of one holding a complete and valid assignment under the said Act of June twenty-third, nineteen hundred and ten, and such person may at any time thereafter receive patent upon submitting satisfactory proof of the reclamation and irrigation required by the said Act of Congress of June seventeenth, nineteen hundred and two, and Acts amendatory thereto, and making the payments required by said Acts. (39 Stat.)

§ 4695c. (Act Aug. 11, 1916, c. 319, § 3.) Maps, plats, and plans of irrigation districts; approval.

No unentered lands and no entered lands for which no final certificates have been issued shall be subject to the lien or liens herein contemplated until there shall have been submitted by said irrigation district to the Secretary of the Interior, and approved by him, a map or plat of said district and sufficient detailed engineering data to demonstrate to the satisfaction of the Secretary of the Interior the sufficiency of the water supply and the feasibility of the project, and which shall explain the plan or mode of irriga-

tion in those irrigation districts where the irrigation works have not been constructed, and which plan shall be sufficient to thoroughly irrigate and reclaim said land and prepare it to raise ordinary agricultural crops, and which shall also show the source of water to be used for irrigation of land included in said district: Provided, That the Secretary of the Interior may, upon the expiration of ten years from the date of his approval of said map and plan of any irrigation district, release from the lien authorized by this Act any unentered land or lands upon which final certificate has not issued, for which irrigation works have not been constructed and water of such district made available for the land: Provided further, That in those irrigation districts already organized and whose irrigation works have been constructed and are in operation as soon as a satisfactory map, plat, and plan shall have been approved by the Secretary of the Interior, as in this Act provided, such entered and unentered lands shall be subject to all district taxes and assessments theretofore actually levied against the lands in said district and in the same manner in which lands of a like character held under private ownership are subject to liens and assessments. (39 Stat.)

§ 4695d. (Act Aug. 11, 1916, c. 319, § 4.) Entry of approval of maps, etc., on records by registers and receivers.

Upon the approval of the district map or plat as hereinbefore provided by the Secretary of the Interior the register and receiver will note said approval upon their records where any unentered or entered and unpatented lands are affected. (39 Stat.)

§ 4695e. (Act Aug. 11, 1916, c. 319, § 5.) Sale of lands for taxes and assessments.

No public lands which were unentered at the time any tax or assessment was levied against same by such irrigation district shall be sold for such taxes or assessments, but such tax or assessment shall be and continue a lien upon such lands, and not more than one hundred and sixty acres of such land shall be entered by any one person; and when such lands shall be applied for, after said approval by the Secretary of the Interior, under the homestead or desert-land laws of the United States the application shall be suspended for a period of thirty days to enable the applicant to present a certificate from the proper district or county officer showing that no unpaid district charges are due and delinquent against said land. (39 Stat.)

§ 4695f. (Act Aug. 11, 1916, c. 319, § 6.) Patents to purchasers or assigns.

Any entered but unpatented lands not subject to the reclamation Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), sold in the manner and for the purposes mentioned in this Act may be patented to the purchaser thereof or his assignee at any time after the expiration of the period of redemption allowed by law under which it may have been sold (no redemption having been made) upon the payment to the receiver of the local land office of the minimum price of $1.25 per acre, or such other price as may be fixed by law for such lands, together with the usual fees and commissions charged in entries of like lands under the homestead laws, and upon a satisfactory showing that the irrigation works have been constructed and that water of the district is available for such land; but the purchaser or his assignee shall, at the time of application for patent, have the qualification of a homestead entryman or desert-land entryman, and not more than one hundred and

sixty acres of said land shall be patented to any one purchaser under the provisions of this Act.

These limitations shall not apply to sales to irrigation districts, but shall apply to purchasers from such irrigation districts of such land bid in by said district.

Unless the purchaser or his assignee of such lands shall, within ninety days after the time for redemption has expired, pay to the proper receiver all fees and commissions and the purchase price to which the United States shall be entitled as provided for in this Act, any person having the qualification of a homestead entryman or a desert-land entryman may pay to the proper receiver, for not more than one hundred and sixty acres of said lands, for which payment has not been made, the unpaid purchase price, fees, and commissions to which the United States may be entitled; and upon satisfactory proof that he has paid to the purchaser at the tax sale, or his assignee or to the proper officer of the district for such purchaser or for the district, as the case may be, the sum for which the land was sold at sale for irrigation district charges or bid in by the district at such sale, and in addition thereto the interest and penalties on the amount bid at the rate allowed by law, shall be subrogated to the rights of such purchaser to receive patent for said land.

In any case where any tract of entered land lying within such approved irrigation district shall become vacant by relinquishment or cancellation for any cause, any subsequent applicant therefor shall be required, in addition to the qualifications and requirements otherwise provided, to furnish satisfactory proof by certificate from the proper district or county officer that he has paid all charges then due to the district upon said land and also has paid to the proper district or county officer for the holder or holders of any tax certificates, delinquency certificates, or other proper evidence of purchase at tax sale the amount for which the said land was sold at tax sale, together with the interest and penalties thereon provided by law. (39 Stat.)

§ 4695g. (Act Aug. 11, 1916, c. 319, § 7.) Notices required by irrigation district laws delivered to registers and receivers, etc.

All notices required by the irrigation district laws mentioned in this act shall, as soon as such notices are issued, be delivered to the register and receiver of the proper land office in cases where unpatented lands are affected thereby, and to the entryman whose unpatented lands are included therein, and the United States and such entryman shall be given the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership, and all entrymen shall be given the same rights of redemption as are given to the owners of lands held in private ownership. (39 Stat.)

§ 4695h. (Act Aug. 11, 1916, c. 319, § 8.) Disposition of money from sale of lands.

All moneys derived by the United States from the sale of public lands herein referred to shall be paid into such funds and applied as provided by law for the disposal of the proceeds from the sale of public lands. (39 Stat.)

RECLAMATION OF ARID LANDS BY THE UNITED STATES

§ 4696. (Act Oct. 2, 1888, c. 1069, § 1.) Surveys in arid regions; reservations for reservoir sites, etc.; opening lands reserved to homestead entries.

For the purpose of investigating the extent to which the arid region of the United States can be redeemed by irrigation, and the segrega-

tion of the irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and the prevention of floods and overflows, * * the work to be performed by the Geological Survey, under the direction of the Secretary of the Interior. * * And all the lands which may hereafter be designated or selected by such United States surveys for sites for reservoirs, ditches or canals for irrigation purposes and all the lands made susceptible of irrigation by such reservoirs, ditches or canals are from this time henceforth hereby reserved from sale as the property of the United States, and shall not be subject after the passage of this act, to entry, settlement or occupation until further provided by law: Provided, That the President may at any time in his discretion, by proclamation, open any portion or all of the lands reserved by this provision to settlement under the homestead laws. (25 Stat. 526.)

These were provisions of the sundry civil appropriation act for the fiscal year 1889, cited above.

The words omitted here stated the amount appropriated for the fiscal year for the work authorized, and required reports to Congress of expenditures under said appropriation.

A subsequent appropriation for the same purposes, accompanied by provisions similar to those of this act, and a requirement of annual reports of expenditures under that and any future appropriations, but without the provisions of this act for reservation of reservoir sites, etc., as made by the similar act for the next following, Act March 2, 1889, c. 411, § 1, ante, § 776.

But so much of this act as provided for withdrawal of public lands from entry, etc., was repealed by Act Aug. 30, 1890, c. 837, § 1, post, § 4697. Said repealing act, however, provided for the reservation of sites for reservoirs, etc.; and the sites so reserved were limited to the land actually necessary, by Act March 3, 1891, c. 561, § 17, post, § 4698.

The provisions of this act, and subsequent provisions amendatory thereof and supplementary thereto, of Act Aug. 30, 1890, c. 837, § 1, post, § 4697, and Act March 3, 1891, c. 561, § 17, post, § 4698, were to a great extent superseded by the provisions, relating to the same subjects, of the Reclamation Act of June 17, 1902, c. 1093, post, §§ 4700–4708.

Notes of Decisions

Object and effect of act.—The provision in this act reserving from sale or entry lands designated or selected for reservoirs, ditches, or canals for irrigation purposes, and also lands made susceptible of irrigation by such reservoirs, ditches, or canals, operates as an immediate withdrawal of the lands thus described from entry and settlement. (1890) 19 Op. Atty. Gen. 564. See, also, U. S. v. Van Horn (D. C. 1912) 197 Fed. 611, 612.

§ 4697. (Act Aug. 30, 1890, c. 837, § 1.) Repeal in part of Act Oct. 2, 1888, c. 1069; entries on arid lands; reservation of reservoir sites.

So much of the act of October second, eighteen hundred and eighty-eight, entitled, "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof. (26 Stat. 391.)

This was a provision of the sundry civil appropriation act for the fiscal year 1891, cited above.

The provision of Act Oct. 2, 1888, c. 1069, repealed in part, is set forth ante, § 4696.

The proviso in another paragraph of this act, set forth ante, § 4558, limiting any one person entering under any of the public land laws to 320 acres in the aggregate, did not include entries validated by this section.

The reservation of reservoir sites was limited to the land actually necessary by Act March 3, 1891, c. 561, § 17, post, § 4698.

The provisions of this act, as well as those of Act Oct. 2, 1888, c. 1069, § 1, ante, § 4696, repealed in part thereby, relating to the withdrawal from entry of public lands, were superseded by the provisions, relating to the same subject, of the Reclamation Act of June 17, 1902, c. 1093, §§ 3, 4, post, §§ 4702, 4703.

§ 4698. (Act March 3, 1891, c. 561, § 17.) Reservoir sites to include only necessary land.

Reservoir sites located or selected and to be located and selected under the provisions of "An act making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and eighty-nine, and for other purposes," and amendments thereto, shall be restricted to and shall contain only so much land as is actually necessary for the construction and maintenance of reservoirs; excluding so far as practicable lands occupied by actual settlers at the date of the location of said reservoirs. * * (26 Stat. 1101.)

This section was part of an act repealing the timber-culture laws. Other sections are set forth or referred to post, § 5116.

The portion of this section omitted here limited the maximum amount of land any one person may enter under all of the public-land laws. It is set forth ante, § 4559.

The provisions of Act Oct. 2, 1888, c. 1069, and amendments thereto, mentioned in this section, are set forth ante, §§ 4696–4698.

The Secretary of the Interior was authorized to file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over any reservoir site, by Act March 3, 1899, c. 427, § 1, post, § 4945.

Notes of Decisions

Control of navigable waters.—The Secretary of the Interior had no power under this act to grant a right to construct dams across the Rio Grande for irrigation purposes. (1897) 21 Op. Atty. Gen. 518.

§ 4699. (Act Feb. 26, 1897, c. 335.) Reservoir sites to be open to use for right of way; occupancy and control by states.

All reservoir sites reserved or to be reserved shall be open to use and occupation under the right-of-way Act of March third, eighteen hundred and ninety-one, and any State is hereby authorized to improve and occupy such reservoir sites to the same extent as an individual or private corporation, under such rules and regulations as the Secretary of the Interior may prescribe: Provided, That the charges for water coming in whole or part from reservoir sites used or occupied under the provisions of this Act shall always be subject to the control and regulation of the respective States and Territories in which such reservoirs are in whole or part situate. (29 Stat. 599.)

This was an act entitled "An act to provide for the use and occupation of reservoir sites reserved."

Act March 3, 1891, c. 561, §§ 18–21, granting rights of way for canals and ditches through public lands, is set forth post, §§ 4934–4937.

§ 4700. (Act June 17, 1902, c. 1093, § 1.) Receipts from public lands in certain States and Territories appropriated as reclamation fund; insufficiency of proceeds of other public lands for support of agricultural colleges to be supplied from other moneys.

All moneys received from the sale and disposal of public lands in Arizona, California, Colorado, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Utah, Washington, and Wyoming, beginning with the fiscal year ending June thirtieth, nineteen hundred and one,

including the surplus of fees and commissions in excess of allowances to registers and receivers, and excepting the five per centum of the proceeds of the sales of public lands in the above States set aside by law for educational and other purposes, shall be, and the same are hereby, reserved, set aside, and appropriated as a special fund in the Treasury to be known as the "reclamation fund," to be used in the examination and survey for and the construction and maintenance of irrigation works for the storage, diversion, and development of waters for the reclamation of arid and semiarid lands in the said States and Territories, and for the payment of all other expenditures provided for in this Act: Provided, That in case the receipts from the sale and disposal of public lands other than those realized from the sale and disposal of lands referred to in this section are insufficient to meet the requirements for the support of agricultural colleges in the several States and Territories, under the Act of August thirtieth, eighteen hundred and ninety, entitled "An Act to apply a portion of the proceeds of the public lands to the more complete endowment and support of the colleges for the benefit of agriculture and the mechanic arts, established under the provisions of an Act of Congress approved July second, eighteen hundred and sixty-two," the deficiency, if any, in the sum necessary for the support of the said colleges shall be provided for from any moneys in the Treasury not otherwise appropriated. (32 Stat. 388.)

This was the first section of the Reclamation Act or National Irrigation Act of 1902. It was entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands."

Sections 2–8 and 10 of the act are set forth post, §§ 4701–4708.

Section 9 of that act required the major portion of the funds arising from the sale of lands within each State or Territory to be expended, so far as practicable, for the benefit of lands within such State or Territory. It was repealed by Act June 25, 1910, c. 407, § 6, 36 Stat. 836.

This act superseded to a great extent the previous provisions relating to irrigation of arid lands, contained in Act Oct. 2, 1888, c. 1069, and subsequent amendatory and supplementary provisions, ante, §§ 4696–4698.

The provisions of this act were extended to the state of Texas, by Act June 12, 1906, c. 3288, post, § 4709.

The act for the admission to the Union of the States of New Mexico and Arizona reserved to the United States all rights and powers for carrying out the provisions of this act and acts amendatory thereof or supplementary thereto, to the same extent as if each of said States had remained a Territory. Act June 20, 1910, c. 310, § 2, subsec. 7, and § 20, subsec. 7, 36 Stat. 558, 569.

Appropriations for the construction and maintenance of irrigation works for Indian reservations and allotments are made in the annual Indian appropriation acts. The provisions for the fiscal year 1917, were contained in Act May 18, 1916, c. 125, § 1, 39 Stat.

The return to the reclamation fund of the cost of construction of works for irrigation, from charges on the lands irrigated, and the purposes for which the fund may be used, were provided for by sections 4–7 of this act, post, §§ 4703–4706.

Proceeds of sales of material utilized for temporary work and structures in connection with the operations under this act, as well as of sales of other condemned property purchased under its provisions, and any moneys refunded in connection with operations under it, were to be covered into the reclamation fund, by Act March 3, 1905, c. 1459, post, § 4742.

Moneys derived from the sale of lands acquired under this act, but not needed for the purposes thereof, were to be covered into the reclamation fund, by Act Feb. 2, 1911, c. 32, § 3, post, § 4748.

Moneys received under contracts for impounding, storage, and carriage of water, with irrigation systems operating under the Carey Act, authorized by Act Feb. 21, 1911, c. 141, post, §§ 4738–4740, were to be covered into the reclamation fund, by section 3 of said act, post, § 4740.

Provisions for advances from the Treasury to the reclamation fund, and for the issue of certificates of indebtedness to provide funds therefor, to be repaid out of the annual receipts of the reclamation fund, were contained in Act June 25, 1910, c. 407, amended by Act Feb. 18, 1911, c. 111, post, §§ 4710–4714.

The Secretary of the Interior was authorized, in carrying out any project under this act, to make such arrangement and agreement to provide for the irrigation of lands allotted to Indians as he might deem best for their interests, by a provision contained in the Indian appropriation act for the fiscal year 1909, Act April 30, 1908, c. 153, 35 Stat. 85, and repeated in the similar appropriation act for the fiscal year 1910, Act March 3, 1909, c. 263, ante, § 4205.

Certain provisions of the Reclamation Act, especially those relative to payments by entrymen, were substantially superseded by Act Aug. 13, 1914, c. 247, post, §§ 4713a–4714f.

Notes of Decisions

Validity and effect of legislation.—This act is not violative of the constitution, as delegating legislative authority to the Secretary of the Interior. U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371.

This act is within the power of congress as to lands within the states, and is not invalid as authorizing the expenditure of public money without an appropriation. Id.

The United States has constitutional authority to organize and maintain an irrigation project within a state where it owns arid lands whereby it will associate itself with other owners of like lands for the purpose of reclaiming and in proving them. Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807, affirming judgment U. S. v. Burley (C. C. 1909) 172 Fed. 615. See, also, Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 661, 190 U. S. 452, 47 L. Ed. 1134 (dissenting opinion); Kansas v. Colorado (1907) 27 Sup. Ct. 655, 665, 206 U. S. 46, 51 L. Ed. 956; Magruder v. Belle Fourche Valley Water Users' Ass'n (1914) 219 Fed. 72, 133 C. C. A. 524.

Plan of irrigation.—The act contemplates the irrigation of private lands as well as lands belonging to the government, and that the fact that a scheme contemplates the irrigation of private as well as a large tract of government land does not render the project illegal, so as to prevent the condemnation of land necessary to carry it out. Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807, affirming judgment U. S. v. Burley (C. C. 1909) 172 Fed. 615.

In a proceeding by the United States to condemn land for reservoir purposes, whether a more feasible plan of irrigation than the one adopted might be devised, or some other site selected for the reservoir, is immaterial; the determination of the proper government authorities being conclusive. U. S. v. Burley (C. C. 1909) 172 Fed. 615, judgment affirmed Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807.

Contract to supply irrigation district with water.—Under the reclamation act the Secretary of the Interior has power to contract with an irrigation district to supply, or partially supply, the district with water. Pioneer Irr. District v. Stone (1913) 130 Pac. 382, 23 Idaho, 344; Hillcrest Irr. Dist. v. Brose (1913) 133 P. 663, 24 Idaho, 376. See, also, Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807.

Assessment for maintenance of works.—Irrigable lands may be assessed with the annual cost of maintenance and operation under the authority conferred on the Secretary of the Interior. Swigart v. Baker (1913) 33 Sup. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143, reversing decree Baker v. Swigart (1912) 199 Fed. 865, 118 C. C. A. 313, and affirming Baker v. Swigart (D. C. 1912) 196 Fed. 569.

§ 4701. (Act June 17, 1902, c. 1093, § 2.) Surveys for and location and construction of irrigation works; reports to Congress.

The Secretary of the Interior is hereby authorized and directed to make examinations and surveys for, and to locate and construct, as herein provided, irrigation works for the storage, diversion, and development of waters, including artesian wells, and to report to Congress at the beginning of each regular session as to the results of such examinations and surveys, giving estimates of cost of all contemplated works, the quantity and location of the lands which can be irrigated therefrom, and all facts relative to the practicability of each irrigation project; also the cost of works in process of construction as well as of those which have been completed. (32 Stat. 388.)

This section superseded the previous similar provisions for investigations and surveys by the Geological Survey and for reports thereof by the Director of the Geological Survey, contained in Act Oct. 2, 1888, c. 1069, ante, § 4696, and Act March 2, 1889, c. 411, § 1, 25 Stat. 960.

The purchase of books, periodicals, and other publications needed in carry-

ing out the surveys and examinations authorized by this act was authorized by a provision of Act May 27, 1908, c. 200, § 1, post, § 4744.

Assignments of pay by employés of the Reclamation Service were authorized by a further provision of Act May 27, 1908, c. 200, § 1, post, § 4745.

Notes of Decisions

Construction of works—Governmental function.—In the construction of works for the irrigation of arid public lands, the United States is not exercising a governmental function, nor even a strictly public function, but is promoting its proprietary interests. Twin Falls Canal Co. v. Foote (C. C. 1911) 192 Fed. 583.

§ 4702. (Act June 17, 1902, c. 1093, § 3.) Withdrawal from entry of lands required for works and lands susceptible of irrigation; lands to be irrigated subject to entry under homestead laws; commutation provisions not applicable.

The Secretary of the Interior shall, before giving the public notice provided for in section four of this Act, withdraw from public entry the lands required for any irrigation works contemplated under the provisions of this Act, and shall restore to public entry any of the lands so withdrawn when, in his judgment, such lands are not required for the purposes of this Act; and the Secretary of the Interior is hereby authorized, at or immediately prior to the time of beginning the surveys for any contemplated irrigation works, to withdraw from entry, except under the homestead laws, any public lands believed to be susceptible of irrigation from said works: Provided, That all lands entered and entries made under the homestead laws within areas so withdrawn during such withdrawal shall be subject to all the provisions, limitations, charges, terms, and conditions of this Act; that said surveys shall be prosecuted diligently to completion, and upon the completion thereof, and of the necessary maps, plans, and estimates of cost, the Secretary of the Interior shall determine whether or not said project is practicable and advisable, and if determined to be impracticable or unadvisable he shall thereupon restore said lands to entry; that public lands which it is proposed to irrigate by means of any contemplated works shall be subject to entry only under the provisions of the homestead laws in tracts of not less than forty nor more than one hundred and sixty acres, and shall be subject to the limitations, charges, terms, and conditions herein provided: Provided, That the commutation provisions of the homestead laws shall not apply to entries made under this Act. (32 Stat. 388.)

Lands needed for town-site purposes in connection with irrigation projects may be withdrawn from public entry, and surveyed and subdivided and sold as town lots, by Act April 16, 1906, c. 1631, post, §§ 4715–4719.

Further provisions relating to the subdivision of lands to be irrigated were contained in Act June 27, 1906, c. 3559, post, §§ 4720–4724.

Requirements to be performed by the entryman of lands to be irrigated, in addition to compliance with the homestead laws, are contained in section 5 of this act, post, § 4714.

Assignments of homestead entries of lands within reclamation projects were authorized by Act June 23, 1910, c. 357, post, § 4727.

Provisions for the issuance of patents upon completed homestead entries within reclamation projects, and of final water-right certificates to purchasers of water rights were made by Act Aug. 9, 1912, c. 278, post, §§ 4728–4732.

No homestead entry made prior to June 25, 1910, within a reclamation project, was to be subject to contest for the failure of the entryman to maintain a residence or make improvements thereon prior to the time when water was available for the irrigation of the lands by Act April 30, 1912, c. 100, post, § 4736.

Leaves of absence to homesteaders upon lands proposed to be irrigated under this act, where water is not available for irrigation, were authorized by Act June 25, 1910, c. 432, post, § 4735.

All public lands in section 8, township 1 south, range 2 west, and in sections 2, 4, 8, 10, and 12, in township 1 south, range 3 west, San Bernardino base and meridian, in California, were withdrawn from settlement and entry and

reserved for the purpose of aiding in the conservation of the waters of the San Bernardino Valley, and the right to conduct to and distribute over said lands flood or waste waters to replenish the supply of underground waters in said valley was granted to any individual or corporation by Act Feb. 20, 1909, c. 165, 35 Stat. 641.

Notes of Decisions

Classes of withdrawals.—Two classes of withdrawals are provided for by this section, and the exception of homestead entry from the second does not apply to the first; withdrawals and reservations thereunder being necessarily absolute. U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371.

Withdrawals under the first clause are not subject to location for mining purposes, being reserved for government use, while lands withdrawn under the second clause are disposed of only for homesteads, and as all lands open to homestead entry are subject to mining location, lands withdrawn under the second clause are so subject. Loney v. Scott (Or. 1910) 112 P. 172.

Effect of withdrawal.—Lands withdrawn because required for irrigation works cannot be entered, selected, or located in any manner so long as they remain so withdrawn, while lands withdrawn because believed to be susceptible of irrigation from irrigation works can be entered only under the homestead laws, subject to the limitations, terms, and conditions of this act. U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

Public lands withdrawn from entry as lands susceptible of irrigation, but which remain subject to homestead entry under specified conditions, and upon which such entries have been made by entrymen who are in possession but have not yet fulfilled the conditions to entitle them to patents, are still "public lands," within the railroad right of way act. U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323. And see U. S. v. Minidoka & S. W. R. Co. (C. C. 1910) 176 Fed. 762; Minidoka & S. W. R. Co. v. Weymouth (1911) 113 P. 455, 19 Idaho, 234.

Settler's rights.—This act contains no provision for recognition or protection of any right of a settler on unsurveyed public lands which may be withdrawn and reserved thereunder for the construction of irrigation works, and he has no right to oppose taking of the land therefor. U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371.

—— Transfer of railroad right of way.—A homesteader without patents but lawfully in possession of irrigable lands in a reclamation area may still grant a right of way over his settlement to a railway company. Minidoka & S. W. R. Co. v. U. S. (1914) 35 Sup. Ct. 46, 235 U. S. 211, 59 L. Ed. 200, reversing decree U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

Lease of withdrawn lands.—The Secretary of the Interior may establish rules as to the use of withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing, the revenue going into the reclamation fund. Clyde v. Cummings (1909) 101 Pac. 106, 35 Utah, 461.

§ 4703. (Act June 17, 1902, c. 1093, § 4.) Contracts for irrigation works; public notice of lands irrigable, limit of entry, charges, etc.; eight hours to be a day's work; no Mongolian labor to be employed.

Upon the determination by the Secretary of the Interior that any irrigation project is practicable, he may cause to be let contracts for the construction of the same, in such portions or sections as it may be practicable to construct and complete as parts of the whole project, providing the necessary funds for such portions or sections are available in the reclamation fund, and thereupon he shall give public notice of the lands irrigable under such project, and limit of area per entry, which limit shall represent the acreage which, in the opinion of the Secretary, may be reasonably required for the support of a family upon the lands in question; also of the charges which shall be made per acre upon the said entries, and upon lands in private ownership which may be irrigated by the waters of the said irrigation project, and the number of annual installments, not exceeding ten, in which such charges shall be paid and the time when such payments shall commence. The said charges shall be determined with a view of returning to the reclamation fund the estimated cost of construction of the project, and shall be apportioned equitably: Provided, That in all construction work eight hours shall constitute

a day's work, and no Mongolian labor shall be employed thereon. (32 Stat. 389.)

The use of earth, stone, and timber from the public lands and from the forest reserves in the construction of irrigation works was authorized by Act Feb. 8, 1905, c. 552, post, § 4741.

Changes of the levels of certain lakes, etc., in Oregon and California, in carrying out irrigation projects under this act, were authorized by Act Feb. 9, 1905, c. 567, post, § 4749.

The construction of dams in or across Yellowstone River in Montana, in carrying out irrigation projects under this act, was authorized by Act March 3, 1905, c. 1476, post, § 4750.

The Secretary of the Interior was authorized to withdraw any notice issued under this section, and to agree to the modification of water-right applications or contracts, or to consent to the abrogation of such applications or contracts, by Act Feb. 13, 1911, c. 49, post, § 4737.

Notes of Decisions

Validity of contracts.—Regulations authorizing the engineers of the reclamation service to enter into contracts with water users or water users' associations, or with representative committees of the settlers, to advance moneys and perform work in the construction of irrigation works, certificates to be issued therefor, redeemable at face value in part or full payment of the charges against the lands of the holders of the certificates, were unauthorized by this act, and the Secretary of the Interior had no authority to enter into such contracts. (1909) 27 Op. Atty. Gen. 360.

Certificates so issued cannot be used by the original payee or transferee as a discharge pro tanto of his indebtedness upon the land. Id.

The certificates are, however, evidence of work performed, and the work may be paid for, as upon a quantum meruit, if the money is available in the reclamation fund. Id.

If the money necessary for this purpose does not come into the reclamation fund in the manner prescribed by this act, the parties have no remedy, except in an application to Congress for an appropriation, or for an amendment of the act providing that the certificates may be credited upon charges on the land. Id.

The contract with the Orchard Construction Company, owners of the stock of the Grand Mesas Company, which had certain rights of irrigation in the Grand Valley, whereby the government abandoned a certain part of its project and permitted the company to construct a private irrigation ditch through an area south of the Grand river, the company transferring one-half of its stock to the United States to secure it against any claim on the part of the company or its associates for an excessive use of the waters of Grand river, the stock to be returned if the United States did not proceed with its Grand Valley project, may be regarded as void, and the stock should be returned. Id.

Joint control and operation is not recognized in any manner by the statute, and the return of the stock cannot be conditioned upon an abandonment by the government of any part of the proposed project. Id.

The practice of the department in fixing a definite charge per acre in each project to cover this cost of construction, and to assess annually a specific amount per acre for operation and maintenance, collecting the same from the landowners, is correct. Id.

This act may be fairly construed to include in the fund charges for maintenance as well as charges for cost of construction. Id.

With regard to reclamation projects on Indian reservations, the Secretary of the Interior has the right to exact payment of maintenance or operation charges from settlers, entrymen, and landowners within such districts prior to the time when payments have been made for the major portion of the lands irrigated. Id.

There is no statute authorizing the Secretary of the Interior to enter into contract contemplated in a reclamation project, to wit, a co-operative plan whereby the United States enters into an agreement with a water users' association, by which the association undertakes to perform certain work within certain maximum prices, the work to become the property of the United States upon acceptance, payment therefor to be made by the association in certificates of work performed, which certificates are to be accepted by the United States in reduction of charges against particular tracts, as an equitable apportionment thereof. (1909) 27 Op. Atty. Gen. 591. See, also (1909) 27 Op. Atty. Gen. 360.

This act gives the Secretary of the Interior authority to let contracts for the construction of reclamation works only when the necessary funds are available in the reclamation fund; and if these funds are not available and sufficient, no such authority exists. (1909) 27 Op. Atty. Gen. 591.

The objection raised in (1909) 27 Op. Atty. Gen. 360, was not that the money subscribed by the water users' association was not in the reclamation fund, but that the fund contemplated by the statute was to be created from the proceeds of the sale of government lands, and there was no provision for

augmenting it by private enterprise, and that the power of the Secretary of the Interior to let contracts for reclamation projects was specifically restricted to the amount of money available in the reclamation fund as constituted by law. Id.

—— **Members of congress as parties.**—Agreements for the purchase of lands, for water rentals, for conveyance of water rights, and similar instruments, contractual in form, relating to the adjustment of vested water rights, executed in behalf of the United States by some officer of the reclamation service for purposes within the purview of the reclamation act, are unlawful when a member of congress is a party to or interested therein. (1908) 26 Op. Atty. Gen. 537.

Assessment for maintenance of works.—The purpose of this act is to encourage the settlement and cultivation of public lands, and it contemplates that such lands may be entered on as soon as the irrigation system is so far completed that water may be furnished thereon for irrigation purposes; and when the act empowers the Secretary of the Interior to fix and determine the charges against the land it must have intended that he should cover the cost of maintenance and operation while in control of the United States as well as construction. U. S. v. Cantrall (C. C. 1910) 176 Fed. 949.

The Secretary of the Interior has authority to levy and collect assessments on lands irrigated from any irrigation works to defray the cost of maintaining such works until the time when under the act the maintenance and operation passes to the landowners. Baker v. Swigart (D. C. 1912) 196 Fed. 569, decree reversed (1912) 199 Fed. 865, 118 C. C. A. 313, which is reversed (1913) 33 Sup. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

Eight hours as day's work.—The provision of this section that eight hours shall constitute a day's work does not conflict with the saving clause in eight-hour law, which allows more than eight hours' work in one calendar day "in case of extraordinary emergency." (1906) 26 Op. Atty. Gen. 64.

Eight hours means eight hours of effective labor. Id.

Irrigation works for the reclamation of arid and semi-arid lands perfectly and comprehensively fill the idea of "public works of the United States." Id.

The blasting, cleaning of tracks, repair of machinery, and all other similar matters incident to the reclamation work, essential to prompt and continuous service in the regular day, may legally be done before and after regular hours. The law does not prescribe in what hours of the day the labor shall be done. Id.

Blacksmiths and their helpers, firemen, and pumpmen are either mechanics or laborers within the meaning of the eight-hour law. Id.

It is the duty of the engineers of the reclamation service to see that the eight-hour law is observed by the contractors and to report violations of that law. Id.

§ 4704. (Act June 17, 1902, c. 1093, § 5.) Requirements to be performed by entryman; sale of water rights to landowners; payments, and forfeiture for nonpayment; disposition of receipts; commissions of registers and receivers.

The entryman upon lands to be irrigated by such works shall, in addition to compliance with the homestead laws, reclaim at least one-half of the total irrigable area of his entry for agricultural purposes, and before receiving patent for the lands covered by his entry shall pay to the Government the charges apportioned against such tract, as provided in section four. No right to the use of water for land in private ownership shall be sold for a tract exceeding one hundred and sixty acres to any one landowner, and no such sale shall be made to any landowner unless he be an actual bona fide resident on such land, or occupant thereof residing in the neighborhood of said land, and no such right shall permanently attach until all payments therefor are made. The annual installments shall be paid to the receiver of the local land office of the district in which the land is situated, and a failure to make any two payments when due shall render the entry subject to cancellation, with the forfeiture of all rights under this Act, as well as of any moneys already paid thereon. All moneys received from the above sources shall be paid into the reclamation fund. Registers and receivers shall be allowed the usual commissions on all moneys paid for lands entered under this Act. (32 Stat. 389.)

Provisions relating to water rights for towns established on town-sites in connection with irrigation projects were made by Act April 16, 1906, c. 1631, § 4, post, § 4718.

The time for the establishment of residence by homestead entrymen on lands within the Huntley irrigation project in the State of Montana was extended by Act March 16, 1908, c. 89, 35 Stat. 44.

Notes of Decisions

Private and public lands.—The act contemplates the irrigation of private lands as well as lands belonging to the government, and that the fact that a scheme contemplates the irrigation of private as well as a large tract of government land does not render the project illegal, so as to prevent the condemnation of land necessary to carry it out. Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807, affirming judgment U. S. v. Burley (C. C. 1909) 172 Fed. 615.

§ 4705. (Act June 17, 1902, c. 1093, § 6.) Use of reclamation fund for reservoirs and irrigation works; transfer of management of irrigation works to landowners; title to and management of reservoirs, etc.

The Secretary of the Interior is hereby authorized and directed to use the reclamation fund for the operation and maintenance of all reservoirs and irrigation works constructed under the provisions of this Act: Provided, That when the payments required by this Act are made for the major portion of the lands irrigated from the waters of any of the works herein provided for, then the management and operation of such irrigation works shall pass to the owners of the lands irrigated thereby, to be maintained at their expense under such form of organization and under such rules and regulations as may be acceptable to the Secretary of the Interior: Provided, That the title to and the management and operation of the reservoirs and the works necessary for their protection and operation shall remain in the Government until otherwise provided by Congress. (32 Stat. 389.)

Payment from the reclamation fund of rent of office accommodations in Washington, D. C., for the Reclamation Service, was authorized by a provision of Act June 30, 1906, c. 3912, § 1, post, § 4743.

The title to and management of works constructed in co-operation with irrigation districts, etc., or water users, authorized by Act Feb. 21, 1911, c. 141, § 2, post, § 4739, are subject to the provisions of this section, by a proviso annexed to said section.

Notes of Decisions

Assessment for maintenance of works.—The Secretary of the Interior, being authorized to tax and determine the charges, is authorized to divide the same into two parts, one for construction, and the other for maintenance and operation; and hence he is authorized to impose reasonable assessments on land irrigated prior to the time when payment of the major portion of the cost of construction had been made, and the works passed under management of the owners of the irrigated land. U. S. v. Cantrall (C. C. 1910) 176 Fed. 949.

Where, by a contract between the United States and landowners tributary to a federal irrigation system, such landowners agreed to pay to the United States the charges duly levied against their lands for the construction and maintenance of the system, they were only liable for such reasonable charges as the government was authorized to collect proportionate to their share of the cost of maintaining and operating the system, and not such as might be arbitrarily fixed in advance by such secretary or other governmental officer. Id.

The Secretary of the Interior has authority to levy and collect assessments on land irrigated from any works to defray the cost of maintaining such works until the time when, under the act, the management passes to the landowners. Baker v. Swigart (D. C. 1912) 196 Fed. 569, decree reversed (1912) 199 Fed. 865, 118 C. C. A. 313, which is reversed in Swigart v. Baker (1913) 33 Sup. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

§ 4706. (Act June 17, 1902, c. 1093, § 7.) Acquisition of rights or property for purposes of act; condemnation proceedings.

Where in carrying out the provisions of this Act it becomes necessary to acquire any rights or property, the Secretary of the Interior is hereby authorized to acquire the same for the United States by purchase or by condemnation under judicial process, and

to pay from the reclamation fund the sums which may be needed for that purpose, and it shall be the duty of the Attorney-General of the United States upon every application of the Secretary of the Interior, under this Act, to cause proceedings to be commenced for condemnation within thirty days from the receipt of the application at the Department of Justice. (32 Stat. 389.)

Provisions applicable generally to proceedings to acquire real estate for public uses by condemnation were made by Act Aug. 1, 1888, c. 728, post, §§ 6909, 6910.

Provisions for the sale of lands acquired under this or other acts for irrigation works, and which are not needed for such purposes, were contained in Act Feb. 2, 1911, c. 32, post, §§ 4746–4748.

Notes of Decisions

Mode of acquisition of rights or property.—Authority given Secretary of Interior by this act, to acquire for United States interests in property, empowers him to acquire for cash and grant of selection of other lands, the lands in an Indian reservation. Henkel v. U. S. (1915) 35 Sup. Ct. 536, 237 U. S. 43, 59 L. Ed. 831, affirming judgment (1912) 196 F. 345, 116 C. C. A. 165.

The Secretary of the Interior is authorized to acquire any rights or property by purchase or condemnation. Henkel v. U. S. (1912) 196 Fed. 345, 116 C. C. A. 165.

Condemnation.—The United States has constitutional authority to organize and maintain an irrigation project within a state where it owns arid lands, whereby it will associate with itself other owners of like lands for the purpose of reclaiming and improving them, and for that purpose may exercise the right of eminent domain against other landowners to obtain land necessary to carry the proposed project in effect. Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807, affirming judgment U. S. v. Burley (C. C. 1909) 172 Fed. 615.

The fact that a scheme contemplates the irrigation of private as well as government land does not prevent condemnation of land necessary to carry it out. Id.

In a proceeding by the United States to condemn land for reservoir purposes, whether a more feasible plan of irrigation than the one adopted might be devised, or some other site selected for the reservoir, is immaterial; the determination of the proper government authorities being conclusive. U. S. v. Burley (C. C. 1909) 172 Fed. 615, judgment affirmed Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807.

Lands condemned by the United States under this section for right of way for a canal or ditch required in the carrying out of an irrigation project are taken for a public use. U. S. v. O'Neill (D. C. 1912) 198 Fed. 677.

The power to condemn land for irrigation works conferred on the Secretary of the Interior is not subject to control by a state, nor its exercise required to conform to state procedure in determining the necessity for the taking, as to which the decision of the Secretary is conclusive, and not reviewable. Id.

In proceedings by the United States to condemn right of way for a ditch under this act, it is not necessary that the damages shall be assessed and paid before the government may be allowed to take possession. Id.

Implied obligation to pay for use of property.—The United States held lable on an implied contract to pay for the use of an engine in the reclamation service in completing a contract. U. S. v. Buffalo Pitts Co. (1914) 34 Sup. Ct. 840, 234 U. S. 228, 58 L. Ed. 1290, affirming judgment (1912) 193 Fed. 905, 114 C. C. A. 119.

§ 4707. (Act June 17, 1902, c. 1093, § 8.) Irrigation laws of States and Territories, and rights to waters of interstate streams, not affected by act; extent of right to use of water acquired under act.

Nothing in this Act shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof: Provided, That the right to the use of water acquired under

the provisions of this Act shall be appurtenant to the land irrigated, and beneficial use shall be the basis, the measure, and the limit of the right. (32 Stat. 390.)

Notes of Decisions

Appropriation of waters.—By the provisions of this act the right to the use of water acquired must be appurtenant to the land and the beneficial use is the basis, the measure, and the limit of the right. Imperial Water Co. No. 5 v. Holabird (1912) 197 Fed. 4, 116 C. C. A. 526. See, also, Gutierres v. Albuquerque Land & Irrigation Co. (1903) 23 Sup. Ct. 338, 342, 188 U. S. 545, 47 L. Ed. 588; U. S. v. Bennett (1913) 207 Fed. 524, 525, 125 C. C. A. 186; Same v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, 128 (affirmed [1908] 161 Fed. 829, 88 C. C. A. 647); San Joaquin & Kings River C. & I. Co. v. Stanislaus County (C. C. 1911) 191 Fed. 875; U. S. v. Union Gap Irr. Co. (D. C. 1913) 209 Fed. 274.

§ 4708. (Act June 17, 1902, c. 1093, § 10.) Execution of provisions of act and regulations therefor.

The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. (32 Stat. 390.)

Notes of Decisions

Regulations—Use of withdrawn lands.—The Secretary of the Interior may establish rules as to the use of withdrawn lands while not needed for the purpose for which they are reserved, and may lease them for grazing and limit animals to be grazed thereon; the revenue derived going into the reclamation fund. Clyde v. Cummings (Utah, 1909) 101 P. 106.

§ 4709. (Act June 12, 1906, c. 3288.) Provisions of Reclamation Act extended to State of Texas.

The provisions of the Act entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, be, and the same are hereby, extended so as to include and apply to the State of Texas. (34 Stat. 259.)

This was an act entitled "An act to extend the irrigation act to the State of Texas."

Act June 17, 1902, c. 1093, mentioned in this act, is the Reclamation Act, ante, §§ 4700–4708. The States originally included therein are mentioned in section 1 thereof, ante, § 4700.

Notes of Decisions

Rights of the United States.—The United States has constitutional authority to organize and maintain an irrigation project within a state where it owns arid lands. Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807.

§ 4710. (Act June 25, 1910, c. 407, § 1.) Advances to reclamation fund from Treasury; aggregate amount; limitation to payment for work performed; reimbursement; examination and approval of projects; no portion of appropriation to be expended on new projects.

To enable the Secretary of the Interior to complete government reclamation projects heretofore begun, the Secretary of the Treasury is authorized, upon request of the Secretary of the Interior, to transfer from time to time to the credit of the reclamation fund created by the Act entitled "An act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, such sum or sums, not exceeding in the aggregate twenty million dollars, as the Secretary of the Interior may deem necessary to complete the said reclamation projects, and such extensions thereof as he may deem proper and necessary to the successful and profitable

operation and maintenance thereof or to protect water rights pertaining thereto claimed by the United States, provided the same shall be approved by the President of the United States; and such sum or sums as may be required to comply with the foregoing authority are hereby appropriated out of any money in the Treasury not otherwise appropriated: Provided, That the sums hereby authorized to be transferred to the reclamation fund shall be so transferred only as such sums shall be actually needed to meet payments for work performed under existing law: And provided further, That all sums so transferred shall be reimbursed to the Treasury from the reclamation fund, as hereinafter provided: And provided further, That no part of this appropriation shall be expended upon any existing project until it shall have been examined and reported upon by a board of engineer officers of the Army, designated by the President of the United States, and until it shall be approved by the President as feasible and practicable and worthy of such expenditure; nor shall any portion of this appropriation be expended upon any new project. (36 Stat. 835.)

This section and the four sections next following were part of an act entitled "An act to authorize advances to the 'Reclamation Fund,' and for the issue and disposal of certificates of indebtedness in reimbursement therefor, and for other purposes."

Section 6 of this act repealed section 9 of the Reclamation Act. See notes to said Act June 17, 1902, c. 1093, § 1, ante, § 4700.

The provisions creating the reclamation fund, contained in Act June 17, 1902, c. 1093, § 1, mentioned in this section, are set forth ante, § 4700.

§ 4711. (Act June 25, 1910, c. 407, § 2.) Certificates of indebtedness to provide funds for advances; disposal; aggregate amount; exemption from taxation; appropriation for expenses.

For the purpose of providing the Treasury with funds for such advances to the reclamation fund, the Secretary of the Treasury is authorized to issue certificates of indebtedness of the United States in such form as he may prescribe and in denominations of fifty dollars, or multiples of that sum; said certificates to be redeemable at the option of the United States at any time after three years from the date of their issue and to be payable five years after such date, and to bear interest, payable semiannually, at not exceeding three per centum per annum; the principal and interest to be payable in gold coin of the United States. The certificates of indebtedness herein authorized may be disposed of by the Secretary of the Treasury at not less than par, under such rules and regulations as he may prescribe, giving all citizens of the United States an equal opportunity to subscribe therefor, but no commission shall be allowed and the aggregate issue of such certificates shall not exceed the amount of all advances made to said reclamation fund, and in no event shall the same exceed the sum of twenty million dollars. The certificates of indebtedness herein authorized shall be exempt from taxes or duties of the United States as well as from taxation in any form by or under state, municipal, or local authority; and a sum not exceeding one-tenth of one per centum of the amount of the certificates of indebtedness issued under this Act is hereby appropriated, out of any money in the Treasury not otherwise appropriated, to pay the expense of preparing, advertising, and issuing the same. (36 Stat. 835.)

§ 4712. (Act June 25, 1910, c. 407, § 3.) Repayment of advances from annual receipts of reclamation fund.

Beginning five years after the date of the first advance to the reclamation fund under this Act, fifty per centum of the annual receipts of the reclamation fund shall be paid into the general fund of the Treasury of the United States until payment so made shall equal the aggregate amount of advances made by the Treasury to said reclamation fund, together with interest paid on the certificates

of indebtedness issued under this Act and any expense incident to preparing, advertising, and issuing the same. (36 Stat. 836.)

§ 4713. (Act June 25, 1910, c. 407, § 4.) Money advanced to reclamation fund to be devoted to completion of work on projects heretofore begun; no other projects to be begun until recommended by the Secretary of the Interior and approved by direct order of the President.

All money placed to the credit of the reclamation fund in pursuance of this Act shall be devoted exclusively to the completion of work on reclamation projects heretofore begun as hereinbefore provided, and the same shall be included with all other expenses in future estimates of construction, operation, or maintenance, and hereafter no irrigation project contemplated by said Act of June seventeenth, nineteen hundred and two, shall be begun unless and until the same shall have been recommended by the Secretary of the Interior and approved by the direct order of the President of the United States. (36 Stat. 836.)

§ 4713a. (Act Aug. 13, 1914, c. 247, § 1.) Payments of construction charges by entryman; installments; time for making entry and for initial payment.

Any person whose lands hereafter become subject to the terms and conditions of the Act approved June seventeenth, nineteen hundred and two, entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," and Acts amendatory thereof or supplementary thereto, hereafter to be referred to as the reclamation law, and any person who hereafter makes entry thereunder shall at the time of making water-right application or entry, as the case may be, pay into the reclamation fund five per centum of the construction charge fixed for his land as an initial installment, and shall pay the balance of said charge in fifteen annual installments, the first five of which shall each be five per centum of the construction charge and the remainder shall each be seven per centum until the whole amount shall have been paid. The first of the annual installments shall become due and payable on December first of the fifth calendar year after the initial installment: Provided, That any water-right applicant or entryman may, if he so elects, pay the whole or any part of the construction charges owing by him within any shorter period: Provided further, That entry may be made whenever water is available, as announced by the Secretary of the Interior, and the initial payment be made when the charge per acre is established. (38 Stat. 686.)

This section and the fifteen sections next following were an act entitled "An act extending the period of payment under reclamation projects, and for other purposes," cited above.

Act June 17, 1902, mentioned in this section, is set forth ante, §§ 4700–4708.

§ 4713b. (Act Aug. 13, 1914, c. 247, § 2.) Payments where land or entry was previously subject to terms and conditions of reclamation law; installments.

Any person whose land or entry has heretofore become subject to the terms and conditions of the reclamation law shall pay the construction charge, or the portion of the construction charge remaining unpaid, in twenty annual installments, the first of which shall become due and payable on December first of the year in which the public notice affecting his land is issued under this Act, and subsequent installments on December first of each year thereafter. The first four of such installments shall each be two per centum, the next two installments shall each be four per centum,

and the next fourteen each six per centum of the total construction charge, or the portion of the construction charge unpaid at the beginning of such installments. (38 Stat. 686.)

§ 4713c. (Act Aug. 13, 1914, c. 247, § 3.) Penalties for failure to pay installments of construction charges; actions for amounts in default.

If any water-right applicant or entryman shall fail to pay any installment of his construction charges when due, there shall be added to the amount unpaid a penalty of one per centum thereof, and there shall be added a like penalty of one per centum of the amount unpaid on the first day of each month thereafter so long as such default shall continue. If any such applicant or entryman shall be one year in default in the payment of any installment of the construction charges and penalties, or any part thereof, his water-right application, and if he be a homestead entryman his entry also, shall be subject to cancellation, and all payments made by him forfeited to the reclamation fund, but no homestead entry shall be subject to contest because of such default: Provided, That if the Secretary of the Interior shall so elect, he may cause suit or action to be brought for the recovery of the amount in default and penalties; but if suit or action be brought, the right to declare a cancellation and forfeiture shall be suspended pending such suit or action. (38 Stat. 686.)

§ 4713d. (Act Aug. 13, 1914, c. 247, § 4.) Increase of construction charges to be made only by agreement with majority of applicants and entrymen to be affected thereby; payment thereof in additional installments.

No increase in the construction charges shall hereafter be made, after the same have been fixed by public notice, except by agreement between the Secretary of the Interior and a majority of the water-right applicants and entrymen to be affected by such increase, whereupon all water-right applicants and entrymen in the area proposed to be affected by the increased charge shall become subject thereto. Such increased charge shall be added to the construction charge and payment thereof distributed over the remaining unpaid installments of construction charges: Provided, That the Secretary of the Interior, in his discretion, may agree that such increased construction charge shall be paid in additional annual installments, each of which shall be at least equal to the amount of the largest installment as fixed for the project by the public notice theretofore issued. And such additional installments of the increased construction charge, as so agreed upon, shall become due and payable on December first of each year subsequent to the year when the final installment of the construction charge under such public notice is due and payable: Provided further, That all such increased construction charges shall be subject to the same conditions, penalties, and suit or action as provided in section three of this Act. (38 Stat. 686.)

No work shall be undertaken or expenditures made where the construction cost will exceed that fixed by public notice until the agreement mentioned in this section has been made, under Act March 3, 1915, c. 75, § 1, post, § 4714g.

§ 4713e. (Act Aug. 13, 1914, c. 247, § 5.) Payment of operation and maintenance charges by entrymen; transfer of care, operation, and maintenance to water users' association or irrigation district; excess or deficit of charges collected.

In addition to the construction charge, every water-right applicant, entryman, or landowner under or upon a reclamation project shall also pay, whenever water service is available for the irrigation of his land, an operation and maintenance charge based

upon the total cost of operation and maintenance of the project, or each separate unit thereof, and such charge shall be made for each acre-foot of water delivered; but each acre of irrigable land, whether irrigated or not, shall be charged with a minimum operation and maintenance charge based upon the charge for delivery of not less than one acre-foot of water: Provided, That, whenever any legally organized water users' association or irrigation district shall so request, the Secretary of the Interior is hereby authorized, in his discretion, to transfer to such water users' association or irrigation district the care, operation, and maintenance of all or any part of the project works, subject to such rules and regulations as he may prescribe. If the total amount of operation and maintenance charges and penalties collected for any one irrigation season on any project shall exceed the cost of operation and maintenance of the project during that irrigation season, the balance shall be applied to a reduction of the charge on the project for the next irrigation season, and any deficit incurred may likewise be added to the charge for the next irrigation season. (38 Stat. 686.)

§ 4713f. (Act Aug. 13, 1914, c. 247, § 6.) Penalties for failure to pay operation and maintenance charges; actions for amounts in default.

All operation and maintenance charges shall become due and payable on the date fixed for each project by the Secretary of the Interior, and if such charge is paid on or before the date when due there shall be a discount of five per centum of such charge; but if such charge is unpaid on the first day of the third calendar month thereafter, a penalty of one per centum of the amount unpaid shall be added thereto, and thereafter an additional penalty of one per centum of the amount unpaid shall be added on the first day of each calendar month if such charge and penalties shall remain unpaid, and no water shall be delivered to the lands of any water-right applicant or entryman who shall be in arrears for more than one calendar year for the payment of any charge for operation and maintenance, or any annual construction charge and penalties. If any water-right applicant or entryman shall be one year in arrears in the payment of any charge for operation and maintenance and penalties, or any part thereof, his water-right application, and if he be a homestead entryman his entry also, shall be subject to cancellation, and all payments made by him forfeited to the reclamation fund, but no homestead entry shall be subject to contest because of such arrears. In the discretion of the Secretary of the Interior suit or action may be brought for the amounts in default and penalties in like manner as provided in section three of this Act. (38 Stat. 686.)

§ 4713g. (Act Aug. 13, 1914, c. 247, § 7.) Water users' association or irrigation district as fiscal agent to collect annual payments and charges.

The Secretary of the Interior is hereby authorized, in his discretion, to designate and appoint, under such rules and regulations as he may prescribe, the legally organized water users' association or irrigation district, under any reclamation project, as the fiscal agent of the United States to collect the annual payments on the construction charge of the project and the annual charges for operation and maintenance and all penalties: Provided, That no water-right applicant or entryman shall be entitled to credit for any payment thus made until the same shall have been paid over to an officer designated by the Secretary of the Interior to receive the same. (38 Stat. 686.)

§ 4713h. (Act Aug. 13, 1914, c. 247, § 8.) Regulations of use of water, and requirements as to reclamation and cultivation of irrigable area.

The Secretary of the Interior is hereby authorized to make general rules and regulations governing the use of water in the irrigation of the lands within any project, and may require the reclamation for agricultural purposes and the cultivation of one-fourth the irrigable area under each water-right application or entry within three full irrigation seasons after the filing of water-right application or entry, and the reclamation for agricultural purposes and the cultivation of one-half the irrigable area within five full irrigation seasons after the filing of the water-right application or entry, and shall provide for continued compliance with such requirements. Failure on the part of any water-right applicant or entryman to comply with such requirements shall render his application or entry subject to cancellation. (38 Stat. 686.)

§ 4713i. (Act Aug. 13, 1914, c. 247, § 9.) Increase of construction charges for lands in private ownership or not subject to reclamation law.

In all cases where application for water right for lands in private ownership or lands held under entries not subject to the reclamation law shall not be made within one year after the passage of this Act, or within one year after notice issued in pursuance of section four of the reclamation Act, in cases where such notice has not heretofore been issued, the construction charges for such land shall be increased five per centum each year until such application is made and an initial installment is paid. (38 Stat. 686.)

§ 4714. (Act June 25, 1910, c. 407, § 5, as amended, Act Feb. 18, 1911, c. 111, and Act Aug. 13, 1914, c. 247, § 10.) Entries of lands reserved for irrigation not to be made until unit of acreage is established and water is ready to be delivered; lands relinquished to be subject to settlement and entry under reclamation law.

No entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage per entry, and water is ready to be delivered for the land in such unit or some part thereof and such fact has been announced by the Secretary of the Interior: Provided, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished, in whole or in part, the lands so relinquished shall be subject to settlement and entry under the reclamation law. (36 Stat. 836. 36 Stat. 917. 38 Stat. 689.)

This section, as originally enacted, read as follows: "No entry shall be hereafter made and no entryman shall be permitted to go upon lands reserved for irrigation purposes until the Secretary of the Interior shall have established the unit of acreage and fixed the water charges and the date when the water can be applied and make public announcement of the same." It was amended by Act Feb. 18, 1911, c. 111, by adding thereto the following: "Provided, That where entries made prior to June twenty-fifth, nineteen hundred and ten, have been or may be relinquished in whole or in part, the lands so relinquished shall be subject to settlement and entry under the homestead law as amended by an Act entitled 'An act appropriating the receipts from the sale and disposal of the public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands,' approved June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight)." It was further amended by Act Aug. 13, 1914, c. 247, § 10, to read as set forth above.

§ 4714a. (Act Aug. 13, 1914, c. 247, § 11.) Charges for water service prior to public notice of construction charges, etc.

Whenever water is available and it is impracticable to apportion operation and maintenance charges as provided in section five of

this Act, the Secretary of the Interior may, prior to giving public notice of the construction charge per acre upon land under any project, furnish water to any entryman or private landowner thereunder until such notice is given, making a reasonable charge therefor, and such charges shall be subject to the same penalties and to the provisions for cancellation and collection as herein provided for other operation and maintenance charges. (38 Stat. 686.)

§ 4714b. (Act Aug. 13, 1914, c. 247, § 12.) Private lands within reclamation projects; owners required to agree to dispose of excess.

Before any contract is let or work begun for the construction of any reclamation project hereafter adopted the Secretary of the Interior shall require the owners of private lands thereunder to agree to dispose of all lands in excess of the area which he shall deem sufficient for the support of a family upon the land in question, upon such terms and at not to exceed such price as the Secretary of the Interior may designate; and if any landowner shall refuse to agree to the requirements fixed by the Secretary of the Interior, his land shall not be included within the project if adopted for construction. (38 Stat. 686.)

§ 4714c. (Act Aug. 13, 1914, c. 247, § 13.) Entries under reclamation projects in excess of one farm unit; reduction in area; restriction on taking by assignment prior to final payment of all charges for land held.

All entries under reclamation projects containing more than one farm unit shall be reduced in area and conformed to a single farm unit within two years after making proof of residence, improvement, and cultivation, or within two years after the issuance of a farm-unit plat for the project, if the same issues subsequent to the making of such proof: Provided, That such proof is made within four years from the date as announced by the Secretary of the Interior that water is available for delivery for the land. Any entryman failing within the period herein provided to dispose of the excess of his entry above one farm unit, in the manner provided by law, and to conform his entry to a single farm unit shall render his entry subject to cancellation as to the excess above one farm unit: Provided, That upon compliance with the provisions of law such entryman shall be entitled to receive a patent for that part of his entry which conforms to one farm unit as established for the project: Provided further, That no person shall hold by assignment more than one farm unit prior to final payment of all charges for all the land held by him subject to the reclamation law, except operation and maintenance charges not then due. (38 Stat. 686.)

§ 4714d. (Act Aug. 13, 1914, c. 247, § 14, as amended, Act July 26, 1916, c. 257.) Acceptance of act by persons whose land or entry was previously subject to reclamation law; time for filing notice of acceptance.

Any person whose land or entry has heretofore become subject to the reclamation law, who desires to secure the benefits of the extension of the period of payments provided by this Act, shall, within six months after the issuance of the first public notice hereunder affecting his land or entry, notify the Secretary of the Interior, in the manner to be prescribed by said Secretary, of his acceptance of all the terms and conditions of this Act, and thereafter his lands or entry shall be subject to all of the provisions of this Act: Provided, That upon sufficient showing the Secretary of the Interior may, in his discretion, permit notice of acceptance of all the terms and conditions of this Act to be filed at any time

after the time limit hereinbefore fixed for filing such acceptance shall have expired, conditioned, however, that where the applicant for such acceptance is in arrears on construction charges, he shall at the time of acceptance pay such installments of the construction charge as he would have been required to pay had he accepted this Act within the time limit hereinabove fixed, plus the penalties that would have accrued had he so accepted, and such applicant shall thereafter be upon the same status that he would have been had he accepted the provisions of this Act within the time limit hereinabove fixed, and thereafter the lands or entry of any such persons so filing such notice of acceptance shall be subject to all the provisions of this Act. (38 Stat. 686. 39 Stat.)

This section was amended by Act July 26, 1916, c. 257, cited above, by adding thereto the proviso.

§ 4714e. (Act Aug. 13, 1914, c. 247, § 15.) Acts and regulations for carrying provisions of act into effect.

The Secretary of the Interior is hereby authorized to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect. (38 Stat. 686.)

§ 4714f. (Act Aug. 13, 1914, c. 247, § 16.) Expenditures for carrying out purposes of reclamation law to be made only out of annual appropriations therefor; estimates for appropriations; payment of appropriations out of reclamation fund.

From and after July first, nineteen hundred and fifteen, expenditures shall not be made for carrying out the purposes of the reclamation law except out of appropriations made annually by Congress therefor, and the Secretary of the Interior shall, for the fiscal year nineteen hundred and sixteen, and annually thereafter, in the regular Book of Estimates, submit to Congress estimates of the amount of money necessary to be expended for carrying out any or all of the purposes authorized by the reclamation law, including the extension and completion of existing projects and units thereof and the construction of new projects. The annual appropriations made hereunder by Congress for such purposes shall be paid out of the reclamation fund provided for by the reclamation law. (38 Stat. 686.)

§ 4714g. (Act March 3, 1915, c. 75, § 1.) No work or expenditure beyond construction charge fixed by public notice without agreement to repay cost by applicants and entrymen affected.

No work shall be undertaken or expenditure made for any lands, for which the construction charge has been fixed by public notice, which work or expenditure shall, in the opinion of the Secretary of the Interior, increase the construction cost above the construction charge so fixed; unless and until valid and binding agreement to repay the cost thereof shall have been entered into between the Secretary of the Interior and the water right applicants and entrymen affected by such increased cost, as provided by section four of the Act of August thirteenth, nineteen hundred and fourteen, entitled "An Act extending the period of payment under reclamation projects, and for other purposes." (38 Stat. 861.)

This was a provision of the sundry civil appropriation act for the fiscal year 1916, cited above.

Act Aug. 13, 1914, c. 247, § 4, mentioned in this section, is set forth ante, § 4713d.

§ 4714h. (Act March 4, 1915, c. 182.) Relinquishment of homestead entry of land withdrawn from irrigation project, and selection and entry in lieu thereof of farm unit within project as established.

Any person who has made homestead entry under the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes at Large, page three hundred and eighty-eight), for land believed to be susceptible of irrigation which at the time of said entry was withdrawn for any contemplated irrigation project, may relinquish the same, provided that it has since been determined that the land embraced in such entry or all thereof in excess of twenty acres is not or will not be irrigable under the project, and in lieu thereof may select and make entry for any farm unit included within such irrigation project as finally established, notwithstanding the provisions of section five of the Act of June twenty-fifth, nineteen hundred and ten, entitled "An Act to authorize advances to the reclamation fund," and so forth, and Acts amendatory thereof: Provided, That such entrymen shall be given credit on the new entry for the time of bona fide residence maintained on the original entry. (38 Stat. 1215.)

This was an act entitled "An act for the relief of homestead entrymen under the reclamation projects of the United States," cited above.

Act June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

For relinquishment by a homestead claimant, see Act May 14, 1880, c. 89, § 1, ante, § 4536.

§ 4715. (Act April 16, 1906, c. 1631, § 1.) Withdrawal from entry of town-sites under irrigation projects; survey and subdivision.

The Secretary of the Interior may withdraw from public entry any lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, not exceeding one hundred and sixty acres in each case, and survey and subdivide the same into town lots, with appropriate reservations for public purposes. (34 Stat. 116.)

This section and the four sections next following were an act entitled "An act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with the irrigation projects under the Reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes."

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

Town-sites in excess of 160 acres may be withdrawn and disposed of under the provisions of this act, when advisable for the public interest, by Act June 27, 1906, c. 3559, § 4, post, § 4723.

Not exceeding 20 acres may be withdrawn for country parks, playgrounds, or community centers by Act Oct. 5, 1914, c. 316, § 1, post, § 4719a.

§ 4716. (Act April 16, 1906, c. 1631, § 2.) Appraisement and sale of lots; expenses, and disposition of proceeds.

The lots so surveyed shall be appraised under the direction of the Secretary of the Interior and sold under his direction at not less than their appraised value at public auction to the highest bidders, from time to time, for cash, and the lots offered for sale and not disposed of may afterwards be sold at not less than the appraised value under such regulations as the Secretary of the Interior may prescribe. Reclamation funds may be used to defray the necessary expenses of appraisement and sale, and the proceeds of such sales shall be covered into the reclamation fund. (34 Stat. 116.)

Town-sites previously set apart or established under R. S. §§ 2380, 2381, post, §§ 4784, 4785, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of this act, by Act June 27, 1906, c. 3559, § 3, post, § 4722.

Provisions for reappraisement of unsold lots appraised under the provisions

of this act and said Act June 27, 1906, c. 3559, and for the manner of payment for lots sold, were made by Act June 11, 1910, c. 284, post, §§ 4725, 4726.

§ 4717. (Act April 16, 1906, c. 1631, § 3.) Public reservations in town-sites.

The public reservations in such town sites shall be improved and maintained by the town authorities at the expense of the town; and upon the organization thereof as municipal corporations the said reservations shall be conveyed to such corporations by the Secretary of the Interior, subject to the condition that they shall be used forever for public purposes. (34 Stat. 116.)

Grounds reserved for parks, playgrounds, etc., are to be maintained by the people by Act Oct. 5, 1914, c. 316, §§ 2, 3, post, §§ 4719b, 4719c.

§ 4718. (Act April 16, 1906, c. 1631, § 4.) Water rights for towns and cities; charges for water supply.

The Secretary of the Interior shall, in accordance with the provisions of the reclamation Act, provide for water rights in amount he may deem necessary for the towns established as herein provided, and may enter into contract with the proper authorities of such towns, and other towns or cities on or in the immediate vicinity of irrigation projects, which shall have a water right from the same source as that of said project for the delivery of such water supply to some convenient point, and for the payment into the reclamation fund of charges for the same to be paid by such towns or cities, which charges shall not be less nor upon terms more favorable than those fixed by the Secretary of the Interior for the irrigation project from which the water is taken. (34 Stat. 116.)

§ 4719. (Act April 16, 1906, c. 1631, § 5, as amended, Act Feb. 24, 1911, c. 155.) Lease of surplus water power; disposition of proceeds; longer term of lease in connection with Rio Grande project.

Whenever a development of power is necessary for the irrigation of lands, under any project undertaken under the said reclamation Act, or an opportunity is afforded for the development of power under any such project, the Secretary of the Interior is authorized to lease for a period not exceeding ten years, giving preference to municipal purposes, any surplus power or power privilege, and the moneys derived from such leases shall be covered into the reclamation fund and be placed to the credit of the project from which such power is derived: Provided, That no lease shall be made of such surplus power or power privileges as will impair the efficiency of the irrigation project: Provided further, That the Secretary of the Interior is authorized, in his discretion, to make such a lease in connection with Rio Grande project in Texas and New Mexico for a longer period not exceeding fifty years, with the approval of the water users' association or associations under any such project, organized in conformity with the rules and regulations prescribed by the Secretary of the Interior in pursuance of section six of the reclamation Act approved June seventeenth, nineteen hundred and two. (34 Stat. 117. 36 Stat. 930.)

The amendment of this section by Act Feb. 24, 1911, c. 155, cited above, consisted chiefly in the addition of the further proviso at the end of the section as set forth here.

§ 4719a. (Act Oct. 5, 1914, c. 316, § 1.) Reservation of tracts for country parks, public playgrounds, and community centers within reclamation projects.

That the Secretary of the Interior be, and he is hereby, authorized to withdraw from other disposition and reserve for country parks, public playgrounds, and community centers for the use of the residents upon the lands such tracts as he may deem advisable

not exceeding twenty acres in any one township in each reclamation project or the several units of such reclamation projects undertaken under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act. (38 Stat. 727.)

This section and the three sections next following were an act entitled "An act to authorize the reservation of public lands for country parks and community centers within reclamation projects, and for other purposes," cited above.

Somewhat similar provisions are found in the sections dealing with townsite reservations, Act April 16, 1906, c. 1631, §§ 1–4, ante, §§ 4715–4718.

§ 4719b. (Act Oct. 5, 1914, c. 316, § 2.) Water service to lands set apart under this act; cost to be part of construction charges against remaining lands of project.

Subject to the provisions hereinafter contained every such tract of land so set apart shall be supplied with water from the Government irrigation system, the cost thereof to be charged to the remaining lands of the project as a part of the construction charge of such project, and shall be maintained and used in perpetuity by the people upon said reclaimed lands for a pleasure park, public playground, and community center. (38 Stat. 727.)

§ 4719c. (Act Oct. 5, 1914, c. 316, § 3.) Contract with organization of landowners within project to maintain and use lands reserved for purposes prescribed.

For the purpose of carrying out and effecting the objects of this Act the Secretary of the Interior is authorized to enter into a contract with the organization formed by the owners of the lands irrigated within said project or project unit pursuant to section six of the Act of June seventeenth, nineteen hundred and two, stipulating and providing that the organization will maintain and use such of the lands so reserved for the purposes prescribed in this Act as such organization may desire, and that upon failure to so maintain and use such lands, or in the event that same shall be permitted to be used or occupied for other purposes than those stipulated in this Act, the control of the lands shall revert to the United States. (38 Stat. 728.)

Act June 17, 1902, c. 1093, § 6, is set forth ante, § 4705.

§ 4719d. (Act Oct. 5, 1914, c. 316, § 4.) Disposition of lands not contracted for in accordance with preceding section; application of proceeds thereof.

Any of such lands not contracted for in accordance with the provisions of section three of this Act within ten years from the time water is available for the same, or sooner, if the Secretary of the Interior may deem it desirable, shall be disposed of in accordance with the public-land laws applicable thereto, and the proceeds from the disposition of lands reverting to the United States under the provisions of this Act, and from sales of water rights, shall be covered into the reclamation fund and placed to the credit of the project wherein the lands are situate. (38 Stat. 728.)

§ 4720. (Act June 27, 1906, c. 3559, § 1.) Subdivision of lands to be irrigated into lesser areas than forty acres; farm units; survey and entry of subdivisions.

Whenever, in the opinion of the Secretary of the Interior, by reason of market conditions and the special fitness of the soil and climate for the growth of fruit and garden produce, a lesser area than forty acres may be sufficient for the support of a family on lands to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, he may fix a lesser area than forty acres as the minimum entry and may establish farm units of not less than ten nor more than one hundred

and sixty acres. That wherever it may be necessary, for the purpose of accurate description, to further subdivide lands to be irrigated under the provisions of said reclamation Act, the Secretary of the Interior may cause subdivision surveys to be made by the officers of the reclamation service, which subdivisions shall be rectangular in form, except in cases where irregular subdivisions may be necessary in order to provide for practicable and economical irrigation. Such subdivision surveys shall be noted upon the tract books in the General Land Office, and they shall be paid for from the reclamation fund: Provided, That an entryman may elect to enter under said reclamation Act a lesser area than the minimum limit in any State or Territory. (34 Stat. 519.)

This section and the four sections next following were an act entitled "An act providing for the subdivision of lands entered under the Reclamation Act, and for other purposes."

Lands to be irrigated were made subject to entry under the homestead laws in tracts of not less than 40 nor more than 160 acres by the provisions of the Reclamation Act of June 17, 1902, c. 1093, ante, §§ 4700–4708.

§ 4721. (Act June 27, 1906, c. 3559, § 2.) Other entry allowed, on relinquishment of former entry on lands acquired under Reclamation Act.

Wherever the Secretary of the Interior, in carrying out the provisions of the reclamation Act, shall acquire by relinquishment lands covered by a bona fide unperfected entry under the land laws of the United States, the entryman upon such tract may make another and additional entry, as though the entry thus relinquished had not been made. (34 Stat. 519.)

The acquisition of rights or property for the purposes of the Reclamation Act was authorized by said Act June 17, 1902, c. 1093, § 7, ante, § 4706.

Notes of Decisions

Object of act.—This section refers to entries so initiated under the land laws as to confer on the entryman vested rights which are voluntarily relinquished. U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371.

Rights of settlers on unsurveyed lands.—The statutes contain no provision for recognition or protection of any right of a settler on unsurveyed public lands which may be withdrawn and reserved thereunder for construction of irrigation works, and he has no right to oppose taking of the land therefor. U. S. v. Hanson (1909) 167 Fed. 881, 93 C. C. A. 371.

§ 4722. (Act June 27, 1906, c. 3559, § 3.) Disposal of town-sites previously set apart, within or in vicinity of reclamation project; expenses, and disposition of proceeds.

Any town site heretofore set apart or established by proclamation of the President, under the provisions of sections twenty-three hundred and eighty and twenty-three hundred and eighty-one of the Revised Statutes of the United States, within or in the vicinity of any reclamation project, may be appraised and disposed of in accordance with the provisions of the Act of Congress approved April sixteenth, nineteen hundred and six, entitled "An Act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes;" and all necessary expenses incurred in the appraisal and sale of lands embraced within any such town site shall be paid from the reclamation fund, and the proceeds of the sales of such lands shall be covered into the reclamation fund. (34 Stat. 519.)

Rev. St. §§ 2380, 2381, mentioned in this section, providing for the reservation of town-sites, are set forth post, §§ 4784, 4785.

Act April 16, 1906, c. 1631, also mentioned in this section, and made applicable by it to town-sites previously set apart, is set forth ante, §§ 4715–4719.

Provisions for reappraisement of unsold lots appraised under the provisions of Act April 12, 1900, c. 1631, ante, §§ 4715–4719, and of this act, and for the manner of payment for lots sold, were made by Act June 11, 1910, c. 284, post, §§ 4725, 4726.

§ 4723. (Act June 27, 1906, c. 3559, § 4.) Settlers previously allowed to establish themselves on certain town-sites to have right to purchase lots built upon; limitation on size of townsites not to apply; withdrawal and disposal of larger townsites authorized; expenses, and disposition of proceeds.

In the town sites of Heyburn and Rupert, in Idaho, created and surveyed by the Government, on which town sites settlers have been allowed to establish themselves, and had actually established themselves prior to March fifth, nineteen hundred and six, in permanent buildings not easily moved, the said settlers shall be given the right to purchase the lots so built upon at an appraised valuation for cash, such appraisement to be made under rules to be prescribed by the Secretary of the Interior. Providing that the limitation on the size of townsites contained in the Act of April sixteenth, nineteen hundred and six, entitled "An Act providing for the withdrawal from public entry of lands needed for townsite purposes in connection with irrigation projects under the reclamation Act of June seventeenth, nineteen hundred and two, and for other purposes," shall not apply to the townsites named in this section; and whenever, in the opinion of the Secretary of the Interior, it shall be advisable for the public interest, he may withdraw and dispose of townsites in excess of one hundred and sixty acres under the provisions of the aforesaid Act, approved April sixteenth, nineteen hundred and six, and reclamation funds shall be available for the payment of all expenses incurred in executing the provisions of this Act, and the aforesaid Act of April sixteenth, nineteen hundred and six, and the proceeds of all sales of townsites shall be covered into the reclamation fund. (34 Stat. 520.)

Act April 16, 1906, c. 1631, mentioned in this section, section 1 of which provided for the withdrawal from entry of lands needed for townsite purposes in connection with irrigation projects, not exceeding 160 acres in each case, is set forth ante, §§ 4715–4719.

§ 4724. (Act June 27, 1906, c. 3559, § 5.) Desert-land entries within exterior limits of land withdrawal or irrigation project; time allowed to make improvements or reclaim land; rights of entryman on abandonment or completion of irrigation project.

Where any bona fide desert-land entry has been or may be embraced within the exterior limits of any land withdrawal or irrigation project under the Act entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands," approved June seventeenth, nineteen hundred and two, and the desert-land entryman has been or may be directly or indirectly hindered, delayed, or prevented from making improvements or from reclaiming the land embraced in any such entry by reason of such land withdrawal or irrigation project, the time during which the desert-land entryman has been or may be so hindered, delayed, or prevented from complying with the desert-land law shall not be computed in determining the time within which such entryman has been or may be required to make improvements or reclaim the land embraced within any such desert-land entry: Provided, That if after investigation the irrigation project has been or may be abandoned by the Government, time for compliance with the desert-land law by any such entryman shall begin to run from the date of notice of such abandonment of the project and the restoration to the public domain of the lands withdrawn in connection therewith, and credit shall be allowed for all expenditures and improvements heretofore made on any such desert-land entry of which proof has been filed; but if the reclamation project is carried to completion so as to make available a water supply for the land embraced in any such desert-land entry, the entryman shall thereupon comply with all the provisions of the aforesaid Act of June seventeenth, nineteen

hundred and two, and shall relinquish all land embraced within his desert-land entry in excess of one hundred and sixty acres, and as to such one hundred and sixty acres retained, he shall be entitled to make final proof and obtain patent upon compliance with the terms of payment prescribed in said Act of June seventeenth, nineteen hundred and two, and not otherwise. But nothing herein contained shall be held to require a desert-land entryman who owns a water right and reclaims the land embraced in his entry to accept the conditions of said reclamation Act. (34 Stat. 520.)

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

Provisions relating to the entry of desert lands for reclamation were made by Act March 3, 1877, c. 107, and subsequent statutes set forth or referred to ante, §§ 4674–4684.

Assignments of desert-land entries within reclamation projects were authorized by Act July 24, 1912, c. 251, post, § 4733.

Provisions for the issuance of patents to desert-land entrymen whose entries were embraced within a reclamation project were made by Act Aug. 26, 1912, c. 408, post, § 4734.

§ 4725. (Act June 11, 1910, c. 284, § 1.) Reappraisement of unsold lots in town sites within reclamation projects.

The Secretary of the Interior is hereby authorized, whenever he may deem it necessary, to reappraise all unsold lots within town sites on projects under the reclamation Act heretofore or hereafter appraised under the provisions of the Act approved April sixteenth, nineteen hundred and six, entitled "An Act providing for the withdrawal from public entry of lands needed for town-site purposes in connection with irrigation projects under the reclamation act of June seventeenth, nineteen hundred and two, and for other purposes," and the Act approved June twenty-seventh, nineteen hundred and six, entitled "An Act providing for the subdivision of lands entered under the reclamation Act, and for other purposes;" and thereafter to proceed with the sale of such town lots in accordance with said Acts. (36 Stat. 465.)

This section and the section next following were an act entitled "An act providing for the reappraisement of unsold lots in town sites on reclamation projects, and for other purposes."

Act April 16, 1906, c. 1631, and Act June 27, 1906, c. 3559, mentioned in this section, are set forth ante, §§ 4715–4719.

§ 4726. (Act June 11, 1910, c. 284, § 2.) Manner of payment for town lots sold.

In the sale of town lots under the provisions of the said Acts of April sixteenth and June twenty-seventh, nineteen hundred and six, the Secretary of the Interior may, in his discretion, require payment for such town lots in full at time of sale or in annual installments, not exceeding five, with interest at the rate of six per centum per annum on deferred payments. (36 Stat. 466.)

§ 4727. (Act June 23, 1910, c. 357, as amended, Act May 8, 1916, c. 114.) Assignment of completed homestead entries within reclamation projects; patents to assignees.

From and after the filing with the Commissioner of the General Land Office of satisfactory proof of residence, improvement, and cultivation for the five years required by law, persons who have, or shall make, homestead entries within reclamation projects under the provisions of the Act of June seventeenth, nineteen hundred and two, may assign such entries, or any part thereof, to other persons, and such assignees, upon submitting proof of the reclamation of the lands and upon payment of the charges apportioned against the same as provided in the said Act of June seventeenth, nineteen hundred and two, may receive from the United States a patent for the lands: Provided, That all assignments made under the provisions of this act

shall be subject to the limitations, charges, terms, and conditions of the reclamation Act. Provided, That in the absence of any intervening valid adverse interests any assignment made between June twenty-third, nineteen hundred and ten, and January first, nineteen hundred and thirteen, of land upon which the assignor has submitted satisfactory final proof and the assignee purchased with the belief that the assignment was valid and under the Act of June twenty-third, nineteen hundred and ten, is hereby confirmed, and the assignee shall be entitled to the land assigned as under the Act of June twenty-third, nineteen hundred and ten, notwithstanding that said original entry was conformed to farm units and that the part assigned was canceled and eliminated from said entry prior to the date of final proof: Provided further, That all entries so assigned shall be subject to the limitations, terms, and conditions of the reclamation Act and Acts amendatory thereof or supplemental thereto, and all of said assignees whose entries are hereby confirmed shall, as a condition to receiving patent, make the proof heretofore required of assignees. (36 Stat. 592. 39 Stat.)

This was an act entitled "An act providing that entrymen for homesteads within reclamation projects may assign their entries upon satisfactory proof of residence, improvement, and cultivation for five years, the same as though said entry had been made under the original homestead act," cited above.

This section was amended by Act May 8, 1916, c. 114, by adding thereto the last two provisos.

Act June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

Provisions for the issuance of patents to homestead entrymen under the Reclamation Act, upon their complying with the law applicable to such lands as to residence, reclamation, and cultivation, were made by Act Aug. 9, 1912, c. 278, post, §§ 4728–4732.

This section was extended and made applicable to lands within the Flathead irrigation project, in the former Flathead Indian reservation, Montana, by Act July 17, 1914, c. 143, post, § 4732a.

Notes of Decisions

Entrymen's interest as property.—The entryman's interest is recognized as property by this section. Cheney v. Minidoka County (1914) 144 Pac. 343, 26 Idaho, 471.

§ 4728. (Act Aug. 9, 1912, c. 278, § 1.) Issuance of patents to homestead entrymen within reclamation projects; issuance of final water-right certificates; conditions prerequisite to issuance.

Any homestead entryman under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, including entrymen on ceded Indian lands, may, at any time after having complied with the provisions of law applicable to such lands as to residence, reclamation and cultivation, submit proof of such residence, reclamation and cultivation, which proof, if found regular and satisfactory, shall entitle the entryman to a patent, and all purchasers of water-right certificates on reclamation projects shall be entitled to a final water-right certificate upon proof of the cultivation and reclamation of the land to which the certificate applies, to the extent required by the reclamation Act for homestead entrymen: Provided, That no such patent or certificate shall issue until all sums due the United States on account of such land or water right at the time of issuance of patent or certificate have been paid. (37 Stat. 265.)

This section and the four sections next following were an act entitled "An act providing for patents on reclamation entries, and for other purposes."

Provisions for homestead entries upon lands within reclamation projects were made by the Reclamation Act of June 17, 1902, c. 1093, §§ 3, 5, ante, §§ 4702, 4704.

Provisions for the assignment of completed homestead entries within reclamation projects were made by Act June 23, 1910, c. 357, ante, § 4727.

The provisions of this act were extended and made applicable to lands within the Flathead irrigation project in the former Flathead Indian reservation, Montana, by Act July 17, 1914, c. 143, post, § 4732a.

Notes of Decisions

Patent.—Where proof of residence and cultivation of a homestead entryman on land within a reclamation project has been accepted, the patent will be issued without further residence, on proof that at least one-half of the irrigable land has been reclaimed and that the requisite charges have been paid. Cheney v. Minidoka County (1914) 144 P. 343, 26 Idaho, 471.

A person so far complying with this act as to residence and cultivation for more than five years as to give him a property right can complete his title by making final proof and paying the deferred payments and fees. Id.

Public land ceases to be such after it has been surveyed and filed on by a qualified entryman; and if he complies with the law, and makes final proof and payments, he is entitled to a patent. Id.

§ 4729. (Act Aug. 9, 1912, c. 278, § 2.) Patents and water-right certificates to reserve to the United States, a lien for sums due or to become due; forfeiture upon default in payment; right of redemption; sale after failure to redeem; bid of United States.

Every patent and water-right certificate issued under this Act shall expressly reserve to the United States a prior lien on the land patented or for which water right is certified, together with all water rights appurtenant or belonging thereto, superior to all other liens, claims or demands whatsoever for the payment of all sums due or to become due to the United States or its successors in control of the irrigation project in connection with such lands and water rights.

Upon default of payment of any amount so due title to the land shall pass to the United States free of all encumbrance, subject to the right of the defaulting debtor or any mortgagee, lien holder, judgment debtor, or subsequent purchaser to redeem the land within one year after the notice of such default shall have been given by payment of all moneys due, with eight per centum interest and cost. And the United States, at its option, acting through the Secretary of the Interior, may cause land to be sold at any time after such failure to redeem, and from the proceeds of the sale there shall be paid into the reclamation fund all moneys due, with interest as herein provided, and costs. The balance of the proceeds, if any, shall be the property of the defaulting debtor or his assignee: Provided, That in case of sale after failure to redeem under this section the United States shall be authorized to bid in such land at not more than the amount in default, including interest and costs. (37 Stat. 266.)

§ 4730. (Act Aug. 9, 1912, c. 278, § 3.) Certificate of final payment; limitation of amount of land acquired or held by one person before payment in full of all charges; excess acquired by descent may be held two years; forfeiture of excess holdings.

Upon full and final payment being made of all amounts due on account of the building and betterment charges to the United States or its successors in control of the project, the United States or its successors, as the case may be, shall issue upon request a certificate certifying that payment of the building and betterment charges in full has been made and that the lien upon the land has been so far satisfied and is no longer of any force or effect except the lien for annual charges for operation and maintenance: Provided, That no person shall at any one time or in any manner, except as hereinafter otherwise provided, acquire, own, or hold irrigable land for which entry or water right application shall have been made under the said reclamation Act of June seventeenth, nineteen hundred and two, and

Acts supplementary thereto and amendatory thereof, before final payment in full of all instalments of building and betterment charges shall have been made on account of such land in excess of one farm unit as fixed by the Secretary of the Interior as the limit of area per entry of public land or per single ownership of private land for which a water right may be purchased respectively, nor in any case in excess of one hundred and sixty acres, nor shall water be furnished under said Acts nor a water right sold or recognized for such excess; but any such excess land acquired at any time in good faith by descent, by will, or by foreclosure of any lien may be held for two years and no longer after its acquisition; and every excess holding prohibited as aforesaid shall be forfeited to the United States by proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction; and this proviso shall be recited in every patent and water-right certificate issued by the United States under the provisions of this Act. (37 Stat. 266.)

The Secretary of the Interior was authorized to fix the farm units under the reclamation projects at not less than 40 nor more than 160 acres by the Reclamation Act of June 17, 1902, c. 1093, ante, §§ 4700–4708, and was authorized to fix a lesser area of not less than 10 acres of fruit and garden land as the unit by Act June 27, 1906, c. 3559, § 1, ante, § 4720.

§ 4731. (Act Aug. 9, 1912, c. 278, § 4.) Appointment of agents to receive payments due on reclamation entries or water rights; copies of records of entries admissible as evidence.

The Secretary of the Interior is hereby authorized to designate such bonded fiscal agents or officers of the Reclamation Service as he may deem advisable on each reclamation project, to whom shall be paid all sums due on reclamation entries or water rights, and the officials so designated shall keep a record for the information of the public of the sums paid and the amount due at any time on account of any entry made or water right purchased under the reclamation Act; and the Secretary of the Interior shall make provision for furnishing copies of duly authenticated records of entries upon payment of reasonable fees, which copies shall be admissible in evidence, as are copies authenticated under section eight hundred and eighty-eight of the Revised Statutes. (37 Stat. 267.)

R. S. § 888, referred to in this section, is set forth ante, § 1501.

§ 4732. (Act Aug. 9, 1912, c. 278, § 5.) Jurisdiction of district courts to enforce provisions of this act.

Jurisdiction of suits by the United States for the enforcement of the provisions of this Act is hereby conferred on the United States district courts of the districts in which the lands are situated. (37 Stat. 267.)

See note to section 1 of this act, ante, § 4728.

§ 4732a. (Act July 17, 1914, c. 143.) Provisions of Act June 23, 1910, c. 357, and Act Aug. 9, 1912, c. 278, authorizing issuance of patents on reclamation entries, extended to lands within Flathead irrigation project; lien reserved on land patented to include sums due United States on account of Indian price of land.

That the provisions of the Act of June twenty-third, nineteen hundred and ten (Thirty-sixth Statutes at Large, page five hundred and ninety-two), authorizing the assignment under certain conditions of homesteads within reclamation projects, and of the Act of August ninth, nineteen hundred and twelve (Thirty-seventh Statutes at Large, page two hundred and sixty-five), authorizing under certain conditions the issuance of patents on reclamation entries, and for other purposes, be, and the same are hereby, extended and made applicable to lands within the Flathead irrigation

project, in the former Flathead Indian Reservation, Montana, but such lands shall otherwise be subject to the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), as amended by the Act of Congress approved May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-eight): Provided, That the lien reserved to the United States on the land patented, as provided for in section two of said Act of August ninth, nineteen hundred and twelve, shall include all sums due or to become due to the United States on account of the Indian price of such land. (38 Stat. 510.)

This was an act entitled "An act to extend the provisions of the Act of June 23, 1910 (36 Stat. 592), authorizing assignment of reclamation homestead entries, and of the Act of August 9, 1912 (37 Stat. 265), authorizing the issuance of patents on reclamation homestead entries, to lands in the Flathead irrigation project, Montana," cited above.

Act June 23, 1910, c. 357, mentioned in this section, is set forth ante, § 4727.

Act Aug. 9, 1912, c. 278, also mentioned in this section, is set forth ante, §§ 4728–4732.

§ 4733. (Act July 24, 1912, c. 251.) Assignment of desert-land entries within reclamation projects.

A desert-land entry within the exterior limits of a Government reclamation project may be assigned in whole or in part under the Act of March twenty-eighth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page fifty-two), and the benefits and limitations of the Act of June twenty-seventh, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and twenty), shall apply to such desert-land entryman and his assignees: Provided, That all such assignments shall conform to and be in accordance with farm units to be established by the Secretary of the Interior upon the application of the desert-land entryman. All such assignments heretofore made in good faith shall be recognized under this Act. (37 Stat. 200.)

This was an act entitled "An act relating to partial assignments of desert-land entries within reclamation projects made since March twenty-eighth, nineteen hundred and eight."

Act March 28, 1908, c. 112, mentioned in this section, is set forth ante, §§ 4674–4680.

Act June 27, 1906, c. 3559, also mentioned in this section, is set forth ante, §§ 4720–4724.

§ 4734. (Act Aug. 26, 1912, c. 408.) Patents to desert-land entrymen within reclamation projects; proof required.

Any desert-land entryman whose desert-land entry has been embraced within the exterior limits of any land withdrawal or irrigation project under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, and who may have obtained a water supply for the land embraced in any such desert-land entry from the reclamation project by the purchase of a water-right certificate, may at any time after having complied with the provisions of the law applicable to such lands and upon proof of the cultivation and reclamation of the land to the extent required by the reclamation Act for homestead entrymen, submit proof of such compliance, which proof, if found regular and satisfactory, shall entitle the entryman to a patent and a final water-right certificate under the same terms and conditions as required of homestead entrymen under the Act entitled "An Act providing for patents on reclamation entries, and for other purposes, approved August ninth, nineteen hundred and twelve." (37 Stat. 610.)

This was a provision of the deficiency appropriation act for the fiscal year 1912, cited above.

Act Aug. 9, 1912, c. 278, referred to in this section, is set forth ante, §§ 4728–4732.

Previous provisions relating to desert-land entries within reclamation projects were made by Act June 17, 1906, c. 3559, ante, §§ 4720–4724, and Act July 24, 1912, c. 251, ante, § 4733.

§ 4734a. (Act Aug. 17, 1916, c. 349.) Entry for farm unit on lands withdrawn from entry.

Any person who has heretofore established residence upon and improved any tract of land within the irrigable area of the Yuma reclamation project in Arizona withdrawn from entry under the provisions of the reclamation law and Acts supplementary thereto and amendatory thereof, and who shall have made valuable improvements upon such lands, and who has resided thereon in good faith for two years prior to the passage of this Act, may make entry for the farm unit upon which his residence is established, and that such residence and improvements heretofore made shall be credited upon his final proof. (39 Stat.)

This was an act entitled "An act for the relief of certain settlers under reclamation projects," cited above.

§ 4735. (Act June 25, 1910, c. 432.) Leaves of absence to homestead entrymen on lands proposed to be irrigated, until water is turned on.

All qualified entrymen who have heretofore made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, known as the national irrigation Act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: Provided, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law. (36 Stat. 864.)

This was an act entitled "An act granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two."

Provisions for homestead entries of lands within reclamation projects, made by the Reclamation Act of June 17, 1902, c. 1093, § 3, mentioned in this act, are set forth ante, § 4702.

No homestead entry made prior to June 25, 1910, within a reclamation project was to be subject to contest for failure of the entryman to maintain a residence or make improvements prior to the time when water was available for the irrigation of the lands, by Act April 30, 1912, c. 100, post, § 4736.

§ 4736. (Act April 30, 1912, c. 100.) Homestead entries made prior to June 25, 1910, within reclamation projects not subject to contest for failure to maintain residence or to improve before water is available; re-establishment of residence.

No qualified entryman who prior to June twenty-fifth, nineteen hundred and ten, made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall, within ninety days after the issuance of the public notice required by section four of the reclamation Act, fixing the date when water will be available for irrigation, file in the local land office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm-unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make

project, in the former Flathead Indian Reservation, Montana, but such lands shall otherwise be subject to the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four (Thirty-third Statutes at Large, page three hundred and two), as amended by the Act of Congress approved May twenty-ninth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page four hundred and forty-eight): Provided, That the lien reserved to the United States on the land patented, as provided for in section two of said Act of August ninth, nineteen hundred and twelve, shall include all sums due or to become due to the United States on account of the Indian price of such land. (38 Stat. 510.)

This was an act entitled "An act to extend the provisions of the Act of June 23, 1910 (36 Stat. 592), authorizing assignment of reclamation homestead entries, and of the Act of August 9, 1912 (37 Stat. 265), authorizing the issuance of patents on reclamation homestead entries, to lands in the Flathead irrigation project, Montana," cited above.

Act June 23, 1910, c. 357, mentioned in this section, is set forth ante, § 4727.

Act Aug. 9, 1912, c. 278, also mentioned in this section, is set forth ante, §§ 4728–4732.

§ 4733. (Act July 24, 1912, c. 251.) Assignment of desert-land entries within reclamation projects.

A desert-land entry within the exterior limits of a Government reclamation project may be assigned in whole or in part under the Act of March twenty-eighth, nineteen hundred and eight (Thirty-fifth Statutes at Large, page fifty-two), and the benefits and limitations of the Act of June twenty-seventh, nineteen hundred and six (Thirty-fourth Statutes at Large, page five hundred and twenty), shall apply to such desert-land entryman and his assignees: Provided, That all such assignments shall conform to and be in accordance with farm units to be established by the Secretary of the Interior upon the application of the desert-land entryman. All such assignments heretofore made in good faith shall be recognized under this Act. (37 Stat. 200.)

This was an act entitled "An act relating to partial assignments of desert-land entries within reclamation projects made since March twenty-eighth, nineteen hundred and eight."

Act March 28, 1908, c. 112, mentioned in this section, is set forth ante, §§ 4674–4680.

Act June 27, 1906, c. 3559, also mentioned in this section, is set forth ante, §§ 4720–4724.

§ 4734. (Act Aug. 26, 1912, c. 408.) Patents to desert-land entrymen within reclamation projects; proof required.

Any desert-land entryman whose desert-land entry has been embraced within the exterior limits of any land withdrawal or irrigation project under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, and who may have obtained a water supply for the land embraced in any such desert-land entry from the reclamation project by the purchase of a water-right certificate, may at any time after having complied with the provisions of the law applicable to such lands and upon proof of the cultivation and reclamation of the land to the extent required by the reclamation Act for homestead entrymen, submit proof of such compliance, which proof, if found regular and satisfactory, shall entitle the entryman to a patent and a final water-right certificate under the same terms and conditions as required of homestead entrymen under the Act entitled "An Act providing for patents on reclamation entries, and for other purposes, approved August ninth, nineteen hundred and twelve." (37 Stat. 610.)

This was a provision of the deficiency appropriation act for the fiscal year 1912, cited above.

Act Aug. 9, 1912, c. 278, referred to in this section, is set forth ante, §§ 4728–4732.

Previous provisions relating to desert-land entries within reclamation projects were made by Act June 17, 1906, c. 3559, ante, §§ 4720–4724, and Act July 24, 1912, c. 251, ante, § 4733.

§ 4734a. (Act Aug. 17, 1916, c. 349.) Entry for farm unit on lands withdrawn from entry.

Any person who has heretofore established residence upon and improved any tract of land within the irrigable area of the Yuma reclamation project in Arizona withdrawn from entry under the provisions of the reclamation law and Acts supplementary thereto and amendatory thereof, and who shall have made valuable improvements upon such lands, and who has resided thereon in good faith for two years prior to the passage of this Act, may make entry for the farm unit upon which his residence is established, and that such residence and improvements heretofore made shall be credited upon his final proof. (39 Stat.)

This was an act entitled "An act for the relief of certain settlers under reclamation projects," cited above.

§ 4735. (Act June 25, 1910, c. 432.) Leaves of absence to homestead entrymen on lands proposed to be irrigated, until water is turned on.

All qualified entrymen who have heretofore made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, known as the national irrigation Act, may, upon application and a showing that they have made substantial improvements, and that water is not available for the irrigation of their said lands, within the discretion of the Secretary of the Interior, obtain leave of absence from their entries, until water for irrigation is turned into the main irrigation canals from which the land is to be irrigated: Provided, That the period of actual absence under this Act shall not be deducted from the full time of residence required by law. (36 Stat. 864.)

This was an act entitled "An act granting leaves of absence to homesteaders on lands to be irrigated under the provisions of the act of June seventeenth, nineteen hundred and two."

Provisions for homestead entries of lands within reclamation projects, made by the Reclamation Act of June 17, 1902, c. 1093, § 3, mentioned in this act, are set forth ante, § 4702.

No homestead entry made prior to June 25, 1910, within a reclamation project was to be subject to contest for failure of the entryman to maintain a residence or make improvements prior to the time when water was available for the irrigation of the lands, by Act April 30, 1912, c. 100, post, § 4736.

§ 4736. (Act April 30, 1912, c. 100.) Homestead entries made prior to June 25, 1910, within reclamation projects not subject to contest for failure to maintain residence or to improve before water is available; re-establishment of residence.

No qualified entryman who prior to June twenty-fifth, nineteen hundred and ten, made bona fide entry upon lands proposed to be irrigated under the provisions of the Act of June seventeenth, nineteen hundred and two, the national reclamation law, and who established residence in good faith upon the lands entered by him, shall be subject to contest for failure to maintain residence or make improvements upon his land prior to the time when water is available for the irrigation of the lands embraced in his entry, but all such entrymen shall, within ninety days after the issuance of the public notice required by section four of the reclamation Act, fixing the date when water will be available for irrigation, file in the local land office a water-right application for the irrigable lands embraced in his entry, in conformity with the public notice and approved farm-unit plat for the township in which his entry lies, and shall also file an affidavit that he has reestablished his residence on the land with the intention of maintaining the same for a period sufficient to enable him to make

final proof: Provided, That no such entryman shall be entitled to have counted as part of the required period of residence any period of time during which he was not actually upon the said land prior to the date of the notice aforesaid, and no application for the entry of said lands shall be received until after the expiration of the ninety days after the issuance of notice within which the entryman is hereby required to reestablish his residence and apply for water right. (37 Stat. 105.)

This was an act entitled, "An act for the relief of homestead entrymen under the reclamation projects in the United States."

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this section is set forth ante, §§ 4700–4708.

Provisions for leaves of absence to homestead entrymen on lands within reclamation projects until water is available, were made by Act June 25, 1910, c. 432, ante, § 4735.

§ 4737. (Act Feb. 13, 1911, c. 49.) Withdrawal of notices of lands irrigable under reclamation act, limit of acreage, charges, etc.; modification or abrogation of water-right applications or contracts.

The Secretary of the Interior may, in his discretion, withdraw any public notice heretofore issued under section four of the reclamation Act of June seventeenth, nineteen hundred and two, and he may agree to such modification of water-right applications heretofore duly filed or contracts with water users' associations and others, entered into prior to the passage of this Act, as he may deem advisable, or he may consent to the abrogation of such water-right applications and contracts, and proceed in all respects as if no such notice had been given. (36 Stat. 902.)

This was an act entitled "An act to authorize the Secretary of the Interior to withdraw public notices issued under section four of the Reclamation Act, and for other purposes."

The Reclamation Act of June 17, 1902, c. 1093, § 4, mentioned in this act, is set forth, ante, § 4703.

§ 4738. (Act Feb. 21, 1911, c. 141, § 1.) Contracts for excess storage or carrying capacity provided under reclamation law, with irrigation systems under Carey Act, for distribution of water to individual users; restriction of use of water; charges.

Whenever in carrying out the provisions of the reclamation law, storage or carrying capacity has been or may be provided in excess of the requirements of the lands to be irrigated under any project, the Secretary of the Interior, preserving a first right to lands and entrymen under the project, is hereby authorized, upon such terms as he may determine to be just and equitable, to contract for the impounding, storage, and carriage of water to an extent not exceeding such excess capacity with irrigation systems operating under the Act of August eighteenth, eighteen hundred and ninety-four, known as the Carey Act, and individuals, corporations, associations, and irrigation districts organized for or engaged in furnishing or in distributing water for irrigation. Water so impounded, stored, or carried under any such contract shall be for the purpose of distribution to individual water users by the party with whom the contract is made: Provided, however, That water so impounded, stored, or carried shall not be used otherwise than as prescribed by law as to lands held in private ownership within Government reclamation projects. In fixing the charges under any such contract for impounding, storing, or carrying water for any irrigation system, corporation, association, district, or individual, as herein provided, the Secretary shall take into consideration the cost of construction and maintenance of the reservoir by which such water is to be impounded or stored and the canal by which it is to be carried, and such charges shall be just and equitable as to water users under the Government

project. No irrigation system, district, association, corporation, or individual so contracting shall make any charge for the storage, carriage, or delivery of such water in excess of the charge paid to the United States except to such extent as may be reasonably necessary to cover cost of carriage and delivery of such water through their works. (36 Stat. 925.)

This section and the two sections next following were an act entitled "An act to authorize the government to contract for the impounding, storing, and carriage of water, and to co-operate in the construction and use of reservoirs and canals under reclamation projects, and for other purposes."

Act Aug. 18, 1894, c. 301, § 4, the Carey Act mentioned in this section, is set forth, ante, § 4685.

§ 4739. (Act Feb. 21, 1911, c. 141, § 2.) Co-operation with irrigation districts, etc., or water users, for construction or use of reservoirs, canals, etc.; title to and management of works; limitation of water to be furnished; right to control waters of streams in States not affected.

In carrying out the provisions of said reclamation Act and Acts amendatory thereof or supplementary thereto, the Secretary of the Interior is authorized, upon such terms as may be agreed upon, to cooperate with irrigation districts, water users associations, corporations, entrymen or water users for the construction or use of such reservoirs, canals, or ditches as may be advantageously used by the Government and irrigation districts, water users associations, corporations, entrymen or water users for impounding, delivering and carrying water for irrigation purposes: Provided, That the title to and management of the works so constructed shall be subject to the provisions of section six of said Act: Provided further, That water shall not be furnished from any such reservoir or delivered through any such canal or ditch to any one landowner in excess of an amount sufficient to irrigate one hundred and sixty acres: Provided, That nothing contained in this Act shall be held or construed as enlarging or attempting to enlarge the right of the United States, under existing law, to control the waters of any stream in any State. (36 Stat. 926.)

The Reclamation Act of June 17, 1902, c. 1093, and acts amendatory thereof or supplementary thereto, mentioned in this section, are set forth ante, §§ 4700–4737.

Notes of Decisions

Contract with irrigation district.— The Secretary of the Interior has power to contract with an irrigation district to supply or partially supply, the district with water. Pioneer Irr. Dist. v. Stone (1913) 130 Pac. 382, 23 Idaho, 344; Hillcrest Irr. Dist. v. Brose (1913) 133 Pac. 663, 24 Idaho, 376. See, also, Burley v. U. S. (1910) 179 Fed. 1, 102 C. C. A. 429, 33 L. R. A. (N. S.) 807; Baker v. Swigart (D. C. 1912) 196 Fed. 569, reversed (1912) 199 Fed. 865, 118 C. C. A. 313, and Swigart v. Baker (1913) 33 Sup. Ct. 645, 229 U. S. 187, 57 L. Ed. 1143.

§ 4740. (Act Feb. 21, 1911, c. 141, § 3.) Proceeds of contracts to be covered into reclamation fund.

The moneys received in pursuance of such contracts shall be covered into the reclamation fund and be available for use under the terms of the reclamation Act and the Acts amendatory thereof or supplementary thereto. (36 Stat. 926.)

§ 4741. (Act Feb. 8, 1905, c. 552.) Use of earth, stone, and timber from public lands and forest reserves for construction of irrigation works.

In carrying out the provisions of the national irrigation law, approved June seventeenth, nineteen hundred and two, and in constructing works thereunder, the Secretary of the Interior is hereby authorized to use and to permit the use by those engaged in the construction of works under said law, under rules and regulations to be prescribed by him, such earth, stone, and timber from the public

lands of the United States as may be required in the construction of such works, and the Secretary of Agriculture is hereby authorized to permit the use of earth, stone, and timber from the forest reserves of the United States for the same purpose, under rules and regulations to be prescribed by him. (33 Stat. 706.)

This was an act entitled "An act authorizing the use of earth, stone and timber on the public lands and forest reserves of the United States in the construction of works under the national irrigation law."

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

§ 4742. (Act March 3, 1905, c. 1459.) Disposition of proceeds of sales of material used and other property, and of moneys refunded in connection with operations.

There shall be covered into the reclamation fund established under the Act of June seventeenth, nineteen hundred and two, known as the reclamation Act, the proceeds of the sales of material utilized for temporary work and structures in connection with the operations under the said Act, as well as of the sales of all other condemned property which had been purchased under the provisions thereof, and also any moneys refunded in connection with the operations under said reclamation Act. (33 Stat. 1032.)

This was an act entitled "An act to provide for the covering into the reclamation fund certain proceeds of sales of property purchased by the reclamation fund."

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

§ 4743. (Act June 30, 1906, c. 3912, § 1.) Expenditure from reclamation fund for rent of offices for Reclamation Service.

The Secretary of the Interior may authorize such expenditure as may be necessary, not exceeding a total of eight thousand dollars annually, for rent of office accommodations in the city of Washington, District of Columbia, for the Reclamation Service, payable from the Reclamation fund, established by Act approved June seventeenth, nineteen hundred and two, entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories to the construction of irrigation works for the reclamation of arid lands." (34 Stat. 663.)

This was a provision of the deficiency appropriation act for the fiscal year 1906, cited above.

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this provision, which established and provided for the disposition of the reclamation fund, is set forth ante, §§ 4700–4708.

§ 4744. (Act May 27, 1908, c. 200, § 1.) Purchase of books, etc., needed in surveys and examinations for irrigation works.

The Secretary of the Interior may authorize the purchase of such law books, books of reference, periodicals, engineering and statistical publications as are needed in carrying out the surveys and examinations authorized by the Act of June seventeenth, nineteen hundred and two, entitled "An Act appropriating the receipts from the sale and disposal of public lands in certain States and Territories for the construction of irrigation works for the reclamation of arid lands." (35 Stat. 350.)

This was a provision of the sundry civil appropriation act for the fiscal year 1909, cited above.

The Reclamation Act of June 17, 1902, c. 1093, mentioned in this section, is set forth ante, §§ 4700–4708.

§ 4745. (Act May 27, 1908, c. 200, § 1.) Assignments of pay by employés of Reclamation Service.

The Secretary of the Interior is hereby authorized to permit the employees of the Reclamation Service, while employed in the field, to

make assignments of their pay under such regulations as he may prescribe. (35 Stat. 350.)

This was a further provision of the sundry civil appropriation act for the fiscal year 1909, cited above.

§ 4746. (Act Feb. 2, 1911, c. 32, § 1.) Sale of lands acquired under reclamation acts; appraisement; notice of sale.

Whenever in the opinion of the Secretary of the Interior any lands which have been acquired under the provisions of the Act of June seventeenth, nineteen hundred and two (Thirty-second Statutes, page three hundred and eighty-eight), commonly called the "reclamation Act," or under the provisions of any Act amendatory thereof or supplementary thereto, for any irrigation works contemplated by said reclamation Act are not needed for the purposes for which they were acquired, said Secretary of the Interior may cause said lands, together with the improvements thereon, to be appraised by three disinterested persons, to be appointed by him, and thereafter to sell the same for not less than the appraised value at public auction to the highest bidder, after giving public notice of the time and place of sale by posting upon the land and by publication for not less than thirty days in a newspaper of general circulation in the vicinity of the land. (36 Stat. 895.)

This section and the two sections next following were an act entitled "An act to provide for the sale of lands acquired under the provisions of the Reclamation Act and which are not needed for the purposes of that act."

The Reclamation Act of June 17, 1902, c. 1093, and other acts amendatory thereof or supplementary thereto, mentioned in this section, are set forth ante, §§ 4700–4745.

§ 4747. (Act Feb. 11, 1911, c. 32, § 2.) Conveyance to purchaser; limitation of amount.

Upon payment of the purchase price, the Secretary of the Interior is authorized by appropriate deed to convey all the right, title, and interest of the United States of, in, and to said lands to the purchaser at said sale, subject, however, to such reservations, limitations, or conditions as said Secretary may deem proper: Provided, That not over one hundred and sixty acres shall be sold to any one person. (36 Stat. 895.)

§ 4748. (Act Feb. 2, 1911, c. 32, § 3.) Proceeds of sale to be covered into reclamation fund and credited to project for which land was acquired.

The moneys derived from the sale of such lands shall be covered into the reclamation fund and be placed to the credit of the project for which such lands had been acquired. (36 Stat. 895.)

§ 4749. (Act Feb. 9, 1905, c. 567.) Change of levels of lakes, etc., in Oregon and California, in carrying out irrigation projects; disposition of lands acquired.

The Secretary of the Interior is hereby authorized in carrying out any irrigation project that may be undertaken by him under the terms and conditions of the national reclamation Act and which may involve the changing of the levels of Lower or Little Klamath Lake, Tule or Rhett Lake, and Goose Lake, or any river or other body of water connected therewith, in the States of Oregon and California, to raise or lower the level of said lakes as may be necessary and to dispose of any lands which may come into the possession of the United States as a result thereof by cession of any State or otherwise under the terms and conditions of the national reclamation Act. (33 Stat. 714.)

This was an act entitled "An act authorizing the changing of the levels of certain lakes and the disposal of certain lands under the terms of the national reclamation act."

The National Reclamation Act, mentioned in this section, Act June 17, 1902, c. 1093, is set forth ante, §§ 4700–4708.

§ 4750. (Act March 3, 1905, c. 1476.) Construction of dams in or across Yellowstone River in Montana in carrying out irrigation projects.

Where, in carrying out projects under the provisions of the national reclamation Act, it shall be necessary to construct dams in or across the Yellowstone River in the State of Montana, the Secretary of the Interior is hereby authorized to construct and use and operate the same in the manner and for the purposes contemplated by said reclamation Act. (33 Stat. 1045.)

This was an act entitled "An act to authorize the Secretary of the Interior to construct dams across the Yellowstone River in Montana in connection with irrigation works."

The National Reclamation Act, mentioned in this section, Act June 17, 1902, c. 1093, is set forth ante, §§ 4700-4708.

CHAPTER SEVEN

Sale and Disposal of the Public Lands

Sec.
4751. Public sale of lands in half quarter-sections.
4752. Sale of saline lands.
4753. Public sale of lands forbidden; exceptions.
4754. Private sales, in what bodies.
4755. Private sales, proceedings in.
4756. No credit on sales of public lands.
4757. Price of lands, $1.25 per acre.
4758. Price of alternate sections of railroad lands reduced to $1.25 per acre.
4759. Act not to apply to mineral lands; persons not entitled to benefit of act.
4760. Private entry of lands forbidden; exceptions.
4761. Price of forfeited railroad lands and lands adjacent to railroad lands.
4762. Effect of act on previous provisions.
4763. Distinction between offered and unoffered lands abolished.
4764. Private sale of public lands in Missouri.
4765. Sale of lands for cemetery purposes.
4766. Public lands may be offered for sale in such proportions as the President chooses.
4767. Advertisement of sales.
4768. Publication of proclamations of sales.
4769. Duration of sales.
4770. Several certificates issued to two or more purchasers of same section.
4771. Purchase-money refunded where sale cannot be confirmed.
4772. Refunding in certain cases, how done.
4773. Minimum price, how fixed when reservations sold.
4774. Highest bidder, when preferred in private sales.
4775. What coins receivable in payment for public lands.
4776. Certain lands located in good faith by claims arising under treaty of Sept. 30, 1854, may be purchased, etc.
4777. Mistakes in entry of lands, provisions for.
4778. Mistakes in patent lands.
4779. Mistakes in location of warrants.
4780. Error in entry, selection, or location by mistake of numbers; proceedings upon; change of entry.
4781. Agreements to pay premium to purchasers at public sales.
4782. Recovery of premiums paid to purchasers at public sales.
4783. Discovery of agreements to pay premium by bill in equity.

§ 4751. (R. S. § 2353.) Public sale of lands in half quarter-sections.

All the public lands, the sale of which is authorized by law, shall, when offered at public sale to the highest bidder, be offered in half quarter-sections.

Act April 24, 1820, c. 51, § 1, 3 Stat. 566.

No public lands were to be sold at public sale, except certain reservations and tracts and lands the sale of which was authorized by special acts, by Act March 3, 1891, c. 561, § 9, post, § 4753.

Provisions for the sale of abandoned and useless military reservations were made by Act July 5, 1884, c. 214, and subsequent acts, post, under Chapter 10H of this Title, "Abandoned Military Reservations."

Notes of Decisions

Duty of executive.—It is the duty of the executive to secure to all persons a fair and equal opportunity of purchasing the public lands. (1837) 3 Op. Atty. Gen. 274.

Survey of land.—See, also, notes to §§ 4803–4805, post.

The surveyor general has no right to divide a fractional section by arbitrary lines, so as to prevent a regular quarter section from being taken up. Brown v. Clements (1845) 3 How. 650, 663, 11 L. Ed. 767.

Validity of sale.—A sale of public lands not authorized by law is void. U. S. v. Tichenor (C. C. 1882) 12 Fed. 415; (1828) 2 Op. Atty. Gen. 186.

A purchaser of a tract, as to part of which there was authority to sell, and as to the other part there was not, has the option to avoid the entire contract, or to receive a patent for such part as could be sold. (1828) 2 Op. Atty. Gen. 186.

Purchaser's right to sue trespasser.—A purchaser of lands from the United States may maintain trespass qu. cl. fr. for an injury to the freehold after the purchase by a person entering and keeping possession without claim or title before the purchase. Blevins v. Cole (1840) 1 Ala. 210; Gale v. Davis (1842) 7 Mo. 544.

§ 4752. (Act Jan. 12, 1877, c. 18, § 1.) Sale of saline lands.

Whenever it shall be made appear to the register and the receiver of any land office of the United States that any lands within their district are saline in character, it shall be the duty of said register and said receiver, under the regulations of the General Land Office, to take testimony in reference to such lands to ascertain their true character, and to report the same to the General Land office; and if, upon such testimony, the Commissioner of the General Land office shall find that such lands are saline and incapable of being purchased under any of the laws of the United States relative to the public domain, then, and in such case, such lands shall be offered for sale by public auction at the local land office of the district in which the same shall be situated, under such regulations as shall be prescribed by the Commissioner of the General Land office, and sold to the highest bidder for cash, at a price not less than one dollar and twenty-five cents per acre; and in case said lands fail to sell when so offered, then the same shall be subject to private sale, at such land office, for cash, at a price not less than one dollar and twenty-five cents per acre, in the same manner as other lands of the United States are sold, Provided, That the foregoing enactments shall not apply to any State or Territory which has not had a grant of salines by act of Congress, nor to any State which may have had such a grant, until either the grant has been fully satisfied, or the right of selection thereunder has expired by efflux of time. But nothing in this act shall authorize the sale or conveyance of any title other than such as the United States has, and the patents issued shall be in the form of a release and quit-claim of all title of the United States in such lands. (19 Stat. 221.)

This was the first section of an act entitled "An act providing for the sale of saline land."

Section 2 of the act related to the publication of proclamations relating to sales of public lands, and is set forth post, § 4768.

The provisions of this section are almost entirely superseded, as to the public sales, thereby authorized, by Act March 3, 1891, c. 561, § 9, post, § 4753, forbidding public sale of public lands, with certain exceptions, and as to private sales by Act March 2, 1889, c. 381, § 1, post, § 4760, forbidding private entry of public lands, except those in the State of Missouri, by Act Jan. 31, 1901, c. 186, ante, § 4641, making saline lands subject to location and purchase under the laws relating to placer-mining claims, and by the grants to certain states, on their admission to the Union, of the saline lands within each of them, by the various acts for their admission, respectively, referred to in subsequent paragraphs of this note.

On the admission to the Union of the State of Colorado, salt springs within

the State, with adjoining land, were granted to that State by the act of admission, Act March 3, 1875, c. 139, § 11, 18 Stat. 476.

Subsequent acts admitting other States to the Union, in lieu of any grant of saline lands to said States, make other grants, as follows: North Dakota, South Dakota, Montana, and Washington, respectively, Act Feb. 22, 1889, c. 180, §§ 17, 19, 25 Stat. 681; Act March 3, 1893, c. 208, 27 Stat. 592; Act March 3, 1893, c. 210, § 1, 27 Stat. 661; and Act June 4, 1897, c. 2, § 1, 30 Stat. 56. Idaho, Act July 3, 1890, c. 656, §§ 11, 12, 26 Stat. 216. Wyoming, Act July 10, 1890, c. 664, §§ 11, 12, 14, 26 Stat. 224, and Act April 23, 1900, c. 254, 31 Stat. 139.

On the admission to the Union of the State of Utah, all saline lands in the State were included in the grant for the use of the State university, by Act July 16, 1894, c. 138, § 8, 28 Stat. 109.

Saline Islands in New Mexico were reserved from entry, location, etc., until Congress should provide for their disposition, by Act June 20, 1910, c. 310, § 18, 36 Stat. 568.

§ 4753. (Act March 3, 1891, c. 561, § 9.) Public sale of lands forbidden; exceptions.

Hereafter no public lands of the United States, except abandoned military or other reservations isolated and disconnected fractional tracts authorized to be sold by section twenty-four hundred and fifty-five of the Revised Statutes, and mineral and other lands the sale of which at public auction has been authorized by acts of Congress of a special nature having local application, shall be sold at public sale. (26 Stat. 1099.)

R. S. § 2455, mentioned in this section, is set forth post, § 5110.

§ 4754. (R. S. § 2354.) Private sales, in what bodies.

All the public lands, when offered at private sale, may be purchased, at the option of the purchaser, in entire sections, half-sections, quarter-sections, half quarter-sections, or quarter quarter-sections.

Act April 5, 1832, c. 65, 4 Stat. 503.

No public lands of the United States, except those in Missouri, were to be subject to private entry, by Act March 2, 1889, c. 381, § 1, post, § 4760.

Notes of Decisions

Partial invalidity.—A defect in the title of one of the parcels sold does not invalidate the sale of the others, if the purchaser makes no objection. Cornelius v. Kessel (1888) 9 Sup. Ct. 122, 128 U. S. 456, 32 L. Ed. 482.

§ 4755. (R. S. § 2355.) Private sales, proceedings in.

Every person making application at any of the land-offices of the United States for the purchase at private sale of a tract of land shall produce to the register a memorandum in writing, describing the tract, which he shall enter by the proper number of the section, half-section, quarter-section, half quarter-section, or quarter quarter-section, as the case may be, and of the township and range, subscribing his name thereto, which memorandum the register shall file and preserve in his office.

Act Feb. 24, 1810, c. 11, § 1, 2 Stat. 556.

See note to R. S. § 2357, post, § 4757.

Notes of Decisions

Mistake in entry.—Where an applicant for a cash entry of public land regularly applied to enter the land, paid the price, and obtained his receipt therefor, he was under no obligation to supervise the entries on the books of the register of the land office, in order to see that the proper entries were made. Le Marchel v. Teagarden (1907) 152 Fed. 662, decree reversed (1909) 175 Fed. 682, 99 C. C. A. 236.

The validity of a government sale is not affected by the register's omission to mark it on the township plat, or by a subsequent sale in error to another. Kittridge v. Breaud (La. 1843) 4 Rob. 79, 39 Am. Dec. 512.

A purchaser who has done all which the law requires to entitle him to a patent for a tract of land cannot be affected by ignorance, negligence, or want of fidelity on the part of the government or its officers. Nelson v. Sims (1852) 23 Miss. (1 Cushm.) 383, 57 Am. Dec. 144.

Unauthorized entries on sales book.—A regular receiver's receipt and certificate on which a patent issued in due course cannot be contradicted or varied by unauthorized entries on the register of sales book or the tract book, kept by the local officials of the United States land office. Foster v. Meyers (1906) 41 So. 551, 117 La. 216.

§ 4756. (R. S. § 2356.) No credit on sales of public lands.

Credit shall not be allowed for the purchase-money on the sale of any of the public lands, but every purchaser of land sold at public sale shall, on the day of purchase, make complete payment therefor; and the purchaser at private sale shall produce to the register of the land-office a receipt from the Treasurer of the United States, or from the receiver of public moneys of the district, for the amount of the purchase-money on any tract, before he enters the same at the land-office; and if any person, being the highest bidder at public sale for a tract of land, fails to make payment therefor on the day on which the same was purchased, the tract shall be again offered at public sale on the next day of sale, and such person shall not be capable of becoming the purchaser of that or any other tract offered at such public sales.

Act April 24, 1820, c. 51, § 2, 3 Stat. 566.
See note to R. S. § 2366, post, § 4775.

Notes of Decisions

Receiver's duty.—The act which substituted cash payments in lieu of credit sales of public lands made no exception in favor of the receiver, and if he can purchase at all it must be by placing his own money with the other moneys which he holds in trust for the government. U. S. v. Boyd (1847) 5 How. 29, 49, 12 L. Ed. 36.

Effect of payment of price upon title.—Public lands, sold and paid for, are segregated from the public domain, and are not subject to entry while the sale continues in force. Simmons v. Wagner (1879) 101 U. S. 260, 261, 25 L. Ed. 910. See, also, Belle v. Hearne (1856) 19 How. 252, 260, 15 L. Ed. 614.

A valid entry of land gives an equitable title to it, which cannot be divested. McDowell v. Morgan (1862) 28 Ill. (18 Peck) 528.

Recitals in patent.—A recital in a patent which merely shows that the purchaser has made the payments required by this act to entitle him to enter the land, does not show that the patent was issued under the act. Baldwin v. Boyd (1885) 18 Neb. 444, 25 N. W. 580.

§ 4757. (R. S. § 2357.) Price of lands, $1.25 per acre.

The price at which the public lands are offered for sale shall be one dollar and twenty-five cents an acre; and at every public sale, the highest bidder, who makes payment as provided in the preceding section, shall be the purchaser; but no land shall be sold, either at public or private sale, for a less price than one dollar and twenty-five cents an acre; and all the public lands which are hereafter offered at public sale, according to law, and remain unsold at the close of such public sales, shall be subject to be sold at private sale, by entry at the land-office, at one dollar and twenty-five cents an acre, to be paid at the time of making such entry: Provided, That the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be two dollars and fifty cents per acre.

Act April 24, 1820, c. 51, § 3, 3 Stat. 566.

The price of alternate reserved sections along the line of railroad grants, subject to entry, and put on the market prior to Jan., 1861, was reduced from $2.50 per acre to $1.25 per acre, by Act June 15, 1880, c. 227, § 3, post, § 4758.

The price of forfeited railroad lands and certain reserved lands lying contiguous to certain railroad lands grants was fixed at $1.25 per acre, by Act March 2, 1889, c. 381, § 4, post, § 4762.

Private entry of public lands, except in Missouri, was prohibited by Act March 2, 1889, c. 381, § 1, post, § 4760.

Lands in Missouri were to be subject to private entry, although they had not been offered at public sale, by Act May 18, 1898, c. 344, § 2, post, § 4764.

The sale of lands at public sale, with certain exceptions, was prohibited by Act March 3, 1891, c. 561, § 9, ante, § 4753.

Provisions for the subdivision, into lots of ten acres or less or into town lots, of certain lands in the State of Washington, and the appraisal and sale thereof at public sale for not less than the appraised value, were contained in Act June 9, 1906, c. 3067, 34 Stat. 229.

The sale to associations or corporations for cemetery purposes of not to exceed 80 acres of public lands was authorized by Act March 1, 1907, c. 2286, post, § 4765.

Notes of Decisions

Desert lands.—See, also, notes to § 4674, ante.

This section was not affected or repealed by the desert land act. U. S. v. Healey (1895) 16 Sup. Ct. 247, 248, 160 U. S. 136, 40 L. Ed. 369; Healey v. U. S. (1894) 29 Ct. Cl. 115. See, also, U. S. v. Ingram (1899) 19 Sup. Ct. 177, 179, 172 U. S. 327, 43 L. Ed. 465; Ingram v. U. S. (1897) 32 Ct. Cl. 147.

Private entry of lands remaining unsold.—The object of the statute is to secure to all persons a fair opportunity of purchasing public lands and to obtain to the government the benefit of competition in case the lands are worth more than the price fixed by congress. Eldred v. Sexton (1873) 19 Wall. 189, 195, 22 L. Ed. 146.

Where, after the line of a railroad was located, and the price of sections within the six miles designated by even numbers had been fixed at $2.50 per acre, had been offered at public sale at that price, and remained unsold, and the line of the railroad was changed, leaving certain of the sections outside of the six-mile limit, those sections were not open to private entry until they had been offered for public sale at $1.25 per acre and had been left unsold. Id.

Private entries on public lands are not permitted until after the lands have been exposed to public auction at the price for which they are afterwards subject to entry. Eldred v. Sexton (1873) 19 Wall. 189, 195, 22 L. Ed. 146. See, also, U. S. v. Blackfeather (1894) 15 Sup. Ct. 64, 68, 155 U. S. 180, 39 L. Ed. 114.

Lands struck off on the last day of a public sale, and not paid for, are not subject to private entry prior to being again offered at public sale. Such tracts are not unsold lands at the close of the public sale, but are to be regarded as reverted lands. (1829) 2 Op. Atty. Gen. 201.

Recovery of payments.—See, also, notes to § 4596, ante.

A purchaser in possession cannot recover back part of the price on the ground that by an erroneous construction of the statutes he paid more than the price prescribed by congress. Shang v. U. S. (1901) 36 Ct. Cl. 466.

§ 4758. (Act June 15, 1880, c. 227, § 3.) Price of alternate sections of railroad lands reduced to $1.25 per acre.

The price of lands now subject to entry which were raised to two dollars and fifty cents per acre, and put in market prior to January, eighteen hundred and sixty one, by reason of the grant of alternate sections for railroad purposes is hereby reduced to one dollar and twenty-five cents per acre. (21 Stat. 238.)

This section and the section next following were parts of an act entitled "An act relating to the public lands of the United States."

Section 1 of that act relieved, under conditions specified, certain trespassers upon public lands from proceedings by the United States for acts done prior to March 1, 1879. Section 2 related to homestead entries already made. These sections are omitted, as temporary merely.

The price of alternate sections of railroad land was fixed at $2.50 per acre by R. S. § 2357, ante, § 4757.

Notes of Decisions

Recovery of payments.—See, also, notes to § 4596, ante.

A voluntary payment by mistake of $2.50 per acre for public lands which, under this section, could be purchased for $1.25 per acre, gives the purchaser no lawful claim against the United States for repayment of the overcharge, where the mistake on his part was not induced by any attempt to deceive or misrepresentation by the government officials. U. S. v. Edmonston (1901) 21 Sup. Ct. 718, 719, 181 U. S. 500, 45 L. Ed. 971.

§ 4759. (Act June 15, 1880, c. 227, § 4.) Act not to apply to mineral lands; persons not entitled to benefit of act.

This act shall not apply to any of the mineral lands of the United States; and no person who shall be prosecuted for or proceeded against on account of any trespass committed or material

taken from any of the public lands after March first, eighteen hundred and seventy-nine shall be entitled to the benefit thereof. (21 Stat. 238.)

See notes to section 3 of this act, ante, § 4758.

§ 4760. (Act March 2, 1889, c. 381, § 1.) Private entry of lands forbidden; exceptions.

From and after the passage of this act no public lands of the United States, except those in the State of Missouri shall be subject to private entry. (25 Stat. 854.)

This section and the two sections next following were parts of an act entitled "An act to withdraw certain public lands from private entry, and for other purposes."

Sections 2, 3, 5–7, of the act related to homestead entries, and are set forth or referred to under chapter 5 of this Title, "Homesteads."

Other provisions relating to the sale of lands by private entry were made by R. S. §§ 2355–2357, ante, §§ 4755–4757, and Act May 18, 1898, c. 344, § 2, post, § 4764.

§ 4761. (Act March 2, 1889, c. 381, § 4.) Price of forfeited railroad lands and lands adjacent to railroad lands.

The price of all sections and parts of sections of the public lands within the limits of the portions of the several grants of lands to aid in the construction of railroads which have been heretofore and which may hereafter be forfeited, which were by the act making such grants or have since been increased to the double minimum price, and, also, of all lands within the limits of any such railroad grant, but not embraced in such grant lying adjacent to and coterminous with the portions of the line of any such railroad which shall not be completed at the date of this act, is hereby fixed at one dollar and twenty-five cents per acre. (25 Stat. 854.)

See notes to section 1 of this act, ante, § 4760.

§ 4762. (Act March 2, 1889, c. 381, § 8.) Effect of act on previous provisions.

Nothing in this act shall be construed as suspending, repealing or in any way rendering inoperative the provisions of the act entitled, "An act to provide for the disposal of abandoned and useless military reservations," approved July fifth, eighteen hundred and eighty-four. (25 Stat. 855.)

See notes to section 1 of this act, ante, § 4760.

Act July 5, 1884, c. 214, mentioned in this section, is set forth post, §§ 5003–5006.

§ 4763. (Act May 18, 1898, c. 344, § 1.) Distinction between offered and unoffered lands abolished.

In cases arising from and after the passage of this Act the distinction now obtaining in the statutes between offered and unoffered lands shall no longer be made in passing upon subsisting preemption claims, in disposing of the public lands under the homestead laws, and under the timber and stone law of June third, eighteen hundred and seventy-eight, as extended by the Act of August fourth, eighteen hundred and ninety-two, but in all such cases hereafter arising the land in question shall be treated as unoffered, without regard to whether it may have actually been at some time offered or not. (30 Stat. 418.)

This section and the section next following were an act entitled "An act to abolish the distinction between offered and unoffered lands, and for other purposes."

The pre-emption laws were repealed by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See note to chapter 4 of this Title.

The homestead laws are set forth ante, in chapter 5 of this Title.

The timber and stone law of June 3, 1878, as extended by Act Aug. 4, 1892, mentioned in this section, is set forth ante, §§ 4671–4673.

§ 4764. (Act May 18, 1898, c. 344, § 2.) Private sale of public lands in Missouri.

All public lands within the State of Missouri shall hereafter be subject to disposal at private sale in the manner now provided by law for the sale of lands which have been publicly offered for sale, whether such lands have ever been offered at public sale or not: Provided, That the actual settlers shall have a preference right, under such rules and regulations as the Secretary of the Interior may prescribe. (30 Stat. 418.)

See notes to section 1 of this act, ante, § 4763.

Private entry of lands other than those in Missouri was forbidden by Act March 2, 1889, c. 381, § 1, ante, § 4760.

§ 4765. (Act March 1, 1907, c. 2286.) Sale of lands for cemetery purposes.

That the Secretary of the Interior be, and he is hereby, authorized to sell and convey to any religious or fraternal association, or private corporation, empowered by the laws under which such corporation or association is organized or incorporated to hold real estate for cemetery purposes, not to exceed eighty acres of any unappropriated nonmineral public lands of the United States for cemetery purposes, upon the payment therefor by such corporation or association of the sum of not less than one dollar and twenty-five cents per acre: Provided, That title to any land disposed of under the provisions of this Act shall revert to the United States, should the land or any part thereof be sold or cease to be used for the purpose herein provided. (34 Stat. 1052.)

This was an act entitled "An act to authorize the sale of public lands for cemetery purposes."

§ 4766. (R. S. § 2358.) Public lands may be offered for sale in such proportions as the President chooses.

Whenever the President is authorized to cause the public lands, in any land-district, to be offered for sale, he may offer for sale, at first, only a part of the lands contained in such district, and at any subsequent time or times he may offer for sale in the same manner any other part, or the remainder of the lands contained in the same.

Act March 31, 1808, c. 40, § 1, 2 Stat. 479.

See note to R. S. § 2353, ante, § 4751.

§ 4767. (R. S. § 2359.) Advertisement of sales.

The public lands which are exposed to public sale by order of the President shall be advertised for a period of not less than three nor more than six months prior to the day of sale, unless otherwise specially provided.

Act June 28, 1834, c. 102, 4 Stat. 702.

Proclamations relating to the sales of public lands were to be published in a newspaper printed and published in the State or Territory where the lands were situated, by Act Jan. 12, 1877, c. 18, § 2, post, § 4768.

See note to R. S. § 2353, ante, § 4751.

§ 4768. (Act Jan. 12, 1877, c. 18, § 2.) Publication of proclamations of sales.

All executive proclamations relating to the sales of Public Lands shall be published in only one newspaper, the same to be printed and published in the State or Territory where the lands are situated, and to be designated by the Secretary of the Interior. (19 Stat. 221.)

See notes to section 1 of this act, ante, § 4752.

§ 4769. (R. S. § 2360.) Duration of sales.

The public sales of lands shall, respectively, be kept open for two weeks, and no longer, unless otherwise specially provided by law.

Act April 24, 1820, c. 51, § 5, 3 Stat. 567.

See note to R. S. § 2353, ante, § 4751.

§ 4770. (R. S. § 2361.) Several certificates issued to two or more purchasers of same section.

Where two or more persons have become purchasers of a section or fractional section, the register of the land-office of the district in which the lands lie shall, on application of the parties, and a surrender of the original certificate, issue separate certificates, of the same date with the original, to each of the purchasers, or their assignees, in conformity with the division agreed on by them; but in no case shall the fractions so purchased be divided by other than north and south, or east and west, lines; nor shall any certificate issue for less than eighty acres.

Act May 23, 1828, c. 71, § 7, 4 Stat. 287.
See note to R. S. § 2353, ante, § 4751.

§ 4771. (R. S. § 2362.) Purchase-money refunded where sale cannot be confirmed.

The Secretary of the Interior is authorized, upon proof being made, to his satisfaction, that any tract of land has been erroneously sold by the United States, so that from any cause the sale cannot be confirmed, to repay to the purchaser, or to his legal representatives or assignees, the sum of money which was paid therefor, out of any money in the Treasury not otherwise appropriated.

Act Jan. 12, 1825, c. 5, 4 Stat. 80. Act Feb. 28, 1859, c. 64, § 1, 11 Stat. 387.
See note to R. S. § 2353, ante, § 4751.

Notes of Decisions

Nature of remedy.—See, also, notes to § 4596, ante.

The statute can be invoked only for the benefit of him who conforms to its requirements. Emmons v. U. S. (C. C. 1890) 42 Fed. 26, 28. See, also, Hewitt v. Schultz (1901) 21 Sup. Ct. 309, 319, 180 U. S. 139, 45 L. Ed. 463 (dissenting opinion).

Where the entry and purchase of land at a land office of the United States is void by reason of a prior sale by the United States, the only relief to which the purchaser is entitled is the repayment of the money paid by him, and not to a change of the entry. Carman v. Johnson (1859) 29 Mo. 84.

When repayment should be made.—Instances where there is a deficiency in the quantity of land purchased, and where an entry has been made of land to which another had a pre-emption right, are cases falling within the terms of the act and call for repayment. (1843) 4 Op. Atty. Gen. 228.

Repayment of purchase money should be made in cases where the purchase of land from the United States is found to be void. (1843) 4 Op. Atty. Gen. 228. See, also (1841) 3 Op. Atty. Gen. 697; (1843) 4 Op. Atty. Gen. 253.

§ 4772. (R. S. § 2363.) Refunding in certain cases, how done.

Where any tract of land has been erroneously sold, as described in the preceding section, and the money which was paid for the same has been invested in any stocks held in trust, or has been paid into the Treasury to the credit of any trust-fund, it is lawful, by the sale of such portion of the stocks as may be necessary for the purpose, or out of such trust-fund, to repay the purchase-money to the parties entitled thereto.

Act Feb. 28, 1859, c. 64, § 2, 11 Stat. 388.
See note to R. S. § 2353, ante, § 4751.

§ 4773. (R. S. § 2364.) Minimum price, how fixed when reservations sold.

Whenever any reservation of public lands is brought into market, the Commissioner of the General Land-Office shall fix a minimum price, not less than one dollar and twenty-five cents per acre, below which such lands shall not be disposed of.

Act July 2, 1864, c. 221, 13 Stat. 374.

§ 4774. (R. S. § 2365.) Highest bidder, when preferred in private sales.

Where two or more persons apply for the purchase, at private

sale, of the same tract, at the same time, the register shall determine the preference, by forthwith offering the tract to the highest bidder.

Act April 24, 1820, c. 51, § 6, 3 Stat. 567.
See note to R. S. § 2357, ante, § 4757.

§ 4775. (R. S. § 2366.) What coins receivable in payment for public lands.

The gold coins of Great Britain and other foreign coins shall be received in all payments on account of public lands, at the value estimated annually by the Director of the Mint, and proclaimed by the Secretary of the Treasury, in accordance with the provisions of section thirty-five hundred and sixty-four, Title, "The Coinage."

Act March 3, 1823, c. 53, § 1, 3 Stat. 779. Act Feb. 21, 1857, c. 56, § 1, 11 Stat. 163.

R. S. § 3564, mentioned in this section, provided that the value of standard foreign coins should be estimated and proclaimed annually. It was superseded by a similar provision of the McKinley Tariff Act of Oct. 1, 1890, c. 1244, § 52, 26 Stat. 624, which was itself superseded by a provision of the Wilson Tariff Act of Aug. 27, 1894, c. 349, § 25, post, § 6536.

R. S. § 3474, post, § 6380, provided that no gold or silver other than coin of standard fineness of the United States should be receivable in payment of dues to the United States, except as provided in this section and section 3567, post, § 6539, which provided that certain Spanish and Mexican pieces should be received at the Treasury, the Post-Offices, and the Land-Offices at certain fixed valuations.

(R. S. § 2367. Superseded.)

This section provided that wherever lands in California, subject to private entry, were withdrawn from the market for any cause, they should not thereafter be subject to private entry until after they had been open to homestead and pre-emption settlers for 90 days, and again offered at public sale. It was superseded by the withdrawal of all public lands, except those in Missouri, from private entry, by Act March 2, 1889, c. 381, § 1, ante, § 4760.

§ 4776. (R. S. § 2368.) Certain lands located in good faith by claims arising under treaty of Sept. 30, 1854, may be purchased, etc.

The Secretary of the Interior is authorized to permit the purchase, with cash or military bounty-land warrants, of such lands as may have been located with claims arising under the seventh clause of the second article of the treaty of September thirty, eighteen hundred and fifty-four, at such price per acre as he deems equitable and proper, but not at a less price than one dollar and twenty-five cents per acre, and the owners and holders of such claims in good faith are also permitted to complete their entries, and to perfect their titles under such claims upon compliance with the terms above mentioned; but it must be shown to the satisfaction of the Secretary of the Interior that such claims are held by innocent parties in good faith, and that the locations made under such claims have been made in good faith and by innocent holders of the same.

Act June 8, 1872, c. 357, 17 Stat. 340.

Notes of Decisions

Bona fide claimants.—This act was intended for the relief of innocent persons claiming under invalid locations made, not only upon the ceded lands themselves, but elsewhere, and in other states or territories. Fee v. Brown (1896) 16 Sup. Ct. 875, 876, 162 U. S. 602, 40 L. Ed. 1086, affirming (1892) 30 Pac. 340, 17 Colo. 510.

One claiming title to land under a deed alleged to have been executed in behalf of the original locator of Chippewa scrip, which was void because issued without authority by the commissioner of Indian affairs is within the provisions of this statute, and the decision of the secretary involves simply the question of fact as to the good faith of the claimants, and is not subject to review. Pugsley v. Brown (C. C. 1888) 35 Fed. 688.

§ 4777. (R. S. § 2369.) Mistakes in entry of lands, provisions for.

In every case of a purchaser of public lands, at private sale, having entered at the land-office, a tract different from that he intended to

purchase, and being desirous of having the error in his entry corrected, he shall make his application for that purpose to the register of the land-office; and if it appears from testimony satisfactory to the register and receiver, that an error in the entry has been made, and that the same was occasioned by original incorrect marks made by the surveyor, or by the obliteration or change of the original marks and numbers at corners of the tract of land; or that it has in any otherwise arisen from mistake or error of the surveyor, or officers of the land-office, the register and receiver shall report the case, with the testimony, and their opinion thereon, to the Secretary of the Interior, who is authorized to direct that the purchaser is at liberty to withdraw the entry so erroneously made, and that the moneys which have been paid shall be applied in the purchase of other lands in the same district, or credited in the payment for other lands which have been purchased at the same office.

Act March 3, 1819, c. 98, 3 Stat. 526.
See note to R. S. § 2357, ante, § 4757.

Notes of Decisions

Mistakes in entry.—This and the following section authorize the correction only of entries of lands by money purchasers. Godkin v. Cohn (1897) 80 Fed. 458, 25 C. C. A. 557; (1830) 2 Op. Atty. Gen. 341. See, also, Le Marchal v. Tegarden (1909) 175 Fed. 682, 99 C. C. A. 236.

An error in the written application for purchase and the certificate thereon arising from the register's mistake in describing the wrong land may be corrected under this section to correspond with the office entries describing the land actually purchased. Widdicombe v. Childers (1888) 8 Sup. Ct. 517, 519, 124 U. S. 400, 31 L. Ed. 427.

Where the office entries, which were correct, showed an applicant's purchase of a certain S. E. ¼, but the register in writing the application and certificate thereon, by mistake described the S. W. ¼, which had been previously entered by another, and the applicant and his grantee have held possession of the S. E. ¼, asserting title thereto and paying taxes, not discovering the mistake until after entry of the S. E. ¼ by a subsequent purchaser after an unauthorized and apparent alteration of the office entries, the latter was chargeable with notice, and he could be compelled to convey the legal title to the first purchaser. Widdicombe v. Childers (1888) 8 Sup. Ct. 517, 519, 124 U. S. 400, 31 L. Ed. 427. See, also, Hedrick v. Atchison, T. & S. F. R. R. (1897) 17 Sup. Ct. 922, 924, 167 U. S. 673, 42 L. Ed. 320.

§ 4778. (R. S. § 2370.) Mistakes in patent lands.

The provisions of the preceding section are declared to extend to all cases where patents have issued or may hereafter issue; upon condition, however, that the party concerned surrenders his patent to the Commissioner of the General Land-Office, with a relinquishment of title thereon, executed in a form to be prescribed by the Secretary of the Interior.

Act May 24, 1828, c. 96, 4 Stat. 301.
See note to R. S. § 2357, ante, § 4757.

Notes of Decisions

Mistakes in patent.—A cash entryman of a tract of public land who received a register's certificate which he forwarded, and on which a patent was issued and recorded in the general land office, is constructively, at least, charged with knowledge of the description therein. Le Marchal v. Tegarden (1909) 175 Fed. 682, 99 C. C. A. 236, reversing judgment Le Marchel v. Teagarden (C. C. 1907) 152 Fed. 662.

This and the preceding section authorize the correction of entries of land by money purchasers. (1830) 2 Op. Atty. Gen. 341. See, also, Widdicombe v. Childers (1888) 8 Sup. Ct. 517, 519, 124 U. S. 400, 31 L. Ed. 427; Godkin v. Cohn (1897) 80 Fed. 458, 25 C. C. A. 557; Le Marchal v. Tegarden (1909) 175 Fed. 682, 99 C. C. A. 236.

§ 4779. (R. S. § 2371.) Mistakes in location of warrants.

The provisions of the two preceding sections are made applicable in all respects to errors in the location of land-warrants.

Act March 3, 1853, c. 147, § 2, 10 Stat. 257.
See note to R. S. § 2357, ante, § 4757.

Cited without definite application, Godkin v. Cohn (1897) 80 Fed. 458, 464, 25 C. C. A. 557; Le Marchal v. Tegarden (1909) 175 Fed. 682, 99 C. C. A. 236.

§ 4780. (R. S. § 2372, as amended, Act Feb. 24, 1909, c. 181.) Error in entry, selection, or location by mistake of numbers; proceedings upon; change of entry.

In all cases where an entry, selection, or location has been or shall hereafter be made of a tract of land not intended to be entered, the entryman, selector, or locator, or, in case of his death, his legal representatives, or, when the claim is by law transferable, his or their transferees, may, in any case coming within the provisions of this section, file his or their affidavit, with such additional evidence as can be procured showing the mistake as to the numbers of the tract intended to be entered and that every reasonable precaution and exertion was used to avoid the error, with the register and receiver of the land district in which such tract of land is situate, who should transmit the evidence submitted to them, in each case, together with their written opinion both as to the existence of the mistake and the credibility of every person testifying thereto, to the Commissioner of the General Land Office, who, if he be entirely satisfied that the mistake has been made and that every reasonable precaution and exertion has been made to avoid it, is authorized to change the entry and transfer the payment from the tract erroneously entered to that intended to be entered, if the same has not been disposed of and is subject to entry, or, if not subject to entry, then to any other tract liable to such entry, selection, or location; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize such change of entry, nor shall anything herein contained affect the right of third persons.

Act May 24, 1824, c. 138, § 1, 4 Stat. 31. Act Feb. 24, 1909, c. 181, 35 Stat. 645.

This section, as enacted in the Revised Statutes, was as follows:

"In all cases of an entry hereafter made, of a tract of land not intended to be entered, by a mistake of the true numbers of the tract intended to be entered, where the tract, thus erroneously entered, does not, in quantity, exceed one half-section, and where the certificate of the original purchaser has not been assigned, or his right in any way transferred, the purchaser, or, in case of his death, the legal representatives, not being assignees or transferees, may, in any case coming within the provisions of this section, file his own affidavit, with such additional evidence as can be procured, showing the mistake of the numbers of the tract intended to be entered, and that every reasonable precaution and exertion had been used to avoid the error, with the register and receiver of the land-district within which such tract of land is situated, who shall transmit the evidence submitted to them in each case, together with their written opinion, both as to the existence of the mistake and the credibility of each person testifying thereto, to the Commissioner of the General Land-Office, who if he be entirely satisfied that the mistake has been made, and that every reasonable precaution and exertion had been made to avoid it, is authorized to change the entry, and transfer the payment from the tract erroneously entered, to that intended to be entered, if unsold; but, if sold, to any other tract liable to entry; but the oath of the person interested shall in no case be deemed sufficient, in the absence of other corroborating testimony, to authorize any such change of entry; nor shall anything herein contained affect the right of third persons."

It was amended to read as set forth here by Act Feb. 24, 1909, c. 181, last cited above, which act was entitled "An act to permit change of entry in case of mistake of the description of tracts intended to be entered."

Notes of Decisions

Change of entry.—This section authorizes relief similar to that afforded by the preceding sections. Widdicombe v. Childers (1888) 8 Sup. Ct. 517, 519, 124 U. S. 400, 31 L. Ed. 427. See, also, Hedrick v. Atchison, T. & S. F. R. Co. (1897) 17 Sup. Ct. 922, 924, 167 U. S. 673, 42 L. Ed. 320; Godkin v. Cohn (1897) 80 Fed. 458, 464, 25 C. C. A. 557.

In a contest before the land department between a patentee who sought to have his patent transferred to a different tract on the ground that such tract was intended and that the wrong numbers were inserted in the patent through mistake, and a homestead entryman of the tract claimed, the fact that the latter contested the question of fact as to the mistake did not estop him to also deny the applicant's right to the transfer as a matter of law in case the ques-

tion of fact was determined against him. Le Marchal v. Tegarden (1909) 175 Fed. 682, 99 C. C. A. 236, reversing judgment (C. C. 1907) 152 Fed. 662.

An application for a change of entry of public land on the ground of a mistake in the description is necessarily governed by this section, which is the only statute applicable, in whatever form it may be presented, and under said section the entry can only be transferred to a tract which is "unsold," and where it will not affect the right of third persons, and a decision of the Secretary of the Interior transferring such an entry to a tract upon which a homestead entry had subsequently been made in good faith by another who had made valuable improvements, completed his residence, made final proof, and received his fatal certificate, which vested in him the equitable title, is wholly unauthorized and erroneous in law. Id.

This section applies to cases where the patent has been issued as well as to those in which the legal title has not been transferred. Id.

Where a person eligible to procure a homestead settles upon, occupies, and makes valuable and lasting improvements on a piece of government land, and attempts to make a homestead entry thereof, but through mistake makes an entry of another piece of land, held, that he has obtained such an interest in the land that he may afterward have his homestead entry so corrected as to make it an entry of the piece of land which he had settled upon and intended to enter. Fearns v. Atchison, T. & S. F. R. Co. (1885) 6 P. 237, 33 Kan. 275.

This section authorizes a transfer of entry only when the tracts intended remain unsold, and a purchaser of the tract intended cannot be charged with constructive notice of a prior application for the transfer. Manuel v. Fabyanski (1890) 44 Minn. 71, 46 N. W. 208.

In no case do the statutes entitle one entering land at a land office of the United States to a change of the entry and a transfer of the payment made to another tract, except in case such purchaser had made entry of a tract not intended to be entered by reason of a mistake as to the true numbers of the tract intended to be entered. Carman v. Johnson (1859) 29 Mo. 84.

Mistake in application—interest acquired.—An applicant for a section of public land acquires a vested interest in such section by the issuance to him of a certificate of entry thereto, though the application misdescribed the range in which the section was situated. Hedrick v. Atchison, T. & S. F. R. Co. (1894) 120 Mo. 516, 25 S. W. 759 (affirmed in Hedrick v. Atchison, T. & S. F. R. Co. [1897] 17 Sup. Ct. 922, 924, 167 U. S. 673, 42 L. Ed. 320). See, also, Sensenderfer v. Kemp (1884) 83 Mo. 581; Swisher v. Sensenderfer (1884) 84 Mo. 104.

(R. S. § 2373. Repealed.)

This section imposed a penalty upon one who agreed with another that the other should not bid upon land offered for sale, or who by intimidation, combination, or unfair management prevented any person from bidding upon or purchasing any land. It was incorporated in Crim. Code, § 59, post, § 10226, and was repealed by Crim. Code, § 341, post, § 10515.

§ 4781. (R. S. § 2374.) Agreements to pay premium to purchasers at public sales.

If any person before, or at the time of the public sale of any of the lands of the United States, enters into any contract, bargain, agreement, or secret understanding with any other person, proposing to purchase such land, to pay or give to such purchasers for such land a sum of money or other article of property, over and above the price at which the land is bid off by such purchasers, every such contract, bargain, agreement, or secret understanding, and every bond, obligation, or writing of any kind whatsoever, founded upon or growing out of the same, shall be utterly null and void.

Act March 31, 1830, c. 48, § 5, 4 Stat. 392.

See note to R. S. § 2353, ante, § 4751.

Notes of Decisions

Object of statute.—This section is evidently intended to protect those who propose to purchase land at the public sales from the extortions of those who have formed the combinations made penal by law. Fackler v. Ford (1860) 24 How. 322, 332, 16 L. Ed. 690. See, also, Gale v. Cutler (Wis. 1842) 1 Pin. 253.

It is no part of the policy of this section to encourage frauds by releasing the fraudulent party from the obligations of his contracts; and one who covenants to sell lands which he expects to purchase cannot afterwards plead his own fraud in obtaining his title from the government in bar of a decree of specific performance of his agreement. Fackler v. Ford (1860) 24 How. 322, 332, 16 L. Ed. 690.

Agreements prohibited.—A covenant by bona fide settlers on unsurveyed

lands to purchase them as soon as surveyed and then mortgage them to a creditor is not a contract in violation of the statute. Wright v. Shumway (D. C. 1853) Fed. Cas. No. 18,093.

An indirect agreement not to bid at a sale of public land is within Act March 31, 1830, to prevent fraud in sales of public lands. Stannard v. McCarty (Iowa, 1841) Morris, 124.

Where one, having made improvements on public land valued at $400, requested another to purchase the same at a public land sale as agent, and to convey one-half the lot, and for this purpose intrusted the latter with $200, the arrangement was not within the prohibition of the statute. Ellis v. Mosier (Iowa, 1849) 2 G. Greene, 246.

§ 4782. (R. S. § 2375.) Recovery of premiums paid to purchasers at public sales.

Every person being a party to such contract, bargain, agreement, or secret understanding, who pays to such purchaser any sum of money or other article of value, over and above the purchase-money of such land, may sue for and recover such excess from such purchaser in any court having jurisdiction of the same.

Act March 31, 1830, c. 48, § 5, 4 Stat. 392.

See note to R. S. § 2353, ante, § 4751.

§ 4783. (R. S. § 2376.) Discovery of agreements to pay premium by bill in equity.

If the party aggrieved have no legal evidence of such contract, bargain, agreement, or secret understanding, or of the payment of the excess, he may, by bill in equity, compel such purchaser to make discovery thereof; and if in such case the complainant shall ask for relief, the court in which the bill is pending may proceed to final decree between the parties to the same; but every such suit either in law or equity shall be commenced within six years next after the sale of such land by the United States.

Act March 31, 1830, c. 48, § 5, 4 Stat. 392.

Notes of Decisions

Relief in equity.—Where relief is sought under this statute against a contract for the purchase of public lands, the bill must aver that the contract is within the statute, and that the complainant has no legal evidence of the contract in order to entitle him to relief in equity. Gale v. Cutler (Wis. 1842) 1 Pin. 253.

(R. S. §§ 2377–2379. Transferred to Chapter 10A.)

R. S. § 2377, limited private entries by scrip issued to any State under Act July 2, 1862, for the establishment of an agricultural college therein, to no more than three sections of public lands in any one township.

R. S. § 2378, granted, for purposes of internal improvement, to each new State admitted into the Union, so much public land as, including the quantity granted before its admission, would make 500,000 acres; and R. S. § 2379, made provisions for selections and locations of such lands.

These three sections are placed, with other provisions relating to similar grants to States, under chapter 10A of this Title "Reservations and Grants to States for Public Purposes," post, §§ 4873–4875.

CHAPTER EIGHT

Reservation and Sale of Town-Sites on the Public Lands

Sec.
4784. Town-sites to be reserved.
4785. Reservations to be surveyed into lots.
4786. Town or city sites in public lands.
4787. When towns established upon unsurveyed lands; extension limits, how adjusted.
4788. When transcript maps of town are not filed in twelve months, proceedings by Secretary of Interior.
4789. Where size of lots or town plat vary from general rule.
4790. Title to lots subject to mineral rights.

Sec.
4791. Entry of town authorities in trust for occupants.
4792. Entry under preceding section, when to be made.
4793. Entry in proportion to number of inhabitants.
4794. Quantity of land excluded from homestead entry for town-site.
4795. Town-site exceeding maximum; excess to be opened to settlement, etc.
4796. Town-site less than maximum; additional entry.
4797. Certain acts of trustees to be void.
4798. No title acquired to gold mines, etc., or to mining-claim, etc.
4799. Town-site entries on mineral lands; title to minerals and mining-claims not acquired; title to lots subject to mining rights.
4800. Military or other reservations, etc.
4801. Inhabitants of towns on public lands, right of, to enter.
4802. Entries by cities and towns for cemetery and park purposes.
4802a. Patents to transferees of town lots purchased from United States at public sale.

§ 4784. (R. S. § 2380.) Town-sites to be reserved.

The President is authorized to reserve from the public lands, whether surveyed or unsurveyed, town-sites on the shores of harbors, at the junction of rivers, important portages, or any natural or prospective centers of population.

Act March 3, 1863, c. 80, § 1, 12 Stat. 754.

The lands within the abandoned naval reservations in Mississippi, situated on Back Bay, near Biloxi, were to be disposed of under the town-site laws only, by Act March 2, 1895, c. 182, 28 Stat. 814.

The undisposed of lands on the abandoned Fort Buford Military Reservation were subject to entry under the town-site laws, by Act May 19, 1900, c. 484, 31 Stat. 180.

Commutation for town-site purposes in Oklahoma, of homestead entries of certain ceded Indian lands, was authorized by Act March 11, 1902, c. 180, 32 Stat. 63.

This chapter of the Revised Statutes was extended to and declared to be applicable to ceded Indian lands in Minnesota, by Act Feb. 9, 1903, c. 531, post, § 5019.

Provisions for withdrawal from entry of lands needed for town-site purposes in connection with irrigation projects, and for survey and subdivision thereof, and appraisement and sale of lots, etc., were contained in Act April 16, 1906, c. 1631, ante, §§ 4715–4719; and town-sites previously set apart or established, under the provisions of this section and the section following, may be appraised and disposed of in accordance with the provisions of that act, by Act June 27, 1906, c. 3559, §§ 3, 4, ante, §§ 4722, 4723.

Special provisions of various acts relating to town sites in Oklahoma are set forth post, under chapter 10J, of this Title, "Public Lands in Oklahoma;" and special provisions relating to townsites in Alaska are set forth post, under chapter 10K of this Title, "Public Lands in Alaska."

Notes of Decisions

Town-site laws.—The settlement laws known as the town-site laws are set forth in this and the following sections. U. S. v. Celestine (1909) 30 Sup. Ct. 93, 96, 215 U. S. 278, 54 L. Ed. 195; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 47; Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 931.

§ 4785. (R. S. § 2381.) Reservations to be surveyed into lots.

When, in the opinion of the President, the public interests require it, it shall be the duty of the Secretary of the Interior to cause any of such reservations, or part thereof, to be surveyed into urban or suburban lots of suitable size, and to fix by appraisement of disinterested persons their cash value, and to offer the same for sale at public outcry to the highest bidder, and thence afterward to be held subject to sale at private entry according to such regulations as the Secretary of the Interior may prescribe; but no lot shall be disposed of at public sale or private entry for less than the appraised value thereof. And all such sales shall be conducted by the register and receiver of the land-office in the district in which the reservations may

be situated, in accordance with the instructions of the Commissioner of the General Land-Office.

Act March 3, 1863, c. 80, § 2, 12 Stat. 754.

The subdivision and sale of the town site of Plummer, Cœur d'Alene Reservation, Idaho, was authorized by Act Aug. 4, 1916, c. 268, 39 Stat.

Provisions for the sale of lots in the town site of Port Angeles, Washington, were made by Act May 2, 1906, c. 2077, 34 Stat. 167, and Act Sept. 7, 1916, c. 454, 39 Stat.

Provisions for the sale of unsold and unappropriated lands in the town-site of Newell, South Dakota, were made by Act Sept. 8, 1916, c. 477, 39 Stat.

§ 4786. (R. S. § 2382.) Town or city sites in public lands.

In any case in which parties have already founded, or may hereafter desire to found, a city or town on the public lands, it may be lawful for them to cause to be filed with the recorder for the county in which the same is situated, a plat thereof, for not exceeding six hundred and forty acres, describing its exterior boundaries according to the lines of the public surveys, where such surveys have been executed; also giving the name of such city or town, and exhibiting the streets, squares, blocks, lots, and alleys, the size of the same, with measurements and area of each municipal subdivision, the lots in which shall each not exceed four thousand two hundred square feet, with a statement of the extent and general character of the improvements; such map and statement to be verified under oath by the party acting for and in behalf of the persons proposing to establish such city or town; and within one month after such filing there shall be transmitted to the General Land-Office a verified transcript of such map and statement, accompanied by the testimony of two witnesses that such city or town has been established in good faith, and when the premises are within the limits of an organized land-district, a similar map and statement shall be filed with the register and receiver, and at any time after the filing of such map, statement, and testimony in the General Land-Office it may be lawful for the President to cause the lots embraced within the limits of such city or town to be offered at public sale to the highest bidder, subject to a minimum of ten dollars for each lot; and such lots as may not be disposed of at public sale shall thereafter be liable to private entry at such minimum, or at such reasonable increase or diminution thereafter as the Secretary of the Interior may order from time to time, after at least three months' notice, in view of the increase or decrease in the value of the municipal property. But any actual settler upon any one lot, as above provided, and upon any additional lot in which he may have substantial improvements shall be entitled to prove up and purchase the same as a pre-emption, at such minimum, at any time before the day fixed for the public sale.

Act July 1, 1864, c. 205, § 2, 13 Stat. 343.

Lands ceded by the Shoshone and Bannock Indians of the Fort Hall Reservation in Idaho were not to be disposed of under the town-site laws for less than ten dollars per acre, by Act June 6, 1900, c. 813, § 5, 31 Stat. 676.

Notes of Decisions

Dedication of public lands.—The fact of a plat of a town-site, platted and entered under the town-site law, showing thereon a block designated "Courthouse Square," does not constitute a dedication of the block to the county; neither the surveyor, the townsite, entryman, nor the Department of the Interior having power, without authority from Congress, to dedicate any part of the public domain to the county. Collins v. Board of Com'rs of Big Horn County (Wyo. 1912) 126 P. 465.

The sale of lots by the government in pursuance of the town-site law does not constitute a dedication to the county of the block designated on the plat of the township as "Courthouse Square." Id.

Title to street laid off by survey of town on public lands.—Title to a part of a street laid off by a survey made of a town which had grown up on public land never passed out of the United States, where the survey was never carried into a patent, and the village never accepted such part of the street, and having been thus abandoned the land was privately occupied for a time, but not long enough to acquire title. U. S. v. Chandler-Dunbar Water Power Co. (1913) 33 Sup. Ct. 667, 229 U. S. 53, 57 L. Ed. 1063.

§ 4787. (R. S. § 2383.) When towns established upon unsurveyed lands; extension limits, how adjusted.

When such cities or towns are established upon unsurveyed lands, it may be lawful, after the extension thereto of the public surveys, to adjust the extension limits of the premises according to those lines, where it can be done without interference with rights which may be vested by sale; and patents for all lots so disposed of at public or private sale shall issue as in ordinary cases.

Act July 1, 1864, c. 205, § 3, 13 Stat. 344.

§ 4788. (R. S. § 2384.) When transcript maps of town are not filed in twelve months, proceedings by Secretary of Interior.

If within twelve months from the establishment of a city or town on the public domain, the parties interested refuse or fail to file in the General Land-Office a transcript map, with the statement and testimony called for by the provisions of section twenty-three hundred and eighty-two, it may be lawful for the Secretary of the Interior to cause a survey and plat to be made of such city or town, and thereafter the lots in the same shall be disposed of as required by such provisions, with this exception, that they shall each be at an increase of fifty per centum on the minimum of ten dollars per lot.

Act July 1, 1864, c. 205, § 4, 13 Stat. 344.

R. S. § 2382, mentioned in this section, is set forth ante, § 4786.

§ 4789. (R. S. § 2385.) Where size of lots or town plat vary from general rule.

In the case of any city or town, in which the lots may be variant as to size from the limitation fixed in section twenty-three hundred and eighty-two, and in which the lots and buildings, as municipal improvements, cover an area greater than six hundred and forty acres, such variance as to size of lots or excess in area shall prove no bar to such city or town claim under the provisions of that section; but the minimum price of each lot in such city or town, which may contain a greater number of square feet than the maximum named in that section, shall be increased to such reasonable amount as the Secretary of the Interior may by rule establish.

Act March 3, 1865, c. 107, § 2, 13 Stat. 530.

R. S. § 2382, mentioned in this section, is set forth ante, § 4786.

§ 4790. (R. S. § 2386.) Title to lots subject to mineral rights.

Where mineral veins are possessed, which possession is recognized by local authority, and to the extent so possessed and recognized, the title to town-lots to be acquired shall be subject to such recognized possession and the necessary use thereof; but nothing contained in this section shall be so construed as to recognize any color of title in possessors for mining purposes as against the United States.

Act March 3, 1865, c. 107, § 2, 13 Stat. 530.

Further provisions relating to minerals and mining-claims in lands entered as town-sites were made by R. S. § 2392, post, § 4798, and Act March 3, 1891, c. 561, § 16, post, § 4799.

Notes of Decisions

Purpose and effect of statute.—This section is a precautionary measure or enactment designed for the protection of the miner in pursuance of the already well-defined policy of the government to encourage the development of its mineral resources. Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 28.

This section is a recognition of both the possessory rights of the miners on the public mineral lands and the authority and validity of the local rules and regulations in relation thereto, though the government had no intention of parting with its title, and the statute must be construed with others bearing upon the same subject. Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378, 409, 410.

This section does not limit the title of the locator of a mining claim to the necessary use of the ground located for mining purposes only. Talbott v. King (1886) 9 P. 434, 6 Mont. 76, 99.

Town-site entry on mineral lands.—See, also, notes to § 4798, post.

A town-site grant is not limited be-

cause made on part of an original mining location, where such part has been abandoned by the locator marking the boundaries and taking a patent for a small part of his location under the statute of 1866. Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344.

A placer claim may be used as a town site. Schwab v. Beam (C. C. 1898) 86 Fed. 41, 43. See St. Louis Smelting Co. v. Kemp (1881) 104 U. S. 636, 26 L. Ed. 875.

Title to mineral lands not acquired.—No title from the United States to land known at the time of the sale to be valuable for its mines of gold, silver, cinnabar, or copper can be obtained under the homestead or the town-site laws, or in any other way than as prescribed by law. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 404, 29 L. Ed. 423; Colorado Coal & Iron Co. v. United States (1887) 8 Sup. Ct. 131, 141, 123 U. S. 307, 309, 31 L. Ed. 182; Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 631, 139 U. S. 507, 517, 35 L. Ed. 238; Sweet v. U. S. (1915) 228 Fed. 421, 143 C. C. A. 3; Northern Pacific R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 603, 614, 616; Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 330; Silver Bow Min., etc., Co. v. Clarke (1885) 5 P. 570, 5 Mont. 378, 416; Talbott v. King (1886) 9 P. 434, 6 Mont. 76, 99; Golden v. Murphy (1909) 103 P. 394, 105 P. 99, 31 Nev. 395, 408; U. S. v. San Pedro, etc., Co. (1888) 17 P. 337, 4 N. M. (Johns.) 225, 294. And see Emerson v. Kennedy Min. & Mill. Co. (1915) 147 P. 939, 169 Cal. 718.

Mineral lands open to exploration and location.—Land embraced within a town site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes. Steel v. St. Louis Smelting & Refining Co., (1882) 1 Sup. Ct. 389, 391, 106 U. S. 447, 27 L. Ed. 226; Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 101, 115 U. S. 392, 406, 29 L. Ed. 423; Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 636, 139 U. S. 507, 529, 35 L. Ed. 238; Northern Pac. R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 605; Richards v. Dower (1889) 22 P. 304, 81 Cal. 44, 52; Poire v. Wells (1882) 6 Colo. 406; Same v. Leadville Imp. Co. (1882) 6 Colo. 413; Hawke v. Deffenbach (1885) 4 Dak. 20, 22 N. W. 480; Pierce v. Sparks (1885) 4 Dak. 1, 22 N. W. 491; Silver Bow Mining & Milling Co. v. Clarke (1885) 5 Pac. 570, 5 Mont. 378; Murray v. Buol (1887) 6 Mont. 397, 12 Pac. 858.

Townsite owner's rights as against mineral claimant.—No right in public lands can be acquired by mere occupancy thereof as a town site for townsite purposes, without any entry thereof, which can avail against a patent of the premises, subsequently issued as a placer-mining claim. Sparks v. Pierce (1885) 6 Sup. Ct. 102, 115 U. S. 408, 29 L. Ed. 428. See, also, Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423.

A party claiming a possessory title and priority of actual possession of a town-site lot cannot maintain ejectment against a patentee or his grantee of the same lot as a mining claim. Steel v. St. Louis Smelting, etc., Co. (1882) 1 Sup. Ct. 389, 106 U. S. 447, 454, 27 L. Ed. 226; Silver Bow Min., etc., Co. v. Clarke (1885) 5 P. 570, 5 Mont. 378; Talbott v. King (1886) 9 P. 434, 6 Mont. 76; Murray v. Buol (1887) 12 P. 858, 6 Mont. 397.

The occupation of mineral lands for the purpose of a town lot is of no effect as against a valid mining claim and no rights or equities flow therefrom. Talbott v. King (1886) 9 P. 434, 6 Mont. 76, 101; King v. Thomas (1887) 12 P. 865, 6 Mont. 409, 411; Chambers v. Jones (1895) 42 P. 758, 17 Mont. 156, 162. See Murray v. Buol (1887) 12 P. 858, 6 Mont. 397.

Where persons locate upon and improve town-site lots in good faith and under the belief that the land was not mineral their rights should not be disturbed by the locator of a mining claim without clear and satisfactory proof that within the limits of such mining location there had been found a vein or lode which, in its natural course or direction, would give the locator a right to all the surface ground within the limits of his location. Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 704.

There is no conflict between the rights flowing from a mining location and from a town-site patent, as the titles are entirely separate and distinct. Chilberg v. Consolidated Min. Co. (1907) 3 Alaska, 235, 240.

The owner of a valid mining claim over which a town site is extended by United States patent is not required to file an adverse claim to such patent, as his claim is expressly excepted by law, and the usual exception inserted in such town-site patent from its operation. Butte City Smokehouse Lode Cases (1887) 6 Mont. 397, 12 Pac. 858.

An exception in a town site patent, excluding from its operation all mines, mining claims, and possessions held under existing laws, is an exception required by the law, and is made by the law itself, and is conclusive upon the question that the government did not, and did not intend by such town site patent to, convey any valid mine, mining claim, or possession held under existing laws; and it is therefore impossible, under a patent to a town site, to acquire any interest in any valid mine or mining claim, or in the surface thereof. Id.

On authority of Butte City Smokehouse Lode Cases (1887) 6 Mont. 397, 12 Pac. 858, held, that the town site patent to Butte City does not cover the mineral ground included within the limits of the Silver King lode, but that the said lode is expressly reserved from the operation of the same by the terms of the patent itself, and by the act of congress. King v. Thomas (1887) 6 Mont. 409, 12 Pac. 865.

—— **Possession and use.**—Where mineral veins are possessed and the possession is recognized by local authority, the title to town lots is acquired subject to such recognized possession and the necessary use thereof. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423. See, also, Callahan v. James (1903) 74 Pac. 853, 141 Cal. 291; Golden v. Murphy (1909) 103 P. 394, 105 P. 99, 31 Nev. 395, 411.

This section protects the possession of the miner as against the title to town lots and subjects such lots to the necessary use of the mineral vein, and is not in conflict with any later statute on the same subject. Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378, 411; King v. Thomas (1887) 12 P. 865, 6 Mont. 409, 411; Chambers v. Jones (1895) 42 P. 758, 17 Mont. 156, 162.

The title to town lots is subject to the possession of any mineral vein where such possession is recognized by local authority. Larned v. Jenkins, (1902) 113 Fed. 634, 51 C. C. A. 344.

A possessory right to town-site property is sufficient to prevent the location of a mining claim thereon by a third person. Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 699.

A town-site application and entry not being applicable to, nor in any manner affecting, a prior mining claim located according to law, there is no obligation on the owner of the mining claim to file an adverse claim to the entry of the town site. Silver Bow Mining & Milling Co. v. Clarke (1885) 5 Mont. 378, 5 Pac. 570.

—— **Effect of town-site patent.**—See, also, notes to § 4798, post.

A town-site patent carries absolute fee-simple title to the patentee of all lands in which no gold, silver, copper, or cinnabar mine existed, or in which no valid mining claim was had or held under local authority or rules or existing laws. Dower v. Richards (1887) 73 Cal. 477, 15 Pac. 105. See, also, Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 931; Regan v. Whittaker (1901) 85 N. W. 863, 14 S. D. 373, 382.

The title to land of persons claiming under a town-site patent, where it was not known that such lands contained valuable minerals at the time the patent was issued, is not impaired by a subsequent discovery of valuable minerals in such lands. Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 632, 139 U. S. 507, 35 L. Ed. 238.

The fact that land on which discovery and location of a mining claim are made is within the patent limits of a town will not affect the title of the locator, where it was known prior to the patent to the town that a mineral vein existed where the discovery and location were made. Moyle v. Bullene (1896) 7 Colo. App. 308, 44 Pac. 69.

—— **Mineral patent.**—The title under a patent for a placer mining claim must prevail as against any subsequent claim of a town-site lot owner, where it is not shown that a valid entry of the alleged town site had ever been made. Sparks v. Pierce (1885) 6 Sup. Ct. 102, 115 U. S. 408, 412, 29 L. Ed. 428, distinguishing Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 29 L. Ed. 423.

A person seeking to obtain a patent for a mining claim on a town site in the possession of another must show he has a better right to the land than the one in possession. Bonner v. Meikle (C. C. 1897) 82 Fed. 697, 700.

Town-site owner's rights as against United States.—This section provides that nothing therein shall be construed to recognize any color of title in possession for mining purposes as against the United States. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 115 U. S. 392, 403, 29 L. Ed. 423.

§ 4791. (R. S. § 2387.) Entry of town authorities in trust for occupants.

Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and, if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust, as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be con-

ducted under such regulations as may be prescribed by the legislative authority of the State or Territory in which the same may be situated.

Act March 2, 1867, c. 177, 14 Stat. 541.
See note to R. S. § 2388, post, § 4792.

Notes of Decisions

1. Scope and purpose of act.
2. Nature of grant made by act.
3. Town-site laws extended to Alaska.
4. Town-site entry in trust.
5. Town-site patent.
6. Occupancy and occupants of town lots—Meaning.
7. Estate or interest of trustee and beneficiaries or occupants.
8. Occupant's rights as against United States.
9. Occupant's rights as against homestead claimant.
10. Occupant's rights as against mining claimant.
11. Occupant's rights as against railway grant.
12. Conveyances by beneficiaries or occupants.
13. Abandonment of occupant's rights.
14. Execution of trusts—Disposal of town lots.
15. —— Local regulations as to disposition of lots.
16. —— Conveyances or deeds by trustee.
17. —— Attacking validity of deed.
18. Vendor's lien of trustee.
19. Highways, streets, and alleys.
20. —— Dedication by town-site claimant.
21. —— Dedication by town-site trustee.
22. Jurisdiction of courts—Federal question.

1. Scope and purpose of act.—The purpose of the town-site act was to pass title through a trustee to bona fide occupants of the lots for use, and not for speculative purposes, and to provide that the benefits received from any unoccupied lots might inure to the benefit of the city. Hodges v. Lemp (1913) 135 P. 250, 24 Idaho, 399. See, also, Scully v. Squier (1907) 90 Pac. 573, 13 Idaho, 417, 30 L. R. A. (N. S.) 183 (affirmed in Scully v. Squier [1909] 30 Sup. Ct. 51, 215 U. S. 144, 54 L. Ed. 131); Parchen v. Ashby (1883) 1 Pac. 204, 5 Mont. 68.

Act May 23, 1844, the original town-site act, was never in force in Oregon. Stark v. Starr (1867) 6 Wall. 402, 415, 18 L. Ed. 925; Marlin v. T'Vault (1854) 1 Or. 77.

The act, in its intents and purposes, is analogous to the general pre-emption laws. City of Pueblo v. Budd (1894) 19 Colo. 579, 36 Pac. 599; Young v. Tiner (1894) 38 Pac. 697, 4 Idaho, 269.

The act was intended for the benefit and protection of actual citizens of a town against those claiming the land for speculative purposes. Lechler v. Chapin (1877) 12 Nev. 65. See, also, Rector v. Gibbon (1884) 4 Sup. Ct. 605, 610, 111 U. S. 276, 28 L. Ed. 427.

The statute was passed for the relief of the inhabitants of cities and towns upon public lands. League v. Town of Taloga (1913) 129 Pac. 702, 35 Okl. 277. And see Foot v. Town of Watonga (1913) 130 Pac. 597, 37 Okl. 43.

An act of congress authorizing the probate judge of a county to enter in trust, for the inhabitants of a town for town-site purposes, certain lands reserved by a prior act for school purposes, does not leave such lands open to controversy between town-site settlers and persons who had prior to the act settled upon the lands, but had not complied with the provisions of the pre-emption laws. Gonzales v. French (1896) 17 Sup. Ct. 102, 105, 164 U. S. 338, 41 L. Ed. 458.

2. Nature of grant made by act.—The grant made by the act was two-fold: (1) A several grant to the several occupants; (2) a grant of all unoccupied lots for public purposes to all the occupants as an aggregation. Newhouse v. Simino (1892) 3 Wash. St. 648, 29 Pac. 263; Rund v. Jensen (1892) 3 Wash. St. 785, 29 Pac. 265.

3. Town-site laws extended to Alaska.—See notes to § 5079, post.

This section has been specially extended to Alaska. Crawford v. Burr (1903) 2 Alaska, 33.

4. Town-site entry in trust.—This act created the trust in favor of those who at the time of the entry were occupants, or entitled to the occupancy. Stringfellow v. Cain (1878) 99 U. S. 610, 25 L. Ed. 421.

The initiatory steps to be taken by citizens in establishing a town site upon public lands are to settle upon and occupy the land for town-site purposes. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

Title to the land passes to the trustee as of the date of the entry, which is the filing of the application, and proof of the performance of the conditions in respect to the occupancy of the town site in the land office. Boise City v. Wilkinson (1909) 102 P. 148, 16 Idaho, 150.

When the town is not incorporated, it is the duty of the probate judge, upon being furnished with the entrance money, to enter the land for the benefit of the occupants of the town site according to their respective interests; and any contract made by one of the occupants with a third person that the probate judge shall not so enter said land is illegal and void. McTaggart v. Harrison (1873) 12 Kan. 62.

Entry and payment at the local land office vests the town with the legal title in trust. Eakin v. McCraith (1882) 2 Wash. T. 112, 3 Pac. 838.

5. Town-site patent.—See, also, notes to § 4798, post.

Offer of public lands for sale at auction is not a condition precedent to their being patented for a town site. Carter v. Thompson (C. C. 1894) 65 Fed. 329.

The implication arising from the act of the United States issuing a patent to a trustee in trust for the occupants of a town site, is that the land has been settled on and occupied as a town site, and the grant is made in trust for the several use and benefit of the occupants thereof according to their respective interests. Diamond Match Co. v. Village of Ontonagon (1888) 40 N. W. 448, 72 Mich. 249.

6. Occupancy and occupants of town lots—Meaning.—To entitle an applicant to a deed, he must be an actual occupant, or entitled to the occupancy, of the land; that is, he must have the actual use or possession of the land. There must be a subjection of the land to his will and control. Lechler v. Chapin (1877) 12 Nev. 65. And see Thompson v. Holbrook (1876) 1 Idaho, 609.

The occupant of lots on a government town site need not be a resident either of the lots or of the town site. Downman v. Saunders (1895) 3 Okl. 227, 41 Pac. 104; Greiner v. Fulton (1891) 46 Kan. 405, 26 Pac. 705.

An "occupant," within the meaning of the law, is one who is a settler or resident of the town, and in bona fide, actual possession of the lot, at the time the entry is made. One who has never been in the actual possession of a lot cannot be said to be an "occupant" thereof. Hussey v. Smith (1873) 1 Utah, 129; Pratt v. Young (1876) 1 Utah, 347. See, also, Gordon v. Ross-Higgins Co. (1908) 162 Fed. 637, 89 C. C. A. 429.

No person not a settler and occupant at the time of entry can derive benefit by an entry. Holland v. Buchanan (1899) 56 P. 561, 19 Utah, 11. See, also, Webber v. Petty (1892) 2 Colo. App. 63, 29 Pac. 1016.

Whoever enters on a vacant town lot, and makes the first act of settlement or occupancy in good faith, with the intention of following it up and claiming the benefit of the law, is the first settler or occupant, and is entitled to acquire the title. Sawyer v. Van Hook (1900) 1 Alaska, 108.

The person claiming under this law must both settle upon and occupy the ground. Osgood v. Donnelly (1901) 1 Alaska, 385.

An "occupant," within the meaning of the law, is one who is in the actual possession of a lot. Singer Mfg. Co. v. Tillman (Ariz. 1889) 21 Pac. 818.

The "occupants" for whom the trustees take the legal title are those who were such at the time the town site was entered. City of Globe v. Slack (Ariz. 1908) 95 P. 126.

The partial building of a rough board shanty on one of several lots, which building remained unfinished and uninhabitable, and the placing of posts around a portion of the lot, is not such a bona fide occupancy as will entitle one to a conveyance of lots under the town-site act. Pascoe v. Green (1893) 18 Colo. 326, 32 Pac. 824.

Mere temporary and partial occupancy of a trespasser is not such open, continuous, and exclusive possession as under the town-site acts is required as preliminary to the statement and proof. Schnepel v. Mellen (1878) 3 Mont. 118.

There is nothing in the town site act of congress which limits the proof upon the part of claimants to their interest in the land at the time of entry thereof in the land office. If the land at that time is vacant, it is subject to location and occupancy by any person at any time prior to the issuance of a patent. Lechler v. Chapin (1877) 12 Nev. 65.

One who erects a building on a town-site lot for business purposes is an occupant. Hagar v. Wikoff (1895) 39 Pac. 281, 2 Okl. 580.

The occupancy referred to in the town-site act must be actual, and cannot be begun by agent; no one being allowed to take up lots by agent. The occupancy may be for residence, or for business or use; but the residence, business, or use must be by the claimants. Cain's Heirs v. Young (1876) 1 Utah, 361.

7. Estate or interest of trustee and beneficiaries or occupants.—On the establishment of a town site on public land, a legal title is vested in the trustee in his official and public capacity, and, simultaneously with the entry, there is vested in the beneficiaries an absolute right in the trust. McCloskey v. Pacific Coast Co. (1908) 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673. See, also, Walter Realty Co. v. Jones (1913) 129 P. 840, 35 Okl. 272.

The trust imposed on the mayor of an incorporated town under the town site act is for the benefit of inhabitants, first as individuals, and then as a community, and the title to the occupied lots becomes vested in the trustee for the benefit of the occupants severally at the time such entry is made, and neither the mayor nor the surveyor can deprive them of that title. Scully v. Squier (1907) 90 P. 573, 13 Idaho, 417.

The trustee takes title to the town site in trust for the occupants of the occupied lands and for the inhabitants of the town as to all unoccupied land or lands to which no valid claims were made in conformity with the statute. Hodges v. Lemp (1913) 135 P. 250, 24 Idaho, 399.

The fact that land entered by the probate judge, trustee under the patent, as part of a town site, was not in-

cluded in a plat of the site, does not give one the right to enter it as public land included in a government subdivision. Brooke v. Jordan (1894) 14 Mont. 375, 36 Pac. 450.

The fact that land entered by the probate judge, trustee under the patent, as part of a town site, was not included in a plat of the site by the surveyor appointed to make such plat, does not give the owner of adjoining land the right to enter such excluded land as public land included in a government subdivision. Neill v. Jordan (1894) 15 Mont. 47, 38 Pac. 223.

Without a statute to that effect trustees of towns have no authority to dispose of lots unsold in a town site, entered under this section, for the benefit of occupants, or convey the same for school purposes, after deeds to such occupants severally for all lots proved up by them under the town-site law. School Dist. No. 160, Caddo County, v. Alcott (Okl. 1912) 120 P. 562.

Where a town site is entered, the probate judge takes title in trust. Walter Realty Co. v. Jones (1913) 129 P. 840, 35 Okl. 272.

The trustee takes the legal title of the occupied lots in trust for the "occupants," and, simultaneously therewith, each occupant takes a vested equitable interest in the lot. Goldberg v. Kidd (1894) 5 S. D. 169, 58 N. W. 574.

An occupant before entry in trust by the town authorities has an inchoate right to the benefit of the law, which descends to his widow and children, but which they lose by failing to retain possession till the entry is made. West v. Child (1892) 8 Utah, 223, 30 Pac. 755; West v. Utah Nat. Bank (1892) 8 Utah, 374, 31 Pac. 987.

The title vests in the trustee for the use of the occupants, at the time when the application is made, although the price was not paid and the receipt issued for several years afterwards. Lockwitz v. Larson (1898) 52 P. 279, 16 Utah, 275.

8. Occupant's rights as against United States.—Mere occupancy of town lots on public lands and making improvements thereon give no vested right therein as against the United States or any purchaser from them. Sparks v. Pierce (1885) 6 Sup. Ct. 102, 105, 115 U. S. 408, 29 L. Ed. 428 (affirming Pierce v. Sparks [1885] 4 Dak. 1, 22 N. W. 491); Bonner v. Meikle (C. C. 1897) 82 Fed. 697.

9. Occupant's rights as against homestead claimant.—Land settled upon, occupied, and used for town-site purposes and for trade and business is not subject to entry under the homestead laws. White v. Whitcomb (Idaho, 1907) 90 P. 1080.

10. Occupant's rights as against mining claimant.—See, also, notes to § 4798, post.

A town-site entry and patent does not carry title to any mine of gold, silver, or copper, or to any valid mining claim or possession held under existing law. Callahan v. James (1903) 74 Pac. 853, 141 Cal. 291. See, also, Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423; Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 631, 139 U. S. 507, 35 L. Ed. 238; Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 931; Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 33.

The locator of a placer mining claim having only a placer mining right and to the extent that his interest is interfered with he can maintain a suit to remove a cloud therefrom or to quiet a title to such limited interest, but he cannot maintain an action to cancel a patent issued for a town site. Carter v. Thompson (C. C. 1894) 65 Fed. 329, 331. See Board of Education v. Mansfield (1903) 95 N. W. 286, 17 S. D. 72, 79, 106 Am. St. Rep. 771.

The citizens of a town have the same right to build dwelling houses upon the public domain as others have to locate mining claims, and such town-site claimants may without securing title to themselves contest the issuance of a patent to the mining claimant. Bonner v. Meikle (C. C. 1897) 82 Fed. 697.

11. Occupant's rights as against railway grant.—Mere possession by a town-site company, without filing a plat until after a land grant railway company constructed its line across the tract, does not give a grantee of the town a title superior to that of the railroad company. Northern Pac. R. Co. v. Smith, 18 Sup. Ct. 794, 797, 171 U. S. 260, 43 L. Ed. 157, reversing judgment (1895) 69 Fed. 579, 16 C. C. A. 336.

12. Conveyances by beneficiaries or occupants.—An occupant in possession, under the town-site law, may sell his equitable right to a lot before patent. Hussey v. Smith (1878) 99 U. S. 20, 25 L. Ed. 314; Stringfellow v. Cain (1878) 99 U. S. 610, 25 L. Ed. 421; McKennon v. Winn (1893) 1 Okl. 327, 33 Pac. 582, 22 L. R. A. 501; Hagar v. Wikoff (1895) 39 Pac. 281, 2 Okl. 580; Clawson v. Wallace (1898) 52 Pac. 9, 16 Utah, 300.

An occupant, in possession of a 40-acre tract embraced in a town site, afterwards entered under this act, will hold the same by a title paramount to that of one claiming under a deed from the mayor, based upon a patent issued to such mayor for the use and benefit of the occupants of the town; the claimant under the deed not having been an occupant or in possession of the tract in controversy, although having con-

tinuously resided upon the town site. Guffin v. Linney (1882) 26 Kan. 717.

An entry of lands by the corporate authorities of a town, under this section, being for the benefit of the occupants, the title is, in effect, that of the occupants, so that judicial and special mortgages granted by them before discovering a defect therein attach to the lands immediately on the entry. Mallard v. Anderson (1884) 36 La. Ann. 834.

One who has made a bona fide occupancy of public lands under the town-site laws of congress can afterwards lease the ground and still retain his rights thereto; and he may sell his land, except that no contract, either for sale or lease, which conflicts with the requirement that the title shall be made to the inhabitant, who is an occupant and has an interest, will be recognized by the government in deciding to whom the title shall go. Cain's Heirs v. Young (1876) 1 Utah, 361.

A beneficiary in a trust deed from the United States to the county judge under the United States town-site law cannot before he has received a deed from the trustee, convey a lot in the town site, so as to prevent the trustee from conveying a valid title to another beneficiary. Whittlesey v. Hoppenyan (1888) 72 Wis. 140, 39 N. W. 355.

13. Abandonment of occupant's rights.—An occupant of public land, platted into blocks, streets, and alleys, and entered as provided by town-site act may lose whatever right he acquired by prior occupancy by abandonment, and such abandonment may be inferred from his acts. Boise City v. Flanagan (1898) 53 P. 453, 6 Idaho, 149. See, also, Thompson v. Holbrook (1876) 1 Idaho, 609; Young v. Tiner (Idaho, 1894) 38 Pac. 697.

A right to have lands entered as a town site under the act of congress, even where a plat has been made and recorded, may be so lost by abandonment of occupancy that other persons may become entitled to have them entered for their benefit. Weisberger v. Tenny (1863) 8 Minn. 456 (Gil. 405).

14. Execution of trust—Disposal of town lots.—Under this act a conveyance to the judge of the county court as trustee divests the government of all control over the subsequent disposition of the lands conveyed. McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S. 209, 37 L. Ed. 1055; Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 839, 190 U. S. 116, 47 L. Ed. 975.

15. —— Local regulations as to disposition of lots.—Trust assumed by entering a town site is created by the laws of the United States; but its execution is confided by those laws to the legislature of the state or territory in which the town is situated. Hoeye v. Willis (Ariz. 1914) 138 P. 15. See, also, Late Corporation of the Church of Jesus Christ v. U. S. (1890) 10 Sup. Ct. 792, 804, 136 U. S. 1, 34 L. Ed. 478; Oklahoma City v. McMaster (1905) 25 Sup. Ct. 324, 326, 196 U. S. 529, 49 L. Ed. 587; Martin v. Hoff (1901) 64 P. 445, 7 Ariz. 247; Robertson v. Martin (1904) 76 P. 614, 8 Ariz. 422; Biddick v. Kobler (1895) 110 Cal. 191, 42 Pac. 578; Amador County v. Gilbert (1901) 65 P. 130, 133 Cal. 51; Cofield v. McClellan (1871) 1 Colo. 370; Greathouse v. Heed (1873) 1 Idaho, 482; State v. Webster (1903) 72 P. 295, 28 Mont. 104; Brown v. Parker (1894) 39 P. 567, 2 Okl. 258; Chisolm v. Weisse (1894) 2 Okl. 611, 39 Pac. 467; League v. Town of Taloga (1913) 129 P. 702, 35 Okl. 277; Foote v. Town of Watonga (1913) 130 P. 597, 37 Okl. 43.

The statute requires the continuance of the trust until the whole site is finally disposed of, and a state law providing that lots unclaimed or unconveyed within a certain time shall revert to the town, and that the failure of persons entitled to lots to pay certain fees shall effect a relinquishment thereof to the town, discharged of the trust, is incompetent to vest the fee of such lots in the town. Town of Aspen v. Rucker (1887) 10 Colo. 184, 15 Pac. 791. See, also, City of Pueblo v. Budd (1894) 19 Colo. 579, 36 Pac. 599.

The provision of a local law, that lands of a town site of an unincorporated town, entered by a county judge for the use of its occupants, and unclaimed within 90 days thereafter, shall revert to the town, is void as being in contravention of this section. City of Pueblo v. Budd (1894) 19 Colo. 579, 36 Pac. 599. Compare Cofield v. McClellan (1871) 1 Colo. 370.

The legislature has power conferred by congress to regulate the execution of the trust, but may not divert the trust from the uses declared. Clark v. Titus (Ariz. 1886) 11 Pac. 312.

The word "disposal," in this section, means distribution, when applied to lots actually occupied and possessed. Scully v. Squier (1907) 90 P. 573, 13 Idaho, 417.

This section does not authorize the legislature to add conditions upon which only an occupant, under actual possession, could hold such possession, and his equitable interest. Goldberg v. Kidd (1894) 5 S. D. 169, 58 N. W. 574.

16. —— Conveyances or deeds by trustee.—It must appear that the judge was trustee, that is, had already entered the land when he executed the deed, and a recital of that fact in the deed itself is not evidence as against a stranger to the instrument. Taylor v. Winona & St. P. R. Co. (1890) 45 Minn. 66, 47 N. W. 453. See, also, Ming v. Foote (1890) 9 Mont. 201, 23 Pac. 515.

The right to a deed does not depend wholly upon occupancy at the time it is made; but if the right existed,

at the time of the application for town-site entry was made, in the persons then in occupancy and possession, such persons would have the preference right to a deed if they or their grantees continue to occupy said premises until deed is passed by the trustee. Johnson v. Pac. Coast S. S. Co. (1904) 2 Alaska, 224.

Deeds by a trustee of a town site should be made only to persons competent to receive title, and in the actual and lawful possession of the lots conveyed. Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224.

A certificate of title to town-site land, executed by the county judge to one who never occupied the land certified to him and who never had any right to occupy it, conveyed no title. Roberts v. Ward (1906) 84 P. 430, 3 Cal. App. 101.

Where a county judge makes entry and pays the price therefor, and four years afterwards receives his patent, he is vested with the legal title; and a deed from his successor in office gives a valid title as against one claiming through the authorities of the town which became incorporated prior to the issuing of the patent. Wheeler v. Wade (1891) 1 Colo. App. 66, 27 Pac. 719.

Where the title to a town site is vested by government patent in the county judge and his successors in trust for the several occupants thereof, a deed for a lot executed by a commissioner appointed by the corporate authorities of the town for that purpose is of no effect. Rice v. Goodwin (1892) 2 Colo. App. 267, 30 Pac. 330.

Where a party in whose name a town site was pre-empted for the occupants thereof, a deed for a town lot to a person not an occupant, in the absence of a showing that the deed was made without the assent of the occupants, or for an illegal purpose, it was error to hold the deed void as not in conformity to the duty of the pre-emptor prescribed by Act March 2, 1867, post, § 4797. Setter v. Alvey (1875) 15 Kan. 157.

Where a probate judge entered a town site, and delivered to the occupants deeds in fee for their respective interests, and subsequently executed to a company deeds for the unoccupied portion, one of the occupants, who had no interest in the land conveyed to the company, could not maintain a suit against the company for the purpose of having its deeds set aside. Jackson v. Winfield Town Co. (1880) 23 Kan. 542.

As soon as the land is entered, the trustee may proceed to execute the trust by giving deeds to the beneficiaries, although the patent from the United States has not been yet issued, and the patent when issued relates back to the date of the entry, and no further deed from the trustee is necessary to vest title in such beneficiaries. Taylor v. Winona & St. P. R. Co. (1890) 45 Minn. 66, 47 N. W. 453

The trustee cannot execute a deed of a town lot to an applicant who has not complied strictly with the law. Edwards v. Tracy (1874) 2 Mont. 49.

The county judge of a county embracing a town site which was patented under the United States town-site law to the county judge of the county out of which the former county has been since formed is the successor of the latter judge, so as to enable him to execute the trust deed. Tucker v. Whittlesey (1889) 74 Wis. 74, 41 N. W. 535, following Whittlesey v. Hoppenyan (1888) 72 Wis. 140, 39 N. W. 355.

17. —— Attacking validity of deed.—A deed of a town-site trustee is not open to collateral attack, and the same rule applies to the government patent. Green v. Barker (1896) 47 Neb. 934, 66 N. W. 1032. See, also, Bolton v. Bennett (Colo. 1914) 138 P. 761; Ming v. Foote (1890) 9 Mont. 201, 23 Pac. 515.

The deed of city authorities authorized to convey lots in a town site is presumptively valid, and is not subject to collateral attack. Larned v. Jenkins (1902) 113 Fed. 634, 638, 51 C. C. A. 344. See Smith v. Pipe (1877) 3 Colo. 187, 199; Anderson v. Bartels (1883) 3 P. 225, 7 Colo. 256, 263, 266; Chever v. Horner (1887) 17 P. 495, 11 Colo. 68, 71, 79, 7 Am. St. Rep. 217.

Where a town site was patented to the mayor in trust for the inhabitants, one not within the grant to the mayor has no interest entitling him to attack the validity of the mayor's deed, where the defect is not apparent on its face. Bolton v. Bennett (Colo. 1914) 138 P. 761.

Where the judge who holds land under the United States town site act, in trust for the occupants, executes an official deed for a part of it, the presumption obtains that he did his duty in all respects by compliance with all the statutory prerequisites, and that he conveyed it to a proper party; and one not a beneficiary of the trust, but a mere stranger to the title, cannot litigate or call in question the validity or regularity of the deed in those respects. Taylor v. Winona & St. P. R. Co. (1890) 45 Minn. 66, 47 N. W. 453; Lamm v. Chicago, St. P., M. & O. Ry. Co. (1890) 45 Minn. 71, 47 N. W. 455, 10 L. R. A. 268.

A deed by a county judge as trustee is presumptively valid, but it may be shown that the county judge had no authority to make such deed. Goldberg v. Kidd (1894) 5 S. D. 169, 58 N. W. 574.

18. Vendor's lien of trustee.—One who has taken legal title to lands as trustee under the statute for the use and benefit of those legally entitled as occupants cannot have a vendor's lien for the unpaid purchase money for land sold by him. Berry v. Ginaca (C. C. 1880) 5 Fed. 475, 476.

19. Highways, streets, and alleys.—The occupant of a lot in a town which had been surveyed and platted into streets, alleys, blocks, and lots continues to possess after the town site is entered the same right of way over an adjoining alley which he had previously possessed, and the interests of occupants previous to the entry either in the land occupied by them or in rights of way over adjoining streets and alleys are secured by the entry, and the legislature of the territory could not change or close the streets or alleys by a new survey. Ashby v. Hall (1886) 7 Sup. Ct. 308, 309, 119 U. S. 526, 30 L. Ed. 469. See, also, Scully v. Squier (1909) 30 Sup. Ct. 51, 53, 215 U. S. 144, 54 L. Ed. 131, affirming decree Scully v. Squier (1907) 90 P. 573, 13 Idaho, 417. And see McCloskey v. Pacific Coast Co. (1908) 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673; Pacific Coast Co. v. McCloskey (1906) 3 Alaska, 77.

A trustee's deed of land used as a street or alley, is unauthorized and void, and so is any survey or plat not coinciding with the rights of occupants. Parchen v. Ashby (1883) 5 Mont. 68, 1 Pac. 204. See, also, Hall v. Ashby (1876) 2 Mont. 489.

It is competent for the legislature to authorize the trustee of town sites to divide unoccupied land within the town sites into lots and blocks and dispose of them for the public benefit, and to that end establish streets and alleys to such unoccupied land. City of Globe v. Slack (Ariz. 1908) 95 P. 126.

A surveyor appointed to plat a town site had no authority to establish streets through and over buildings, nor to cut off any portion or parts of buildings for street purposes. Scully v. Squier (1907) 90 P. 573, 13 Idaho, 417.

A mayor, appointed as a trustee under the town site act, has no authority to designate any part of the town site then within the possession of an actual occupant as a part of a street. Id.

A surveyor employed to plat and lay out the lands in a town site cannot make a paper street in such towns and deprive the actual occupants of vested rights, as his only authority was to plat the town in conformity with the lots and blocks. Id.

The interest which the occupants of town site lots possessed previous to the entry of the town site in trust, for their use, under this section, either in the land occupied by them or in the rights of way over adjoining streets and alleys, were secured by the entry. Id.

The trustee cannot convey any part of the lands dedicated for streets and alleys. Boise City v. Wilkinson (1909) 102 P. 148, 16 Idaho, 150.

The local legislature is without power to vacate a street or alley of a town site. Id.

Parties who receive deeds from the trustee of a town site are required to ascertain his authority, and they acquire no right to the use of a part of the town site illegally granted as an alley. Hall v. Ashby (1876) 2 Mont. 489.

The trustee of a town site holds all the public land within its exterior limits, not occupied and to which there is no possessory rights, for the benefit of the inhabitants as a community, and has no power to dedicate any portion of the tract as an alley for the use of any person. Id.

The act of the trustee in establishing by a plat a street over lands actually occupied as a residence when the entry was made is in conflict with the execution of his trust to convey the lands to occupants, and the public acquires no rights as against the occupant. City of Helena v. Albertose (1889) 8 Mont. 499, 20 Pac. 817.

Where public land is entered and platted under this act, the purchasers of lots abutting on a platted street acquire the easements of access, light, and air; and they are entitled to have the street forever kept open, though the fee may be in the town as trustee for the public, instead of in the abutting owners for street uses. Dooly Block v. Salt Lake Rapid Transit Co. (1893) 9 Utah, 31, 33 Pac. 229, 24 L. R. A. 610.

The interest of an occupant extends to his actual and beneficial holdings at the time of the entry and is not to be limited by a plat, filed with a survey of the prospective town, divided into lots, blocks, streets, and alleys. Bingham v. Walla Walla (1887) 3 Wash. T. 68, 13 Pac. 408.

20. —— Dedication by town-site claimant.—A claimant under the town-site law may, before his right to a deed is established, by his acts make a common-law dedication binding as to him, and such as will operate as an estoppel in pais. McCloskey v. Pacific Coast Co. (1908) 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

21. —— Dedication by town-site trustee.—Where a town site is located on public land, a trustee of the town site takes title for the individual occupants of the town, and also for the occupants collectively as a community, and therefore has no power as against the individual occupants to dedicate land in the site to public use for street purposes. McCloskey v. Pacific Coast Co. (1908) 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

The streets contemplated by the act, providing for the establishment of town sites on public land, and as to which a public right attaches, are those which in fact existed at the time of the town-site entry either by actual use or dedication; the trustee being without authority by any act of his own to dedicate a street. Id.

A town-site trustee has no authority

to dedicate a portion of it to the public as a highway. City of Pueblo v. Budd (1894) 19 Colo. 579, 36 Pac. 599.

22. **Jurisdiction of courts—Federal question.**—See, also, notes to §§ 991, 1010, ante.

Where both parties in ejectment claim under deeds from the trustee holding the legal title of a town site, and both claim to be cestuis que trustent under the statute, the case involves a federal question. Dunton v. Muth (C. C. 1891) 45 Fed. 390.

§ 4792. (R. S. § 2388.) Entry under preceding section, when to be made.

The entry of the land provided for in the preceding section shall be made, or a declaratory statement of the purpose of the inhabitants to enter it as a town-site shall be filed with the register of the proper land-office, prior to the commencement of the public sale of the body of land in which it is included, and the entry or declaratory statement shall include only such land as is actually occupied by the town, and the title to which is in the United States; but in any Territory in which a land-office may not have been established, such declaratory statements may be filed with the surveyor-general of the surveying-district in which the lands are situated; who shall transmit the same to the General Land-Office.

Act March 2, 1867, c. 177, 14 Stat. 541.

The lands acquired from the Seminole Indians, after they had been opened to settlement by proclamation, might be entered under the provisions of this section and the preceding section, by Act March 2, 1889, c. 412, § 13, 25 Stat. 1005.

The Secretary of the Interior was required to reserve not to exceed one half section of land in each county in Oklahoma for county-seat purposes, said land to be entered under the provisions of this section and the preceding section, by Act March 3, 1891, c. 543, §§ 17, 37, post, § 5028.

Notes of Decisions

Effect of entry on mineral lands.—See notes to § 4798, post.

§ 4793. (R. S. § 2389.) Entry in proportion to number of inhabitants.

If upon surveyed lands, the entry shall in its exterior limit be made in conformity to the legal subdivisions of the public lands authorized by law; and where the inhabitants are in number one hundred, and less than two hundred, shall embrace not exceeding three hundred and twenty acres; and in cases where the inhabitants of such town are more than two hundred, and less than one thousand, shall embrace not exceeding six hundred and forty acres; and where the number of inhabitants is one thousand and over one thousand, shall embrace not exceeding twelve hundred and eighty acres; but for each additional one thousand inhabitants, not exceeding five thousand in all, a further grant of three hundred and twenty acres shall be allowed.

Act March 2, 1867, c. 177, 14 Stat. 541.

Further provisions relating to the maximum quantity of land to be entered as town-sites were made by Act March 3, 1877, c. 113, post, §§ 4794–4796.

Incorporated cities and towns were authorized to enter public lands for cemetery and park purposes, by Act Sept. 30, 1890, c. 1121, post, § 4802.

The inhabitants of any town located in Greer county, Oklahoma, were to be entitled to enter the same as a town-site under the provisions of this and the two preceding sections, by Act Jan. 18, 1897, c. 62, § 3, post, § 5042.

(R. S. § 2390. Temporary.)

This section provided that the words "not exceeding five thousand in all," in the preceding section, should not apply to Salt Lake City, Utah, but that lands might be entered for the full number of inhabitants of that city, not exceeding fifteen thousand, and also provided that it might embrace the school section number 36, covered by the city, for which indemnity should be given when a grant was made of the sections for school purposes. It is omitted as temporary merely and executed.

§ 4794. (Act March 3, 1877, c. 113, § 1.) Quantity of land excluded from homestead entry for town-site.

The existence or incorporation of any town upon the public lands of the United States shall not be held to exclude from [pre-emption or] homestead entry a greater quantity than twenty-five hundred and sixty acres of land, or the maximum area which may be entered as a town-site under existing laws, unless the entire tract claimed or incorporated as such town-site shall, including and in excess of the area above specified, be actually settled upon, inhabited, improved, and used for business and municipal purposes. (19 Stat. 392.)

This section and the two sections next following were parts of an act entitled "An act respecting the limits of reservations for town sites upon the public domain." Section 2 of that act confirmed entries already made. It is omitted as temporary merely.

The words "pre-emption or," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

Notes of Decisions

Application and purpose of act.— This act applies only to cities laid out exclusively on the public lands of the United States, and not to cities laid out mostly on private lands, but including some of the lands of the United States. Houlton v. Chicago, St. P., M. & O. Ry. Co. (1893) 86 Wis. 59, 56 N. W. 336. See, also, Vilas v. Algar (1901) 109 Fed. 519, 48 C. C. A. 524.

This act is a curative act intended to permit pre-emption entries on public lands, though included within the corporate limits of a city or town. Salt Lake Inv. Co. v. Oregon Short Line R. Co. (Utah, 1915) 148 P. 439.

§ 4795. (Act March 3, 1877, c. 113, § 3.) Town-site exceeding maximum; excess to be opened to settlement, etc.

Whenever the corporate limits of any town upon the public domain are shown or alleged to include lands in excess of the maximum area specified in section one of this act, the Commissioner of the General Land Office may require the authorities of such town, and it shall be lawful for them, to elect what portion of said lands, in compact form and embracing the actual site of the municipal occupation and improvement, shall be withheld from [pre-emption and] homestead entry; and thereafter the residue of such lands shall be open to disposal under the homestead [and pre-emption] laws. And upon default of said town authorities to make such selection within sixty days after notification by the Commissioner, he may direct testimony respecting the actual location and extent of said improvements, to be taken by the register and receiver of the district in which such town may be situated; and, upon receipt of the same, he may determine and set off the proper site according to section one of this act, and declare the remaining lands open to settlement and entry under the homestead [and pre-emption] laws; * * (19 Stat. 392.)

The words inclosed in brackets in this section were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

The last provision of this section, omitted here, required the Secretary of a Territory to furnish to the surveyor-general of the Territory a certified copy of all acts incorporating cities and towns. It was superseded by the provisions forbidding the passage by any Territorial legislature of special acts incorporating cities and towns of Act July 30, 1886, c. 818, § 1, ante, § 3479.

§ 4796. (Act March 3, 1877, c. 113, § 4.) Town-site less than maximum; additional entry.

It shall be lawful for any town which has made, or may hereafter make entry of less than the maximum quantity of land named in section twenty-three hundred and eighty-nine of the Revised Statutes to make such additional entry, or entries, of contiguous

tracts, which may be occupied for town purposes as when added to the entry or entries therefore made will not exceed twenty-five hundred and sixty acres: Provided, That such additional entry shall not together with all prior entries be in excess of the area to which the town may be entitled at date of the additional entry by virtue of its population as prescribed in said section twenty-three hundred and eighty-nine. (19 Stat. 392.)

R. S. § 2389, mentioned in this section, is set forth ante, § 4793.

§ 4797. (R. S. § 2391.) Certain acts of trustees to be void.

Any act of the trustees not made in conformity to the regulations alluded to in section twenty-three hundred and eighty-seven shall be void.

Act March 2, 1867, c. 177, 14 Stat. 541.
R. S. § 2387, mentioned in this section, is set forth ante, § 4791.

Notes of Decisions

Validity of trustee's acts.—A trustee's deed, not in conformity to the town-site act, is void. Parchen v. Ashby (1883) 1 Pac. 204, 5 Mont. 68. See, also, Dunton v. Muth (C. C. 1891) 45 Fed. 390, 395; City of Globe v. Slack (Ariz. 1908) 95 P. 126; Callahan v. James (Cal. 1902) 71 P. 104, reversed (1903) 74 P. 853, 141 Cal. 291.

§ 4798. (R. S. § 2392.) No title acquired to gold-mines, etc., or to mining-claim, etc.

No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper; or to any valid mining-claim or possession held under existing laws.

Act March 2, 1867, c. 177, 14 Stat. 541. Act June 8, 1868, c. 53, 15 Stat. 67.
Similar provisions were made by Act March 3, 1891, c. 561, § 16, post, § 4799, and by R. S. § 2386, ante, § 4790.

Notes of Decisions

1. Purpose and effect of statute.
2. Meaning of terms.
3. Existing mining rights preserved.
4. Mineral lands not acquired.
5. Mines and mining claims excluded from town-site patent.
6. Mineral character of lands excluded from town-site patent.
7. Mill site excluded from town-site patent.
8. Discovery of mineral after town-site patent.
9. Effect of town-site patent as against mining claimant.
10. Mineral patent.
11. —— Priorities.
12. —— Adverse claim.

1. Purpose and effect of statute.—These statutes recognize the possession of mining claims within the limits of town sites. Steel v. St. Louis, S. & R. Co. (1882) 1 Sup. Ct. 389, 391, 392, 106 U. S. 447, 27 L. Ed. 226; Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423. And see Callahan v. James (Cal. 1902) 71 P. 104, reversed (1902) 74 P. 853, 141 Cal. 291.

This section has no relation to a patent for town site of the city of Nevada. Richards v. Dower (1889) 81 Cal. 44, 22 Pac. 304.

2. Meaning of terms.—The term "mine of gold, silver, cinnabar, or copper," as used in the exception found in this section, means a paying mine known to exist at the time of the grant, or one which there was good reason to believe then existed. Smith v. Hill (1891) 89 Cal. 122, 125, 26 P. 644. See, also, Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 33.

3. Existing mining rights preserved.—Congress intended by this section to preserve existing rights to known mines of gold, silver, cinnabar, or copper, and to known mining claims and possessions, as against any assertion of title thereto by virtue of conveyances received under the town-site act, and not to leave the title of purchasers on town sites to be disturbed by future discoveries. Davis v. Weibbold (1891) 11 Sup. Ct. 628, 635, 139 U. S. 507, 35 L. Ed. 238; Northern Pac. R. Co. v. Barden 46 Fed. 592, 602; Kansas City Min. & M. Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326; Smith v. Hill (1891) 89 Cal. 122, 126, 26 P. 644; Loney v. Scott (1910) 112 P. 172, 57 Or. 378, 383.

A locator in possession of an existing valid mining claim is not required to file an adverse claim to a subsequent entry of a town site. Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378, 417.

4. Mineral lands not acquired.—The provision of this section does not constitute a reservation of minerals to the United States, but it only imports that the provisions by which town sites are transferred shall not be the means of passing title to the minerals named, or to valid mining claims existing thereon.

Davis v. Weibbold (1891) 11 Sup. Ct. 628, 632, 139 U. S. 507, 35 L. Ed. 238; Golden v. Murphy (1909) 103 P. 394, 105 P. 99, 31 Nev. 395, 418.

Mining ground is expressly excluded from the force and effect of a town-site patent by the language of the patent itself and also by this section of the statute. King v. Thomas (1887) 12 P. 865, 6 Mont. 409, 414.

5. **Mines and mining claims excluded from town-site patent.**—No title can be acquired under the homestead or town-site laws to lands known at the time of sale to be valuable for minerals. Deffeback v. Hawke (1885) 6 Sup. Ct. 95, 100, 115 U. S. 392, 29 L. Ed. 423; Shaw v. Kellogg (1898) 18 Sup. Ct. 632, 643, 170 U. S. 312, 42 L. Ed. 1050; Sweet v. U. S. (1915) 228 Fed. 421, 143 C. C. A. 3; Bonner v. Meikle (C. C. 1897) 82 Fed. 697; Reilly v. Berry (1887) 15 P. 726, 2 Ariz. 272, 274; Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 331; Old Dominion Copper Min., etc., Co. v. Haverly (1907) 11 Ariz. 241, 253, 90 P. 333; Dower v. Richards (1887) 73 Cal. 477, 15 P. 105; Richards v. Dower (1889) 81 Cal. 44, 51, 22 P. 304; Emerson v. Kennedy Min. & Mill. Co. (1915) 147 P. 939, 169 Cal. 718; Hawke v. Deffeback (1885) 22 N. W. 480, 4 Dak. 20, 29; Golden v. Murphy (1909) 103 P. 394, 31 Nev. 395; rehearing denied (1909) 105 P. 99, 31 Nev. 395. See Dower v. Richards (1894) 14 Sup. Ct. 452, 151 U. S. 658, 38 L. Ed. 305; Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378; Talbott v. King (1886) 9 P. 434, 6 Mont. 76. See Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 632, 139 U. S. 508, 35 L. Ed. 238 (affirming Richards v. Dower [1889] 81 Cal. 44, 22 Pac. 304); Dower v. Richards (1894) 14 Sup. Ct. 452, 454, 151 U. S. 658, 38 L. Ed. 305; Larned v. Jenkins (1902) 113 Fed. 634, 51 C. C. A. 344; Northern Pac. R. Co. v. Barden (C. C. 1891) 46 Fed. 592, 600 (reversed [1894] 14 Sup. Ct. 1030, 154 U. S. 288, 38 L. Ed. 992); Bonner v. Meikle (C. C. 1897) 82 Fed. 697; Ritter v. Lynch (C. C. 1903) 123 Fed. 930, 931; Smith v. Hill (1891) 89 Cal. 122, 26 P. 644; Callahan v. James (1903) 141 Cal. 291, 293. And see Kansas City Min., etc., Co. v. Clay (1892) 29 P. 9, 3 Ariz. 326, 332; Casey v. Thieviege (1897) 48 P. 394, 19 Mont. 341, 353, 61 Am. St. Rep. 511.

In ejectment against one claiming under a town-site patent, where plaintiff relies on a subsequently issued patent of the land as mineral, raising the presumption that it was mineral land when the town-site patent was issued, defendant should be allowed to prove that it was not known to be mineral land. Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 139 U. S. 507, 35 L. Ed. 238, reversing Weibbold v. Davis (1887) 7 Mont. 107, 14 Pac. 865.

A location void for uncertainty prior to a town site afterwards amended and made the basis of a patent will not defeat a town-site patent prior to such amendment. The Tombstone Town Site Cases (Ariz. 1887) 15 Pac. 26; Blackmore v. Reilly (1888) 17 Pac. 72, 2 Ariz. 442.

A town-site patent does not vest a right in lands known at the time to be mineral lands. Id.

A location uncertain as to lands claimed, unaided by proof of monuments, possession, or working, cannot be evidence that lands were then known to be mineral lands. Id.

The mere possession of shafts, dumps, etc., on an exhausted vein, which has been abandoned, does not amount to a mining claim, so as to prevent the land from passing by town-site patent. Richards v. Dower (1889) 81 Cal. 44, 22 Pac. 304.

Where a patent to a town site has issued, a deed from the town authorities, of a town lot, vests in the grantee a title which cannot be afterwards questioned collaterally, if at the time the patent issued no mine had been discovered, and the land was not known to be mineral. McCormick v. Sutton (1893) 97 Cal. 373, 32 Pac. 444.

A town-site entry can give no title to a valid mining claim, though it was not known at the time that the claim contained minerals of sufficient value to justify expenditure for extracting them. Callahan v. James (1903) 74 P. 853, 141 Cal. 291, reversing judgment (1902) 71 P. 104.

The land department is only authorized to issue patents to the probate judge for town-site purposes on the public lands, not lands previously granted and sold or reserved from sale; and the act authorizing the issue of such patents forbids the department to include in the patent any mines, mining claim, or possession. Silver Bow Mining & Milling Co. v. Clarke (1885) 5 Mont. 378, 5 Pac. 570.

Where mining ground did not pass under a town-site patent the locator is entitled to extralateral rights and a reservation in the town-site patent is in accordance with the provisions of this act. Golden v. Murphy (1909) 103 P. 394; 105 P. 99, 31 Nev. 395, 408.

6. **Mineral character of lands excluded from town-site patent.**—In order to except mines or mineral lands from the operation of a town-site patent it is not sufficient that the lands do in fact contain valuable minerals, but they must be known to contain minerals of such extent and value as to justify expenditures for the purpose of extracting them. Deffeback v. Hawke (1885) 6 S. Ct. 95, 115 U. S. 392, 404, 29 L. Ed. 423; Davis v. Weibbold (1891) 11 S. Ct. 628, 139 U. S. 507, 518, 35 L. Ed.

238; Dower v. Richards (1894) 14 S. Ct. 452, 151 U. S. 658, 663, 38 L. Ed. 305; Migeon v. Manta Central R. Co. (C. C. A. 1896) 77 Fed. 249, 256; Montana Central R. Co. v. Migeon (C. C. 1895) 68 Fed. 811, 815; Bonner v. Meikle (C. C. 1897) 82 Fed. 697; U. S. v. Central Pac. R. Co. (C. C. 1898) 84 Fed. 218, 220; Id. (C. C. 1899) 93 Fed. 871, 873; Brownfield v. Bier (1895) 39 P. 461, 15 Mont. 403, 414; Horsky v. Moran (1898) 53 P. 1064, 21 Mont. 345, 363 (distinguishing Golden v. Murphy [1909] 103 P. 394, 105 P. 99, 31 Nev. 395, 408).

7. Millsite excluded from town-site patent.—Under the town-site laws no title can be acquired to a mill site located in connection with a mining claim. Davis v. Weibbold (1891) 11 S. Ct. 628, 139 U. S. 507, 517, 35 L. Ed. 238; Cleary v. Skiffich (1901) 65 P. 59, 28 Colo. 362, 369, 89 Am. St. Rep. 207.

This section applies also to a mill site properly located, and the town-site patent carries no title to the mill site. Hartman v. Smith (1887) 7 Mont. 19, 14 Pac. 648.

8. Discovery of mineral after town-site patent.—The title under a town-site patent where it was not known that such lands contain valuable minerals at the time the patent was issued is not impaired by a subsequent discovery of valuable minerals in such lands. Davis v. Wiebbold (1891) 11 Sup. Ct. 628, 631, 139 U. S. 507, 35 L. Ed. 238; Dower v. Richards (1894) 14 S. Ct. 452, 151 U. S. 658, 663, 38 L. Ed. 305; Moran v. Horsky (1900) 20 Sup. Ct. 856, 858, 178 U. S. 205, 44 L. Ed. 1038; Migeon v. Montana Central R. Co. (1896) 77 Fed. 249, 256, 23 C. C. A. 156; Smith v. Hill (1891) 89 Cal. 122, 26 Pac. 644. See Olive Land & Dev. Co. v. Olmstead (C. C. 1900) 103 Fed. 568; Chambers v. Jones (1895) 42 P. 758, 17 Mont. 156, 162; Horsky v. Moran (1898) 53 P. 1064, 21 Mont. 345, 363.

A town-site patent will not be defeated by discovery of mineral and location of mineral lands as such after the town-site patent. The Tombstone Town-Site Cases (Ariz. 1887) 15 Pac. 26; Blackmore v. Reilly (1888) 17 Pac. 72, 2 Ariz. 442.

9. Effect of town-site patent as against mining claimant.—A patent for a town site cannot be attacked by one whose rights, if any, in the land, attached after issue of the patent, on the ground that the land was theretofore known to be mineral land, but it can be assailed only in a direct proceeding by the United States. Carter v. Thompson (C. C. 1894) 65 Fed. 329.

A town site patent issued by the land office officials cannot be collaterally attacked by private parties locating mining claims subsequent to the entry of the town site and issuance of the patent, on the theory that the land covered by the patent was known to be mineral at the time of its entry, and hence did not pass by the patent. Board of Education of City of Deadwood v. Mansfield (1903) 95 N. W. 286, 17 S. D. 72, 106 Am. St. Rep. 771.

10. Mineral patent.—The existence of prior possessory rights of mineral lands, whether in town sites or otherwise, is a matter properly cognizable by the land department when application is made for a patent, unless Congress has referred it to local tribunals. Steel v. Smelting Co. (1882) 1 Sup. Ct. 389, 392, 106 U. S. 447, 450, 27 L. Ed. 226.

11. —— Priorities.—Where a patent to a town site and a patent to a mining claim conflict, the one will be sustained which first vests the right. The Tombstone Town-Site Cases (1887) 15 Pac. 26, 2 Ariz. 272; Blackmore v. Reilly (1888) 17 Pac. 72, 2 Ariz. 442.

Where no minerals were known to exist at the time it was issued, a town-site patent is paramount to a mineral patent issued at a later date, where the original mining location, made before the town-site patent was issued, was so uncertain that the land could not be identified, and was not amended until after the town-site patent was issued. Blackmore v. Reilly (Ariz. 1888) 17 Pac. 72, following Reilly v. Blackmore (1887) 15 Pac. 26, 2 Ariz. 272.

Mining claims legally located are prior to subsequent town-site entries and the patent when issued dates by relation to the time of the location. Silver Bow Min., etc., Co. v. Clark (1885) 5 P. 570, 5 Mont. 378; Talbott v. King (1886) 9 P. 434, 6 Mont. 76; Murray v. Buol (1887) 12 P. 858, 6 Mont. 397.

12. —— Adverse claim.—Occupants of lots in a town located on public lands, who have built on and improved the same, have a possessory right, which entitles them to contest the issuance of a patent to the claimant of a mining location covering such lots, though neither they nor the authorities of the town have taken any steps to secure title to themselves. Bonner v. Meikle (C. C. 1897) 82 Fed. 697.

Claimants claiming title, under a town-site patent, to the surface ground of a mining claim over which the town site is extended, are not relieved by such town-site patent from setting up their adverse claims on notice of application for a patent to the mining claim, and their failure to assert their claims before such patent is issued bars them from doing so thereafter. Butte City Smokehouse Lode Cases (1887) 6 Mont. 397, 12 Pac. 858.

A town-site entry and patent can only embrace land not known to be mineral at the time of entry, and therefore a town-site patentee has no standing as an adverse claimant against an application for patent by a mineral claim-

ant, as this question must be decided by the land department, and a decision by a court on that question would not be binding or relieve the department from the duty of making its own decision. Wright v. Town of Hartville (1905) 81 Pac. 649, 82 P. 450, 13 Wyo. 497, 507.

§ 4799. (Act March 3, 1891, c. 561, § 16.) Town-site entries on mineral lands; title to minerals and mining-claims not acquired; title to lots subject to mining rights.

Town-site entries may be made by incorporated towns and cities on the mineral lands of the United States, but no title shall be acquired by such towns or cities to any vein of gold, silver, cinnabar, copper, or lead, or to any valid mining claim or possession held under existing law. When mineral veins are possessed within the limits of an incorporated town or city, and such possession is recognized by local authority or by the laws of the United States, the title to town lots shall be subject to such recognized possession and the necessary use thereof and when entry has been made or patent issued for such town sites to such incorporated town or city, the possessor of such mineral vein may enter and receive patent for such mineral vein, and the surface ground appertaining thereto: Provided, That no entry shall be made by such mineral-vein claimant for surface ground where the owner or occupier of the surface ground shall have had possession of the same before the inception of the title of the mineral-vein applicant. (26 Stat. 1101.)

This section was part of the act to repeal timber-culture laws, etc., cited above.

See note to R. S. § 2392, ante, § 4798.

Notes of Decisions

Town sites on mineral lands.—See, also, notes to §§ 4790, 4798, ante.

No title to a prior existing valid placer mining claim can be acquired by a town-site lot claimant through subsequent patent issued to the town-site trustee. Chilberg v. Consumers' Milk Co. (1907) 3 Alaska, 235. See, also, Murray v. Buol (1887) 6 Mont. 397, 12 Pac. 858.

Adverse claim.—The owner of a valid mining claim, over which is sought to be extended a town-site patent by the United States, is not required to file an adverse claim. Chilberg v. Consumers' Milk Co. (1907) 3 Alaska, 235.

§ 4800. (R. S. § 2393.) Military or other reservations, etc.

The provisions of this chapter shall not apply to military or other reservations heretofore made by the United States, nor to reservations for light-houses, custom-houses, mints, or such other public purposes as the interests of the United States may require, whether held under reservations through the Land-Office by title derived from the Crown of Spain, or otherwise.

Act March 2, 1867, c. 177, 14 Stat. 541.

Notes of Decisions

Entry on military reservations.—Settlement and entry of a public military reservation cannot be made under the land laws. Crawford v. Burr (1903) 2 Alaska, 33; Gavigan v. Crary (1905) 2 Alaska, 370.

§ 4801. (R. S. § 2394.) Inhabitants of towns on public lands, right of, to enter.

The inhabitants of any town located on the public lands may avail themselves, if the town authorities choose to do so, of the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine; and in addition to the minimum price of the lands embracing any town-site so entered, there shall be paid by the parties availing themselves of such provisions all costs of surveying and platting any such town-site, and expenses incident thereto incurred by the United States, before any patent issues therefor; but nothing contained in the sections herein cited shall prevent the issuance of patents to persons who have made or may hereafter make entries, and elect

to proceed under other laws relative to town-sites in this chapter set forth.

Act June 8, 1868, c. 53, 15 Stat. 67.

R. S. §§ 2387, 2388 and 2389, mentioned in this section, are set forth ante, §§ 4791–4793.

§ 4802. (Act Sept. 30, 1890, c. 1121.) Entries by cities and towns for cemetery and park purposes.

Incorporated cities and towns shall have the right, under rules and regulations prescribed by the Secretary of the Interior, to purchase for cemetery and park purposes not exceeding one-quarter section of public lands not reserved for public use, such lands to be within three miles of such cities or towns: Provided, That when such city or town is situated within a mining district, the land proposed to be taken under this act shall be considered as mineral lands, and patent to such land shall not authorize such city or town to extract mineral therefrom, but all such mineral shall be reserved to the United States, and such reservation shall be entered into such patent. (26 Stat. 502.)

This was an act entitled "An act to authorize entry of public lands by incorporated cities and towns for cemetery and park purposes."

§ 4802a. (Act July 9, 1914, c. 138.) Patents to transferees of town lots purchased from United States at public sale.

In all cases where town lots were sold by the United States at public sale, and the purchaser at such sale had transferred his interest in any such lot prior to the eleventh day of October, nineteen hundred and eleven, and patent has not been issued in the name of the original purchaser, the Commissioner of the General Land Office may issue a patent in the name of the transferee where full payment of the purchase price has been made and satisfactory evidence of the transfer has been furnished: Provided, That it be shown that the original purchaser is dead, or that after due inquiry his whereabouts can not be ascertained, and that the instrument of transfer given by the original purchaser has been lost or destroyed. (38 Stat. 454.)

This was an act entitled "An act providing for the issuance of patents to transferees of town lots purchased from the United States at public sale in certain cases," cited above.

CHAPTER NINE

Survey of the Public Lands

Sec.
4803. Rules of survey.
4804. Boundaries and contents of public lands, how ascertained.
4805. Lines of division of half quarter-sections, how run.
4806. Contracts for surveys of public lands, when binding.
4807. What instructions to be deemed part of contract.
4808. Prices of surveys, how established.
4809. Cost of survey of private land claims to be reported and paid.
4810. Cost of survey of private land claims to be paid.
4811. When survey may be had by settlers in township.
4812. Deposit for expenses of surveys deemed an appropriation, etc.
4813. Repayment of excess of deposits to cover cost of surveys of mineral lands.
4814. Deposits made by settlers for public surveys to go in part payment of lands.
4815. Deposits in Louisiana applicable to resurveys; certificates of deposit receivable in payment for land.
4816. Augmented rates for surveys of lands covered with forests, etc., in Oregon.
4817. Augmented rates for surveys of lands covered with forests, etc., in California and Washington.
4818. Geological surveys, extension of public surveys, expenses of subdividing.

Sec.
4819. Surveys on rivers in certain cases.
4820. Lines of surveys in Nevada.
4821. Geodetic method of survey in Oregon and California.
4822. Rectangular mode of survey, when may be departed from.
4823. Compensation for surveying by the day in Oregon and California.
4824. Resurveys or retracements of surveys to mark boundaries of public lands undisposed of.
4825. Protection of surveyor by marshal of district.

§ 4803. (R. S. § 2395.) Rules of survey.

The public lands shall be divided by north and south lines run according to the true meridian, and by others crossing them at right angles, so as to form townships of six miles square, unless where the line of an Indian reservation, or of tracts of land heretofore surveyed or patented, or the course of navigable rivers, may render this impracticable; and in that case this rule must be departed from no further than such particular circumstances require.

Second. The corners of the townships must be marked with progressive numbers from the beginning; each distance of a mile between such corners must be also distinctly marked with marks different from those of the corners.

Third. The township shall be subdivided into sections, containing, as nearly as may be, six hundred and forty acres each, by running through the same, each way, parallel lines at the end of every two miles; and by making a corner on each of such lines, at the end of every mile. The sections shall be numbered respectively, beginning with the number one in the northeast section and proceeding west and east alternately through the township with progressive numbers till the thirty-six be completed.

Fourth. The deputy surveyors, respectively, shall cause to be marked on a tree near each corner established in the manner described, and within the section, the number of such section, and over it the number of the township within which such section may be; and the deputy surveyors shall carefully note, in their respective field-books, the names of the corner-trees marked and the numbers so made.

Fifth. Where the exterior lines of the townships which may be subdivided into sections or half-sections exceed, or do not extend six miles, the excess or deficiency shall be specially noted, and added to or deducted from the western and northern ranges of sections or half-sections in such township, according as the error may be in running the lines from east to west, or from north to south; the sections and half-sections bounded on the northern and western lines of such townships shall be sold as containing only the quantity expressed in the returns and plats respectively, and all others as containing the complete legal quantity.

Sixth. All lines shall be plainly marked upon trees, and measured with chains, containing two perches of sixteen and one-half feet each, subdivided into twenty-five equal links; and the chain shall be adjusted to a standard to be kept for that purpose.

Seventh. Every surveyor shall note in his field-book the true situations of all mines, salt licks, salt springs, and mill-seats which come to his knowledge; all water-courses over which the line he runs may pass; and also the quality of the lands.

Eighth. These field-books shall be returned to the surveyor-general, who shall cause therefrom a description of the whole lands surveyed to be made out and transmitted to the officers who may superintend the sales. He shall also cause a fair plat to be made of the townships and fractional parts of townships contained in the lands, describing the subdivisions thereof, and the marks of the corners. This plat shall be recorded in books to be kept for that purpose;

and a copy thereof shall be kept open at the surveyor-general's office for public information, and other copies shall be sent to the places of the sale, and to the General Land-Office.

Act May 18, 1796, c. 29, § 2, 1 Stat. 465. Act May 10, 1800, c. 55, § 3, 2 Stat. 73.

Surveys of forest reserves were provided for by Act June 4, 1897, c. 2, § 1, par. 2, post, § 5124, and Act March 3, 1899, c. 424, § 1, post, § 5136.

Surveys of abandoned military reservations were provided for by Act July 5, 1884, c. 214, § 2, post, § 5004.

The system of public land surveys was extended to Alaska by Act March 3, 1899, c. 424, § 1, post, § 5045.

Notes of Decisions

I. Making surveys and effect thereof
1. Basis of system.
2. Power to make surveys—Land department.
3. Survey essential to disposal.
4. Ingredients of survey.
5. Division of lands into townships and sections.
6. Fractional townships.
7. Township maps—Certification.
8. Erroneous or defective surveys and correction thereof.
9. Effect of erroneous designation of character of land.
10. Omissions of islands.
11. Conclusiveness and effect of surveys.
12. —— Change or correction of survey after disposal of lands.
13. Overlapping or conflicting surveys and priority.
14. Collateral attack on surveys.
15. Plat and survey as part of patent.
16. Surveys as evidence.
17. Judicial notice of surveys.
18. Title and rights of riparian owners.

II. Plats and field notes
19. Object of requirement.
20. Correction of errors.
21. Conclusiveness and effect as evidence.

I. MAKING SURVEYS AND EFFECT THEREOF

1. Basis of system.—Act May 18, 1796, is the basis of our present system of surveys. Morton v. Nebraska (1874) 88 U. S. (21 Wall.) 660, 667, 22 L. Ed. 639.

2. Power to make surveys—Land department.—See, also, notes to § 699, ante.

The power to make and correct surveys of public lands belongs to the political department of the government, and the decisions of the general land office are unassailable by the courts, except by direct proceedings. Cragin v. Powell (1888) 9 Sup. Ct. 200, 203, 128 U. S. 691, 32 L. Ed. 566. See, also, Stoneroad v. Stoneroad (1895) 15 Sup. Ct. 822, 827, 158 U. S. 240, 39 L. Ed. 966; French v. U. S. (1914) 49 Ct. Cl. 337.

Courts cannot enjoin a survey directed by the land department claiming lands to be unsurveyed. Kirwan v. Murphy (1903) 23 Sup. Ct. 599, 603, 189 U. S. 35, 47 L. Ed. 698. Compare Kirwan v. Murphy (1897) 83 Fed. 275, 28 C. C. A. 348, appeal dismissed (1898) 18 Sup. Ct. 592, 170 U. S. 205, 42 L. Ed. 1009.

The approval of a survey by the commissioner of the general land office is not necessary. Frasher v. O'Connor (1885) 5 Sup. Ct. 1141, 115 U. S. 102, 29 L. Ed. 311.

The validity of a survey will not be affected by the interest in the grant of the deputy surveyor who made it, where the survey has been subsequently approved by the surveyor general of the United States and by the department at Washington. Mott v. Smith (1860) 16 Cal. 533.

3. Survey essential to disposal.—A patent conveys only land which has been surveyed. Horne v. Smith (1895) 15 Sup. Ct. 988, 990, 159 U. S. 40, 40 L. Ed. 68; State v. Tuesburg Land Co. (Ind. App. 1915) 109 N. E. 530, rehearing denied (1916) 111 N. E. 342. And see Niles v. Cedar Point Club (1899) 20 Sup. Ct. 124, 127, 175 U. S. 300, 44 L. Ed. 171; French Glenn Live Stock Co. v. Springer (1902) 22 Sup. Ct. 563, 564, 185 U. S. 47, 46 L. Ed. 800; Kean v. Calumet Canal & Imp. Co. (1903) 23 Sup. Ct. 651, 190 U. S. 452, 47 L. Ed. 1134; Security L. & E. Co. v. Burns (1904) 24 Sup. Ct. 424, 430, 193 U. S. 167, 48 L. Ed. 662; Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630.

The words "public lands" or "public domain," as used in national legislation, mean such lands as are subject to sale or other disposal under the general land laws of the United States, and unsurveyed lands do not pass by a patent issued under a grant of public lands. Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630. See, also, Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 657, 185 U. S. 373, 46 L. Ed. 954; U. S. v. Curtner (C. C. 1889) 38 Fed. 1 (decree reversed [1893] 13 Sup. Ct. 985, 149 U. S. 662, 37 L. Ed. 890); Cobban v. Hyde (D. C. 1913) 212 Fed. 480.

The government survey creates, and does not merely identify, sections of land, and a filing of selections of lieu lands by numbered sections before survey is wholly ineffective. Sawyer v. Gray (D. C. 1913) 205 Fed. 160.

4. Ingredients of survey.—Running lines with compass and chain, establishing corners, marking trees and other

objects on the ground, giving bearings and distances, and making field notes and plats, are the ingredients of an actual survey. Muse v. Arlington Hotel Co. (C. C. 1895) 68 Fed. 637. See Winter v. U. S. (D. C. 1848) Fed. Cas. No. 17,895.

5. Division of lands into townships and sections.—Public lands are to be surveyed into townships, six miles square, and each, in turn, subdivided into 36 sections of a mile square, except where a line of an Indian reservation or of a tract of land theretofore surveyed or patented or the course of a navigable river may render this impracticable, and in that case the rule must be departed from no further than such particular circumstances require. Johnson v. Johnson (1908) 95 P. 499, 14 Idaho, 561; Moss v. Ramey (1908) 95 P. 513, 14 Idaho, 598. See, also, St. Paul & P. R. Co. v. Schurmeir (1868) 7 Wall. 272, 285, 19 L. Ed. 74; Hardin v. Jordan (1891) 11 Sup. Ct. 808, 811, 140 U. S. 371, 35 L. Ed. 428; Jefferies v. East Omaha Land Co. (1890) 10 Sup. Ct. 518, 522, 134 U. S. 178, 33 L. Ed. 872; Shively v. Bowlby (1894) 14 Sup. Ct. 548, 560, 152 U. S. 1, 38 L. Ed. 331; Niles v. Cedar Point Club (1899) 20 Sup. Ct. 124, 127, 175 U. S. 300, 44 L. Ed. 171; Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 656, 190 U. S. 452, 47 L. Ed. 1134 (dissenting opinion); Mendota Club v. Anderson (1899) 78 N. W. 185, 101 Wis. 479.

The government survey of public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter sections. Bullock v. Rouse (1889) 81 Cal. 590, 22 Pac. 919. See, also, Kean v. Roby (1896) 145 Ind. 221, 42 N. E. 1011; Johnson v. Hurst (1904) 77 P. 784, 10 Idaho, 308; Goltermann v. Schiermeyer (1892) 111 Mo. 404, 19 S. W. 484, 20 S. W. 161; Coombs' Lessee v. Lane (1854) 4 Ohio St. 112; Whitney v. Detroit Lumber Co. (1890) 78 Wis. 240, 47 N. W. 425.

Until public land is officially surveyed, it cannot be described or conveyed by reference thereto as sections or subdivisions of sections. Carroll v. U. S. (1907) 154 Fed. 425, 83 C. C. A. 245.

There can be no township on the public lands except it has been actually surveyed and marked. Powers v. Jackson (1875) 50 Cal. 429.

Where all the lines of the north half of a section were actually run but the west, the survey was sufficient to authorize the issuance of a patent. Holler v. Emerson (1896) 112 Cal. 573, 44 Pac. 1073.

Even after a principal meridian and a base line are established and the exterior lines of the township surveyed, the sections or subsections do not have a legal existence, until they are established by an approved survey under authority of Congress. Smith v. City of Los Angeles (Cal. 1910) 112 P. 307.

A government survey which actually runs its section lines every two miles across swamp lands, and makes the corners on each line at the end of every mile, is a legal survey. Tolleston Club of Chicago v. State (1894) 141 Ind. 197, 40 N. E. 690.

6. Fractional townships.—It does not make a township "fractional" because in laying it off into sections there is a deficiency or excess to be carried into the western or northern ranges of half and quarter sections, but townships are fractional only when the outer boundary lines cannot be carried out in full because of a water course, Indian boundary, or some other external interference. Goltermann v. Schiermeyer (1892) 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

7. Township maps — Certification. — The surveyor general of the United States is the proper person to certify the township maps. Millandon v. McDonough (1841) 18 La. 102; Lawrence v. Grout (1857) 12 La. Ann. 835.

8. Erroneous or defective surveys and correction thereof.—A sale of the public lands, by the executive of the federal government, before the public surveys, may be treated as void; but if the public survey be regularly made, returned, and approved, a sale would be valid, though the survey should be defective or erroneous, if such defect does not render the identity of the tract uncertain as to locality or quantity. Rector v. Gaines (1857) 19 Ark. 70.

Before the courts will correct original United States surveys that have been upheld by the land department, and overthrow the credit due them as established by field notes, a mistake must be shown by clear and convincing testimony. Blair v. Brown (1897) 50 P. 483, 17 Wash. 570.

Surveys by United States surveyors, though sanctioned by the principal deputy surveyor of the district, may be corrected when erroneous. Kittridge v. Landry (La. 1842) 2 Rob. 72; Same v. Dugas (La. 1842) 2 Rob. 85. See, also, Murphy v. Sumner (1887) 74 Cal. 316, 16 Pac. 3.

9. Effect of erroneous designation of character of land.—A tract of agricultural land susceptible of cultivation, but which by wrongful act or error of the surveyor was omitted from the survey, and was designated and meandered as a lake, was as much public land after the survey, and as much within the operation of the Federal settlement laws, as if its true character had been reported by the surveyor. It merely was left unsurveyed. Gauthier v. Mor-

rison (1914) 34 Sup. Ct. 384, 232 U. S. 452, 58 L. Ed. 680.

10. Omissions of islands.—See, also, notes to § 4918, post.

Errors of the government surveyor in failing to extend the survey over an island in a navigable stream did not make it any the less a part of the public domain. Scott v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107; Moss v. Ramey (1916) 36 Sup. Ct. 183, 239 U. S. 538, 60 L. Ed. 425; State v. Nolegs (1914) 139 P. 943, 40 Okl. 479.

11. Conclusiveness and effect of surveys.—The public, by the act of the proper officer, has a right to fix and declare the place of a river for the purpose of a survey and sale of lands, and a grantee cannot contradict the survey and claim beyond it by showing that the true channel of the river was really at another place. Bates Illinois Central R. Co. (1861) 1 Black, 204, 206, 17 L. Ed. 158.

A party cannot be adjudged a wrongdoer who simply asserts, by a survey filed in the land office, the full extent of the title he believes he has, and resorts to the only means left to him of ascertaining its true limits. United States v. Maxwell Land-Grant Co. (C. C. 1886) 26 Fed. 118, decree affirmed (1887) 7 Sup. Ct. 1015, 121 U. S. 325, 30 L. Ed. 949.

Until the government elects to correct mistakes in an original survey of public land and asserts a claim to the lands by virtue of such mistakes, no one can complain or dispute the title of the holders of a prima facie title. Little v. Williams (Ark. 1908) 113 S. W. 340.

Where the surveyor general examines the field notes in a survey of a portion of the public land plats, and returns it as one tract only, under the instructions from the land office, it is made final and conclusive as to its being but one tract, and the quantity contained in it. Hunt v. Rowley (1877) 87 Ill. 491.

The surveyor may in the first instance determine whether a given river shall be included, but his decision is not conclusive. State v. Tuesburg Land Co. (Ind. App. 1915) 109 N. E. 530, rehearing denied (Ind. App. 1916) 111 N. E. 342.

A survey, fixing land covered with water as being a lake, followed by a sale of adjacent land with reference to the survey, is not conclusive, precluding the land department from determining that the land is a swamp, if the purchasers of the adjacent land are not prejudiced. Rood v. Wallace (1899) 79 N. W. 449, 109 Iowa, 5.

Locations by the surveyors cannot take from nor add to the rights of individuals recognized by the proper government officers. Kittridge v. Breaud (La. 1842) 2 Rob. 40.

One holding under the United States cannot, by an ex parte survey by another claimant or a government surveyor, be deprived of the quantity of land to which he is entitled without his assent. Sprigg v. Hooper (La. 1844) 9 Rob. 248.

Unless there is some other action of government besides the surveyor general's approval of a survey on which land is designated as public, the title thereto cannot be disturbed, much less will such approval be proof that the land is public. Roubieu v. Michel (1847) 2 La. Ann. 808.

The United States surveys and approved township maps must control the action of surveyors appointed by the court to establish the boundary line between parties, both of whom derive title under a patentee of the general government. Stewart v. Boyd (1860) 15 La. Ann. 171.

After the government has sold lands according to a survey and plat it cannot dispute the truth of such survey and plat. St. Paul S. & T. F. R. Co. v. First Division St. P. & R. R. Co. (1879) 26 Minn. 31, 49 N. W. 303.

Under the practical construction given to the laws of the United States previous to 1836, United States surveys, when made and approved by the surveyors general, stood as the authorized governmental surveys until they were set aside by some authority having a right of surpervision over the official action of the surveyors general, although they were not transmitted to the general land office, and did not receive the formal approval of the commissioner, or of the department to which he was subordinate. Dent v. Sigerson (1860) 29 Mo. 489.

Surveys are merely evidence of location and boundary of land conveyed by a patent, and decide nothing as to the validity or superiority of the title to the land located. Gibson v. Chouteau (1867) 39 Mo. 536.

Where a quarter section corner was fixed by the surveyor general by stating the distance thereof from the section corner, and the government accepted the plat and sold the land in pursuance thereto, such acceptance through the political departments adopted the plat with all the marks and figures thereon, and is not reviewable by the courts. Goltermann v. Schiermeyer (1892) 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

12. —— Change or correction of survey after disposal of lands.—Where the United States parts with title to land constituting part of the public domain, a new survey cannot affect rights of those holding under such prior grant or patent. Barringer v. Davis (1909) 120 N. W. 65, 141 Iowa, 419 (reversing judgment on rehearing [1907], 112 N. W. 208); Cage v. Danks (1858) 13 La. Ann. 128. See, also, Kean v. Roby (1896) 145 Ind. 221, 42 N. E. 1011; Slack v. Orillion (1839) 13 La. 56, 33 Am. Dec. 551;

Ferry v. Fowler (Utah, 1910) 106 P. 506.

The title to lands embraced within patents from the United States in pursuance of Swamp Land Act, cannot be affected by a resurvey of the land covered by water at the time of the original survey, and patents granted, pursuant to such resurvey, for tracts below the original water line. Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 652, 190 U. S. 452, 47 L. Ed. 1134, affirming judgment Mason v. Calumet Canal & Improvement Co. (1898) 50 N. E. 85, 150 Ind. 699.

Where the United States surveyed and platted land about a lake, and then patented the tracts according to its plats, which showed these tracts bounded by the lake, and made no attempt to correct its survey until after complainants had purchased of the patentees for full value, in reliance on the plats and patents of the government, the United States cannot correct the survey and revoke its grants. Kirwan v. Murphy (1901) 109 Fed. 354, 48 C. C. A. 399, decree reversed (1903) 23 Sup. Ct. 599, 189 U. S. 35, 47 L. Ed. 698.

The land department has no power to correct errors in a survey of public lands after such lands have been sold, by reference to such survey, to purchasers in good faith; the remedy of the government, if a mistake has been made to its injury, being by a suit in the courts. Murphy v. Kirwan (C. C. 1900) 103 Fed. 104.

Where the United States has caused a township of public land, containing a navigable lake, to be surveyed, and a plat of the same made, showing the meander line of the lake, and the fractional subdivisions of land bordering and having riparian rights thereon, and has sold all the lands in the township in accordance with such plat, the land department has no jurisdiction or authority, on a claim that the meander line as shown on the plat is inaccurate, and is in fact at some distance from the lake, to survey and sell the lands lying between such line and the lake, as against bona fide owners of fractional lots, who purchased the same on account of their riparian rights, and especially where no boundaries were marked on the ground by the surveyor, so that the location of the land could only be determined by purchasers by reference to the lake shore, as the only natural boundary given. Id.

Where the United States has parted with its title, and the controversy is between persons asserting conflicting claims under grants or patents based upon the official survey, such survey is conclusive, though incorrect, and the land department has no authority or jurisdiction to affect the rights of either party by directing a new survey or the issuance of a new patent. Barringer v. Davis (1909) 120 N. W. 65, 141 Iowa, 419.

13. Overlapping or conflicting surveys and priority.—Of two overlapping surveys, the one first made has priority. Van Amburgh v. Randall (1893) 115 Mo. 607, 22 S. W. 636.

Any calls of the second survey conflicting with monuments and calls of the first must yield thereto. Id.

14. Collateral attack on surveys.—The government's official surveys are not open to collateral attack in an action at law between private parties. Horne v. Smith (1895) 15 Sup. Ct. 988, 989, 159 U. S. 40, 40 L. Ed. 68; Whitaker v. McBride (1905) 25 Sup. Ct. 530, 531, 197 U. S. 510, 49 L. Ed. 857; Murphy v. Tanner (1910) 176 Fed. 537, 100 C. C. A. 125; Same v. Shea (1910) 176 Fed. 544, 100 C. C. A. 132 (writ of certiorari denied Tanner v. Murphy [1911] 31 Sup. Ct. 716, 220 U. S. 612, 55 L. Ed. 609); Kneeland v. Korter (1905) 82 P. 608, 40 Wash. 359, 1 L. R. A. (N. S.) 745. See, also, Russell v. Maxwell Land Grant Co. (1895) 15 Sup. Ct. 827, 158 U. S. 253, 39 L. Ed. 971; Little v. Williams (Ark. 1908) 113 S. W. 340; Board of Directors of Public Schools of Parish of Orleans v. New Orleans Land Co. (La. 1915) 70 South. 27; Brown v. Milliman (1899) 78 N. W. 785, 119 Mich. 606.

15. Plat and survey as part of patent.—The government plat and survey referred to in a patent become a part of the same as if copied therein. Chapman & Dewey Lumber Co. v. St. Francis Levee District (1914) 34 Sup. Ct. 297, 299, 232 U. S. 186, 58 L. Ed. 564; Foss v. Johnstone (Cal. 1910) 110 P. 294, and authorities there cited; Campbell v. Wood (1893) 116 Mo. 196, 22 S. W. 796. See, also, Cragin v. Powell (1888) 9 Sup. Ct. 203, 205, 128 U. S. 691, 32 L. Ed. 566; Hunt v. Rowley (1877) 87 Ill. 491; Brown v. Milliman (1899) 78 N. W. 785, 119 Mich. 606, 6 Detroit Leg. N. 1; Goltermann v. Schiermeyer (1892) 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

A patent issued "according to the official plat" is limited by calls for bayous noted on the official plat certified to the state by the general land office and the interior department. Cragin v. Powell (1888) 9 Sup. Ct. 203, 205, 128 U. S. 691, 32 L. Ed. 566.

16. Surveys as evidence.—An ex parte survey of the exterior boundaries of a rejected Mexican grant, made by direction of the commissioner of the land office, after the lands embraced in the supposed grant have been officially surveyed and disposed of as public lands, is not admissible as evidence on the part of the government in a suit to vacate a patent. U. S. v. Central Pac. R. Co. (C. C. 1882) 11 Fed. 449.

A United States surveyor's survey or

map is inadmissible evidence to establish boundaries, without proof of the orders or authority under which he acted. The mere fact that the survey was made by the United States surveyor is no proof that it was a public survey authorized by law. Rose v. Davis (1858) 11 Cal. 133.

A survey which has not been duly approved and recorded in accordance with the practice in the office of the surveyor general is not admissible in evidence. Gamache v. Piquignot (1852) 17 Mo. 310.

The presumption that a deputy surveyor general, in surveying the boundary of an Indian reservation, regularly performed his official duty, may be rebutted. Barnhart v. Ehrhart (1898) 54 P. 195, 33 Or. 274.

17. Judicial notice of surveys.—The courts will take judicial notice of the government surveys and the legal subdivisions of the public lands. Smitha v. Flournoy's Adm'r (1872) 47 Ala. 345; Money v. Turnipseed (1874) 50 Ala. 499; Webb v. Mullins (1884) 78 Ala. 111; Ledbetter v. Borland (1901) 29 So. 579, 128 Ala. 418; Brannan v. Henry (1905) 39 South. 92, 142 Ala. 698, 110 Am. St. Rep. 55; Rucker v. Tennessee Coal, Iron & R. Co. (Ala. 1912) 58 So. 465; Elliott v. Coleman & Davis (Ala. 1911) 54 South. 491; Bittle v. Stuart (1879) 34 Ark. 224; Stephens v. Stephens (Ark. 1913) 156 S. W. 837; Quinn v. Windmiller (1885) 67 Cal. 461, 8 Pac. 14; Faekler v. Wright (1890) 86 Cal. 210, 24 Pac. 996; Rogers v. Cady (1894) 104 Cal. 288, 38 Pac. 81, 43 Am. St. Rep. 100; Harrington v. Goldsmith (1902) 68 Pac. 594, 136 Cal. 168; Kimball v. McKee (1906) 86 Pac. 1089, 149 Cal. 435; Dickenson v. Breeden (1863) 30 Ill. (20 Peck) 279; Hill v. Bacon (1867) 43 Ill. 477; Gooding v. Morgan (1873) 70 Ill. 275; Kile v. Town of Yellowhead (1875) 80 Ill. 208; Gardner v. Eberhart (1876) 82 Ill. 316; Meacham v. Sunderland (1882) 10 Ill. App. (10 Bradw.) 123; O'Brien v. Krockinski (1893) 50 Ill. App. 456; McChesney v. City of Chicago (1898) 50 N. E. 191, 173 Ill. 75; Mossman v. Forrest (1866) 27 Ind. 233; Bannister v. Grassy Fork Ditching Ass'n (1875) 52 Ind. 178; Rich v. Same (1875) 52 Ind. 187; Buchanan v. Whitam (1871) 36 Ind. 257; Murphy v. Hendricks (1877) 57 Ind. 593; Dawson v. James (1878) 64 Ind. 162; Burton v. Ferguson (1880) 69 Ind. 486; Craven v. Butterfield (1881) 80 Ind. 503; Dutch v. Boyd (1881) 81 Ind. 146; Adams v. Harrington (1887) 114 Ind. 66, 14 N. E. 603; Peck v. Sims (1889) 120 Ind. 345, 22 N. E. 313; Richardson v. Hedges (1898) 49 N. E. 822, 150 Ind. 53; North v. Jones (1912) 100 N. E. 84, 53 Ind. App. 203; Wright v. Phillips (1849) 2 G. Greene, 191; Hypfner v. Walsh (1852) 3 G. Greene, 509; Dexter v. Cranston (1879) 41 Mich. 448, 2 N. W. 674; Quinn v. Champagne (1888) 38 Minn. 322, 37 N. W. 451; Muse v. Richards (1893) 70 Miss. 581, 12 South. 821; Shivers v. Farmers' Mut. Fire Ins. Co. (Miss. 1911) 55 So. 965; Campbell v. Wood (1893) 116 Mo. 196, 22 S. W. 796; Briant v. Garrison (1899) 150 Mo. 655, 52 S. W. 361; Cummings v. Winters (1886) 19 Neb. 719, 28 N. W. 302; Devine v. Burleson (1892) 35 Neb. 238, 52 N. W. 1112; Prieger v. Exchange Mut. Ins. Co. (1857) 6 Wis. 89; Atwater v. Schenck (1859) 9 Wis. 160.

But it is held that the courts will not take judicial notice of the fact that a particular quarter section is or is not fractional. Wendell v. Whitaker (1882) 28 Kan. 690.

The rule that the court may take judicial notice of variations in the quantity of land under the system of government surveys has no application to parties to a private contract for the sale of lands. Smith v. Johnson (1912) 138 N. W. 18, 30 S. Dak. 200.

18. Title and rights of riparian owners.—See notes to the following section and § 4918, post.

II. PLATS AND FIELD NOTES

19. Object of requirement.—All saline lands were reserved from sale whether marked on the plat of the surveyor general as such or not. Morton v. Nebraska (1874) 88 U. S. 660, 22 L. Ed. 639.

The ordinary surveys of public lands do not include any examination or exploration of them for mineral deposits. U. S. v. Smith (C. C. 1882) 11 Fed. 487, 491. See, also, Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20.

The object of the statute is to enable the officers in charge to determine whether the lands are patentable or not. Cowell v. Lammers (C. C. 1884) 21 Fed. 200, 205.

The object of the requirement that the surveyor shall note in his field book the situation of mines, etc., was to furnish the land department with information as to the character of the land. Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272.

It is the practice of the land department to require notation of evidences of mineral deposits and to treat all lands as to which no notation is made as nonmineral. West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189.

20. Correction of errors.—Where government field notes show that a government plat delineates land where there is no land according to such notes, the land department may at any time correct such plat to correspond to the field notes. Harrington v. Boehmer (1901) 66 P. 214, 489, 134 Cal. 196.

A government plat, corrected to correspond with the government field notes, supersedes the original plat. Id.

21. Conclusiveness and effect as evidence.—The field notes of the survey of public lands are competent evidence and have the force of a deposition. Kirby v. Lewis (C. C. 1889) 39 Fed. 66, 75. See, also, U. S. v. Breward (1842) 16 Pet. 143, 147, 10 L. Ed. 916; Same v. Low (1842) 16 Pet. 160, 166, 10 L. Ed. 923; Same v. Hanson (1842) 16 Pet. 196, 201, 10 L. Ed. 935.

The field notes are presumptively correct, and are prima facie evidence of the fact stated. They must be taken as true, till disproved by a clear preponderance of evidence. Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272. See, also, Johnston v. Morris (1896) 72 Fed. 890, 897, 19 C. C. A. 229; State v. Ball (1911) 133 N. W. 412, 90 Neb. 307.

The field and descriptive notes of a survey form a part of the survey, and are to be considered along with the plat. Heath v. Wallace (1891) 11 Sup. Ct. 380, 138 U. S. 573, 34 L. Ed. 1063.

Where the plats and field notes of the surveyors have been approved by the commissioner of the general land office, they are, as to all matters relating to the sale and disposition of the lands of the United States, conclusive and binding upon all persons dealing with the United States as well as upon the government itself. Mann v. Tacoma Land Co. (C. C. 1890) 44 Fed. 27, 29, affirmed (1894) 14 Sup. Ct. 820, 153 U. S. 273, 38 L. Ed. 714.

Copies of field notes of surveys of public lands, transmitted by the surveyor-general to the several land offices in the districts where the public lands are sold, are not admissible in evidence. Hamner v. Eddins (Ala. 1830) 3 Stew. 192.

Where the plats of a government survey of land in controversy and the field notes accompanying them showed that the lands when surveyed constituted the bed of a lake and were within the meandered lines thereof, they constituted prima facie evidence that the lands were a part of the lake bed. Little v. Williams (Ark. 1908) 113 S. W. 340.

The plat and field notes are prima facie evidence of the facts therein stated. Lattig v. Scott (1910) 107 P. 47, 17 Idaho, 506.

The official platting of lands by authority of the United States, indicating the character thereof as swamp lands or lands covered by the waters of a lake, as the same appears to the official surveyors when the original survey was made, is prima facie evidence as to their then character. Illinois Steel Co. v. Budzisz (1902) 90 N. W. 1019, 115 Wis. 68.

The map of a government survey of the land along a river, showing an island near the south bank at a point where an island was later shown to be located in the north half of the river, was insufficient to show that the island at the time of the survey was in the south half of the river. Farris v. Bentley (1910) 124 N. W. 1003, 141 Wis. 671.

§ 4804. (R. S. § 2396.) Boundaries and contents of public lands, how ascertained.

The boundaries and contents of the several sections, half-sections, and quarter-sections of the public lands shall be ascertained in conformity with the following principles:

First. All the corners marked in the surveys, returned by the surveyor-general, shall be established as the proper corners of sections, or subdivisions of sections, which they were intended to designate; and the corners of half and quarter sections, not marked on the surveys, shall be placed as nearly as possible equidistant from two corners which stand on the same line.

Second. The boundary-lines, actually run and marked in the surveys returned by the surveyor-general, shall be established as the proper boundary-lines of the sections, or subdivisions, for which they were intended, and the length of such lines, as returned, shall be held and considered as the true length thereof. And the boundary-lines which have not been actually run and marked shall be ascertained, by running straight lines from the established corners to the opposite corresponding corners; but in those portions of the fractional townships where no such opposite corresponding corners have been or can be fixed, the boundary-lines shall be ascertained by running from the established corners due north and south or east and west lines, as the case may be, to the water-course, Indian boundary-line, or other external boundary of such fractional township.

Third. Each section or subdivision of section, the contents whereof have been returned by the surveyor-general, shall be held and considered as containing the exact quantity expressed in such return; and the half-sections and quarter-sections, the contents whereof shall not have been thus returned, shall be held and considered as containing the one-half or the one-fourth part, respectively, of the returned contents of the section of which they may make part.

Act Feb. 11, 1805, c. 14, § 2, 2 Stat. 313.

Notes of Decisions

I. Corners in surveys
1. True corners.
2. Returns and plats.

II. Boundary lines
3. Boundary lines actually run and marked in surveys returned.
4. Line between townships.
5. Subdivision lines of section.

III. Boundaries of lands bordering on waters
6. State control of disposal of rights in navigable waters and soil under them.
7. Meander lines—Object and significance.
8. Fraud or mistake in running meander line.
9. Fractional sections and water course or meander line as boundary.
10. Riparian owners of land bordering on lake.

IV. Contents of section or subdivision of Section
11. Quantity of land acquired by purchaser.
12. Contracts between private parties.

I. CORNERS IN SURVEYS

1. True corners.—The true corner of a government subdivision of land is where the United States surveyors in fact located it, whether the location was right or wrong. Nesselroad v. Parrish (1882) 59 Iowa, 570, 13 N. W. 746; Climer v. Wallace (1859) 28 Mo. 556, 75 Am. Dec. 135. See, also, Hess v. Meyer (1889) 73 Mich. 259, 41 N. W. 422.

Government monuments of corners, as placed upon public lands surveyed, control the calls of the maps, plats, and field notes. Galbraith v. Parker (Ariz. 1915) 153 P. 283; State v. Ball (1911) 133 N. W. 412, 90 Neb. 307.

A resurvey must follow the boundaries and monuments, as run and made by the government survey, if the monuments placed to indicate the section corners and quarter section posts can be found, or the places where they were originally placed can be identified. Randall v. Burk Tp. (1893) 4 S. D. 337, 57 N. W. 4; Arneson v. Spawn (1891) 49 N. W. 1066, 2 S. D. 269, 39 Am. St. Rep. 783.

The acts of Congress of 1805 and 1820 do not establish the corners of subdivisions of fractional sections, as fixed by the United States surveyors, in the government surveys, as the true corners; but the corners of quarter sections are to be placed equidistant from the section corners on the same line. Walters v. Commons (Ala. 1835) 2 Port. 38; Nolen v. Palmer (1854) 24 Ala. 391.

Where original United States monuments indicating corners of a survey have disappeared, in the absence of evidence as to their location, plat, field notes, and calls therein determine private rights as to disputed boundaries. Galbraith v. Parker (Ariz. 1915) 153 P. 283.

Where the north line of a government section is actually run, and the northwest corner of the southwest quarter section located, the northwest section corner is located by running a line due north from the northwest corner of the southwest quarter section until it intersects the north line, and the point of intersection will be the true northwest corner; and this method should be adopted though the length of the north line being given as 80 chains, and the northeast section corner established, it would appear that a point on the north line 80 chains due west from the northeast section corner would establish the northwest section corner. Holler v. Emerson (1896) 112 Cal. 573, 44 Pac. 1073.

In relocating lost monuments designating the boundaries of government lands, a party in possession of the land under an assumed survey cannot be disturbed unless resort be had to other known lines and monuments as a basis of survey. Sawyer v. Cox (1872) 63 Ill. 130.

2. Returns and plats.—The law makes it the surveyor general's duty to calculate the areas, and state the result thereof on the plat, and it is competent for him to note thereon, as part of the plat, the distances of quarter section lines on which such calculations were based. Goltermann v. Schiermeyer (1892) 111 Mo. 404, 19 S. W. 484, 20 S. W. 161.

II. BOUNDARY LINES

3. Boundary lines actually run and marked in surveys returned.—Corners marked in the surveys in the manner prescribed must be regarded as the proper corners of sections, and boundary lines actually run and marked on the surveys returned are made the proper boundary lines of the sections or subdivisions for which they are intended, and lines intended as boundaries not actually run and marked must be ascertained by running straight lines

from the established corners to the opposite corresponding corners, and where no opposite corresponding corners are fixed, the boundary lines must be ascertained by running from the established corners due north and south or east and west. St. Paul & P. R. Co. v. Schurmeier (1868) 7 Wall. 272, 286, 19 L. Ed. 74.

Defendant, in ejectment for land derived from the United States under different surveys, is not debarred by this section from introducing evidence other than field notes identifying the precise location of tract occupied by him, though showing a mistake in the field notes of the survey of tract claimed by plaintiff. Graham v. Gill (1912) 32 Sup. Ct. 396, 397, 223 U. S. 643, 56 L. Ed. 586, affirming judgment (1909) 47 South. 917, 56 Fla. 316. See, also, French-Glenn Live Stock Co. v. Springer (1902) 22 Sup. Ct. 563, 185 U. S. 54, 46 L. Ed. 803.

Where the field notes of a survey of a fractional township partly covered by a lake show the external boundary lines thereof to have been run and the section corners marked thereon, and all the interior lines to the lake shore, and the corners marked in the field, except the south line of one section of which but a part was run, but which could be ascertained by running the line due west across the lake to the external boundary, and the east and west section lines as run were less than a mile apart, the survey was sufficient, and included the land covered by the lake. Kean v. Roby (1896) 145 Ind. 221, 42 N. E. 1011.

A resurvey made after a patent is issued cannot, in the absence of fraud, change the corners and boundaries as established by the original survey so as to affect the patentee's rights. Spawr v. Johnson (1892) 49 Kan. 788, 31 Pac. 664. See, also, Burt v. Busch (1890) 82 Mich. 506, 46 N. W. 790.

In government surveys of the public lands the terms "east half" and "west half" are used, not with reference to quantity, but to a line equidistant from the boundary lines of the parcel subdivided, and these terms have the same signification in patents issued by the government; and this is true because so provided by act of Congress. Jones v. Pashby (1886) 29 N. W. 374, 62 Mich. 614.

4. Line between townships.—The first survey determines the line between townships, and they cannot be changed by a subsequent survey made to subdivide the sections. Palmer v. Montgomery (1886) 59 Mich. 338, 26 N. W. 535.

5. Subdivision lines of section.—All subdivision lines of a section of land according to government survey must run straight from a point in one exterior line of the section to the corresponding point in the opposite boundary. Wilson v. Hoffman (1884) 20 N. W. 37, 54 Mich. 246.

Quarter lines are not run upon the ground, but they exist by law, the same as section lines. When the township and section lines are run, and the corners marked according to law, the quarter section lines are ascertained, on the plat, by protracting lines across the section north and south and east and west from the opposite quarter section posts, set in the exterior lines of the section by the government surveyor, and smaller subdivisions are protracted so as to make one-half and one-fourth of a quarter section. The settled policy of the law has been to survey the public lands, and subdivide them, as far as possible, into square figures, running the lines north and south and east and west. Keyser v. Sutherland (1886) 26 N. W. 865, 59 Mich. 455.

III. BOUNDARIES OF LANDS BORDERING ON WATERS

6. State control of disposal of rights in navigable waters and soil under them.—See, also, notes to § 4918, post.

In surveys of public lands bordering on navigable waters, shore lines are meandered, and in general all government grants and conveyances thereof give title only to land above line of ordinary high water. U. S. v. Ashton (C. C. 1909) 170 Fed. 509, appeal dismissed Bird v. Same (1911) 31 Sup. Ct. 718, 220 U. S. 604, 55 L. Ed. 605. See, also, Shively v. Bowlby (1894) 14 Sup. Ct. 548, 152 U. S. 1, 38 L. Ed. 331; Mann v. Tacoma Land Co. (1894) 14 Sup. Ct. 820, 153 U. S. 273, 38 L. Ed. 714; Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 652, 190 U. S. 452, 47 L. Ed. 1134.

The United States have acted on the policy of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states, respectively, when organized and admitted into the Union. Shively v. Bowlby (1894) 14 Sup. Ct. 548, 560, 152 U. S. 1, 38 L. Ed. 331.

This section is inapplicable to a controversy relating to the riparian rights of owners of fractional lots in a fractional township abutting upon a lake, since upon the filing of the plats complete jurisdiction over the land passed to the state. Burton v. Isaacson (1913) 142 N. W. 925, 122 Minn. 483.

7. Meander lines—Object and significance.—Meander lines are run in surveying fractional portions of the public lands bordering on navigable rivers, not as boundaries of the tract, but for the purpose of defining the sinuosities of the banks of the stream, and as the means of ascertaining the quantity of the land in the fraction subject to sale and which is to be paid for by the purchaser. St. Paul & P. R. Co. v. Schur-

meier (1868) 7 Wall. 272, 286, 19 L. Ed. 74 (affirming Schurmeier v. St. Paul & P. R. Co. [1865] 10 Minn. 82 [Gil. 59], 83 Am. Dec. 59); Jefferis v. East Omaha Land Co. (1890) 10 Sup. Ct. 518, 523, 134 U. S. 178, 33 L. Ed. 872; Hardin v. Jordan (1891) 11 Sup. Ct. 808, 811, 140 U. S. 371, 35 L. Ed. 428 (reversing Hardin v. Jordan [C. C. 1883] 16 Fed. 823); Horne v. Smith (1895) 15 Sup. Ct. 988, 990, 159 U. S. 40, 40 L. Ed. 68; Niles v. Cedar Point Club (1899) 20 Sup. Ct. 124, 127, 175 U. S. 300, 44 L. Ed. 171 (affirming decree Niles v. Cedar Point Club [1898] 85 Fed. 45, 29 C. C. A. 5); Whitaker v. McBride (1905) 25 Sup. Ct. 530, 531, 197 U. S. 510, 49 L. Ed. 857; Kirwan v. Murphy (1897) 83 Fed. 275, 28 C. C. A. 348 (appeal dismissed [1898] 18 Sup. Ct. 592, 170 U. S. 205, 42 L. Ed. 1009); Alaska Gold Min. Co. v. Barbridge (1901) 1 Alaska, 311; Kirby v. Potter (1903) 72 Pac. 338, 138 Cal. 686; Foss v. Johnstone (1910) 110 Pac. 294, 158 Cal. 119; Lattig v. Scott (1910) 107 Pac. 47, 17 Idaho, 506; Fuller v. Dauphin (1888) 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; Gary Land Co. v. Griesel (1913) 100 N. E. 673, 179 Ind. 204; Kraut v. Crawford (1865) 18 Iowa, 549, 87 Am. Dec. 414; Steele v. Sanchez (1887) 72 Iowa, 65, 33 N. W. 366, 2 Am. St. Rep. 233; Schlosser v. Cruickshank (1895) 96 Iowa, 414, 65 N. W. 344; McDade v. Bossier Levee Board (1902) 33 South. 628, 109 La. 625; Producers' Oil Co. v. Hanszen (1913) 61 South. 754, 132 La. 691; St. Paul, S. & T. F. R. Co. v. First Division St. P. & P. R. Co. (1879) 26 Minn. 31, 49 N. W. 303; In re Tucker (1914) 148 N. W. 60, 126 Minn. 214; June v. Purcell (1881) 36 Ohio St. 396; Minto v. Delaney (1879) 7 Or. 337; Micelli v. Andrus (Or. 1912) 120 Pac. 737; Knudson v. Omanson (1894) 10 Utah, 124, 37 Pac. 250; Washougal & L. Transp. Co. v. The Dalles, P. & A. Nav. Co. (1902) 68 Pac. 74, 27 Wash. 490; Mendota Club v. Anderson (1899) 78 N. W. 185, 101 Wis. 479. See, also, Shively v. Bowlby (1894) 14 Sup. Ct. 548, 562, 152 U. S. 1, 38 L. Ed. 331; French-Glenn Live Stock Co. v. Springer (1902) 22 Sup. Ct. 563, 565, 185 U. S. 54, 46 L. Ed. 803; Kirwan v. Murphy (1903) 23 Sup. Ct. 599, 603, 189 U. S. 35, 47 L. Ed. 698; Chapman & Dewey Lumber Co. v. St. Francis Levee Dist. (1914) 34 Sup. Ct. 297, 299, 232 U. S. 186, 58 L. Ed. 564; Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630; Glasscock v. National Box Co. (1912) 148 S. W. 248, 104 Ark. 154; Johnson v. Hurst (1904) 77 Pac. 784, 10 Idaho, 308; State v. Tuesburg Land Co. (Ind. 1915) 109 N. E. 530 (rehearing denied [1916] 111 N. E. 342); Dashiel v. Harshman (1901) 85 N. W. 85, 113 Iowa, 283; McDade v. Bossier Levee Board (1902) 33 South. 628, 109 La. 625; Hanson v. Rice (1903) 92 N. W. 982, 88 Minn. 273; Shoemaker v. Hatch (1878) 13 Nev. 261; Baer v. Moran Bros. Co. (1891) 2 Wash. 608, 27 Pac. 470; Hauge v. Walton (1913) 131 Pac. 248, 72 Wash. 554; Boorman v. Sunnuchs (1877) 42 Wis. 233.

A state patent, though not describing the lands as having upon them any water course or bayou, is limited by calls for bayous noted on such official plat certified to the state by the general land office and the interior department. Cragin v. Powell (1888) 128 U. S. 691, 9 Sup. Ct. 203, 32 L. Ed. 566.

The making of a meander line has no certain significance, and does not import that the tract on the other side is not surveyed, or will not pass by a conveyance of the upland shown by the plat to border on the lake. Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 652, 190 U. S. 452, 47 L. Ed. 1134.

The meandering of a stream under the authority of the government, though conclusive of its navigability so far as the rights of riparian owners are concerned, does not constitute such line a boundary line in a strict and conclusive sense. State v. Livingston (1914) 145 N. W. 91, 164 Iowa, 31.

8. Fraud or mistake in running meander line.—Where, by mistake or fraud in a survey, a meander line is run where no lake or stream calling for it exists, or where it is established so far from actual shore as to leave between its course and the shore such an excess of unsurveyed land as clearly indicates fraud or mistake, and the United States has not parted with its right to land left unsurveyed, it may cause a survey to be made, and dispose of it as part of the public domain. Barringer v. Davis (1909) 120 N. W. 65, 141 Iowa, 419, reversing judgment on rehearing (1907) 112 N. W. 208. And see Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630.

An owner of lots on a meander line, which was supposed to separate such lots from a lake which in fact did not exist, does not own the land covered by the supposed lake, but it is a part of the unsurveyed domain of the United States. Grant v. Hemphill (1894) 92 Iowa, 218, 59 N. W. 263.

9. Fractional sections, and water course or meander line as boundary.—An entry of government land, bounded by a meander line, does not include land lying at the time between such meander line and the bank of the river. Lammers v. Nissen (1876) 4 Neb. 245; Bissell v. Fletcher (1886) 19 Neb. 725, 28 N. W. 303; Harrison v. Stipes (1892) 34 Neb. 431, 51 N. W. 976. See, also, Horne v. Smith (1895) 15 Sup. Ct. 988, 989, 159 U. S. 40, 40 L. Ed. 68; Granger v. Swart (C. C. 1865) Fed.

Cas. No. 5,685; Fuller v. Dauphin (1888) 124 Ill. 542, 16 N. E. 917, 7 Am. St. Rep. 388; Glenn v. Jeffrey (1888) 75 Iowa, 20, 39 N. W. 160 (distinguishing Kraut v. Crawford [1865] 18 Iowa, 549, 87 Am. Dec. 414); Shoemaker v. Hatch (1878) 13 Nev. 261.

Where a section is divided by a water course, and is subdivided in lots instead of regular subdivisions, and a lot bounds on the water course, the water course itself, and not the meander lines thereof, is the proper boundary; and, if the grantee does not find the water course as called for by his patent, he may go as far as the next "eighth line" to locate his boundary. Lally v. Rossman (1892) 82 Wis. 147, 51 N. W. 1132. See, also, Whitney v. Detroit Lumber Co. (1890) 78 Wis. 240, 47 N. W. 425; Northern Pine Land Co. v. Bigelow (1893) 84 Wis. 157, 54 N. W. 496. And see Tolleston Club v. State (1894) 141 Ind. 197, 38 N. E. 214, 40 N. E. 690; Same v. Clough (1896) 146 Ind. 93, 43 N. E. 647.

Letters patent from the United States which refer to the official plat of survey and describe the land as "the whole of fractional sections" therein enumerated, convey to the extent of full subdivisions the land under nonnavigable water on which such fractional sections border, as appears from the meander line shown on such plat, beyond which the survey did not extend. Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 652, 190 U. S. 452, 47 L. Ed. 1134, affirming judgment Mason v. Calumet Canal & Improvement Co. (1898) 50 N. E. 85, 150 Ind. 699. See, also, Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; State v. Tuesburg Land Co. (1915) 109 N. E. 530, rehearing denied (1916) 111 N. E. 342.

Patents for fractional sections of land facing on a marsh, which recite the number of acres granted, and refer to the official plat of the survey, by which plat the marsh is shown as the boundary, while the computed areas conform to the area included within the surveyed lines, without including any part of the marsh, must be limited by the surveyed boundaries, without including any land which is a part of the marsh. Niles v. Cedar Point Club (1899) 20 Sup. Ct. 124, 126, 175 U. S. 300, 44 L. Ed. 171, affirming decree (1898) 85 Fed. 45, 29 C. C. A. 5. See, also, Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351.

Government lots bordering on a nonnavigable stream are bounded by the thread of the stream, and not by the meander line on the bank. Kirby v. Potter (1903) 72 P. 338, 138 Cal. 686. See St. Paul & P. R. Co. v. Schurmeier (1868) 7 Wall. 272, 19 L. Ed. 74.

A grant of riparian lands on navigable waters terminates at a meander border line, and does not cover swamp lands lying between such line and the shores of the navigable water. Producers' Oil Co. v. Hanszen (1913) 61 South. 754, 132 La. 691. See Niles v. Cedar Point Club (1899) 20 Sup. Ct. 124, 175 U. S. 300, 44 L. Ed. 171.

In surveying a lot bordering on a river the water course becomes the boundary, and continues so, no matter how much it shifts by accretion, and conveyances of the lot pass all, including such accretion, to that line. East Omaha Land Co. v. Jeffries (C. C. 1889) 40 Fed. 386, decree affirmed Jefferis v. East Omaha Land Co. (1890) 10 Sup. Ct. 518, 134 U. S. 178, 33 L. Ed. 872.

Where ledges or spits or tongues of land project out beyond the meander line of a bay, they are included as part of the fractions of sections shown on the government survey, and conveyed by government patent. Ex parte Davidson (C. C. 1893) 57 Fed. 883.

Where the notes and official plat show that all the lands within the legal subdivisions as authorized to be laid out by the preceding section, have been returned to the government as surveyed, and the remainder of the subdivision is shown to be the waters of a navigable stream, and the government issues its patent to a settler or purchaser for fractional subdivisions thereof abutting on a line which purports to meander the stream, the meander line will not be the true boundary, but the patentee will take title to the stream. Johnson v. Hurst (1904) 77 P. 784, 10 Idaho, 308.

Where the government has parted with a larger acreage than it has received pay for by a patent to fractional lots abutting on a meandered stream, and the patentee takes possession of the lands between the meander line and the stream, no one but the government or its grantee can be heard to question the title or right of possession. Id.

A purchase of a given subdivision of public lands, which happens to have for one of its boundaries a marsh or pond, does not give the purchaser a part or all of another defined subdivision, in order to reach the center of such pond. Edwards v. Ogle (1881) 76 Ind. 302.

The fact that the number of acres recited in a government patent corresponds with the quantity within the meander line along a navigable lake will not prevent the patentee from claiming the land between the meander line and the shore line. Schlosser v. Cruickshank (1895) 96 Iowa, 414, 65 N. W. 344.

Private ownership of lands bounded on navigable fresh waters is not restricted to the meander line, and, even if the owner of the bank did not also own land made within the meander line, it would not belong to the United States, but to the state, which always con-

cedes the right of the owner to the shore. Pere Marquette Boom Co. v. Adams (1880) 6 N. W. 857, 44 Mich. 403.

Where plaintiff claimed under a patent conveying such a fractional quarter bounded on the north by a meandering creek, although the land claimed was outside the line ordinarily bounding such quarter, and within the east half of the adjoining quarter, a tax deed to defendant, of the east half of such adjoining quarter, conveys only that portion of such east half which lies north of the creek. Wilson v. Hoffman (1888) 70 Mich. 552, 38 N. W. 558.

Although a meandered line is generally considered as following the windings of a stream, yet the question whether it does so or not may be determined by evidence aliunde. The mere fact that it is run and designated upon the plats as a meandered line is not conclusive against the government. Lammers v. Nissen (1876) 4 Neb. 245.

Where, by the government survey, field notes, and plat, it appeared that a meander line was run as the boundary between fractional sections and a marsh, and that the ground between the marsh and a lake was surveyed, meandered, and platted as an island, with separately computed acreage, and marked by township, and not by section, held, that the fractional sections did not include any part of the land surveyed as an island. James v. Howell (1885) 41 Ohio St. 696.

Where the surveyor omits to include in his survey large tracts of land lying between the meander line and the streams or bodies of water meandered, the patents for the adjoining lots, though referring to the official plat of the survey, are merely grants of the premises limited by such meander line, and not by the water. Little v. Pherson (1899) 56 P. 807, 35 Or. 51.

The point to which the water of a navigable stream usually rises, in an ordinary season of high water, is the "meander line" which forms the boundary of the title of the government. State v. Portland General Electric Co. (Or. 1908) 98 Pac. 160, denying rehearing (1908) 95 Pac. 722, 52 Or. 502.

Where a stream is intended to be meandered by public surveys, the stream, and not the actual meander line as run on the ground, is the true boundary of the riparian owner. Sun Dial Ranch v. May Land Co. (1912) 119 P. 758, 61 Or. 205.

10. Riparian owners of land bordering on lake.—See, also, notes to § 4918, post.

Since the United States, continuing in the ownerhsip of lands which by public survey appeared to abut on nonnavigable waters, has the right to readjust the marginal survey, and reserve uplands that appear between the actual margin of the water supposed to have been previously meandered, a purchaser therefrom under entries after a second survey, reserving upland between the first survey and the margin of a nonnavigable lake, purchases the land with notice thereof, and is estopped to claim beyond the boundary under which he purchased. Warner Valley Stock Co. v. Calderwood (1899) 59 P. 115, 36 Or. 228. See, also, Cragin v. Powell (1888) 9 Sup. Ct. 203, 128 U. S. 691, 32 L. Ed. 566.

Where an inland nonnavigable lake covers a portion of a section of land, and the government survey designates the dry land in each subdivision as a fractional subdivision or lot, the purchaser from the government of such lots acquires title to all that portion of the bed of the lake included in the whole subdivision. Stoner v. Rice (1889) 121 Ind. 51, 22 N. E. 968, 6 L. R. A. 387.

When the United States has disposed of the lands bordering on a meandered lake, by patent, without reservation or restriction, it has nothing left to convey, and any patent thereafter issued for land forming the bed, or former bed, of the lake, is void and inoperative. Lamprey v. State (1893) 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

IV. CONTENTS OF SECTION OR SUBDIVISION OF SECTION

11. Quantity of land acquired by purchaser.—A patentee of a part of a fractional section whose patent, through the carelessness of the Land Department in relying on the description in his homestead entry, refers, for the description of the land conveyed, to the original survey, which calls for a water boundary on the east, although a resurvey had then been made at his instance, cannot recover from a subsequent patentee under the second survey any land lying east of the meander line as shown on the earlier survey, since otherwise he would profit by a mistake of the government of which he must have been cognizant. Gleason v. White (1905) 25 Sup. Ct. 782, 783, 199 U. S. 54, 50 L. Ed. 87.

The United States, in providing for the survey of the public domain, established the rule that sections of land that should be held to contain the exact quantity returned by the surveyor general, so that the corner bounds of sections fixed by such survey cannot be removed. Under that rule, the purchaser of a section will take such quantity of land as is contained within the boundary lines established by the survey, whether they contain more or less than the quantity returned; but the purchaser of an aliquot part, or of aliquot parts, of a section, will take the same part or parts of the actual quantity; the intermediate bounds

between the corners of the sections not being considered as fixed. Walters v. Commons (Ala. 1835) 2 Port. 38.

When the United States grants lands by legal subdivisions, the grantee takes all the land in the subdivision, and is not limited by the number of acres specified in the patent. Palmer v. Dodd (1887) 64 Mich. 474, 31 N. W. 209.

Lands sold under the United States surveys pass according to the descriptions of the legal subdivisions whether those subdivisions contain the legal quantity more or less. Fulton v. McAfee (1841) 6 Miss. (5 How.) 751.

A purchaser of public lands is governed in the boundaries and contents of the land purchased by this section. Campbell v. Clark (1840) 6 Mo. 219.

12. Contracts between private parties.—This section fixes the quantity at which the government must dispose of the tract, but does not control the area in contracts between private parties. Heald v. Yumisko (1898) 75 N. W. 806, 7 N. D. 422.

§ 4805. (R. S. § 2397.) Lines of division of half quarter-sections, how run.

In every case of the division of a quarter-section the line for the division thereof shall run north and south, and the corners and contents of half quarter-sections which may thereafter be sold, shall be ascertained in the manner and on the principles directed and prescribed by the section preceding, and fractional sections containing one hundred and sixty acres or upwards shall in like manner as nearly as practicable be subdivided into half quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Interior, and in every case of a division of a half quarter-section, the line for the division thereof shall run east and west, and the corners and contents of quarter quarter-sections, which may thereafter be sold, shall be ascertained as nearly as may be, in the manner, and on the principles, directed and prescribed by the section preceding; and fractional sections containing fewer or more than one hundred and sixty acres shall in like manner, as nearly as may be practicable, be subdivided into quarter quarter-sections, under such rules and regulations as may be prescribed by the Secretary of the Interior.

Act April 24, 1820, c. 51, § 1, 3 Stat. 566. Act April 5, 1832, c. 65, 4 Stat. 503.

Notes of Decisions

Fractional sections.—It is the duty of the surveyor general to lay out a fractional section in such manner that an entire quarter section may be had if such fraction will admit of it, and the surveyor general has no right to divide a fractional section by arbitrary lines so as to prevent a regular quarter section from being taken up. Brown v. Clements (1845) 3 How. 650, 663, 11 L. Ed. 767. See, also, Stolp v. Hoyt (1867) 44 Ill. 219; Kraut v. Crawford (1865) 18 Iowa, 549, 87 Am. Dec. 414.

Some discretion is allowed the surveyor general in the subdivision of fractional sections containing more than 160 acres, and he is not obliged absolutely to lay off a full quarter or half quarter section, though the fraction is capable of such a subdivision. Gazzam v. Phillips (1857) 20 How. 372, 376, 15 L. Ed. 958.

There is no legal subdivision of the public lands less than a quarter of a quarter section, or forty acres, except in the case of fractional sections. Warren v. Van Brunt (1873) 19 Wall. 646, 652, 22 L. Ed. 219. See, also, State v. Pryor (1852) 13 Ark. (8 Eng.) 142.

The Land Department must determine what lands are to be surveyed. Kirwan v. Murphy (1903) 23 Sup. Ct. 599, 603, 189 U. S. 35, 47 L. Ed. 698.

The act of April 24, 1820, and the instructions issued under it, did not require the absolute platting of every quarter or half quarter of which the section was susceptible; but contemplated the exercise of discretion so as to prevent small and inconvenient fractions of a fractional section. (1837) 3 Op. Atty. Gen. 281.

It is the duty of surveyors general to divide fractional sections containing over 160 acres into lots approaching as nearly as practicable to the form and quantity of half-quarter sections; and it is competent for the department to direct the performance of the duty. (1837) 3 Op. Atty. Gen. 285.

The act of 1820, is not to be construed as inoperative in requiring those that contain more than 160 acres to be so divided in all cases as to make half quarter sections, though its length and breath admits of the formation of several. Brown v. Hunt (1842) 4 Ala. 129.

When the course of a running stream through a fractional section prevents the subdivision of the quarter sections into 80-acre tracts, the subdivision of a quarter section by the United States

surveyor into two tracts divided by the stream is not in contravention of the act. Stein v. Ashby (1854) 24 Ala. 521.

Where a fractional section has been subdivided under the statute and the rules and regulations prescribed in conformity therewith, a deficiency in the contents of the section must, as between a quarter quarter section and a residuary fraction, fall entirely on the latter, and cannot be apportioned between them. Wharton v. Littlefield (1857) 30 Ala. 245.

The surveyor general, in making a plat where there was no return in the survey of the line run in the field, dividing a quarter section into halves, must, on dividing a quarter into east and west halves, draw a north and south line from a point equally distant from the southeast and southwest corners of the section, and thus divide the quarter into halves equal in quantity. Wood v. Mandrilla (1914) 140 P. 279, 167 Cal. 607.

Where a quarter section containing an excess over 160 acres is to be divided, the excess must fall on the exterior half. Grover v. Paddock (1882) 84 Ind. 244.

The surveyor general has not authority, under the federal statute, to extend a south fraction north of the east and west quarter line of the section, and such act on his part is void. Keyser v. Sutherland (1886) 59 Mich. 455, 26 N. W. 865. See, also, Brown v. Clements (1845) 3 How. 650, 11 L. Ed. 767; Wilson v. Hoffman (1888) 70 Mich. 552, 38 N. W. 558.

§ 4806. (R. S. § 2398.) Contracts for surveys of public lands, when binding.

Contracts for the survey of the public lands shall not become binding upon the United States until approved by the Commissioner of the General Land-Office, except in such cases as the Commissioner may otherwise specially order.

Act May 30, 1862, c. 86, § 1, 12 Stat. 409.

Notes of Decisions

Authority to contract.—Prior to this act a surveyor general had authority to enter into contracts without their first being approved by the Commissioner of the General Land Office. McKee v. U. S. (1865) 1 Ct. Cl. 336.

Construction of contract.—The rule that a contract is to be construed most strongly against the party preparing it applies to the government with respect to a contract for the survey of public land. Scully v. U. S. (D. C. 1912) 197 Fed. 327.

A surveyor, contracting with the government to resurvey boundaries, held not relieved from liability on the theory that he was not officially notified of the approval of his contract and bond. American Bonding Co. of Baltimore v. Vickery (Colo. App. 1915) 146 P. 1073.

§ 4807. (R. S. § 2399, as amended, Act Oct. 1, 1890, c. 1262, Act Aug. 15, 1894, c. 288, and Act April 26, 1902, c. 592.) What instructions to be deemed part of contract.

The printed manual of surveying instructions for the survey of the public lands of the United States and private land claims, prepared at the General Land Office, and bearing date January first, nineteen hundred and two, the instructions of the Commissioner of the General Land Office, and the special instructions of the surveyor-general, when not in conflict with said printed manual or the instructions of said Commissioner, shall be taken and deemed to be a part of every contract for surveying the public lands of the United States and private land claims.

Act May 30, 1862, c. 86, § 2, 12 Stat. 409. Act Oct. 1, 1890, c. 1262, 26 Stat. 650. Act Aug. 15, 1894, c. 288, 28 Stat. 285. Act April 26, 1902, c. 592, 32 Stat. 120.

This section, as originally enacted, made the manual of Feb. 22, 1855, part of every contract for surveying. It was amended by Act Oct. 1, 1890, c. 1262, cited above, to provide that the manual of Dec. 2, 1889, should be a part of every such contract, and was again amended by Act Aug. 15, 1894, c. 288, also cited above, by substituting the manual of June 30, 1894, and was further amended by Act April 26, 1902, c. 592, last cited above, by substituting the Manual of January 1, 1902, as set forth here.

Notes of Decisions

Manual and instructions.—This section makes the manual and special instructions a part of every contract. Meldrum v. U. S. (1907) 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324. See, also, Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 666, 190 U. S. 452, 47 L. Ed. 1134 (dis-

senting opinion); Scott v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107.

The Commissioner of the Land Office has power to depart from the requirements of the Manual, but authority from him to that effect cannot be implied. White v. U. S. (1879) 15 Ct. Cl. 305.

Where a surveyor in good faith followed special instructions of a surveyor general which conflicted with the Manual of the Land Office, he cannot, on the one hand, recover for his work, nor, on the other, be compelled to obliterate the erroneous survey; and if, pursuant to an order of the Commissioner, he does obliterate it, an implied contract arises, and he may recover in quantum meruit. Id.

§ 4808. (R. S. § 2400, as amended, Act March 3, 1875, c. 130, § 1.) Prices of surveys, how established.

The Commissioner of the General Land-Office has power, and it shall be his duty, to fix the prices per mile for public surveys, which shall in no case exceed the maximum established by law; * *

Act May 30, 1862, c. 86, § 3, 12 Stat. 409.

The part of this section omitted here required an accurate account of the cost of surveying and platting private land-claims to be kept by the surveyor-general and reported to the General Land Office, and also provided that patents for private land claims should not issue until the cost of surveying and platting them had been paid by the claimant. This last provision, requiring payment by the claimant of the cost of the survey, was repealed by Act March 3, 1875, c. 130, § 1, 18 Stat. 384.

All the provisions of this section, as enacted in the Revised Statutes, which are omitted here, were superseded and substantially re-enacted by Act July 31, 1876, c. 246, post, § 4809, and the requirement of the payment of the cost of surveying and platting private land claims before issuance of patent was again substantially re-enacted by Act March 3, 1885, c. 360, post, § 4810.

Appropriations for surveys and resurveys of the public lands are made in the annual sundry civil appropriation acts, in which the rates of payment therefor are prescribed or limited for the particular year. The provisions for the fiscal year 1917 were by Act July 1, 1916, c. 209, § 1, 39 Stat.

§ 4809. (Act July 31, 1876, c. 246.) Cost of survey of private land claims to be reported and paid.

That an accurate account shall be kept by each surveyor-general of the cost of surveying and platting every private land claim to be reported to the General Land Office with the map of such claim; and that a patent shall not issue nor shall any copy of any such survey be furnished for any such private claim until the cost of survey and platting shall have been paid into the Treasury of the United States by the party or parties in interest in said grant or by any other party. (19 Stat. 121.)

This was a provision of the sundry civil appropriation act for the fiscal year 1877, cited above.

A proviso annexed to this provision, requiring, before a conveyance of land granted to any railroad company, payment of the cost of surveying, etc., the same, is set forth post, § 4882.

§ 4810. (Act March 3, 1885, c. 360.) Cost of survey of private land claims to be paid.

That hereafter in all cases of the survey of private land claims the cost of the same shall be refunded to the Treasury by the owner before the delivery of the patent. (23 Stat. 499.)

This was a provision of the sundry civil appropriation act for the fiscal year 1886, cited above.

See note to R. S. § 2400, ante, § 4808.

§ 4811. (R. S. § 2401, as amended, Act Aug. 20, 1894, c. 302, § 1.) When survey may be had by settlers in township.

When the settlers in any township not mineral or reserved by the Government, or persons and associations lawfully possessed of coal lands and otherwise qualified to make entry thereof, or when the owners or grantees of public lands of the United States, under any law thereof, desire a survey made of the same under the authority of the surveyor-general and shall file an application therefor in writing, and shall deposit in a proper United States depository to the

credit of the United States a sum sufficient to pay for such survey, together with all expenditures incident thereto, without cost or claim for indemnity on the United States, it shall be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land Office, and in accordance with law, to survey such township or such public lands owned by said grantees of the Government, and make return therefor to the general and proper local land office: Provided, That no application shall be granted unless the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for township and subdivisional surveys.

Act May 30, 1862, c. 86, § 10, 12 Stat. 410. Act Aug. 20, 1894, c. 302, § 1, 28 Stat. 423.

This section as originally enacted was as follows:

"When the settlers in any township, not mineral or reserved by Government, desire a survey made of the same, under the authority of the surveyor-general, and file an application therefor in writing, and deposit in a proper United States depository, to the credit of the United States, a sum sufficient to pay for such survey, together with all expenses incident thereto, without cost or claim for indemnity on the United States, it may be lawful for the surveyor-general, under such instructions as may be given him by the Commissioner of the General Land-Office, and in accordance with law, to survey such township and make return thereof to the general and proper local land-office, provided the township so proposed to be surveyed is within the range of the regular progress of the public surveys embraced by existing standard lines or bases for the township and subdivisional surveys."

It was amended by Act Aug. 20, 1894, c. 302, § 1, cited above, to read as set forth here.

The deposits in Louisiana may be used in making resurveys, by Act Aug. 7, 1882, c. 433, § 1, post, § 4815.

Resurveys of particular public lands, without petitions therefor from settlers on such lands, were authorized by special acts: Lands in Nebraska, by Act May 19, 1908, c. 176, 35 Stat. 165; in Wyoming, by Act May 29, 1908, c. 220, §§ 1, 2, 35 Stat. 465; in Louisiana, by Act May 25, 1906, c. 2554, 34 Stat. 199.

Notes of Decisions

Survey of omitted islands.—As to title to islands, see notes to § 4918, post.

To give the commissioner jurisdiction to order a survey of omitted islands, there must have been such omitted islands, and the land must not have been previously conveyed by the United States. Webber v. Pere Marquette Boom Co. (1886) 30 N. W. 469, 62 Mich. 626.

Forgery.—The government may be defrauded by forged affidavits filed for the purpose of procuring a survey. Meldrum v. U. S. (1907) 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324.

§ 4812. (R. S. § 2402.) Deposit for expenses of surveys deemed an appropriation, etc.

The deposit of money in a proper United States depository, under the provisions of the preceding section, shall be deemed an appropriation of the sums so deposited for the objects contemplated by that section, and the Secretary of the Treasury is authorized to cause the sums so deposited to be placed to the credit of the proper appropriations for the surveying-service; but any excesses in such sums over and above the actual cost of the surveys, comprising all expenses incident thereto, for which they were severally deposited, shall be repaid to the depositors respectively.

Res. July 1, 1864, No. 60, 13 Stat. 414.

A permanent appropriation for repayment to depositors of money for expenses incident to surveys of the excess over the actual cost and expenses of the surveys was made by R. S. § 3689, post, § 6799.

Besides the provisions of this section for repayment of excesses of deposits for expenses of surveys over the actual cost of the surveys, provisions for repayment of such excesses of deposits to cover the cost of survey of mineral lands were made by Act Feb. 24, 1909, c. 180, post, § 4813.

§ 4813. (Act Feb. 24, 1909, c. 180.) Repayment of excess of deposits to cover cost of surveys of mineral lands.

That the Secretary of the Treasury be, and he is hereby, au-

thorized and directed to pay, out of the moneys heretofore or hereafter covered into the Treasury from deposits made by individuals to cover cost of work performed and to be performed in the offices of the United States surveyors-general in connection with the survey of mineral lands, any excess in the amount deposited over and above the actual cost of the work performed, including all expenses incident thereto for which the deposits were severally made or the whole of any unused deposit; and such sums, as the several cases may be, shall be deemed to be annually and permanently appropriated for that purpose. Such repayments shall be made to the person or persons who made the several deposits, or to his or their legal representatives, after the completion or abandonment of the work for which the deposits were made, and upon an account certified by the surveyor-general of the district in which the mineral land surveyed, or sought to be surveyed is situated and approved by the Commissioner of the General Land Office. (35 Stat. 645.)

This was an act entitled "An act for relief of applicants for mineral surveys."

Previous provisions for the repayment of excess amounts deposited to cover the cost of surveys of the public lands were made by R. S. § 2402, ante, § 4812, and R. S. § 3689, post, § 6799.

§ 4814. (R. S. § 2403, as amended, Act April 27, 1876, c. 84, Act March 3, 1879, c. 170, and Act Aug. 20, 1894, c. 302, § 2.) Deposits made by settlers for public surveys to go in part payment of lands.

Where settlers or owners or grantees of public lands make deposits in accordance with the provisions of section twenty-four hundred and one, as hereby amended, certificates shall be issued for such deposits which may be used by settlers in part payment for the lands settled upon by them, the survey of which is paid for out of such deposits, or said certificates may be assigned by indorsement and may be received by the Government in payment for any public lands of the United States in the States where the surveys were made, entered or to be entered under the laws thereof.

Act March 3, 1871, c. 127, 16 Stat. 581. Act April 27, 1876, c. 84, 19 Stat. 38. Act March 3, 1879, c. 170, 20 Stat. 352. Act Aug. 20, 1894, c. 302, § 2, 28 Stat. 423.

This section, as originally enacted, was as follows:

"Where settlers make deposits in accordance with the provisions of section twenty-four hundred and seven the amount so deposited shall go in part payment for their lands situated in the townships, the surveying of which is paid for out of such deposits."

It was amended by Act April 27, 1876, c. 84, cited above, by striking out the word "seven" and inserting in lieu thereof the word "one," and by providing that proceedings thereunder should have the same force and effect as though the section had been originally enacted as amended.

It was again amended by Act March 3, 1879, c. 170, 20 Stat. 352, by adding, at the end of the section, the following provision:

"Or the certificates issued for such deposits may be assigned by indorsement, and be received in payment for any public lands of the United States entered by settlers under the pre-emption and homestead laws of the United States, and not otherwise."

It was again amended by Act Aug. 20, 1894, c. 302, § 2, 28 Stat. 423, to read as set forth here.

R. S. § 2401, as amended by Act Aug. 20, 1894, c. 302, § 1, mentioned in this section, is set forth ante, § 4811.

A provision that no certificate issued under this section and Act March 3, 1879, c. 170, "shall be received in payment for lands except at the land office in which the lands surveyed for which the deposit was made are subject to entry," which was made by Act Aug. 7, 1882, c. 433, § 1, 22 Stat. 327, was superseded by the subsequent amendment of this section by Act Aug. 20, 1894,

c. 302, § 2, last cited above, making the certificates receivable in payment for any public lands in the States when the surveys were made, entered, or to be entered.

Notes of Decisions

Fraud.—The government may be defrauded by false affidavits filed for the purpose of procuring a survey. Meldrum v. U. S. (1907) 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324.

§ 4815. (Act Aug. 7, 1882, c. 433, § 1.) Deposits in Louisiana applicable to resurveys; certificates of deposit receivable in payment for land.

The part of the sum hereby appropriated which may be apportioned to the surveying district of Louisiana, together with such sums as have been or may be deposited for surveys therein by actual settlers, under sections twenty-four hundred and one, twenty-four hundred and two, and twenty-four hundred and three of the Revised Statutes, may be, in whole or in part, employed in making such resurveys as may be necessary in the discretion of the Commissioner of the General Land Office. (22 Stat. 327.)

This was a proviso annexed to an appropriation for surveying, in the sundry civil appropriation act for the fiscal year 1883, cited above.

The appropriation referred to was the annual appropriation for surveying the public lands.

R. S. §§ 2401, 2402, 2403, mentioned in this provision, are set forth ante, §§ 4811, 4812, 4814.

§ 4816. (R. S. § 2404.) Augmented rates for surveys of lands covered with forests, etc., in Oregon.

The Commissioner of the General Land-Office may authorize, in his discretion, public lands in Oregon, densely covered with forests or thick undergrowth, to be surveyed at augmented rates, not exceeding eighteen dollars per mile for standard parallels, fifteen dollars for townships, and twelve dollars for section lines.

Act July 15, 1870, c. 292, § 1, 16 Stat. 305.

See notes to R. S. § 2400, ante, § 4808.

§ 4817. (R. S. § 2405.) Augmented rates for surveys of lands covered with forests, etc., in California and Washington.

The Commissioner of the General Land-Office, in his discretion, may hereafter authorize public lands in California and in Washington [Territory], densely covered with forests or thick undergrowth, to be surveyed at augmented rates, not exceeding eighteen dollars per linear mile for standard parallels, sixteen dollars for townships, and fourteen dollars for section lines.

Act June 10, 1872, c. 415, § 1, 17 Stat. 358.

The word "Territory," inclosed in brackets in this section, was superseded by the admission of Washington into the Union by Act Feb. 22, 1889, c. 180, 25 Stat. 676.

See notes to R. S. § 2400, ante, § 4808.

§ 4818. (R. S. § 2406.) Geological surveys, extension of public surveys, expenses of subdividing.

There shall be no further geological survey by the Government, unless hereafter authorized by law. The public surveys shall extend over all mineral lands; and all subdividing of surveyed lands into lots less than one hundred and sixty acres may be done by county and local surveyors at the expense of claimants; but nothing in this section contained shall require the survey of waste or useless lands.

Act July 21, 1852, c. 66, § 1, 10 Stat. 15, 21. Act July 9, 1870, c. 235, § 16, 16 Stat. 218.

Subsequent provisions for geological surveys are collected ante, under Title XI, "The Department of the Interior," Chapter 9 A, "The Geological Survey."

Deputy surveyors, were required to make a critical examination of the character of sections 16 and 36 in any township in Colorado, and report in their

field notes mineral discoveries, by Act April 2, 1884, c. 20, § 2, 23 Stat. 10; that act providing that the State of Colorado should select other lands for school purposes in lieu of sections 16 and 36 found to be mineral lands.

Notes of Decisions

Mineral lands.—This section provides that surveys shall extend over mineral lands. Johnston v. Morris (1896) 72 Fed. 890, 897, 19 C. C. A. 229; Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272.

§ 4819. (R. S. § 2407.) Surveys on rivers in certain cases.

Whenever, in the opinion of the President, a departure from the ordinary method of surveying land on any river, lake, bayou, or water-course would promote the public interest, he may direct the surveyor-general in whose district such land is situated, and where the change is intended to be made, to cause the lands thus situated to be surveyed in tracts of two acres in width, fronting on any river, bayou, lake, or water-course, and running back the depth of forty acres; which tracts of land so surveyed shall be offered for sale entire, instead of in half-quarter sections, and in the usual manner and on the same terms in all respects as the other public lands of the United States.

Act May 24, 1824, c. 141, 4 Stat. 34.

Notes of Decisions

Government ownership of lands under water.—See, also, notes to § 4918, post. It is the settled policy of Congress to leave the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states. Shively v. Bowlby (1894) 14 Sup. Ct. 548, 567, 152 U. S. 1, 38 L. Ed. 331.

§ 4820. (R. S. § 2408.) Lines of surveys in Nevada.

In extending the surveys of the public lands in the State of Nevada, the Secretary of the Interior may vary the lines of the subdivisions from a rectangular form, to suit the circumstances of the country.

Act July 4, 1866, c. 166, § 5, 14 Stat. 86.

§ 4821. (R. S. § 2409.) Geodetic method of survey in Oregon and California.

The Secretary of the Interior, if he deems it advisable, is authorized to continue the surveys in Oregon and California, to be made after what is known as the geodetic method, under such regulations and upon such terms as have been or may hereafter be prescribed by the Commissioner of the General Land-Office; but none other than township-lines shall be run where the land is unfit for cultivation; nor shall any deputy surveyor charge for any line except such as may be actually run and marked, or for any line not necessary to be run.

Act Sept. 27, 1850, c. 76, § 3, 9 Stat. 496. Act March 3, 1853, c. 145, § 4, 10 Stat. 245.

Notes of Decisions

Lands in Oregon—Acquisition of title.—The provisions of the general land laws of the United States were not applicable to Oregon territory, and before 1850 there was no statute under which any one could acquire a legal title from the United States to lands in Oregon. Shively v. Bowlby (1894) 14 Sup. Ct. 548, 567, 152 U. S. 1, 38 L. Ed. 331.

§ 4822. (R. S. § 2410.) Rectangular mode of survey, when may be departed from.

Whenever, in the opinion of the Secretary of the Interior, a departure from the rectangular mode of surveying and subdividing the public lands in California would promote the public interests, he may direct such change to be made in the mode of surveying and designating such lands as he deems proper, with reference to the existence of mountains, mineral deposits, and the advantages derived from timber and water privileges; but such lands shall not be sur-

veyed into less than one hundred and sixty acres, or subdivided into less than forty acres.

Act March 3, 1853, c. 145, § 4, 10 Stat. 245.

Notes of Decisions

Application of statute.—This and other acts and regulations of the surveyor general as to form of subdivisions of public lands held not to apply to lands in grant from Mexico to the city of San Francisco. Burk v. Howe (Cal. 1915) 152 P. 434.

§ 4823. (R. S. § 2411.) Compensation for surveying by the day in Oregon and California.

Whenever the public surveys, or any portion of them, in the States of Oregon and California, are so required to be made as to render it expedient to make compensation for the surveying thereof by the day instead of by the mile, it shall be lawful for the Commissioner of the General Land-Office, under the direction of the Secretary of the Interior, to make such fair and reasonable allowance as, in his judgment, may be necessary to insure the accurate and faithful execution of the work.

Act March 3, 1853, c. 145, § 8, 10 Stat. 247.

The provisions of this section were extended to Colorado, Idaho, Montana, Nevada, Utah, Washington, Wyoming, Arizona, New Mexico, and Alaska, by special provisions annexed to the appropriations for the surveys contained in various sundry civil appropriation acts, but omitted in later similar appropriation acts.

The appropriation for the surveys for the fiscal year 1917, with the special provisions as to its expenditure, were contained in the sundry civil appropriation act for that year, Act July 1, 1916, c. 209, § 1, 39 Stat.

See notes to R. S. § 2400, ante, § 4808.

§ 4824. (Act March 3, 1909, c. 271, as amended, Res. June 25, 1910, No. 40.) Resurveys or retracements of surveys to mark boundaries of public lands undisposed of.

The Secretary of the Interior may in his discretion cause to be made, as he may deem wise under the rectangular system now provided by law, such resurveys or retracements of the surveys of public lands as, after full investigation, he may deem essential to properly mark the boundaries of the public lands remaining undisposed of: Provided, That no such resurvey or retracement shall be so executed as to impair the bona fide rights or claims of any claimant, entryman, or owner of lands affected by such resurvey or retracement: Provided further, That not to exceed twenty per cent. of the total annual appropriation for surveys and resurveys of the public lands shall be used for the resurveys and retracements authorized hereby. (35 Stat. 845. 36 Stat. 884.)

This was an act entitled "An act authorizing the necessary resurvey of public lands."

The amendment of this act by Res. June 25, 1910, No. 40, cited above, consisted in changing the words "five per centum" in the last proviso, as originally enacted, to "twenty per centum," as set forth here.

Resurveys of particular public lands were authorized by special acts: Lands in Nebraska, by Act May 19, 1908, c. 176, 35 Stat. 165; in Wyoming, by Act May 29, 1908, c. 220, §§ 1, 2, 35 Stat. 465; in Louisiana, by Act May 25, 1906, c. 2554, 34 Stat. 199.

(R. S. § 2412. Repealed.)

This section imposed a penalty upon every person who, by threats or force, interrupted, hindered, or prevented the surveying of the public lands or of any private land-claim. It was incorporated in Crim. Code, § 58, post, § 10225, and was expressly repealed by Crim. Code, § 341, post, § 10515.

§ 4825. (R. S. § 2413.) Protection of surveyor by marshal of district.

Whenever the President is satisfied that forcible opposition has been offered, or is likely to be offered, to any surveyor or deputy surveyor in the discharge of his duties in surveying the public lands,

it may be lawful for the President to order the marshal of the State or district, by himself or deputy, to attend such surveyor or deputy surveyor with sufficient force to protect such officer in the execution of his duty, and to remove force should any be offered.

Act May 29, 1830, c. 163, § 2, 4 Stat. 417.

CHAPTER TEN

Bounty-Lands

Sec.
4826. Military bounty-land warrants and locations assignable.
4827. Warrants located at $1.25; excess paid in cash.
4828. Claims for bounty-lands in virtue of certain acts named, etc.
4829. Same subject.
4830. Bounty-lands for soldiers in certain wars.
4831. Certain classes of persons in the Mexican war, their widows, etc., entitled to forty acres.
4832. Militia and volunteers in service since 1812.
4833. Persons not entitled under preceding sections.
4834. Period of captivity added to actual service.
4835. Warrant and patent to issue, when.
4836. Widows of persons entitled.
4837. Additional bounty-lands, etc.
4838. Classes under last section specified.
4839. What classes of persons entitled under R. S. § 2425, without regard to length of service.
4840. Widows and children of persons entitled under R. S. § 2425.
4841. Subsequent marriage of widow.
4842. Minors under R. S. § 2428.
4843. Proof of service.
4844. Former evidence of right to bounty-land to be received in certain cases.
4845. Allowance of time of service for distance from home to place of muster or discharge.
4846. Indians included.
4847. Former evidence of right to a pension to be received in certain cases on application for bounty-land.
4848. Sales, mortgages, letters of attorney, etc., made before issue of warrant to be void.
4849. Warrants to be located free of expense by Commissioner of Land-Office, etc.
4850. Deserters not entitled to bounty-land.
4851. Lost warrants, provisions for.
4852. Discharges, omissions, and loss of, provided for.
4853. New warrant issued in lieu of lost warrant.
4854. Regulations by Secretary of Interior.
4855. Mode of issuing patents to the heirs of persons entitled to bounty-lands.
4856. Death of claimant after establishing right and before issuing of warrant.
4857. When proofs may be filed by legal representatives.
4858. Relocation of military bounty-land warrants in cases of error.
4859. Bounty warrants and indemnity certificates receivable in payment for lands.

§ 4826. (R. S. § 2414.) Military bounty-land warrants and locations assignable.

All warrants for military bounty-lands which have been or may hereafter be issued under any law of the United States, and all valid locations of the same which have been or may hereafter be made, are declared to be assignable by deed or instrument of writing, made and executed according to such form and pursuant to such regulations as may be prescribed by the Commissioner of the General Land-Office, so as to vest the assignee with all the rights of the original owner of the warrant or location.

Act March 22, 1852, c. 19, § 1, 10 Stat. 3. Act June 3, 1858, c. 84, § 2, 11 Stat. 309.

Notes of Decisions

Assignability of warrants.—Warrants for military bounty lands and valid locations of the same are assignable. Waters v. Bush (1875) 42 Iowa, 255; Wilcox v. Phillips (1906) 97 S. W. 886, 199 Mo. 288; McSorley v. Hill (1891) 2 Wash. St. 638, 27 Pac. 552; McAleer v. Same (1891) 2 Wash. St. 653, 27 Pac. 557. See, also, Wetzel v. Minnesota Transfer Ry. Co. (C. C. 1893) 56

Fed. 919, decree affirmed (1894) 65 Fed. 23, 12 C. C. A. 490; (1881) 17 Op. Atty. Gen. 157; Bates v. Herron (1859) 35 Ala. 117; Johns v. Warren (1892) 85 Iowa, 300, 52 N. W. 230; Merrill v. Hartwell (1863) 11 Mich. 200; Johnson v. Gilfillan (1863) 8 Minn. 395 (Gil. 352); Johnson v. Fluetsch (1903) 75 S. W. 1005, 176 Mo. 452.

A land grant is not negotiable. Fort v. Wilson (1856) 3 Iowa (3 Clarke) 153.

Mere possession of a warrant in blank does not authorize the holder to give a title to it. Id.

—— Warrants fraudulently procured.—The assignee of a land warrant, fraudulently procured from the government, has no higher legal rights than the warrantee. Bronson v. Kukuk (C. C. 1874) Fed. Cas. No. 1,929.

A land warrant fraudulently obtained in the name of a person deceased without heirs or widow, or of a fictitious person, is a nullity, incapable of assignment, and may be rejected or canceled. But when a warrant, valid on its face, has been issued to a person in esse, who has assigned it to a bona fide purchaser, the government cannot cancel it on the ground that it was issued in misapprehension or on imperfect or false evidence. (1856) 7 Op. Atty. Gen. 657.

Suspension of location because of insufficiency of assignment.—Where the records of the Land Office show that the location of land under a military bounty warrant was suspended by the Commissioner of the General Land Office because of the insufficiency of an assignment of the warrant, the equity of the holder of the land was not perfected until the assignment was made good. Price v. Dennis (Ala. 1909) 49 South. 248. See, also, Kohn v. Barr (1893) 52 Kan. 269, 34 Pac. 880.

Effect of assignment.—A conveyance by one holding a certificate of location, before a patent is issued, will pass the title to his grantee. Sillyman v. King (1873) 36 Iowa, 207.

The interest acquired by the valid location of military bounty land warrants is assignable; and where there is a sufficient assignment of the certificate, the assignee becomes fully vested with the property of the original owner of the land. Waters v. Bush (1875) 42 Iowa, 255.

If the holder of a military land warrant locates the same upon public land, and receives the usual certificate therefor, he then has the right to transfer or sell the land; and, if he exercise such right before a patent has issued to him, the patent inures to the benefit of his grantee. Stinson v. Geer (1889) 42 Kan. 520, 22 Pac. 586.

Where the locator of a military land warrant locates the same upon public land, and subsequently sells, transfers, and assigns his certificate of location to another person for a valuable consideration, but does not in all respects follow the forms and regulations for assignment of land warrants and locations, as prescribed by the commissioner of the general land office, the grantee takes the interest and estate of the locator, and becomes the equitable owner thereof. Id.

Assignor as trustee for assignee.—A certificate of entry or location under a military land warrant vests in the holder an equitable title to the land, and gives him a right to the patent when issued; and if he conveys the land, or assigns the certificate and afterwards obtains the patent, he becomes a trustee for the person to whom he had previously sold or assigned. Gray v. Jones (C. C. 1882) 14 Fed. 83.

§ 4827. (R. S. § 2415.) Warrants located at $1.25; excess paid in cash.

The warrants which have been or may hereafter be issued in pursuance of law may be located according to the legal subdivisions of the public lands in one body upon any lands of the United States subject to private entry at the time of such location at the minimum price. When such warrant is located on lands which are subject to entry at a greater minimum than one dollar and twenty-five cents per acre, the locator shall pay to the United States in cash the difference between the value of such warrants at one dollar and twenty-five cents per acre and the tract of land located on. But where such tract is rated at one dollar and twenty-five cents per acre, and does not exceed the area specified in the warrant, it must be taken in full satisfaction thereof.

Act March 22, 1852, c. 19, § 1, 10 Stat. 3.

Notes of Decisions

Location as extinguishment of warrant.—A land warrant is not canceled, nor does the title thereto pass from the locator, until it is accepted in payment for land by the United States. Such acceptance is not consummated

until the entry is fully confirmed by the general land office. Johnson v. Gilfillan (1863) 8 Minn. 395 (Gil. 352).

Effect of location upon title to land.—The title to land covered by a certificate of location, remains in the government until it receives payment. Hussman v. Durham (1897) 17 Sup. Ct. 253, 255, 165 U. S. 144, 41 L. Ed. 664. See, also, Carter v. Ruddy (1897) 17 Sup. Ct. 640, 642, 166 U. S. 493, 41 L. Ed. 1090, affirming (1893) 56 Fed. 542, 6 C. C. A. 3.

Until the equity of the locator becomes complete, the United States can convey by patent or grant by act of Congress the legal title to a stranger. Price v. Dennis (Ala. 1909) 49 South. 248.

A location of a military land warrant will enable the locator or his grantee to maintain trespass for damage to the land. Butterfield v. Central Pac. R. Co. (1866) 31 Cal. 264.

A location of land under a military land warrant accompanied by a record of entry in the proper office removes the land from the general domain of the government open to purchase or settlement, and the legal title is held by the government in the nature of a trust for the one showing himself entitled to the benefit of the location. Herrick & Stevens v. Sargent & Lahr (Iowa, 1908) 117 N. W. 751. See, also, Wirth v. Branson (1878) 98 U. S. 118, 121, 25 L. Ed. 86.

Equitable title acquired by locator.—The locator of a land warrant on a tract of public land, who does all that is required to entitle him to a patent, becomes the equitable owner of the land, though by mistake it is incorrectly described in his application; and where he and his grantees take possession of, improve, and pay taxes on the land, another who procures a patent therefor from the government with knowledge of such facts is a purchaser in bad faith, and may be compelled to convey the legal title to the holder of the superior equity. Hedrick v. Atchison, T. & S. F. R. Co. (1897) 17 Sup. Ct. 922, 925, 167 U. S. 673, 42 L. Ed. 320.

The equitable title to the land did not pass from the United States, so as to make it liable to state taxation, upon the location of a military bounty land warrant, by one who was not the lawful owner and holder of such warrant, since such location did not operate as a payment of the purchase price, which was essential to the right to a patent. Sargeant & Lahr v. Herrick & Stevens (1911) 31 Sup. Ct. 574, 221 U. S. 404, 55 L. Ed. 787, reversing decree Herrick & Stevens v. Sargent & Lahr (1908) 117 N. W. 751, 140 Iowa, 590, 132 Am. St. Rep. 281.

When a person enters land at a government land office, and pays for it, either by a land warrant or in money, he acquires precisely the same equitable rights that he would in a similar transaction with a private individual. Aldrich v. Aldrich (1865) 37 Ill. 32.

Where one located certain government land on a military bounty land warrant, and received a duplicate certificate of entry, and went into possession, he acquired equitable title, though his original application misdescribed the land. Sensenderfer v. Kemp, 83 Mo. 581; Swisher v. Sensenderfer (1884) 84 Mo. 104. See, also, Hedrick v. Atchison, T. & S. F. R. Co. (1894) 120 Mo. 516, 25 S. W. 759.

After entry of public land under a military bounty land warrant, the holder thereof is the equitable owner; the mere naked title remaining in the government until the issuance of a patent. Johnson v. Fluetsch (1903) 75 S. W. 1005, 176 Mo. 452; Wilcox v. Phillips (1906) 97 S. W. 886, 199 Mo. 288. See, also, Langdon v. Sherwood (1888) 8 Sup. Ct. 429, 432, 124 U. S. 74, 31 L. Ed. 344; Price v. Dennis (1909) 49 South. 248, 159 Ala. 318.

Location on swamp lands.—Land on which a military land warrant was located was not affected by the subsequent grant of swamp lands. Culver v. Uthe (1890) 10 Sup. Ct. 415, 133 U. S. 655, 33 L. Ed. 776.

Cancellation of warrant after entry.—If, after land has been entered under a military land warrant, the commissioner of pensions cancels the warrant, and thereupon the commissioner of the general land office cancels the entry, and subsequently the commissioner of pensions rescinds the order canceling the warrant, such rescission is evidence that such order of cancellation and the order canceling the entry in consequence of the cancellation of the warrant were both improperly made. Aldrich v. Aldrich (1865) 37 Ill. 32.

§ 4828. (R. S. § 2416.) Claims for bounty-lands in virtue of certain acts named, etc.

In all cases of warrants for bounty-lands, issued by virtue of an act approved July twenty-seven, one thousand eight hundred and forty-two, and of two acts approved January twenty-seven, one thousand eight hundred and thirty-five, therein and thereby revised, and of two acts to the same intent, respectively, approved June twenty-six, eighteen hundred and forty-eight, and February eight, eighteen hundred and fifty-four, for military services in the revolutionary war, or in the war of eighteen hundred and twelve with Great Britain,

which remained unsatisfied on the second day of July, eighteen hundred and sixty-four, it is lawful for the person in whose name such warrant issued, his heirs or legal representatives, to enter in quarter-sections, at the proper local land-office in any of the States or Territories, the quantity of the public lands subject to private entry which he is entitled to under such warrant.

Act July 2, 1864, c. 226, § 1, 13 Stat. 378.

§ 4829. (R. S. § 2417.) Same subject.

All warrants for bounty-lands referred to in the preceding section may be located at any time, in conformity with the general laws in force at the time of such location.

Act July 2, 1864, c. 226, § 2, 13 Stat. 379.

§ 4830. (R. S. § 2418.) Bounty-lands for soldiers in certain wars.

Each of the surviving, or the widow or minor children of deceased commissioned and non-commissioned officers, musicians, or privates, whether of regulars, volunteers, rangers, or militia, who performed military service in any regiment, company, or detachment, in the service of the United States, in the war with Great Britain, declared on the eighteenth day of June, eighteen hundred and twelve, or in any of the Indian wars since seventeen hundred and ninety, and prior to the third of March, eighteen hundred and fifty, and each of the commissioned officers who was engaged in the military service of the United States in the war with Mexico, shall be entitled to lands as follows: Those who engaged to serve twelve months or during the war, and actually served nine months, shall receive one hundred and sixty acres, and those who engaged to serve six months, and actually served four months, shall receive eighty acres, and those who engaged to serve for any or an indefinite period, and actually served one month, shall receive forty acres; but wherever any officer or soldier was honorably discharged in consequence of disability contracted in the service, before the expiration of his period of service, he shall receive the amount to which he would have been entitled if he had served the full period for which he had engaged to serve. All the persons enumerated in this section who enlisted in the regular army, or were mustered in any volunteer company for a period of not less than twelve months, and who served in the war with Mexico and received an honorable discharge, or who were killed or died of wounds received or sickness incurred in the course of such service, or were discharged before the expiration of the term of service in consequence of wounds received or sickness incurred in the course of such service, shall be entitled to receive a certificate or warrant for one hundred and sixty acres of land: or at option Treasury scrip for one hundred dollars bearing interest at six per cent. per annum, payable semi-annually, at the pleasure of the Government. In the event of the death of any one of the persons mentioned in this section during service, or after his discharge, and before the issuing of a certificate or warrant, the warrant or scrip shall be issued in favor of his family or relatives; first, to the widow and his children; second, his father; third, his mother; fourth, his brothers and sisters.

Act Feb. 11, 1847, c. 8, § 9, 9 Stat. 125, 126. Act Sept. 28, 1850, c. 85, § 1, 9 Stat. 520.

An appropriation was made for the redemption of outstanding Treasury scrip, and the further issuance of such scrip was prohibited by Act March 3, 1849, c. 100, 9 Stat. 366. Notwithstanding that act, the provision of Act Feb. 11, 1847, c. 8, § 9, for the issuance of such scrip, was carried into R. S. §§ 2418, 2419, as set forth in this and the following section.

Notes of Decisions

Soldiers entitled to bounty lands.— Soldiers who enlisted during the war with Mexico for twelve months, but who, without having been wounded or sick, were honorably discharged before the expiration of their term of service,

are not entitled to bounty lands. (1848) 4 Op. Atty. Gen. 718.

A soldier honorably discharged, against his own wishes, is entitled to bounty land. (1849) 5 Op. Atty. Gen. 147.

The section embraces those of the regular army enlisted for twelve months or for a longer period; volunteers regularly mustered into a volunteer company, who served during the war and have been honorably discharged; those killed, or who died of wounds received or by sickness incurred in the course of their service; and those who were discharged before the expiration of their term of service in consequence of wounds received or sickness incurred in the course of their service. Id.

Issuance and validity of warrants.—The issuance of more than one warrant upon the same claim is unauthorized. (1851) 5 Op. Atty. Gen. 388.

Election to take treasury scrip instead of land.—Discharged soldiers who have elected to take treasury scrip instead of bounty land, and have obtained the requisite certificate therefor from the Commissioner of Pensions, cannot afterwards be permitted to surrender such scrip and obtain a warrant for lands instead. (1847) 4 Op. Atty. Gen. 642.

Claims of minors.—The right of the claimant will not be defeated by obtaining his or her majority before the case is finally disposed of. (1860) 9 Op. Atty. Gen. 427.

The act does not vest the right to the warrant for bounty land in the child of a minor before his or her claim is filed. Id.

Lands subject to location.—The statute was intended to operate on the public lands which are subject to sale at the minimum price. (1848) 4 Op. Atty. Gen. 714.

§ 4831. (R. S. § 2419.) Certain classes of persons in the Mexican war, their widows, etc., entitled to forty acres.

The persons enumerated in the preceding section received into service after the commencement of the war with Mexico, for less than twelve months, and who served such term, or were honorably discharged are entitled to receive a certificate or warrant for forty acres, or scrip for twenty-five dollars if preferred, and in the event of the death of such person during service, or after honorable discharge before the eleventh of February, eighteen hundred and forty-seven, the warrant or scrip shall issue to the wife, child, or children, if there be any, and if none, to the father, and if no father, to the mother of such soldier.

Act Feb. 11, 1847, c. 8, § 9, 9 Stat. 126.
See note to R. S. § 2418, ante, § 4820.

§ 4832. (R. S. § 2420.) Militia and volunteers in service since 1812.

Where the militia, or volunteers, or State troops of any State or Territory, subsequent to the eighteenth day of June, eighteen hundred and twelve, and prior to March twenty-second, eighteen hundred and fifty-two, were called into service, the officers and soldiers thereof shall be entitled to all the benefits of section two thousand four hundred and eighteen upon proof of length of service as therein required.

Act March 22, 1852, c. 19, § 4, 10 Stat. 4.
R. S. § 2418, mentioned in this section, is set forth ante, § 4830.

§ 4833. (R. S. § 2421.) Persons not entitled under preceding sections.

No person shall take any benefit under the provisions of the three preceding sections, if he has received, or is entitled to receive, any military land-bounty under any act of Congress passed prior to the twenty-second March, eighteen hundred and fifty-two.

Act Sept. 28, 1850, c. 85, § 1, 9 Stat. 520.

§ 4834. (R. S. § 2422.) Period of captivity added to actual service.

The period during which any officer or soldier remained in captivity with the enemy shall be estimated and added to the period of his actual service, and the person so retained in captivity shall receive land under the provisions of sections twenty-four hundred and eighteen and twenty-four hundred and twenty, in the same manner

that he would be entitled in case he had entered the service for the whole term made up by the addition of the time of his captivity, and had served during such term.

Act Sept. 28, 1850, c. 85, § 2, 9 Stat. 520.

R. S. §§ 2418, 2420, mentioned in this section, are set forth ante, §§ 4830, 4832.

§ 4835. (R. S. § 2423.) Warrant and patent to issue, when.

Every person for whom provision is made by sections twenty-four hundred and eighteen and twenty-four hundred and twenty shall receive a warrant from the Department of the Interior for the quantity of land to which he is entitled; and, upon the return of such warrant, with evidence of the location thereof having been legally made to the General Land-Office, a patent shall be issued therefor.

Act Sept. 28, 1850, c. 85, § 3, 9 Stat. 520.

R. S. §§ 2418, 2420, mentioned in this section, are set forth ante, §§ 4830, 4832.

Notes of Decisions

Locator's right to patent.—A grant of lands to be selected by the grantees is like a land warrant, but the title passes on selection and approval thereof by the land department, with the same effect as if a patent issued. Shaw v. Kellogg (1898) 18 Sup. Ct. 632, 170 U. S. 312, 42 L. Ed. 1050.

The location of a land warrant disables the United States to convey to any but the warrant holder. Bates v. Herron (1859) 35 Ala. 117.

After issuance of a military bounty land warrant and location of land under it pursuant to act of Congress, and approval of the location by the Land Department, the locator obtains such an equity as state and federal courts will protect, and which gives him an absolute right to the patent and the legal title, rendering a patent issued to another in violation of his equity void. Price v. Dennis (Ala. 1909) 49 South. 248.

The holder of a land warrant, free from question, has, by statute, an absolute right to locate land under it, and to a patent. Merrill v. Hartwell (1863) 11 Mich. 200.

The assignee of a land warrant, who locates the same and secures his certificate of entry or purchase, and, as required by law, delivers up his warrant to the register of the land office, is not responsible for the latter's neglect in failing to report his location to the General Land Office. Johnson v. Fluetsch (1903) 75 S. W. 1005, 176 Mo. 452.

Patent to administrator of deceased assignee.—A patent of lands, which recites a location upon them by B., administrator of C., deceased, of a military land warrant assigned to C., and which grants to "B., administrator of C. as assignee, as aforesaid, and to his heirs" the land described, is not void upon its face. Bonds v. Hickman (1866) 29 Cal. 460.

Effect of patent as relating back to entry.—A conveyance by the United States of the legal title to land does not operate by relation back of the time when the consideration for the land was paid. Hussman v. Durham (1897) 17 Sup. Ct. 253, 254, 165 U. S. 144, 41 L. Ed. 664, holding that the lands were not taxable.

The passing of the legal title from the government by issuing a patent to land located under a military land warrant relates back to the date of the entry of the location, and removes all doubt as to the taxable character of the property after such date. Herrick & Stevens v. Sargent & Lahr (Iowa, 1908) 117 N. W. 751. See, also, Weeks v. Loy (1879) 52 Iowa, 202, 2 N. W. 1075.

§ 4836. (R. S. § 2424.) Widows of persons entitled.

In the event of the death of any person, for whom provision is made by sections twenty-four hundred and eighteen and twenty-four hundred and twenty, and who did not receive bounty-land for his services, a like warrant shall issue in favor of his widow, who shall be entitled to one hundred and sixty acres of land in case her husband was killed in battle; nor shall a subsequent marriage impair the right of any widow to such warrant, if she be a widow at the time of making her application.

Act Sept. 28, 1850, c. 85, § 3, 9 Stat. 520.

R. S. §§ 2418, 2420, mentioned in this section, are set forth ante, §§ 4830, 4832.

§ 4837. (R. S. § 2425.) Additional bounty-lands, etc.

Each of the surviving persons specified in the classes enumerated in the following section, who has served for a period of not less

than fourteen days, in any of the wars in which the United States have been engaged since the year seventeen hundred and ninety, and prior to the third day of March, eighteen hundred and fifty-five, shall be entitled to receive a warrant from the Department of the Interior, for one hundred and sixty acres of land; and, where any person so entitled has, prior to the third day of March, eighteen hundred and fifty-five, received a warrant for any number of acres less than one hundred and sixty, he shall be allowed a warrant for such quantity of land only as will make, in the whole, with what he may have received prior to that date, one hundred and sixty acres.

Act March 3, 1855, c. 207, §§ 1, 3, 10 Stat. 701, 702.

§ 4838. (R. S. § 2426.) Classes under last section specified.

The classes of persons embraced as beneficiaries under the preceding section, are as follows, namely:

First. Commissioned and non-commissioned officers, musicians, and privates, whether of the regulars, volunteers, rangers, or militia, who were regularly mustered into the service of the United States.

Second. Commissioned and non-commissioned officers, seamen, ordinary seamen, flotilla-men, marines, clerks, and landsmen in the Navy.

Third. Militia, volunteers, and State troops of any State or Territory, called into military service, and regularly mustered therein, and whose services have been paid by the United States.

Fourth. Wagon-masters and teamsters who have been employed under the direction of competent authority, in time of war, in the transportation of military stores and supplies.

Fifth. Officers and soldiers of the revolutionary war, and marines, seamen, and other persons in the naval service of the United States during that war.

Sixth. Chaplains who served with the Army.

Seventh. Volunteers who served with the armed forces of the United States in any of the wars mentioned, subject to military orders, whether regularly mustered into the service of the United States or not.

Act March 3, 1855, c. 207, §§ 1, 8, 10, 10 Stat. 701, 702. Act May 14, 1856, c. 26, §§ 4, 5, 11 Stat. 8, 9.

Notes of Decisions

Beneficiaries—Militia or volunteers.—Military service in the prosecution of a war subsequent to the act of March 3, 1855, and prior to the act of May 14, 1856, entitles such party to a land warrant. Such services are embraced within the terms employed by the latter law. It is not necessary that the party be mustered in, or formally enlisted, provided that he has served as "a volunteer with the armed forces of the United States, subject to military orders, for the space of fourteen days." Alire v. U. S. (1865) 1 Ct. Cl. 233. And see U. S. v. Alire (1867) 6 Wall. 573, 18 L. Ed. 947.

The statute embraces not only militia or volunteers whose military services were performed under the general command of the United States and in time of war, but also such as rendered military service, whether in war or not, and whether under the immediate authority of the United States or of a state or territory, but who shall have been paid for such service by the United States. (1855) 7 Op. Atty. Gen. 606.

—— **Clerks in navy.**—A paymaster's clerk may become entitled to bounty land. Ex parte Reed (1879) 100 U. S. 13, 22, 25 L. Ed. 538; Johnson v. Sayre (1895) 15 Sup. Ct. 773, 776, 158 U. S. 109, 39 L. Ed. 914.

§ 4839. (R. S. § 2427.) What classes of persons entitled under R. S. § 2425, without regard to length of service.

The following class of persons are included as beneficiaries under section twenty-four hundred and twenty-five, without regard to the length of service rendered.

First. Any of the classes of persons mentioned in section twenty-four hundred and twenty-six who have been actually engaged in any

battle in any of the wars in which this country has been engaged since seventeen hundred and ninety, and prior to March third, eighteen hundred and fifty-five.

Second. Those volunteers who served at the invasion of Plattsburgh, in September, eighteen hundred and fourteen.

Third. The volunteers who served at the battle of King's Mountain, in the revolutionary war.

Fourth. The volunteers who served at the battle of Nickojack against the confederate savages of the South.

Fifth. The volunters who served at the attack on Lewistown, in Delaware, by the British fleet, in the war of eighteen hundred and twelve.

Act March 3, 1855, c. 207, §§ 3, 9, 11, 10 Stat. 702.

R. S. §§ 2425, 2426, mentioned in this section, are set forth ante, §§ 4837, 4838.

§ 4840. (R. S. § 2428.) Widows and children of persons entitled under R. S. § 2425.

In the event of the death of any person who would be entitled to a warrant, as provided in section twenty-four hundred and twenty-five, leaving a widow, or, if no widow, a minor child, such widow or such minor child shall receive a warrant for the same quantity of land that the decedent would be entitled to receive, if living on the third day of March, eighteen hundred and fifty-five.

Act March 3, 1855, c. 207, § 2, 10 Stat. 702.

R. S. § 2425, mentioned in this section, is set forth ante, § 4837.

§ 4841. (R. S. § 2429.) Subsequent marriage of widow.

A subsequent marriage shall not impair the right of any widow, under the preceding section, if she be a widow at the time of her application.

Act March 3, 1855, c. 207, § 2, 10 Stat. 702.

§ 4842. (R. S. § 2430.) Minors under R. S. § 2428.

Persons within the age of twenty-one years on the third day of March, eighteen hundred and fifty-five, shall be considered minors within the intent of section twenty-four hundred and twenty-eight.

Act March 3, 1855, c. 207, § 2, 10 Stat. 702.

R. S. § 2428, mentioned in this section, is set forth ante, § 4840.

§ 4843. (R. S. § 2431.) Proof of service.

Where no record evidence of the service for which a warrant is claimed exists, parol evidence may be admitted to prove the service performed, under such regulations as the Commissioner of Pensions may prescribe.

Act March 3, 1855, c. 207, § 3, 10 Stat. 702. Act May 14, 1856, c. 26, § 3, 11 Stat. 8.

Proof of loyalty of an applicant for bounty-land was dispensed with, where the applicant was otherwise entitled thereto, by Act March 11, 1898, c. 57, post, § 6388, amendatory of R. S. § 3480, post, § 6387.

§ 4844. (R. S. § 2432.) Former evidence of right to bounty-land to be received in certain cases.

Where certificate or a warrant for bounty-land for any less quantity than one hundred and sixty acres has been issued to any officer or soldier, or to the widow or minor child of any officer or soldier, the evidence upon which such certificate or warrant was issued shall be received to establish the service of such officer or soldier in the application of himself, or of his widow or minor child, for a warrant for so much land as may be required to make up the full sum of one hundred and sixty acres, to which he may be entitled under the preceding section, on proof of the identity of such officer or soldier, or, in case of his death, of the marriage and identity of his widow, or, in case of her death, of the identity of his minor child. But if, upon a review of such evidence, the Commissioner of Pensions is not sat-

isfied that the former warrant was properly granted, he may require additional evidence, as well of the term as of the fact of service.

Act May 14, 1856, c. 26, § 1, 11 Stat. 8.

§ 4845. (R. S. § 2433.) Allowance of time of service for distance from home to place of muster or discharge.

When any company, battalion, or regiment, in an organized form, marched more than twenty miles to the place where they were mustered into the service of the United States, or were discharged more than twenty miles from the place where such company, battalion, or regiment was organized, in all such cases, in computing the length of service of the officers and soldiers of any such company, battalion, or regiment, there shall be allowed one day for every twenty miles from the place where the company, battalion, or regiment was organized to the place where the same was mustered into the service of the United States, and one day for every twenty miles from the place where such company, battalion, or regiment was discharged, to the place where it was organized, and from whence it marched to enter the service, provided that such march was in obedience to the command or direction of the President, or some general officer of the United States, commanding an army or department, or the chief executive officer of the State or Territory by which such company, battalion, or regiment was called into service.

Act May 14, 1856, c. 26, § 7, 11 Stat. 9. Act March 22, 1852, c. 19, § 5, 10 Stat. 4.

§ 4846. (R. S. § 2434.) Indians included.

The provisions of all the bounty-land laws shall be extended to Indians, in the same manner and to the same extent as to white persons.

Act March 3, 1855, c. 207, § 7, 10 Stat. 702.

§ 4847. (R. S. § 2435.) Former evidence of right to a pension to be received in certain cases on application for bounty-land.

Where a pension has been granted to any officer or soldier, the evidence upon which such pension was granted shall be received to establish the service of such officer or soldier in his application for bounty-land; and upon proof of his identity as such pensioner, a warrant may be issued to him for the quantity of land to which he is entitled; and in case of the death of such pensioned officer or soldier, his widow shall be entitled to a warrant for the same quantity of land to which her husband would have been entitled, if living, upon proof that she is such widow; and in case of the death of such officer or soldier, leaving a minor child and no widow, or where the widow may have deceased before the issuing of any warrant, such minor child shall be entitled to a warrant for the same quantity of land as the father would have been entitled to receive if living, upon proof of the decease of father and mother. But if, upon a review of such evidence, the Commissioner of Pensions is not satisfied that the pension was properly granted, he may require additional evidence, as well of the term as of the fact of service.

Act May 14, 1856, c. 26, § 2, 11 Stat. 8.

§ 4848. (R. S. § 2436.) Sales, mortgages, letters of attorney, etc., made before issue of warrant to be void.

All sales, mortgages, letters of attorney, or other instruments of writing, going to affect the title or claim to any warrant issued, or to be issued, or any land granted, or to be granted, under the preceding provisions of this chapter, made or executed prior to the issue of such warrant, shall be null and void to all intents and purposes whatsoever; nor shall such warrant, or the land obtained thereby, be in anywise affected by, or charged with, or subject to, the pay-

ment of any debt or claim incurred by any officer or soldier, prior to the issuing of the patent.

Act Sept. 28, 1850, c. 85, § 4, 9 Stat. 521.

Notes of Decisions

Sale or assignment of claims.—Under former acts it has been held that, where land was located under a military land warrant, a deed of it executed prior to the issue of the patent was invalid. Maxwell v. Moore (1859) 63 U. S. (22 How.) 185, 16 L. Ed. 251; Stephenson v. Wilson (1875) 37 Wis. 482, following Nichols v. Nichols (1851) 3 Chand. 189, 3 Pin. 174. See, also, Wright v. Taylor (C. C. 1871) Fed. Cas. No. 18,096; Moore v. Maxwell (1857) 18 Ark. 469.

The traffic in soldiers' claims is illegal. Brooks v. Martin (1863) 2 Wall. 70, 79, 17 L. Ed. 732.

One to whom a warrant for land has issued may dispose of the same prior to the issuing of the patent. Dyke v. McVey (1854) 16 Ill. (6 Peck) 41.

Since the assignment of land warrants is prohibited, an assignee can acquire no equity in land of which the government is bound to take notice. Burlington & M. R. Co. v. Clingman (1876) 43 Iowa, 306.

Such provisions do not prevent the assignment of a certificate or warrant after its issuance, and the assignee may locate the same in his own name. Johnson v. Fluetsch (1903) 75 S. W. 1005, 176 Mo. 452.

A contract for the assignment of a land warrant made before the issuance thereof cannot be enforced. Moore v. Mills (1858) 37 Tenn. (5 Sneed) 461.

—— **Power of attorney.**—A power of attorney to sell land to be located with a military land warrant is invalid when such power of attorney was given before the passage of the act, making such warrants assignable, and before issuance of the certificate of location, though after the issuance of the warrant. Johns v. Warren (1892) 85 Iowa, 300, 52 N. W. 230.

Where land is located in the name of the warrantee in a military land warrant by the person holding the power of attorney to sell land located under such warrant, title vests in the warrantee and his heirs. Id.

§ 4849. (R. S. § 2437.) Warrants to be located free of expense by Commissioner of Land-Office, etc.

It shall be the duty of the Commissioner of the General Land-Office, under such regulations as may be prescribed by the Secretary of the Interior, to cause to be located, free of expense, any warrant which the holder may transmit to the General Land-Office for that purpose, in such State or land-district as the holder or warrantee may designate, and upon good farming-land, so far as the same can be ascertained from the maps, plats, and field-notes of the surveyor, or from any other information in the possession of the local office, and, upon the location being made, the Secretary shall cause a patent to be transmitted to such warrantee or holder.

Act Sept. 28, 1850, c. 85, § 4, 9 Stat. 521.

§ 4850. (R. S. § 2438.) Deserters not entitled to bounty-land.

No person who has been in the military service of the United States shall, in any case, receive a bounty-land warrant if it appears by the muster-rolls of his regiment or corps that he deserted or was dishonorably discharged from service.

Act Sept. 28, 1850, c. 85, § 1, 9 Stat. 520. Act March 3, 1855, c. 207, § 1, 10 Stat. 701.

§ 4851. (R. S. § 2439.) Lost warrants, provisions for.

When a soldier of the Regular Army, who has obtained a military land-warrant, loses the same, or such warrant is destroyed by accident, he shall, upon proof thereof to the satisfaction of the Secretary of the Interior, be entitled to a patent in like manner as if the warrant was produced.

Act April 27, 1816, c. 127, § 1, 3 Stat. 317.

§ 4852. (R. S. § 2440.) Discharges, omissions, and loss of, provided for.

In all cases of discharge from the military service of the United States of any soldier of the Regular Army, when it appears to the satisfaction of the Secretary of War that a certificate of faithful services has been omitted by the neglect of the discharging officer, by

misconstruction of the law, or by any other neglect or casualty, such omission shall not prevent the issuing of the warrant and patent as in other cases. And when it is proved that any soldier of the Regular Army has lost his discharge and certificate of faithful service, the Secretary of War shall cause such papers to be furnished such soldier as will entitle him to his land-warrant and patent, provided such measure is justified by the time of his enlistment, the period of service, and the report of some officer of the corps to which he was attached.

Act April 27, 1816, c. 127, § 2, 3 Stat. 317.

§ 4853. (R. S. § 2441.) New warrant issued in lieu of lost warrant.

Whenever it appears that any certificate or warrant, issued in pursuance of any law granting bounty-land, has been lost or destroyed, whether the same has been sold and assigned by the warrantee or not, the Secretary of the Interior is required to cause a new certificate or warrant of like tenor to be issued in lieu thereof; which new certificate or warrant may be assigned, located, and patented in like manner as other certificates or warrants for bounty-land are now authorized by law to be assigned, located, and patented; and in all cases where warrants have been, or may be, re-issued, the original warrant, in whoseever hands it may be, shall be deemed and held to be null and void, and the assignment thereof, if any there be, fraudulent; and no patent shall ever issue for any land located therewith, unless such presumption of fraud in the assignment be removed by due proof that the same was executed by the warrantee in good faith and for a valuable consideration.

Act June 23, 1860, c. 203, § 1, 12 Stat. 90.

The provisions of this section were made applicable to the reissue of agricultural college land scrip canceled or destroyed without fault of the owner thereof, by Act June 20, 1874, c. 330, post, § 4872.

Notes of Decisions

Cancellation of warrants.—The fact that a finding of the secretary of the interior that an assignment of a land warrant, was a forgery, and his order canceling the warrant, were made without notice to the assignee, does not constitute a valid objection by one not in privity with the assignee, but claiming under a sale of the land for taxes after the cancellation, where the assignee had accepted the adjudication of the secretary as binding, and the fact that the assignment was forged is admitted. Hussman v. Durham (1897) 17 Sup. Ct. 253, 255, 165 U. S. 144, 41 L. Ed. 664.

This act authorizes the interior department to cancel bounty warrants which have been lost or destroyed. Durham v. Hussman (1893) 88 Iowa, 29, 55 N. W. 11.

Issuance of patent by filing substitute for objectionable warrant.—Where an entry was made upon a bounty land warrant, which was void because of a duplicate having been issued, and upon which, consequently, no patent could issue, and the warrant was afterwards canceled, the entryman had no such right to procure a patent by substitution as would preclude a purchase of the land from the government by third persons. Boyd v. Mammoth Spring Imp. Co. (1897) 38 S. W. 964, 137 Mo. 482.

§ 4854. (R. S. § 2442.) Regulations by Secretary of Interior.

The Secretary of the Interior is required to prescribe such regulations for carrying the preceding section into effect as he may deem necessary and proper in order to protect the Government against imposition and fraud by persons claiming the benefit thereof; and all laws and parts of laws for the punishment of frauds against the United States are made applicable to frauds under that section.

Act June 23, 1860, c. 203, § 2, 12 Stat. 91.

See note to R. S. § 2441, ante, § 4853.

§ 4855. (R. S. § 2443.) Mode of issuing patents to the heirs of persons entitled to bounty-lands.

In all cases where an officer or soldier of the revolutionary war, or a soldier of the war of eighteen hundred and twelve, was entitled

to bounty-land, has died before obtaining a patent for the land, and where application is made by a part only of the heirs of such deceased officer or soldier for such bounty-land, it shall be the duty of the Secretary of the Interior to issue the patent in the name of the heirs of such deceased officer or soldier, without specifying each; and the patent so issued in the name of the heirs, generally, shall inure to the benefit of the whole, in such portions as they are severally entitled to by the laws of descent in the State or Territory where the officer or soldier belonged at the time of his death.

Res. March 3, 1843, No. 7, 5 Stat. 650.

Notes of Decisions

Patent to heirs.—That the language of the acts of congress has not been uniform in the matter of the disposition of the public domain after the death of the principal beneficiary is illustrated by this section. Hutchinson Investment Co. v. Caldwell (1894) 14 Sup. Ct. 504, 506, 152 U. S. 65, 38 L. Ed. 356.

§ 4856. (R. S. § 2444.) Death of claimant after establishing right and before issuing of warrant.

When proof has been or hereafter is filed in the Pension-Office, during the life-time of a claimant, establishing, to the satisfaction of that office, his right to a warrant for military services, and such warrant has not been, or may not be, issued until after the death of the claimant, and all such warrants as have been heretofore issued subsequent to the death of the claimant, the title to such warrants shall vest in his widow, if there be one, and if there be no widow, then in the heirs or legatees of the claimant; and all military bounty-land warrants issued pursuant to law shall be treated as personal chattels, and may be conveyed by assignment of such widow, heirs, or legatees, or by the legal representatives of the deceased claimant, for the use of such heirs or legatees only.

Act June 3, 1858, c. 84, § 1, 11 Stat. 308.

Notes of Decisions

Rights by widow, heirs, or legatees.—Where the deceased claimant was a widow, with two sets of children, the warrant inures to the benefit of her heirs or legatees. (1858) 9 Op. Atty. Gen. 243.

A land warrant issued after the death of a claimant who left a widow and children inures to the widow's benefit alone. Id.

Heirs are those who are so declared by the law of the claimant's domicile. Id.

Soldiers' Home not entitled to warrants.—The Soldiers' Home is not entitled to bounty land warrants belonging to estates of deceased soldiers. (1855) 7 Op. Atty. Gen. 157.

§ 4857. (R. S. § 2445.) When proofs may be filed by legal representatives.

The legal representatives of a deceased claimant for a bounty-land warrant, whose claim was filed prior to his death, may file the proofs necessary to perfect such claim.

Act March 3, 1869, c. 138, 15 Stat. 336.

§ 4858. (R. S. § 2446.) Relocation of military bounty-land warrants in cases of error.

Where an actual settler on the public lands has sought, or hereafter attempts, to locate the land settled on and improved by him, with a military bounty-land warrant, and where, from any cause, an error has occurred in making such location, he is authorized to relinquish the land so erroneously located, and to locate such warrant upon the land so settled upon and improved by him, if the same then be vacant, and if not, upon any other vacant land, on making proof of those facts to the satisfaction of the land-officers, according to such rules and regulations as may be prescribed by the Commissioner of the General Land-Office, and subject to his final adjudication.

Act March 3, 1853, c. 147, § 1, 10 Stat. 256.

§ 4859. (Act Dec. 13, 1894, c. 3.) Bounty warrants and indemnity certificates receivable in payment for lands.

In addition to the benefits now given thereto by law, all unsatisfied military bounty land warrants under any act of Congress, and unsatisfied indemnity certificates of location under the Act of Congress approved June second, eighteen hundred and fifty-eight, whether heretofore or hereafter issued, shall be receivable at the rate of one dollar and twenty-five cents per acre in payment or part payment for any lands entered under the desert land law of March third, eighteen hundred and eighty-seven, entitled "An Act to provide for the sale of desert lands in certain States and Territories," and the amendments thereto, the timber-culture law of March third, eighteen hundred and seventy-three, entitled "An Act to encourage the growth of timber on the Western prairies," and the amendments thereto; the timber and stone law of June third, eighteen hundred and seventy-eight, entitled "An Act for the sale of timber lands in the States of California, Oregon, Nebraska, and Washington Territory," and the amendments thereto, or for lands which may be sold at public auction, except such lands as shall have been purchased from any Indian tribe within ten years last past. (28 Stat. 594.)

This was an act entitled "An act to provide for the location and satisfaction of outstanding military bounty land warrants and certificates of location under section three of the act approved June second, eighteen hundred and fifty-eight."

The unsatisfied indemnity certificates of location mentioned in this act were those authorized to be issued to certain named persons by Act June 2, 1858, c. 81, 11 Stat. 294.

The desert-land laws are set forth ante, under chapter 6B of this Title.

The timber-culture laws were repealed by Act March 3, 1891, c. 561, § 1, post, § 5116.

The timber and stone laws are set forth ante, under chapter 6A of this Title.

The laws relating to the sale and disposal of the public lands are contained in Chapter 7 of this Title.

CHAPTER TEN A

Reservations and Grants to States for Public Purposes

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes R. S. §§ 2275, 2276, 2286, 2377–2379, 2449, 2485–2487, and all other acts of a permanent, general nature relating to reservations by the United States, or grants to the various States, of public lands in aid of schools, universities, colleges, internal improvements, and other public purposes.

Sec.
4860. Settlements before survey on sections 16 or 36; deficiencies thereof.
4861. Selections to supply deficiencies of school lands.
4862. Selection of school lands upon ceded Indian reservations.
4863. Selection of phosphate or oil lands by Idaho under indemnity and other land grants; reservation of phosphates and oil to United States.
4864. Application for selection of phosphate or oil lands.
4865. Lands selected to be certified to State; reservation of phosphates and oil and right to prospect for and mine it; bond of prospector or miner; occupation of surface; damages to owner; objections to classification of lands; reserved phosphate and oil deposits not subject to exploration or entry.
4866. Provisions for selections to supply deficiencies of school lands, made applicable to grant of school lands to State of Utah.
4867. Additional school sections included in provisions as applicable to State of Utah.
4868. Provisions for selections to supply deficiencies of school lands made applicable to grant of

Sec.
school lands to Territory of New Mexico.
4869. Pre-emptions by counties for seats of justice.
4870. Fee-simple to pass in all grants of land to States and Territories.
4871. Patents for wagon-road grants to Oregon.
4872. Reissue of agricultural college land scrip lost or destroyed.
4873. Limitation of entries by agricultural-college scrip.
4874. Grant to new States.
4875. Selections and locations of lands granted in last section.
4876. Survey of lands granted to certain States.
4877. Preference right of selection granted to North Dakota, South Dakota, Montana, Idaho and Washington.
4878. Certain lands selected by California confirmed to that State.
4879. Where selections are on lands already surveyed.
4880. Where selections are upon land surveyed only by State authority.
4881. Representation of Indian claimants in suits to determine right of States to school lands.

§ 4860. (R. S. § 2275, as amended, Act Feb. 28, 1891, c. 384.) Settlements before survey on sections 16 or 36; deficiencies thereof.

Where settlements with a view to pre-emption or homestead have been, or shall hereafter be made, before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the claims of such settlers; and if such sections, or either of them, have been or shall be granted, reserved, or pledged for the use of schools or colleges in the State or Territory in which they lie, other lands of equal acreage are hereby appropriated and granted, and may be selected by said State or Territory, in lieu of such as may be thus taken by pre-emption of homestead settlers. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory where sections sixteen or thirty-six are mineral land, or are included within any Indian, military, or other reservation, or are otherwise disposed of by the United States: Provided, Where any State is entitled to said sections sixteen and thirty-six, or where said sections are reserved to any Territory, notwithstanding the same may be mineral land or embraced within a military, Indian, or other reservation, the selection of such lands in lieu thereof by said State or Territory shall be a waiver of its right to said sections. And other lands of equal acreage are also hereby appropriated and granted, and may be selected by said State or Territory to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever. And it shall be the duty of the Secretary of the Interior, without awaiting the extension of the public surveys, to ascertain and determine, by protraction or otherwise, the number of townships that will be included within such Indian, military, or other reservations, and thereupon the State or Territory shall be entitled to select indemnity lands to the extent of two sections for each of said townships, in lieu of sections sixteen and thirty-six therein; but such selections may not be made within the boundaries of said reservations: Provided, however, That nothing herein contained shall prevent any State or Territory from awaiting the extinguishment of any such military, Indian, or other reservation and the restoration of the lands therein embraced to the public domain and then taking the sections sixteen and thirty-six in place therein; but nothing in this proviso shall be construed as conferring any right not now existing.

Act Feb. 26, 1859, c. 58, 11 Stat. 385. Act Feb. 28, 1891, c. 384, 26 Stat. 796.

This section as originally enacted was as follows:

"Where settlements, with a view to pre-emption, have been made before the survey of the lands in the field, which are found to have been made on sections sixteen or thirty-six, those sections shall be subject to the pre-emption

claim of such settler; and if they, or either of them, have been or shall be reserved or pledged for the use of schools or colleges in the State or Territory in which the lands lie, other lands of like quantity are appropriated in lieu of such as may be patented by pre-emptors; and other lands are also appropriated to compensate deficiencies for school purposes, where sections sixteen or thirty-six are fractional in quantity, or where one or both are wanting by reason of the township being fractional, or from any natural cause whatever."

It was amended by Act Feb. 28, 1891, c. 384, cited above, to read as set forth here.

See notes to R. S. § 2276, post, § 4861.

Notes of Decisions

I. Settlements on school sections
1. Settler's privilege personal.

II. Reservation of lands for schools
2. Nature of reservation.
3. State's title to school lands.
4. Survey as affecting state's title.
5. School lands included within forest reservation.
6. Judicial notice of state's title.

III. Selection of indemnity lands by state
7. Purpose and effect of statute.
8. Vested right to make selection.
9. Selection where school sections are within a reservation.
10. Selection for loss of mineral lands.
11. Approval by Secretary of Interior.

I SETTLEMENTS ON SCHOOL SECTIONS

1. Settler's privilege personal.—Where settlers on a school section fail to assert any claim to pre-emption after survey, but sell their possessions and improvements, the purchaser does not succeed to their rights, or acquire any interest in such land. Gonzales v. French (1896) 17 Sup. Ct. 102, 104, 164 U. S. 338, 41 L. Ed. 458; Gonzales v. French (Ariz. 1893) 33 P. 501.

Settlement is the initiatory step to secure to a party the right of pre-emption. U. S. v. Union Pac. Ry. Co. (C. C. 1894) 61 Fed. 143, 146.

II. RESERVATION OF LANDS FOR SCHOOLS

2. Nature of reservation.—School land reservations are not irrevocable nor do they confer on the states to which they are granted any rights antedating actual cession, but are subject to such laws and changes in the laws regulating primary disposition as Congress may enact. State v. Stampfly (1912) 125 P. 148, 69 Wash. 368.

3. State's title to school lands.—The title to a school section, if unincumbered at the date of the survey, then vests absolutely in the state. Hibberd v. Slack (C. C. 1897) 84 Fed. 571; State v. Ball (Neb. 1911) 133 N. W. 412.

The title to the sixteenth section of land is in the state, in trust for the support of the schools of the township. Jefferson Davis County v. James-Sumrall Lumber Co. (Miss. 1909) 49 South. 611.

4. Survey as affecting state's title.—Prior to an official survey, the title to land which, when surveyed, would constitute school sections remains in the United States. U. S. v. Bonners Ferry Lumber Co. (C. C. 1910) 184 Fed. 187.

A grant by the federal government to a state of school lands, described by the designation of section numbers only, vests no title in the state to any specific portion until the official survey is made and approved by the federal authorities. Clemmons v. Gillette (1905) 83 P. 879, 33 Mont. 321, 114 Am. St. Rep. 814. See, also, Azcuenaga Bros. Live Stock & Land Co. v. Corta (Idaho, 1911) 115 P. 18, approving Balderston v. Brady (1910) 18 Idaho, 238, 108 Pac. 742.

The various acts of congress reserving portions of the public lands of the United States to the territories or states for the benefit of their people vest the title of such lands in the territories or states when the lands are surveyed, but until such time the obligation is executory, and the title remains in the federal government. Ferry v. Street (1886) 4 Utah, 521, 7 Pac. 712, 11 Pac. 571. And see Heydenfeldt v. Daney Gold & S. Min. Co. (1876) 93 U. S. 634, 640, 23 L. Ed. 995.

5. School lands included within forest reservation.—School lands the title to which has vested in a state by their survey are not thereafter subject to the disposal of congress, and, although included within the limits of a forest reservation, they are not a part of such reservation. Hibberd v. Slack (C. C. 1897) 84 Fed. 571.

Where the state has acquired complete title to school lands, the fact that such land is surrounded by other land, declared by the federal government to be a national forest, will not divest the state's title. Deseret Water, Oil & Irrigation Co. v. State (Cal. 1914) 138 P. 981.

Because of the failure of Congress, as evidenced by this and the following section, to agree to the proposal of the state of California, as evidenced by the state statute, to exchange state lands lying within the boundaries of a national forest reservation, the state statutes did not divest the state of title to such land. Id.

6. Judicial notice of state's title.—Judicial notice will be taken that title to all sections numbered 16 was vested

by act of Congress in the state for school purposes. Greene v. Boaz (Ala. 1908) 47 South. 255.

III. SELECTION OF INDEMNITY LANDS BY STATE

See, also, notes to § 4861, post.

7. Purpose and effect of statute.—The statute is intended to provide a uniform rule for the selection of indemnity school lands, and is applicable to all states and territories having grants of school lands. Johnston v. Morris (1896) 72 Fed. 890, 19 C. C. A. 229; State v. Whitney (1912) 120 P. 116, 66 Wash. 473.

This section in terms authorizes the selection of other lands where sections 16 or 36 are mineral lands, or are included within any reservation, or are otherwise disposed of by the United States. Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 656, 185 U. S. 373, 46 L. Ed. 954.

The statute does not contemplate an exchange of lands between the state and the United States, but only indemnity for loss to a state by reason of lands to which it is entitled being disposed of by the United States. Hibberd v. Slack (C. C. 1897) 84 Fed. 571, 572.

No title to lien lands passed by virtue of the statute alone, that is, it was not a grant in præsenti as was the grant of the school sections. Slade v. Butte County (1910) 112 Pac. 485, 14 Cal. App. 453.

8. Vested right to make selection.—A state has no indefeasible vested right to select lands in lieu of school sections. U. S. v. Mullan (C. C. 1882) 10 Fed. 785.

9. Selection where school sections are within a reservation.—This and the following section do not authorize a state to select indemnity lands in lieu of school lands which, after they have been surveyed and the title has thereby become vested in the state, are included within the exterior boundaries of a forest reservation. Hibberd v. Slack (C. C. 1897) 84 Fed. 571.

Land is within a reservation, within this section, where it has been withdrawn by the Secretary of the Interior "pending determination as to the advisability of including the same within a forest reservation." Alberger v. Kingsbury (1907) 91 P. 674, 6 Cal. App. 5.

10. Selection for loss of mineral lands.—The state of California is entitled to make indemnity selections in place of lands lost from its school sections by reason of being mineral lands. Johnston v. Morris (1896) 72 Fed. 890, 19 C. C. A. 229.

When school lands surveyed by a United States deputy surveyor are certified by him to be mineral, and his field notes and plats are approved by the surveyor general and the commissioner of the general land office, and filed in the land office, this is a sufficient determination that the lands are mineral in character to give the state a right to select other lands as indemnity for the loss. Id.

11. Approval by Secretary of Interior.—Where a state made a selection of indemnity land, no title passed and no vested interest accrued thereunder until such selection was approved by the Secretary of the Interior. Buena Vista Land & Development Co. v. Honolulu Oil Co. (Cal. 1913) 134 P. 1154. See, also, Johanson v. Washington (1903) 23 Sup. Ct. 825, 826, 190 U. S. 179, 47 L. Ed. 1008.

The approval by the Secretary of the Interior of a selection of public land in lieu of school sections, made by one claiming to be the agent of a territory, is, if nothing more, a withdrawal from private entry of the selected land, which continues until the approval of the selection is set aside. Johanson v. Washington (1903) 23 Sup. Ct. 825, 826, 190 U. S. 179, 47 L. Ed. 1008, affirming judgment State v. Johanson (1901) 67 P. 401, 26 Wash. 668.

The approval, by the Secretary of the Interior, of a selection of public lands in lieu of school sections, by a person authorized to represent the territory of Washington, being that of the officer charged with the supervision of the landed interests of the United States, should, unless some direction of Congress manifestly has been violated, be held to be conclusive on the transfer of title. Johanson v. Washington (1903) 23 Sup. Ct. 825, 827, 190 U. S. 179, 47 L. Ed. 1008.

§ 4861. (R. S. § 2276, as amended, Act Feb. 28, 1891, c. 384.) Selections to supply deficiencies of school lands.

That the lands appropriated by the preceding section shall be selected from any unappropriated, surveyed public lands, not mineral in character, within the State or Territory where such losses or deficiencies of school sections occur; and where the selections are to compensate for deficiencies of school lands in fractional townships, such selections shall be made in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than

three-quarters of a township, three quarters of a section; for a fractional township, containing a greater quantity of land than one quarter, and not more than one half of a township, one-half section; and for a fractional township containing a greater quantity of land than one entire section, and not more than one-quarter of a township one-quarter section of land: Provided, That the States or Territories which are, or shall be entitled to both the sixteenth and thirty-sixth sections in place, shall have the right to select double the amounts named, to compensate for deficiencies of school land in fractional townships.

Act Feb. 26, 1859, c. 58, 11 Stat. 385. Act May 20, 1826, c. 83, § 1, 4 Stat. 179. Act Feb. 28, 1891, c. 384, 26 Stat. 796.

This section, as originally enacted, was as follows:

"The lands appropriated by the preceding section shall be selected, within the same land district, in accordance with the following principles of adjustment, to wit: For each township, or fractional township, containing a greater quantity of land than three-quarters of an entire township, one section; for a fractional township, containing a greater quantity of land than one-half, and not more than three-quarters, of a township, three-quarters of a section; for a fractional township, containing a greater quantity of land than one-quarter, and not more than one-half, of a township, one-half section; and for a fractional township, containing a greater quantity of land than one entire section, and not more than one-quarter of a township, one quarter section of land."

It was amended by Act Feb. 28, 1891, c. 384, cited above, to read as set forth here.

Sections numbered 16 and 36, in each township in the Territories of New Mexico, Utah, Colorado, Dakota, Arizona, Idaho, Montana, Wyoming, and Washington were reserved for school purposes by Rev. St. §§ 1946, 1947; and in Oklahoma by Act May 2, 1890, c. 182, § 18, 26 Stat. 89, and Act Jan. 18, 1897, c. 62, § 4, 29 Stat. 490.

On the admission into the Union of new States formed from these Territories, the sections so reserved, or other lands equivalent thereto, were granted to each State, as similarly numbered sections had been granted to other public-land States, for the support of common schools, by the several acts admitting such States, as follows: Colorado, Act March 3, 1875, c. 139, § 7, 18 Stat. 475; North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889, c. 180, §§ 10, 18, 25 Stat. 679, 681, Act March 3, 1891, c. 543, § 38, 26 Stat. 1044; Idaho, Act July 3, 1890, c. 656, §§ 4, 13, 26 Stat. 215, 217; Wyoming, Act July 10, 1890, c. 664, §§ 4, 13, 26 Stat. 222, 224; Utah, to which sections numbered 2, 16, 32, and 36, or other lands equivalent thereto, are granted, Act July 16, 1894, c. 138, § 6, 28 Stat. 109; and a similar grant to the Territory of New Mexico was made by Act June 21, 1898, c. 489, § 1, 30 Stat. 484.

The act providing for the admission into the Union of the Territory of Oklahoma and the Indian Territory as the State of Oklahoma granted sections 16 and 36 in every township in Oklahoma Territory and indemnity lands selected in lieu thereof, and the sum of $5,000,000 in lieu of sections 16 and 36 and other lands in the Indian Territory, to the State for the use and benefit of common schools, and granted other lands for the use and benefit of the University of Oklahoma and other educational institutions, with special provisions as to the disposal of said lands and the proceeds thereof. Act June 16, 1906, c. 3335, §§ 7–10, 12, 34 Stat. 272–274.

An amount equal to five per cent. of the proceeds of the sales of public lands within said State of Oklahoma, was to be paid to the State, to be used as a permanent fund, the interest to be expended for the support of common schools by Act June 16, 1906, c. 3335, § 11, 34 Stat. 274.

The act providing for the admission into the Union of the States of New Mexico and Arizona, granted to each State, in addition to sections 16 and 36 previously granted or reserved, sections 2 and 32 in every township not otherwise appropriated, for the support of common schools; and when those sections, or any parts thereof, are mineral, or have been sold, etc., or otherwise appropriated, the provisions of R. S. §§ 2275, 2276, were made applicable thereto and to the selection of lands in lieu thereof. Act June 20, 1910, c. 310, §§ 6, 24, 36 Stat. 561, 572.

The State of Montana was permitted to reconvey to the United States certain lands selected by and certified to said State under the provisions of the act admitting the State into the Union, and to select other lands in lieu thereof, by Act March 31, 1906, c. 1354, 34 Stat. 92, and Act April 12, 1910, c. 154, 36 Stat. 295.

The State of Montana was permitted to reconvey to the United States certain lands selected as indemnity school land under the provisions of the

act admitting the State into the Union, and to select other lands in lieu thereof, by Act April 28, 1906, c. 2068, 34 Stat. 150.

The selection by and grant to the several States of lands in lieu of or as indemnity for the sections so numbered, but excepted from the grant, or sold or otherwise disposed of, were provided for by subsequent acts, as follows: California, Act March 1, 1877, c. 81, 19 Stat. 267; Nevada, Act June 16, 1880, c. 245, 21 Stat. 287; Colorado, Act April 2, 1884, c. 20, § 1, 23 Stat. 10; Wyoming, Act Aug. 9, 1888, c. 819, § 6, 25 Stat. 393; Act July 10, 1890, c. 664, § 2, 26 Stat. 222; New Mexico, Act June 20, 1910, c. 310, § 6, 36 Stat. 561; Arizona, Act June 20, 1910, c. 310, § 24, 36 Stat. 572. And such indemnity school lands may be selected from surplus lands of any Indian reservation purchased by the United States, by a provision of Act March 2, 1895, c. 188, § 1, 28 Stat. 899.

The sale or lease of lands so reserved or granted, and the creation from the proceeds of a permanent school fund, were provided for as follows: Colorado, Act March 3, 1875, c. 139, § 14, 18 Stat. 476; Nevada, Act June 16, 1880, c. 245, § 3, 21 Stat. 288; Illinois, Arkansas, Louisiana, and Tennessee, Act June 12, 1884, c. 79, 23 Stat. 41; Wyoming, Act Aug. 9, 1888, c. 819, §§ 1, 2, 5, 25 Stat. 393, Act July 10, 1890, c. 664, § 4, 26 Stat. 222; North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889, c. 180, § 11, 25 Stat. 679; Idaho, Act July 3, 1890, c. 656, § 5, 26 Stat. 216; Oklahoma, Act March 3, 1891, c. 543, §§ 18, 36, 38, 26 Stat. 1026, 1043, 1044, Act May 4, 1894, c. 68, 28 Stat. 71, Act June 16, 1906, c. 3335, §§ 8–10, 34 Stat. 273, 274; Utah, Act July 16, 1894, c. 138, § 10, 28 Stat. 110; Arizona, Act April 7, 1896, c. 95, 29 Stat. 90, Act June 20, 1910, c. 310, § 28, 36 Stat. 574; New Mexico, Act June 21, 1898, c. 489, § 10, 30 Stat. 486, Act June 20, 1910, c. 310, § 10, 36 Stat. 563.

Grants of land for fractional townships for support of schools were made to the State of Missouri by Act June 22, 1874, c. 422, 18 Stat. 202.

Five per cent. of the proceeds of the sales of public lands within certain States are to be paid to said States, to be used as a permanent fund, the interest to be expended for the support of common schools, by the following acts: North Dakota, South Dakota, Montana, Washington, Act Feb. 22, 1889, c. 180, § 13, 25 Stat. 680; Idaho, Act July 3, 1890, c. 656, § 7, 26 Stat. 216; Wyoming, Act July 10, 1890, c. 664, § 7, 26 Stat. 223; Utah, Act July 16, 1894, c. 138, § 9, 28 Stat. 110; Oklahoma, Act June 16, 1906, c. 3335, § 11, 34 Stat. 274; New Mexico, Act June 21, 1898, c. 489, § 4, 30 Stat. 485, Act June 20, 1910, c. 310, § 9, 36 Stat. 563; Arizona, Act June 20, 1910, c. 310, § 28, 36 Stat. 574.

A permanent appropriation for payment to certain States of five per cent. of the net proceeds of sales of all public lands within their limits, for the purpose of education, or of making public roads and improvements, in pursuance of certain acts specified, was made by Rev. St. § 3689, post, § 6799.

Grants to several States and Territories of 72 sections of land to each for the use and support of a State university, and provisions relating to the disposition of said lands and of the money derived therefrom, were made by the following acts: State of Colorado, Act March 3, 1875, c. 139, § 10, 18 Stat. 475; Territories of Dakota, Montana, Arizona, Idaho, and Wyoming, Act Feb. 18, 1881, c. 61, 21 Stat. 326, and Act Aug. 9, 1888, c. 819, §§ 3–5, 25 Stat. 393; States of North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889, c. 180, § 14, 25 Stat. 680; State of Idaho, Act July 3, 1890, c. 656, § 8, 26 Stat. 216; State of Wyoming, Act July 10, 1890, c. 664, § 8, 26 Stat. 223; Territory of Oklahoma, Act May 4, 1894, c. 68, 28 Stat. 71; State of Utah, Act July 16, 1894, c. 138, §§ 8, 11, 28 Stat. 109, 110; Act July 23, 1894, c. 151, 28 Stat. 117; and Act Jan. 8, 1897, c. 7, 29 Stat. 483; Territory of Arizona, Act April 7, 1896, c. 95, 29 Stat. 90; Territory of New Mexico, Act June 21, 1898, c. 489, §§ 3, 5, 30 Stat. 484; State of Oklahoma, Act June 16, 1906, c. 3335, § 12, 34 Stat. 274; State of New Mexico, Act June 20, 1910, c. 310, § 7, 36 Stat. 562; State of Arizona, Act June 20, 1910, c. 310, § 25, 36 Stat. 573.

Grants to States and Territories which should provide colleges for the benefit of agriculture and the mechanic arts were made by Act July 2, 1862, c. 130, 12 Stat. 504. The selection of such lands was provided for, and special grants for such purposes to particular States were provided for, by the following acts: Colorado, Act April 2, 1884, c. 20, § 3, 23 Stat. 10; North Dakota, South Dakota, Montana, and Washington, Act Feb. 22, 1889, c. 180, § 16, 25 Stat. 681; Idaho, Act July 3, 1890, c. 656, § 10, 26 Stat. 216; Wyoming, Act July 10, 1890, c. 664, § 10, 26 Stat. 224; Utah, Act July 16, 1894, c. 138, §§ 8, 11, 28 Stat. 109, 110; Mississippi, Act Feb. 20, 1895, c. 106, 28 Stat. 673; New Mexico, Act June 21, 1898, c. 489, §§ 3, 5, 30 Stat. 484, Act June 20, 1910, c. 310, § 7, 36 Stat. 562; Arizona, Act June 20, 1910, c. 310, § 25, 36 Stat. 573; Oklahoma, Act June 6, 1906, c. 3335, § 12, 34 Stat. 274.

Provisions for the creation, from the proceeds of the lands granted, of a permanent fund for the endowment of such colleges and for annual appro-

priations, out of money arising from sales of public lands, for more complete endowment, with other provisions relating to them, are set forth post, under Title LVI I, "Agricultural Colleges and Experiment Stations."

The reissue of agricultural college land scrip, lost, canceled, or destroyed without fault of the owner, was provided for by Act June 20, 1874, c. 330, post, § 4872.

Special grants to States admitted to the Union, for the support of normal schools, reform schools, and other educational institutions, were also contained in the respective acts of admission mentioned above.

The provisions of Act Feb. 28, 1891, c. 384, amending this section to read as set forth here, were made applicable to the State of Utah, and to the grant of school lands to that State, including sections 2 and 32 as well as 16 and 36 in each township or other lands equivalent thereto, as stated in this note by Act May 3, 1902, c. 683, post, §§ 4866, 4867.

The provisions of said Act Feb. 28, 1891, c. 384, were made applicable also to the Territory of New Mexico, by Act March 16, 1908, c. 88, post, § 4868.

Lands selected and appropriated in lieu of lands granted for school purposes to the Territory and State of Washington, under the several acts relating thereto, as stated in the notes under this section, when approved by the Secretary of the Interior, were to be deemed to have been granted to the State by Act Feb. 22, 1889, c. 180, and the title of the State thereto was confirmed by Act Dec. 18, 1902, c. 5, 32 Stat. 756.

Title to certain tracts of land previously selected by the State of Nebraska as indemnity for granted school lands, and certified to the State, but the certification of which was declared void, was confirmed to the State, by Act April 15, 1902, c. 506, 32 Stat. 105.

Selections by States in lieu of school sections in abandoned military reservations were confirmed, and provisions for the disposal of the lands in such school sections were made, by Act Feb. 11, 1903, c. 543, post, § 5012.

Selection by the State of Idaho of phosphate and oil lands under indemnity and other land grants, with a reservation of the phosphates and oil to the United States, was authorized by Act Feb. 27, 1913, c. 85, post, §§ 4863–4865.

Unsurveyed lands in Louisiana, which were shown by protraction to lie within section 16 in the same township as lands granted to that State as swamp lands under the provisions of the swamp land acts, were granted to the State for school purposes by Act April 23, 1912, c. 88, 37 Stat. 90.

Provisions for settlement on or sale of lands included in various agreements with certain Indian tribes mentioned in Act March 3, 1891, c. 543, 26 Stat. 989, were not to apply to sections 16 and 36 thereon, which in the States were granted to the State in which they were situated, for the support of the common schools of the State, and in the Territories were reserved from occupancy, entry, or sale, under any land law of the United States, by section 38 of said act, 26 Stat. 1044; but that provision was not to apply to mineral land, which was to be disposed of under the laws applicable thereto.

Notes of Decisions

Purpose and effect of statute.—See, also, notes to § 4860, ante.

The statute does not contemplate an exchange of lands between a state and the United States, but only indemnity for loss to a state by reason of lands to which it is entitled being disposed of by the United States. Hibberd v. Slack (C. C. 1897) 84 Fed. 571.

No title passed to the lieu lands by virtue of the statute alone, but the statute looked to possible losses to the state and provided that, when such losses were acertained and locations and selections were made by the state, the government, if the lands selected were unoccupied public land, would inform the state, and thereupon title would vest in it. Slade v. Butte County (Cal. App. 1910) 112 P. 485.

Under Act Cong. May 20, 1826, c. 83, 4 Stat. 179, appropriating for each fractional township, for which no land had been appropriated for school purposes, a certain amount of land for such purposes, the lands so appropriated were not granted directly to the township, but were to be held by the same tenure and upon the same terms for the support of schools as section 16 of each township, the title to which was held by the state. Black v. Chicago, B. & Q. R. Co. (1909) 86 N. E. 1065, 237 Ill. 500.

Under such act, the title of the state was not a mere passive trust, which the statute of uses would execute, thereby placing the legal title in the inhabitants of the township, but the state was a purchaser for valuable consideration, with full power to sell or lease the school lands for the use of schools, as might be considered most beneficial for the public. Id.

The only effect of the amendment of 1891 was to extend the provisions of the act of 1859 to homestead as well as pre-emption entry, and it was applicable to all lands within the public domain. It could not apply to lands previousy withdrawn from the public domain, which either by special or gen-

eral grant had passed from the United States. State v. Whitney (Wash. 1912) 120 P. 116.

Functions of Secretary of the Treasury and Secretary of the Interior.—The Secretary of the Treasury was not designated as the officer to make selections of public lands in lieu of school sections by the provision of Act Feb. 26, 1859, c. 58, 11 Stat. 385, requiring such selections to be made "in accordance with the principles of adjustment and the provisions" of Act Cong. May 20, 1826, c. 83, 4 Stat. 179, which act provided for selection by that officer; but such provision must, in view of the creation of the Interior Department by Act March 3, 1849, c. 108, 9 Stat. 395, and the transfer, to the Secretary thereof, of the supervising powers of the Secretary of the Treasury in respect to public lands, be construed simply as describing the general mode of procedure. Johanson v. Washington (1903) 23 Sup. Ct. 825, 827, 190 U. S. 179, 47 L. Ed. 1008. And see Campbell v. Doe ex dem. Township No. 1 (1851) 13 How. 244, 247, 14 L. Ed. 130.

The official certificate of the recorder of the General Land Office showing the selection of certain land by the state, approved by the Secretary of the Treasury, is evidence that the selection by the surveyor of state school lands was approved by the Secretary of the Treasury, and is equivalent to proof of a selection by him as required by section 2, Act Cong. May 20, 1826, c. 83, 4 Stat. 179. Black v. Chicago, B. & Q. R. Co. (1909) 86 N. E. 1065, 237 Ill. 500.

Forest reservations.—This and the preceding section do not authorize a state to select indemnity lands in lieu of school lands which, after they have been surveyed, are included within the boundaries of a forest reservation. Hibberd v. Slack (C. C. 1897) 84 Fed. 571, 572.

Selection of mineral lands.—Known coal lands are not subject to state selection in lieu of school lands; and, if the state issues a patent for such lands to a private person, a court of equity, upon a bill filed by the United States, will annul the selection, listing over by the secretary of the interior, and the patent. U. S. v. Mullan (C. C. 1882) 10 Fed. 785, affirmed Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 30 L. Ed. 170.

Where land, when selected as indemnity land by a state, was not known to be mineral land, such land not being open to selection, the fact that minerals in paying quantities have been found since selection, but before approval thereof by the Interior Department, will vacate the selection, since it cannot be approved by the Secretary. Buena Vista Land & Development Co. v. Honolulu Oil Co. (1913) 134 P. 1154, 166 Cal. 71.

Selections upon unsurveyed lands.—State selections of lieu lands for school purposes, made upon lands unsurveyed by the United States, are utterly void. U. S. v. Curtner (C. C. 1889) 38 Fed. 1, decree reversed Curtner v. U. S. (1893) 13 Sup. Ct. 985, 149 U. S. 662, 37 L. Ed. 890. And see Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 658, 185 U. S. 373, 46 L. Ed. 954; Wisconsin v. Hitchcock (1906) 26 Sup. Ct. 498, 201 U. S. 202, 50 L. Ed. 727; Cobban v. Hyde (D. C. 1913) 212 Fed. 480.

Abandonment of title.—Where the state accepts and sells indemnity scrip for a section of land or more in lieu of a fractional sixteenth section in place in a designated township, it thereby abandons the title to the school land in that township, acquired by grant from the United States of all regular sections numbered 16 in place. Riggio v. McNeely (1914) 65 South. 552, 135 La. 391.

§ 4862. (Act March 2, 1895, c. 188, § 1.) Selection of school lands upon ceded Indian reservations.

Any State or Territory entitled to indemnity school lands or entitled to select lands for educational purposes under existing law may select such lands within the boundaries of any Indian reservation in such State or Territory from the surplus lands thereof, purchased by the United States after allotments have been made to the Indians of such reservation, and prior to the opening of such reservation to settlement. (28 Stat. 899.)

This was a provision of the Indian appropriation act for the fiscal year 1896, cited above.

§ 4863. (Act Feb. 27, 1913, c. 85, § 1.) Selection of phosphate or oil lands by Idaho under indemnity and other land grants; reservation of phosphates and oil to United States.

From and after the passage of this Act unreserved public lands of the United States in the State of Idaho which have been withdrawn or classified as phosphate or oil lands, or are valuable for phosphates or oil, shall, if otherwise available under existing law, be subject to selection by the State of Idaho under indemnity and

other land grants made to it by Congress whenever such selections shall be made with a view of obtaining or passing title, with a reservation to the United States of the phosphates and oil in such lands, and of the right to prospect for, mine, and remove the same. (37 Stat. 687.)

This section and the two sections next following were an act entitled "An act to provide for selection by the State of Idaho of phosphate and oil lands."

§ 4864. (Act Feb. 27, 1913, c. 85, § 2.) Application for selection of phosphate or oil lands.

The State of Idaho, when applying to select lands classified as phosphate or oil lands, or valuable for phosphates or oil, with a view to securing or passing title to the same in accordance with the provisions of the indemnity and other granting Acts, shall state in the application for selection that same is made in accordance with and subject to the provisions and reservations of this Act. (37 Stat. 687.)

§ 4865. (Act Feb. 27, 1913, c. 85, § 3.) Lands selected to be certified to State; reservation of phosphates and oil and right to prospect for and mine it; bond of prospector or miner; occupation of surface; damages to owner; objections to classification of lands; reserved phosphate and oil deposits not subject to exploration or entry.

Upon satisfactory proof of full compliance with the provisions of the laws under which selection is made and this Act, the State shall, upon approval of the selection by the Secretary of the Interior, be entitled to have the lands certified to it, with a reservation to the United States of all the phosphates and oil in the land so certified, together with the right in the United States, or persons authorized by it, to prospect for, mine, and remove the same; but before any person not acting for the United States shall be entitled to enter upon the lands certified for the purpose of prospecting for phosphates or oil he shall furnish, subject to approval by the Secretary of the Interior, a bond or undertaking as security for the payment of all damages to the crops and improvements on said lands by reason of such prospecting for phosphates or oil. Any person who has acquired from the United States the oil or phosphate deposits in any such land, or the right to mine or remove the same, may reenter and occupy so much of the surface thereof as may be required for all purposes reasonably incident to the mining and removal of the oil or phosphate therefrom and mine and remove the oil or phosphate upon payment of the damages caused thereby to the owner thereof, or upon giving a good and sufficient bond or undertaking in an action instituted in any competent court to ascertain and fix said damages: Provided, That nothing herein contained shall be held to deny or abridge the right of the State of Idaho to present and have prompt consideration of applications to select lands, which have been classified as oil or phosphate lands, with a view to disproving such classification and securing a certificate without reservation: And provided further, That the reserved phosphate and oil deposits in approved selections under this Act shall not be subject to exploration or entry, other than by the United States, except as hereinafter authorized by Congress. (37 Stat. 687.)

§ 4866. (Act May 3, 1902, c. 683, § 1.) Provisions for selections to supply deficiencies of school lands, made applicable to grant of school lands to State of Utah.

All the provisions of an Act of Congress approved February twenty-eighth, eighteen hundred and ninety-one, which provides for the selection of lands for educational purposes in lieu of those

appropriated for other purposes, be, and the same are hereby, made applicable to the State of Utah, and the grant of school lands to said State, including sections two and thirty-two in each township, and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said Act, anything in the Act approved July sixteenth, eighteen hundred and ninety-four, providing for the admission of said State into the Union, to the contrary notwithstanding. (32 Stat. 188.)

This section and the section next following were an act entitled "An act to make the provisions of an act of Congress approved February twenty-eighth, eighteen hundred and ninety-one (twenty-sixth Statutes, seven hundred and ninety-six), applicable to the State of Utah."

Act Feb. 28, 1891, c. 384, mentioned in this section, amended R. S. §§ 2275, 2276, and is incorporated in those sections as set forth ante, §§ 4860, 4861.

§ 4867. (Act May 3, 1902, c. 683, § 2.) Additional school sections included in provisions as applicable to State of Utah.

Wherever the words "sections sixteen and thirty-six" occur in said Act, the same as applicable to the State of Utah shall read: "sections two, sixteen, thirty-two, and thirty-six," and wherever the words "sixteenth and thirty-sixth sections" occur the same shall read: "second, sixteenth, thirty-second, and thirty-sixth sections," and wherever the words "sections sixteen or thirty-six" occur the same shall read: "sections two, sixteen, thirty-two, or thirty-six," and wherever the words "two sections" occur the same shall read "four sections." (32 Stat. 189.)

See notes to section 1 of this act, ante, § 4866.

Sections numbered 2, 16, 32, and 36, or other lands equivalent thereto, were granted to the State of Utah for school purposes, by Act July 16, 1894, c. 138, § 6, 28 Stat. 109.

§ 4868. (Act March 16, 1908, c. 88.) Provisions for selections to supply deficiencies of school lands made applicable to grant of school lands to Territory of New Mexico.

All the provisions of an Act of Congress approved February twenty-eighth, eighteen hundred and ninety-one, entitled "An Act to amend sections twenty-two hundred and seventy-five and twenty-two hundred and seventy-six of the Revised Statutes of the United States providing for the selection of lands for educational purposes in lieu of those appropriated for other purposes," be, and the same are hereby, made applicable to the [Territory of] New Mexico, and the grant of school lands to said [Territory], and indemnity therefor, shall be administered and adjusted in accordance with the provisions of said Act, anything in the Act of Congress approved June twenty-first, eighteen hundred and ninety-eight, making certain grants of land to the [Territory of] New Mexico, and for other purposes, to the contrary notwithstanding. (35 Stat. 44.)

This was an act entitled "An act to make the provisions of an act of Congress approved February twenty-eighth, eighteen hundred and ninety-one (twenty-sixth Statutes, page seven hundred and ninety-six), applicable to the Territory of New Mexico."

Act Feb. 28, 1891, c. 384, mentioned in this act, amended R. S. §§ 2275, 2276, and is incorporated in those sections as set forth ante, §§ 4860, 4861.

The words "Territory of," and "Territory," inclosed in brackets in this section, were superseded by the admission of New Mexico into the Union by Act June 20, 1910, c. 310, 36 Stat. 557, and Res. Aug. 21, 1911, No. 8, 37 Stat. 39.

§ 4869. (R. S. § 2286.) Pre-emptions by counties for seats of justice.

There shall be granted to the several counties or parishes of each State and Territory, where there are public lands, at the minimum price for which public lands of the United States are sold, the

right of pre-emption to one quarter-section of land, in each of the counties or parishes, in trust for such counties or parishes, respectively, for the establishment of seats of justice therein; but the proceeds of the sale of each of such quarter-section shall be appropriated for the purpose of erecting public buildings in the county or parish for which it is located, after deducting therefrom the amount originally paid for the same. And the seat of justice for such counties or parishes, respectively, shall be fixed previously to a sale of the adjoining lands within the county or parish for which the same is located.

Act May 26, 1824, c. 169, § 1, 4 Stat. 50.

Reservations for county seats in Oklahoma were provided for by Act March 3, 1891, c. 543, § 37, post, § 5028.

Notes of Decisions

Scope of statute.—This act was never in force in Oregon. Whitlow v. Reese (1873) 4 Or. 335.

§ 4870. (R. S. § 2449.) Fee-simple to pass in all grants of land to States and Territories.

Where lands have been or may hereafter be granted by any law of Congress to any one of the several States and Territories, and where such law does not convey the fee-simple title of the lands, or require patents to be issued therefor, the list of such lands which have been or may hereafter be certified by the Commissioner of the General Land-Office, under the seal of his office, either as originals or copies of the originals or records shall be regarded as conveying the fee-simple of all the lands embraced in such lists that are of the character contemplated by such act of Congress, and intended to be granted thereby; but where lands embraced in such lists are not of the character embraced by such acts of Congress, and are not intended to be granted thereby, the lists, so far as these lands are concerned, shall be perfectly null and void, and no right, title, claim, or interest shall be conveyed thereby.

Act Aug. 3, 1854, c. 201, 10 Stat. 346.

The issuance of patents for wagon-road grants to the State of Oregon was provided for by Act June 18, 1874, c. 305, post, § 4871.

The reissue of agricultural college land scrip lost, canceled, or destroyed without fault of the owner, is provided for by Act June 20, 1874, c. 330, post, § 4872.

Notes of Decisions

Listing and certification to state as conveyance.—A certified list issued under and pursuant to the statute is of the same effect as a patent. Frasher v. O'Connor (1885) 5 Sup. Ct. 1141, 115 U. S. 102, 29 L. Ed. 311; Mower v. Fletcher (1886) 6 Sup. Ct. 409, 411, 116 U. S. 380, 29 L. Ed. 593; McCreery v. Haskell (1886) 7 Sup. Ct. 176, 178, 119 U. S. 327, 30 L. Ed. 408; Chandler v. Calumet & Hecla Min. Co. (1893) 13 Sup. Ct. 798, 802, 149 U. S. 79, 37 L. Ed. 657; McCormick v. Hayes (1895) 16 Sup. Ct. 37, 42, 159 U. S. 332, 40 L. Ed. 171; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; Garrard v. Silver Peak Mines (1899) 94 Fed. 983, 984, 36 C. C. A. 603; Hough v. Buchanan (C. C. 1886) 27 Fed. 328; Buena Vista Petroleum Co. v. Tulare Oil & Mining Co. (C. C. 1895) 67 Fed. 226, 228. See, also, Durand v. Martin (1887) 7 Sup. Ct. 587, 589, 120 U. S. 366, 30 L. Ed. 675; Rogers Locomotive Machine Works v. American Emigrant Co. (1896) 17 Sup. Ct. 188, 192, 164 U. S. 559, 41 L. Ed. 552.

Where, by reason of the loss of the school sections, a selection is made of other lands, the list certified operates upon the selection as of the day when made and reported to the local land office, and cuts off, as would a patent in such cases, all subsequent claimants. McCreery v. Haskell (1886) 7 Sup. Ct. 176, 178, 119 U. S. 327, 30 L. Ed. 408.

Land which has been properly selected by a state as indemnity school land and listed as such by the proper United States official, and which has been patented by the state to an individual, is not open to pre-emption settlement as against the patentee in possession. Durand v. Martin (1887) 7 Sup. Ct. 587, 589, 120 U. S. 366, 30 L. Ed. 675.

When land is not subject to disposition as a part of the public domain, owing to a decision by the secretary of the interior that it is subject to a pre-emption right, the action of the land

department in including it in a list of lands certified to the state is ineffectual to pass any title. Weeks v. Bridgman (1895) 16 Sup. Ct. 72, 159 U. S. 541, 40 L. Ed. 253.

The validity of the certification to the state can be challenged in an action at law. Deweese v. Reinhard (1897) 17 Sup. Ct. 340, 341, 165 U. S. 386, 41 L. Ed. 757.

This section makes a certification to the state equivalent to a patent as a conveyance of title. Carter v. Ruddy (1897) 17 Sup. Ct. 640, 641, 166 U. S. 493, 41 L. Ed. 1090. And see Louisiana v. Garfield (1908) 29 Sup. Ct. 31, 32, 211 U. S. 70, 53 L. Ed. 92; Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272; Shepley v. Cowan (1873) 52 Mo. 559, affirmed (1875) 91 U. S. 330, 23 L. Ed. 424.

The provision of this section that the certification of the lists of lands selected by a state under a congressional grant shall be null and void, and convey no title as to lands not of the character contemplated by the grant, cannot be construed as leaving the title to lands certified under a grant on nonmineral lands subject to attack at any time thereafter in case mineral should be discovered thereon. Southern Development Co. v. Endersen (D. C. 1912) 200 Fed. 272.

A list of lands selected by the state as indemnity for the loss of school lands, prepared and certified by the general land office of the United States, and transmitted by it to the local land office, vests the title to the lands in the state as effectually as a patent, and the title so transferred relates back to the date of the selection of the land by the state. Howell v. Slauson (1890) 83 Cal. 539, 23 Pac. 692. See, also, McCreery v. Haskell (1886) 7 Sup. Ct. 176, 178, 119 U. S. 327, 30 L. Ed. 408.

Conclusiveness of certification.—Certification of land under a grant, if induced by fraudulent ex parte statements or proofs as to its character, is not conclusive on the United States. Milner v. U. S. (1915) 228 Fed. 431, 142 C. C. A. 13.

Effect of selection without approval or certification.—The state, by merely selecting lands of the United States to supply deficiencies of school lands arising from pre-emption, does not acquire a title to such lands,—not, at least, until such selection is approved by the secretary of the interior; and perhaps not until the lands are certified to the state. Baker v. Jamison (1893) 54 Minn. 17, 55 N. W. 749.

Effect of listing unsurveyed lands.—The listing over of land to the state by the general land commissioner as lieu land, taken by the state in place of a thirty-sixth section included within the boundaries of a confirmed Mexican grant, is void, and confers no title on the state, if such grant has not been finally surveyed when the land is listed over. Such selection of lieu land by the state is void as between the state and the federal government, and the state has no title which it can convey by patent. Rosecrans v. Douglass (1877) 52 Cal. 213.

§ 4871. (Act June 18, 1874, c. 305.) Patents for wagon-road grants to Oregon.

In all cases when the roads in aid of the construction of which said lands were granted are shown by the certificate of the governor of the State of Oregon, as in said acts provided, to have been constructed and completed, patents for said lands shall issue in due form to the State of Oregon as fast as the same shall, under said grants, be selected and certified, unless the State of Oregon shall by public act have transferred its interests in said lands to any corporation or corporations, in which case the patents shall issue from the General Land Office to such corporation or corporations upon their payment of the necessary expenses thereof: Provided, That this shall not be construed to revive any land grant already expired nor to create any new rights of any kind except to provide for issuing patents for lands to which the State is already entitled. (18 Stat. 80.)

This was an act entitled "An act to authorize the issuance of patents for lands granted to the State of Oregon in certain cases."

It was preceded by the following preamble:

"Whereas certain lands have heretofore, by acts of Congress, been granted to the State of Oregon to aid in the construction of certain military wagon-roads in said State, and there exists no law providing for the issuing of formal patents for said lands: Therefore,"

The acts making the grants mentioned in this act were Act July 4, 1866, c. 167, 14 Stat. 86, Act July 5, 1866, c. 174, 14 Stat. 89, Act Feb. 25, 1867, c. 77, 14 Stat. 409, and Act March 3, 1869, c. 150, 15 Stat. 340.

Notes of Decisions

Conditions of grant to state.—Condition in the grant by Act March 3, 1869, requiring "that the lands shall be sold to any one person only in quantities

not greater than one quarter section and for a price not exceeding two dollars and fifty cents per acre," were not a condition subsequent, but an enforceable covenant. U. S. v. Southern Oregon Co. (D. C. 1915) 225 Fed. 560.

—— **Purchasers from state bound by conditions.**—Compliance with conditions imposed by the granting act of March 3, 1869, upon disposal of public lands granted to the state of Oregon, is not a mere matter of good faith, and one to whom the state, under this act, conveyed its interest must observe the conditions. U. S. v. Southern Oregon Co. (D. C. 1915) 225 Fed. 560.

Where the original grant from the government contained restrictions on the use of land, the patentee's grantee cannot be a bona fide purchaser without notice, and thus entitled to take the property free from the duty to comply with the burdens. Id.

—— **Forfeiture of grant.**—The federal government is not estopped to forfeit a grant of lands for the patentees' noncompliance with conditions of the grant, by reason of having full knowledge that the patentees were treating the property as if it was theirs in fee simple, subject to no conditions. U. S. v. Southern Oregon Co. (D. C. 1915) 225 Fed. 560.

Patent to state.—The lands donated, to the state in aid of the construction of wagon roads were to be patented to the state or its grantees upon the certificates of the governor that specified portions of the road had been completed. U. S. v. California & O. Land Co. (1893) 13 Sup. Ct. 458, 459, 148 U. S. 31, 37 L. Ed. 354. See, also, Wilcox v. Eastern Oregon Land Co. (1900) 20 Sup. Ct. 269, 270, 176 U. S. 51, 44 L. Ed. 368; U. S. v. California & Oregon Land Co. (1892) 49 Fed. 496, 1 C. C. A. 330 (decree affirmed [1893] 13 Sup. Ct. 458, 148 U. S. 31, 37 L. Ed. 354); Same v. Dalles Military Road Co. (1892) 51 Fed. 629, 2 C. C. A. 419 (decree affirmed [1893] 13 Sup. Ct. 465, 148 U. S. 49, 37 L. Ed. 362); Pengra v. Munz (C. C. 1887) 29 Fed. 830; U. S. v. Dalles Military Road Co. (C. C. 1889) 40 Fed. 114; Same v. Oregon Cent. Military Road Co., Id. 120 (decree reversed U. S. v. Dalles Military Road Co. [1891] 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560); U. S. v. Dalles Military Road Co. (1890) 41 Fed. 493; Same v. Oregon Cent. Military Road Co., Id. 501 (decree reversed U. S. v. Dalles Military Road Co. [1891] 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560); U. S. v. Wallamet Val. & C. M. Wagon-Road Co. (1890) 44 Fed. 234 (decree reversed Same v. Dalles Military Road Co. [1891] 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560); U. S. v. Willamette Val. & C. M. Wagon-Road Co. (C. C. 1892) 54 Fed. 807; Id., 55 Fed. 711; U. S. v. Coos Bay Wagon-Road Co. (C. C. 1898) 89 Fed. 151; Nichols v. Southern Oregon Co. (C. C. 1905) 135 Fed. 232; U. S. v. Wallamet V. & C. M. Wagon-Road Co. (D. C. 1890) 42 Fed. 351 (decree reversed U. S. v. Dalles Military Road Co. [1891] 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560); Altschul v. Clark (1901) 65 P. 991, 39 Or. 315.

Certificate of governor.—In the absence of fraud, the certificate of the governor that the road was completed was final and conclusive. U. S. v. Dalles Military Road Co. (C. C. 1890) 41 Fed. 493; Same v. Oregon Central Military Road Co. (C. C. 1890) Id. 501, decree reversed U. S. v. Dalles Military Road Co. (1891) 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560.

Effect of patent.—The patent is conclusive evidence at law that the premises were included in the wagon road grant, and were therefore not swamp land. Cahn v. Barnes (C. C. 1881) 5 Fed. 326, 327.

The effect of these patents was not to vest title, but to afford record evidence of the existence thereof. Pengra v. Munz (C. C. 1887) 29 Fed. 830; California & Oregon Land Co. v. Munz (C. C. 1887) Id. 837.

By passing this act and issuing patents thereunder, the United States is estopped from claiming a forfeiture from persons who in good faith purchased the lands and expended money thereon on the faith of such patents. U. S. v. Wallamet V. & C. M. Wagon-Road Co. (D. C. 1890) 42 Fed. 351, decree reversed U. S. v. Dalles Military Road Co. (1891) 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560. See, also, U. S. v. Wallamet V. & C. M. Wagon-Road Co. (C. C. 1890) 44 Fed. 234, decree reversed U. S. v. Dalles Military Road Co. (1891) 11 Sup. Ct. 988, 140 U. S. 599, 35 L. Ed. 560; Id. (C. C. 1892) 54 Fed. 807.

§ 4872. (Act June 20, 1874, c. 330.) Reissue of agricultural college land scrip lost or destroyed.

That the provisions of the act of Congress of the twenty-third day of June, eighteen hundred and sixty, relating to the reissue of land warrants in certain cases, be, and the same are hereby, extended so as to include the reissue of agricultural-college land scrip lost, cancelled or destroyed without the fault of the owner

thereof, under such rules and regulations as the Secretary of the Interior may prescribe. (18 Stat. 111.)

This was an act entitled, "An act to authorize the issue of duplicate agricultural land scrip where the original has been lost or destroyed."

The provisions of Act June 23, 1860, c. 203, relating to the reissue of warrants issued in pursuance of any law granting bounty-land, and lost or destroyed, mentioned in this act, were incorporated in Rev. St. §§ 2441, 2442, ante, §§ 4853, 4854.

The issue of agricultural college land scrip was authorized by Act July 2, 1862, c. 130, 12 Stat. 503.

Notes of Decisions

Location of land.—The state receiving land scrip had only the right to sell it, and could not locate the land. Cornell University v. Fiske (1890) 10 Sup. Ct. 775, 779, 136 U. S. 152, 34 L. Ed. 427.

§ 4873. (R. S. § 2377.) Limitation of entries by agricultural-college scrip.

In no case shall more than three sections of public lands be entered at private entry in any one township by scrip issued to any State under the act approved July two, eighteen hundred and sixty-two, for the establishment of an agricultural college therein.

Act July 27, 1868, c. 256, 15 Stat. 227.

See note to Rev. St. § 2353, ante, § 4751.

See note to Rev. St. § 2357, ante, § 4757, as to private entry of public lands.

See note to Rev. St. § 2276, ante, § 4861, as to grants of public lands to States for support of agricultural colleges.

§ 4874. (R. S. § 2378.) Grant to new States.

There is granted, for purposes of internal improvement, to each new State hereafter admitted into the Union, upon such admission, so much public land as, including the quantity that was granted to such State before its admission and while under a territorial government, will make five hundred thousand acres.

Act Sept. 4, 1841, c. 16, § 8, 5 Stat. 455.

On the admission of Colorado to the Union, grants of lands were made to that State for public buildings, etc., and also 5 per cent. of the proceeds of the sale of agricultural public lands within the State after its admission, for the purpose of internal improvements, by the act admitting the State, Act March 3, 1875, c. 139, §§ 8, 9, 11, 18 Stat. 475, 476.

Subsequent acts admitting other States to the Union repeal the provisions of this section as to such States, and, in lieu of the grant made by it for purposes of internal improvement, make grants to each State for various schools and colleges, the State university, and other educational and charitable purposes, and for public buildings and institutions. Grants for such purposes to the States of North Dakota, South Dakota, Montana, and Washington, respectively, were made by Act Feb. 22, 1889, c. 180, §§ 12, 14–19, 25 Stat. 680, 681; Act March 3, 1893, c. 208, 27 Stat. 592; Act March 3, 1893, c. 210, § 1, 27 Stat. 661; and Act June 4, 1897, c. 2, 30 Stat. 56; to the State of Idaho by Act July 3, 1890, c. 656, §§ 6, 9, 11–14, 26 Stat. 216; to the State of Wyoming by Act July 10, 1890, c. 664, §§ 6, 9, 11–14, 26 Stat. 223, 224, and Act April 23, 1900, c. 254, 31 Stat. 139; to the State of Utah by Act July 16, 1894, c. 138, §§ 7, 12, 13, 28 Stat. 109, 110; to the State of Oklahoma by Act June 16, 1906, c. 3335, § 12, 34 Stat. 274.

Similar grants to the Territory of New Mexico were made by Act June 21, 1898, c. 489, §§ 2, 6–12, 30 Stat. 484, 485; and to the States of New Mexico and Arizona by Act June 20, 1910, c. 310, §§ 7–12, 25–30, 36 Stat. 562, 573.

All these provisions, being merely special and local in their nature, are omitted.

A permanent appropriation for payment to certain States of five per cent. of the net proceeds of sales of all public lands within their limits, for the purpose of education, or of making public roads and improvements, in pursuance of certain acts specified, was made by R. S. § 3689, post, § 6799.

The State of Wyoming was permitted to reconvey to the United States certain lands selected by and certified to said State under the provisions of the act admitting the State into the Union, and to select other lands in lieu thereof, by Act March 31, 1906, c. 1354, 34 Stat. 92.

The State of Montana was permitted to reconvey to the United States cer-

tain lands selected as indemnity school land under the provisions of the act admitting the State into the Union, and to select other lands in lieu thereof, by Act April 28, 1906, c. 2068, 34 Stat. 150.

Notes of Decisions

Nature and effect of grant.—The act of 1841 did not convey the fee, and where a person claimed under a patent from one of the states, and another person claimed under patents from the United States, the title of the latter was superior to the former. Foley v. Harrison (1853) 15 How. 433, 446, 14 L. Ed. 761.

The state of Nebraska, upon its admission into the Union, became entitled by virtue of this section to 500,000 acres of public land, to aid in promoting internal improvements. Deweese v. Reinhard (1897) 17 Sup. Ct. 340, 165 U. S. 386, 41 L. Ed. 757.

The grant to the state is not of any specific land, but of a specific quantity, to be selected, under the direction of the legislature of the state, in parcels conformable to the lines of the public surveys, out of any public lands, excepting such as was then reserved, or might thereafter, at the date of the selection, be reserved, from sale by any act of congress or proclamation of the president. Patterson v. Tatum (C. C. 1874) Fed. Cas. No. 10,830. See, also, Shepley v. Cowan (1875) 91 U. S. 330, 23 L. Ed. 424; Wolsey v. Chapman (1879) 101 U. S. 755, 25 L. Ed. 915; Frasher v. O'Connor (1885) 5 Sup. Ct. 1141, 115 U. S. 102, 29 L. Ed. 311; Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30.

The grant to California of 500,000 acres of land took effect immediately upon her admission as a state, and gave to her at once, not a title to any specific land, but an interest in the designated quantity, to be afterwards selected out of any public lands. Doll v. Meador (1860) 16 Cal. 295.

The language of the statute imports as to the new states a present, not a future, grant, and vests the specific quantity in each new state, immediately upon its admission into the Union, with rights of selection, etc., as set forth in the act. Van Valkenburg v. McCloud (1863) 21 Cal. 330.

Internal improvements defined.—This section authorizes the use by the state of money derived from the sale of such land for constructing a system of reservoirs and canals for the purpose of irrigation and domestic use, or for changing the channels of streams so as to better control the water for such uses. In re Senate Resolution Relating to Internal Improvement Fund (1888) 12 Colo. 285, 21 Pac. 483.

Public reservoirs for the storage of water for irrigation and domestic uses are "internal improvements." In re Senate Resolution Relating to Appropriation of Moneys Belonging to Internal Improvement Fund (Colo. 1888) 12 Colo. 287, 21 Pac. 484.

"Internal improvements" must be improvements of real property within the state of a fixed and permanent nature, and designed and intended for the benefit of the public. In re Internal Improvements (1893) 18 Colo. 317, 32 Pac. 611.

Public buildings, such as asylums, statehouses, etc., are not "internal improvements." In re Internal Improvement Fund (1897) 48 P. 807, 24 Colo. 247.

§ 4875. (R. S. § 2379.) Selections and locations of lands granted in last section.

The selections of lands, granted in the preceding section, shall be made within the limits of each State so admitted into the Union, in such manner as the legislatures thereof, respectively, may direct; and such lands shall be located in parcels conformably to sectional divisions and subdivisions of not less than three hundred and twenty acres in any one location, on any public land not reserved from sale by law of Congress or by proclamation of the President. The locations may be made at any time after the public lands in any such new State have been surveyed according to law.

Act Sept. 4, 1841, c. 16, § 8, 5 Stat. 455.
See note to R. S. § 2378, ante, § 4874.

Notes of Decisions

Lands subject to selection.—A state can make no valid selection of lands granted it for internal improvement which are in the possession of a bona fide pre-emptioner, nor can it convey any title therein to another. Terry v. Megerle (1864) 24 Cal. 609, 85 Am. Dec. 84.

Survey of land.—The right of selection or location was not suspended until the United States had made their surveys; but locations made previous to the survey of the United States were subject to change in conformity therewith. Doll v. Meador (1860) 16 Cal. 295.

State selections thereof do not become absolute and definite until surveyed by the United States. Id.

A state has no right to select and lo-

cate the lands granted it until after the lands have been surveyed by the federal government. Terry v. Megerle (1864) 24 Cal. 609, 85 Am. Dec. 84.

No valid selection can be made until after the land selected has been surveyed by the proper officers of the United States, nor except in the manner prescribed by the legislature of the state. Neither the secretary of the interior nor any officer of the land department of the general government has authority to determine the question of the regularity of the sufficiency of the selection of such lands, or decide as between conflicting claimants thereto, under the state. Hastings v. Jackson (1873) 46 Cal. 234.

Filing selection.—Marking a selection filed with the date thereof, and placing it on the files of the land office, although not signed by the register, is prima facie a filing of the same. Ison v. Nelson Min. Co. (C. C. 1891) 47 Fed. 199.

Title acquired by selection and approval thereof.—The general gift of 500,000 acres to California became a particular gift of specific lands, on the location by the state of lands subject thereto, vesting a title in the state from the date of such location. Patterson v. Tatum (C. C. 1874) Fed. Cas. No. 10,830.

The title of the state in lands selected by it, when finally approved, relates back to the date of selection. Ison v. Nelson Min. Co. (C. C. 1891) 47 Fed. 199. See Shepley v. Cowan (1875) 91 U. S. 330, 23 L. Ed. 424; Patterson v. Tatum (C. C. 1874) Fed. Cas. No. 10,830.

A United States patent is not conclusive evidence of legal title in the patentee claiming land under it, as against everything except a prior patent from the same source of title; but such a claim is inferior to that of a state, under the act of 1841, where the land has been selected by the state, and such selection has been approved by the United States previous to the issue of the patent. Megerle v. Ashe (1865) 27 Cal. 322, 87 Am. Dec. 76.

Where selections of land by the state, under Act Cong. Sept. 4, 1841, granting land for internal improvement, had been approved by the land department at Washington, and the state had issued a patent, the United States conferred no title to such lands by a patent to another. Wiggins v. Guier (1858) 13 La. Ann. 356.

Where the United States land department has approved the list of lands selected for the state, under the donation act of 1841, the issuing by such department of a patent of such lands to a person claiming a prior equitable title does not ipso facto annul a state patent of the same lands issued before the United States patent, and the court may pass upon the validity of the two titles. Ludeling v. Vester (1868) 20 La. Ann. 433.

The approval of the United States land department of the list of lands to be transferred to Louisiana under the donation act of 1841 vested the title to those lands in the state, subject to any equitable right existing at the time to the lands. There was not reserved to the land department the power to annul the vested title of the state by subsequently conferring on other parties an unconditional and conclusive title to the same land. Id.

Attack on state's title.—If the state selects lands in the possession of a bona fide pre-emptioner under United States laws, he may impeach the title of the state in an action of a grantee of the state to eject him. Terry v. Megerle (1864) 24 Cal. 609, 85 Am. Dec. 84.

§ 4876. (Act Aug. 18, 1894, c. 301, § 1.) Survey of lands granted to certain States.

It shall be lawful for the governors of the States of Washington, Idaho, Montana, North Dakota, South Dakota and Wyoming to apply to the Commissioner of the General Land Office for the survey of any township or townships of public land then remaining unsurveyed in any of the several surveying districts, with a view to satisfy the public land grants made by the several Acts admitting the said States into the Union to the extent of the full quantity of land called for thereby; and upon the application of said governors the Commissioner of the General Land Office shall proceed to immediately notify the Surveyor-General of the application made by the governor of any of the said States of the application made for the withdrawal of said lands, and the Surveyor-General shall proceed to have the survey or surveys so applied for made, as in the cases of surveys of public lands; and the lands that may be found to fall within the limits of such township or townships, as ascertained by the survey, shall be reserved upon the filing of the application for survey from any adverse appropriation by settlement or otherwise except under rights that may be found to exist of prior inception, for a

period to extend from such application for survey until the expiration of sixty days from the date of the filing of the township plat of survey in the proper district land office, during which period of sixty days the State may select any of such lands not embraced in any valid adverse claim, for the satisfaction of such grants, with the condition, however, that the governor of the State, within thirty days from the date of such filing of the application for survey, shall cause a notice to be published, which publication shall be continued for thirty days from the first publication, in some newspaper of general circulation in the vicinity of the lands likely to be embraced in such township or townships, giving notice to all parties interested of the fact of such application for survey and the exclusive right of selection by the State for the aforesaid period of sixty days as herein provided for; and after the expiration of such period of sixty days any lands which may remain unselected by the State, and not otherwise appropriated according to law, shall be subject to disposal under general laws as other public lands: And provided further, That the Commissioner of the General Land Office shall give notice immediately of the reservation of any township or townships to the local land office in which the land is situate of the withdrawal of such township or townships, for the purpose hereinbefore provided: And provided further, That the governors of the several States herein named are authorized to advance money from time to time for the survey of the townships withdrawn at such United States depository as may be designated by the Commissioner of the General Land Office, and the moneys so advanced shall be reimbursable. The foregoing provisions shall be applicable to Utah when admitted as a State into the Union and a governor is duly inaugurated and acting. (28 Stat. 394.)

This was a provision of the sundry civil appropriation act for the fiscal year 1895, cited above.

The States of Washington, Montana, North Dakota, and South Dakota were admitted into the Union by Act Feb. 22, 1889, c. 180, 25 Stat. 676; Idaho, by Act July 3, 1890, c. 656, 26 Stat. 215; Wyoming, by Act July 10, 1890, c. 664, 26 Stat. 222; Utah, by Act July 16, 1894, c. 138, 28 Stat. 107.

Notes of Decisions

Forest reserves.—The state of Idaho held to have no such preferential right of selection under this act as would interfere with the right of the United States to include the lands in question within a forest reserve established by the President's proclamation issued prior to the survey and selection of such lands by the state. (1909) 27 Op. Atty. Gen. 605.

§ 4877. (Act March 3, 1893, c. 208.) Preference right of selection granted to North Dakota, South Dakota, Montana, Idaho and Washington.

The States of North Dakota, South Dakota, Montana, Idaho, and Washington shall have a preference right over any person or corporation to select lands subject to entry by said States by the act of Congress approved February twenty-second, eighteen hundred and eighty-nine, for a period of sixty days after lands have been surveyed and duly declared to be subject to selection and entry under the general land laws of the United States. (27 Stat. 592.)

This was a provision of the sundry civil appropriation act for the fiscal year 1894, cited above.

Act Feb. 22, 1889, c. 180, 25 Stat. 676, mentioned in this section, was the act providing for the admission of the States named herein into the Union.

§ 4878. (R. S. § 2485.) Certain lands selected by California confirmed to that State.

All selections of any portion of the public domain, to which no homestead, pre-emption or other right had been acquired by any settler under the laws of the United States, and not being mineral

land, nor reserved for naval, military or Indian purposes nor held or claimed under any valid Mexican or Spanish grant, and not included within the limits of any city, town or village or of the county of San Francisco, made prior to the twenty-third day of July, one thousand eight hundred and sixty-six, and theretofore sold to bona-fide purchasers by the State of California are confirmed to the State of California: Provided, however, That said State shall not receive any greater quantity of land for school or improvement purposes than she is entitled to by law.

Act July 23, 1866, c. 219, § 1, 14 Stat. 218.

Notes of Decisions

Scope and effect of act.—This act does not provide for the settlement of the rights of conflicting claimants under the state. California v. Jackson (1884) 5 Sup. Ct. 113, 115, 112 U. S. 233, 28 L. Ed. 712.

This section, as modified by the following section, confirms title only to lands which were selected from lands previously surveyed by authority of the United States, and of which selection notification has been, or should thereafter be, given to the register of the local land office. McNee v. Donahue (1892) 12 Sup. Ct. 211, 215, 142 U. S. 587, 35 L. Ed. 1122, affirming (1888) 18 P. 438, 76 Cal. 499. See, also, Frasher v. O'Connor (1885) 5 Sup. Ct. 1141, 115 U. S. 102, 29 L. Ed. 311; Good v. Same (1885) 5 Sup. Ct. 1148, 115 U. S. 116, 29 L. Ed. 316; Durand v. Martin (1887) 7 Sup. Ct. 587, 120 U. S. 366, 30 L. Ed. 675; Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30; Mastick v. Cave (1877) 52 Cal. 67.

The act did not extend to lands as to which an adverse right had been acquired at the date of the passage of the act by any settler under the United States laws. Keeran v. Griffith (1868) 34 Cal. 580.

The act cannot be so construed as to affect a valid location made before the passage of the act, though it may cure the invalidity of a first location; no intervening right having accrued. People v. Jackson (1881) 62 Cal. 548.

The effect of the act is to grant in præsenti the lands mentioned, and no patent is necessary to convey the legal title. McNee v. Donahue (1888) 76 Cal. 499, 18 Pac. 438.

Bona fide purchasers.—An error in the selection of lands in lieu of school lands granted to the state and which are in fact in place, or in the selection of unsurveyed lands, is the error of the state officials, and will not, in the absence of any evidence that the purchaser was cognizant of it, deprive him of the position of a purchaser in good faith within the act. Hodapp v. Sharp (1870) 40 Cal. 69.

Mineral land.—This act expressly excludes from its operation all selections of mineral land. Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 1044, 118 U. S. 271, 30 L. Ed. 170.

Indemnity lands.—After confirmation, by this section, of the selection of lands in place of school sections, the township in which the selected lands were situate having been previously surveyed by the United States, such lands were not subject to the grant to the state for the establishment of agricultural colleges. McNee v. Donahue (1892) 12 Sup. Ct. 211, 216, 142 U. S. 587, 35 L. Ed. 1122.

The confirmatory act applied to and validated a location of land made by the state in lieu of school land, on an application to purchase under a state law by one who had settled on the land in 1858, and to whom the state had issued a certificate of purchase, though such land was within the Pacific Railroad grant, and had been, prior to its location by the state, withdrawn from pre-emption, private entry, and sale, by order of the secretary of the interior, on the filing by the railroad company of the map of its general route, no map showing the definite location of the line of road having been filed. Menotti v. Dillon (1897) 17 Sup. Ct. 945, 949, 167 U. S. 703, 42 L. Ed. 333.

This act did not confirm to the state lands selected by the state as lieu lands, unless they had not only been selected as lieu lands, but had also been sold by the state before the passage of the act. Laughlin v. McGarvey (1875) 50 Cal. 169.

Railroad lands.—The act did not have the effect of confirming the title of the state to a selection of an odd section within the belt granted to the Central Pacific Railroad Company. Central Pacific R. Co. v. Robinson (1875) 49 Cal. 446.

Swamp lands.—This section does not apply to the swamp lands. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 995, 121 U. S. 488, 30 L. Ed. 1039.

The act does not relate to lands which had been segregated by the state as swamp and overflowed lands, donated to it by the act of congress. Sutton v. Fassett (1875) 51 Cal. 12.

This section refers only to the selections made by the state, and not to lands claimed by the state as part of swamp lands granted by the United States. Kile v. Tubbs (1881) 59 Cal. 191.

Mexican grants excepted.—The exception of "any land held or claimed under any valid Mexican or Spanish grant" applied to land which at the time of selection was part of a claim under a valid Mexican grant, although not within its limits as fixed by the final survey subsequently made, whereby the land was restored to the public domain; and a claimant thereof under the selection by the state has no equity superior to the right of a pre-emptor whose application was the first claim made after such survey, as the statute in express language gives the holder of the invalid state selection the same rights as those of a pre-emption settler on unsurveyed lands, and no more. Aurrecoechea v. Bangs (1885) 5 Sup. Ct. 892, 893, 114 U. S. 381, 29 L. Ed. 170; Id., 5 Sup. Ct. 895, 114 U. S. 387, 29 L. Ed. 172.

The exception of lands "held or claimed under a valid Mexican or Spanish grant" must be determined as of the date when the claimant under state's selection undertakes to prove up his claim after the surveys have been made and filed and within the time allowed thereafter to pre-emptors, and if at that time the lands selected by the state are excluded from such a grant, either by judicial decision or by a survey made by the United States, the claimant may have his claim confirmed. Huff v. Doyle (1876) 93 U. S. 558, 560, 23 L. Ed. 975, reversing Huff v. Doyle (1875) 50 Cal. 16.

§ 4879. (R. S. § 2486.) Where selections are on lands already surveyed.

When selections named in the foregoing section have been made upon lands already surveyed by authority of the United States, the authorities of said States, where the same has not been already done, shall notify the register of the land-office, for the district in which the land is situated, which notice shall be regarded as the date of the State selection; and the said registers of the several land-offices, after investigation and decision, shall, under the instruction of the Commissioner of the General Land-Office, forward all such selections to the General Land-Office, and the Commissioner of the General Land-Office shall certify the same over to the State in the usual manner.

Act July 23, 1866, c. 219, § 2, 14 Stat. 219.

Notes of Decisions

Scope and effect of act.—Under this section the title to lieu lands, selected in place of school sections after the survey of the township by the United States, were confirmed, and the title of the state thereto was perfected from the date of the act, as effectually as by a grant or quitclaim from the government; and such confirmation inured to the benefit of a prior grantee from the state without any further action of the state authorities. McNee v. Donahue (1892) 12 Sup. Ct. 211, 215, 142 U. S. 587, 35 L. Ed. 1122, affirming (1888) 18 P. 438, 76 Cal. 499.

This and the preceding section confirm title only to lands which were selected from lands previously surveyed by the authority of the United States, and of which selection notification has been or should be given to the register of the local land office. McNee v. Donahue (1892) 12 Sup. Ct. 211, 215, 142 U. S. 587, 35 L. Ed. 1122. See, also, Huff v. Doyle (1876) 93 U. S. 558, 560, 23 L. Ed. 975; Thompson v. Thornton (1875) 50 Cal. 142; Mastick v. Cave (1877) 52 Cal. 67.

The effect of the act is to grant in præsenti the lands mentioned, in spite of the provisions concerning notice, and the duty imposed on the commissioner of the general land office; and no patent is necessary to convey the legal title. McNee v. Donahue (1888) 76 Cal. 499, 18 Pac. 438.

Selections made before survey.—A state selection of land granted by congress, made before it is surveyed by the United States, is invalid. Chant v. Reynolds (1874) 49 Cal. 213.

A selection of land as lieu land in place of the sixteenth and thirty-sixth sections granted to California, made before the land selected has been surveyed by the United States, is unauthorized and void. Central Pac. R. Co. v. Robinson (1875) 49 Cal. 446.

Certification to state.—See, also, notes to § 4870, ante.

When lists of lands are certified to a state by the commissioner of the general land office and the secretary of the interior, they convey as complete a title as patents. Frasher v. O'Connor (1885) 5 Sup. Ct. 1141, 115 U. S. 102, 29 L. Ed. 311; Durand v. Martin (1887) 7 Sup. Ct. 587, 589, 120 U. S. 366, 30 L. Ed. 675. See, also, Wright v. Roseberry (1887) 7 Sup. Ct. 985, 121 U. S. 488, 30 L. Ed. 1039.

Land selected by the state does not become the property of the state under the curative act until the selection has been certified over to the state by the commissioner of the general land office. Buhne v. Chism (1874) 48 Cal. 467; Chant v. Reynolds (1874) 49 Cal. 213.

Selections made by the state, and disposed of in good faith under the laws of the state, are not confirmed, nor does the title pass until the lands are certified over to the state by the Commissioner of the General Land Office. (1872) 14 Op. Atty. Gen. 50.

§ 4880. (R. S. § 2487.) Where selections are upon land surveyed only by State authority.

When the State of California has made such selections from the lands not surveyed by the authority of the United States, but which selections have been surveyed by the authority of said State, and the land sold to purchasers in good faith, under the laws of the State, such selections, from said twenty-third of July, eighteen hundred and sixty-six, when marked off and designated in the field, shall have the same force and effect as the pre-emption rights of a settler upon unsurveyed public lands; and if upon a survey of such lands by the United States, the lines of the two surveys shall be found not to agree, the selection shall be so changed as to include those legal subdivisions which nearest conform to the identical land included in the State survey and selection. Upon filing with the register of the proper United States land-office of the township plat, in which any such selection of unsurveyed land is located, the holder of the State title shall be allowed the same time to present and prove up his purchase and claim as is allowed pre-emptors under existing laws—and if found in accordance with the law the land embraced therein shall be certified over to the State by the Commissioner of the General Land-Office.

Act July 23, 1866, c. 219, § 3, 14 Stat. 219.

R. S. § 2489, provided that the local land offices in California should immediately forward to the General Land Offices lists of selections made under this and the two preceding sections, and lists of swamp, etc., lands claimed by the State, for final disposition and determination, which final disposition should be made by the Commissioner of the General Land Office without delay. That section is omitted, as temporary merely, and executed.

Notes of Decisions

Bona fide purchasers.—The holders of state selections, made upon public lands not then surveyed by authority of the United States under the act, acquire a pre-emption right upon unsurveyed public land, if their selections have been surveyed and marked off, and designated in the field, and bought, in good faith, under the laws of the state, unless, at the date of that act, some pre-emption, homestead, or other right under the laws of the United States had attached to the land, or the land was within some reservation. Toland v. Mandell (1869) 38 Cal. 30.

Presentation of proof of claims.—The exception of lands "held or claimed under a valid Mexican or Spanish grant" must be determined as of the date when the state's selection undertakes to prove up his claim after the surveys have been made and filed within the time allowed thereafter to pre-emptors. Huff v. Doyle (1876) 93 U. S. 558, 560, 23 L. Ed. 975.

The confirmatory act provides the means by which an invalid location of a state school land warrant on unsurveyed lands may be confirmed; but, in order to obtain such confirmation, the purchaser must present and prove up his purchase and claim within the time allowed to pre-emptioners under existing laws. The land will not be certified to the state until the claim is presented and proved up. No title to such lands passes from the United States to the state, or to the purchaser from the state, until the same are certified over to the state by the commissioner of the general land office at Washington. Collins v. Bartlett (1872) 44 Cal. 371.

Effect of decisions of land department.—Under the confirmatory act it was a question for the land department to decide whether selections were made as required by the act; and if the state had sold the same in good faith, and the purchaser properly proved his claim, its decision in favor of the regularity of the proceedings, and its act in listing the land to the state before another person applied to purchase the land from the state, was conclusive; and, though the first application was defective, it cannot be attacked. Wilkinson v. Merrill (1877) 52 Cal. 424. See, also, Mace v. Merrill (1880) 56 Cal. 554. And see Tewksbury v. Derosier (1881) 59 Cal 100.

§ 4881. (Act March 2, 1901, c. 808.) Representation of Indian claimants in suits to determine right of States to school lands.

In any suit heretofore or hereafter instituted in the Supreme Court of the United States to determine the right of a State to

what are commonly known as school lands within any Indian reservation or any Indian cession where an Indian tribe claims any right to or interest in the lands in controversy, or in the disposition thereof by the United States, the right of such State may be fully tested and determined without making the Indian tribe, or any portion thereof, a party to the suit if the Secretary of the Interior is made a party thereto; and the duty of representing and defending the right or interest of the Indian tribe, or any portion thereof, in the matter shall devolve upon the Attorney-General upon the request of such Secretary. (31 Stat. 950.)

This was an act entitled "An act authorizing the Attorney-General, upon the request of the Secretary of the Interior, to appear in suits brought by States relative to school lands."

Notes of Decisions

United States as party to suit.—This act is a consent on the part of the United States to be sued in respect to school lands within an Indian reservation, and an acceptance by the government of full responsibility for the result of the decision, so far as the Indians are concerned. Minnesota v. Hitchcock (1902) 22 Sup. Ct. 650, 654, 185 U. S. 373, 46 L. Ed. 954, distinguished in Oregon v. Hitchcock (1906) 26 Sup. Ct. 568, 570, 202 U. S. 60, 50 L. Ed. 935. See, also, Naganab v. Hitchcock (1906) 26 Sup. Ct. 667, 668, 202 U. S. 473, 50 L. Ed. 1113.

CHAPTER TEN B

Grants in Aid of Railroads and Wagon Roads

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes provisions of a general and permanent nature relating to the location, survey, etc., and to the forfeiture of lands granted to States or to corporations in aid of the construction of railroads and wagon roads, principally Act April 21, 1876, c. 72, 19 Stat. 35, Act July 10, 1886, c. 764, 24 Stat. 143, Act March 3, 1887, c. 376, 24 Stat. 556, Act Sept. 29, 1890, c. 1040, 26 Stat. 496, Act March 2, 1896, c. 39, 29 Stat. 42, and Act June 25, 1910, c. 406, 36 Stat. 834, with acts amendatory thereof or supplemental thereto, and other provisions relating to said subject, remaining in force.

Sec.
4882. Cost of survey, etc., of grants to railroads to be paid.
4883. Surveyed railroad grant lands taxable notwithstanding lien for cost of surveying, etc.
4884. Collection of cost of surveying, etc., railroad grant lands.
4885. Right of forfeiture of railroad grants not affected by act.
4886. Cost of surveying lands granted to Union Pacific Railroad.
4887. Survey of lands within limits of railroad grants; continuing appropriation; reimbursement; reports.
4888. Deposits for surveys of lands granted to railroads.
4889. Selection by railroads of lands in lieu of lands entered by settlers subsequent to accrual of rights of railroads; title of settlers.
4890. Rights of entrymen on railroad lands whose entries have not been admitted to record.
4891. Homestead entries on railroad lands prior to their withdrawal or after their restoration to market confirmed.
4892. Homestead entries on abandoned railroad lands.
4893. Homestead entries on railroad lands subsequent to expiration of grant.
4894. Rights of permissive settlers on railroad lands restored to public domain.
4895. Adjustment of land grants to railroads by Secretary of Interior.
4896. Cancellation of patents erroneously issued; reconveyance to United States; suits to cancel patents.
4897. Erroneous cancellation of entries of bona fide settlers corrected.
4898. Patents to purchasers of lands from railroads; payment to United States by railroads of purchase money; suits for purchase money.
4899. Rights of purchasers from railroads of coterminous lands not within railroad grants.
4900. Limitation of quantity of lands to be conveyed.
4901. Suits to cancel patents to lands erroneously issued under rail-

Sec.
road or wagon road grants; limitations.
4902. Claims of bona fide purchasers; establishment of rights.
4903. Claims of bona fide purchasers; investigation before suit.
4904. Provisions for relief of settlers on lands granted in aid of railroads, applicable to grants in aid of wagon roads.
4905. Forfeiture of unearned railroad land grants; restoration to public domain.
4906. Homestead entries on forfeited lands; preference rights.
4907. Extension of time for entries on or purchases of forfeited lands.
4908. Repurchase by bona fide purchasers from grantees; removal of crops and improvements by settlers.
4909. Extension of time for purchases of forfeited lands.
Sec.
4910. Extension of time for purchases of forfeited lands.
4911. Extension of time for purchases of forfeited lands.
4912. Extension of time for purchases of forfeited lands.
4913. Rights of original grantees to forfeited lands.
4914. Deposits by railroad companies for costs of surveying, etc., and conveying unsurveyed lands granted to them; disbursement of deposits; repayment of excess.
4915. Forfeiture of grant on failure to make deposit.
4916. Right to extend public surveys over lands granted, and other rights of United States, not affected by act; granted lands surveyed subject to taxation by State, etc.
4917. Regulations for carrying out provisions of act.

§ 4882. (Act July 31, 1876, c. 246.) Cost of survey, etc., of grants to railroads to be paid.

Before any land granted to any railroad company by the United States shall be conveyed to such company, or any persons entitled thereto under any of the acts incorporating or relating to said company, unless such company is exempted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest. (19 Stat. 121.)

This was a provision of the sundry civil appropriation act for the fiscal year 1877, cited above.

Certain lands within railroad land grants are not exempt from taxation by reason of the lien which the United States may have for the cost of surveying, etc., but, if such lands are sold for taxes, the purchaser takes them subject to such lien, and the United States is entitled to become a preferred purchaser, by Act July 10, 1886, c. 764, post, §§ 4883–4886.

Deposits by railroad companies for expenses of surveys were provided for by Act Feb. 27, 1899, c. 205, post, § 4888.

Notes of Decisions

Purpose of requirements as to cost of survey.—A requirement that cost of surveying, selecting, and conveying the lands shall be paid before the patents are issued does not show an intention to retain title in the government until that time, but merely affords a means of compelling the payment of such costs. Deseret Salt Co. v. Tarpey (1891) 12 Sup. Ct. 158, 162, 142 U. S. 241, 35 L. Ed. 999. See, also, Ankeny v. Clark (1893) 13 Sup. Ct. 617, 621, 148 U. S. 345, 37 L. Ed. 475, affirming (1889) 20 Pac. 583, 1 Wash. 549.

Power of Congress to impose new conditions on grant.—Where the line of a land grant railroad was not completed within the time stipulated in the grant, Congress had a right to impose a new condition on its grant by this act, and the right of Congress to impose such condition was not affected by the authority given it to complete the road. New Orleans Pac. R. Co. v. U. S. (1888) 8 Sup. Ct. 417, 419, 124 U. S. 124, 31 L. Ed. 383, affirming New Orleans Pacific Ry. v. U. S. (1886) 21 Ct. Cl. 459.

Exemption from payment of cost.—That a grant made prior to this act was silent as to payment of the costs of survey, although incurred at the time of the grant, did not bring the grantee within the clause of this act, saving from its operations such grantees as should be exempted by law from the payment of such costs. New Orleans Pac. R. Co. v. U. S. (1888) 8 Sup. Ct. 417, 419, 124 U. S. 124, 31 L. Ed. 383.

Deposit.—The successor of a land grant railroad company may be required to make a deposit to cover the cost of a survey, where its predecessor has not been expressly exempted by statute from paying the cost. Santa Fé Pac. R. Co. v. Lane (1915) 43 App. D. C. 497.

§ 4883. (Act July 10, 1886, c. 764, § 1.) Surveyed railroad grant lands taxable notwithstanding lien for cost of surveying, etc.

No lands granted to any railroad corporation by any act of Congress shall be exempt from taxation by States, Territories, and municipal corporations on account of the lien of the United States upon the same for the costs of surveying, selecting, and conveying the same, or because no patent has been issued therefor; but this provision shall not apply to lands unsurveyed: Provided, That any such land sold for taxes shall be taken by the purchaser subject to the lien for costs of surveying, selecting, and conveying, to be paid in such manner by the purchaser as the Secretary of the Interior may by rule provide and to all liens of the United States, all mortgages of the United States, and all rights of the United States in respect of such lands: Provided further, That this act shall apply only to lands situated opposite to and coterminous with completed portions of said roads, and in organized counties: Provided further, That at any sale of lands under the provisions of this act the United States may become a preferred purchaser, and in such case the lands sold shall be restored to the public domain and disposed of as provided by the laws relating thereto. (24 Stat. 143.)

This section and the three sections next following were an act entitled "An act to provide for taxation of railroad-grant lands, and for other purposes."

Notes of Decisions

Effect of grant of power to tax.—Prior to this act lands granted to a railroad company were not taxable until the cost of surveying and selecting them had been paid. Northern Pac. R. Co. v. Rockne (1885) 6 Sup. Ct. 201, 115 U. S. 600, 29 L. Ed. 477. See, also, Kansas P. R. Co. v. Prescott (1872) 16 Wall. 603, 21 L. Ed. 373; Union P. R. Co. v. McShane (1874) 22 Wall. 444, 22 L. Ed. 747. Former decisions would seem to have been rendered of no force by this act. McHenry v. Alford (1898) 18 Sup. Ct. 242, 246, 168 U. S. 651, 42 L. Ed. 614.

State tax laws, which would be applicable to unpatented railroad grant lands but for the fact that, under the laws of the United States, such lands are held not taxable, come into operation without re-enactment, immediately upon the passage of an act of Congress authorizing the states to tax such lands. Central Pac. R. Co. v. Nevada (1896) 16 Sup. Ct. 885, 886, 162 U. S. 512, 40 L. Ed. 1057. See, also, Northern Pac. Ry. Co. v. Myers (1899) 19 Sup. Ct. 276, 277, 172 U. S. 589, 43 L. Ed. 564.

The grant of authority to tax railroad grant lands requires no acceptance by the states as a preliminary to the exercise of such taxing power. Central Pac. R. Co. v. Nevada (1896) 16 Sup. Ct. 885, 886, 162 U. S. 512, 40 L. Ed. 1057, affirming State v. Central Pac. R. Co. (1892) 21 Nev. 247, 30 Pac. 686.

By this act congress delegated to the states the right to tax the lands granted to railroad companies, though the latter had not paid the costs of surveying and selecting such lands. State v. Central Pac. R. Co. (1889) 20 Nev. 372, 22 Pac. 237.

Lands taxable.—Lands within the place limits of the grant, the lists of which have been approved and certified by the local land officers, but patents for which have been withheld pending investigation as to the mineral or nonmineral character of the lands, are taxable by the state. Northern Pac. Ry. Co. v. Myers (1899) 19 Sup. Ct. 276, 172 U. S. 589, 43 L. Ed. 564. See, also, Northern Pac. R. Co. v. Wright (1893) 54 Fed. 67, 4 C. C. A. 193; Id. (C. C. 1892) 51 Fed. 68; Clearwater Timber Co. v. Shoshone County (C. C. 1907) 155 Fed. 612; U. S. v. Southern Oregon Co. (C. C. 1912) 196 Fed. 423.

Land is taxable though not "selected by, set off, certified, or listed" to the company by the government. State v. Central Pac. R. Co. (1889) 20 Nev. 372, 22 Pac. 237.

—— **Mineral lands.**—The fact that some of the lands included in a grant may turn out to be mineral lands is no defense to the claim of a state for taxes on the entire grant, so long as the railroad company claims all the lands. Central Pac. R. Co. v. Nevada (1896) 16 Sup. Ct. 885, 886, 162 U. S. 512, 40 L. Ed. 1057, affirmed State v. Central Pac. R. Co. (1892) 21 Nev. 247, 30 Pac. 686.

—— **Unsurveyed lands.**—Unsurveyed lands are not subject to taxation. State v. Central Pac. Ry. Co. (1890) 21 Nev. 94, 25 Pac. 442.

Federal question.—The question whether, under the laws of the state, the railroad company has any taxable

interest, involves no federal question. Central Pac. R. Co. v. Nevada (1896) 16 Sup. Ct. 885, 886, 162 U. S. 512, 40 L. Ed. 1057. See, also, Northern Pac. Ry. Co. v. Myers (1899) 19 Sup. Ct. 276, 279, 172 U. S. 589, 43 L. Ed. 564.

§ 4884. (Act July 10, 1886, c. 764, § 2.) Collection of cost of surveying, etc., railroad grant lands.

If any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such company or for its use and benefit by act of Congress shall for thirty days neglect or refuse to pay any such costs after demand for payment thereof by the Secretary of the Interior, he shall notify the Attorney-General, who shall at once commence proceedings to collect the same. But when any sum shall be collected of such railroad company as costs of surveying, selecting, and conveying any tract of land which shall have been purchased under the provisions of section one hereof, the Secretary of the Interior shall out of such collections reimburse said purchaser, his heirs or assigns, the amount of money paid by him as the costs of such surveying, selecting, and conveying. (24 Stat. 143.)

§ 4885. (Act July 10, 1886, c. 764, § 3.) Right of forfeiture of railroad grants not affected by act.

This act shall not affect the right of the Government to declare or enforce a forfeiture of any lands so granted; but all the rights of the United States to said lands or to any interest therein shall be and remain as if this act had not passed, except as to the lien mentioned in the first section hereof. (24 Stat. 143.)

§ 4886. (Act July 10, 1886, c. 764, § 4.) Cost of surveying lands granted to Union Pacific Railroad.

Section twenty-one of chapter two hundred and sixteen, approved July second, eighteen hundred and sixty-four, is hereby so amended as that the costs of surveying, selecting and conveying therein required to be paid shall become due and payable at and on the demand therefor made by the Secretary of the Interior as provided in section two of this act, and nothing in this act shall be construed or taken in any wise to affect or impair the right of Congress at any time hereafter further to alter, amend, or repeal the said act, as in the opinion of Congress, justice or the public welfare may require, or to impair or waive any right or remedy in the premises now existing in favor of the United States. This act shall be subject to alteration, amendment, or repeal. (24 Stat. 143.)

Act July 2, 1864, c. 216, § 21, 13 Stat. 365, mentioned in this section, provided that before any of the land granted to the Union Pacific Railway Company should be conveyed the cost of surveying, etc., must be paid.

§ 4887. (Act March 2, 1895, c. 189, § 1.) Survey of lands within limits of railroad grants; continuing appropriation; reimbursement; reports.

For the survey of the public lands lying within the limits of land grants made by Congress to aid in the construction of railroads, and the selection therein of such lands as are granted therefor, to enable the Secretary of the Interior to carry out the provisions of section one of the Act of March third, eighteen hundred and eighty-seven, entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads, and for the forfeiture of unearned lands, and for other purposes," being chapter three hundred and seventy-six of volume twenty-four of the Statutes at Large, page five hundred and fifty-six, the sum of one hundred thousand dollars is hereby appropriated and made a continuing appropriation for the survey of lands within the limits of railroad land grants, and any money which shall be expended of such appropriation and reimbursed and paid into the Treasury is hereby reappropriated,

and said sum shall remain a continuing appropriation, and so often as any part of the same shall, after being expended, be reimbursed by any railroad company as hereinafter provided, the same shall be again available for the purposes aforesaid: Provided, That any portion of said sum expended for surveying such lands shall be reimbursed by the respective companies or parties in interest for whose benefit the lands are granted, according to the provisions of the Act of July fifteenth, eighteen hundred and seventy, chapter two hundred and ninety-two, volume sixteen, pages three hundred and five and three hundred and six, and Act of July thirty-first, eighteen hundred and seventy-six, chapter two hundred and forty-six of volume nineteen, page one hundred and twenty-one of the Statutes at Large, requiring "that before any lands granted to any railroad company shall be conveyed to such company or any persons entitled thereto under any of the Acts incorporating or relating to said company, unless said company is excepted by law from the payment of such cost, there shall first be paid into the Treasury of the United States the cost of surveying, selecting, and conveying the same by the said company or persons in interest": And provided further, That whenever there shall have been reimbursed and paid into the Treasury of the United States, by the respective companies or parties in interest, any part of said appropriation expended for surveys within such grants, there shall be immediately available, out of any money in the Treasury not otherwise appropriated, an amount equal to the amount so reimbursed, and the same shall be available for the survey of the public lands lying within the limits of the railroad land grants made by Congress, until all of said lands shall have been surveyed: Provided, That nothing herein contained shall be construed to prevent the use, within the limits of any railroad land grant made by Congress, of any part of any regular appropriation for surveying the public lands: Provided, That no part of the foregoing money shall be used for any land embraced in any grant to the State of Florida: And provided further, That the provisions of law requiring reimbursements to be made to the United States by railroad corporations claiming such grants, shall apply equally to the successors of such railroad corporations acquiring title to their lands and other property, under decree of foreclosure of any mortgage authorized by Congress. This paragraph shall be in lieu of the provision in the sundry civil appropriation Act approved August eighteenth, eighteen hundred and ninety-four, providing for the survey of such lands, and the Secretary of the Interior shall report to each regular session of Congress what has been done under the foregoing provisions. (28 Stat. 937.)

This was a provision of the sundry civil appropriation act for the fiscal year 1896, cited above.

It superseded a similar provision in the sundry civil appropriation act for the preceding year, Act Aug. 18, 1894, c. 301, § 1, 28 Stat. 395.

Act March 3, 1887, c. 376, mentioned in this provision, is set forth post, §§ 4895–4900.

Act July 15, 1870, c. 292, 16 Stat. 305, also mentioned in this provision, made appropriations for surveying the public lands; and required the survey of lands granted to the Northern Pacific Railroad to be paid for.

Provisions of Act July 31, 1876, a similar requirement of which is quoted in this provision, are set forth ante, § 4882, and the further provisions, relating to the subject, of Act July 10, 1886, c. 764, are also set forth ante, §§ 4883–4886.

The legislative, executive, and judicial appropriation act for the fiscal year ending June 30, 1917, Act May 10, 1916, c. 117, § 1, 39 Stat., provides that the use of the fund created by Act July 2, 1864, c. 216, § 21, 13 Stat. 365, and this section, shall be extended for one year from June 30, 1916. A similar provision was made for the fiscal year 1916 by Act March 4, 1915, c. 141, § 1, 38 Stat. 1035.

§ 4888. (Act Feb. 27, 1899, c. 205.) Deposits for surveys of lands granted to railroads.

When any railroad company claiming a grant of land under any Act of Congress, desiring to secure the survey of any unsurveyed lands within the limits of its grant, shall file an application therefor in writing with the surveyor-general of the State in which the lands sought to be surveyed are situated, and deposit in a proper United States depository to the credit of the United States a sum sufficient to pay for such survey and for the examination thereof pursuant to law and the rules and regulations of the Department of the Interior under the direction of the Commissioner of the General Land Office, it shall thereupon be the duty of the Commissioner of the General Land Office, or the Director of the Geological Survey, as the case may be, to cause said lands to be surveyed.

For any deposits made by any railroad company hereunder, certificates shall be issued, which may be used by such railroad company, its successors or assigns, to the same extent as cash is now allowed in payment of entries of public lands under existing law and regulations for any public lands of the United States in the States where the surveys were made, or for any survey or office fees due the United States from such railroad company on account of surveys of lands within its grant. The Secretary of the Interior shall provide such rules and regulations as may be necessary for carrying out the foregoing provisions. (30 Stat. 892.)

This was an act entitled "An act to authorize the Commissioner of the General Land Office to cause public lands to be surveyed in certain cases."

Provisions relating to the payment and collection of the cost of surveying lands granted to railroads of Act July 31, 1876, c. 246, § 1, and Act July 10, 1886, c. 764, are set forth ante, §§ 4882–4886.

§ 4889. (Act June 22, 1874, c. 400.) Selection by railroads of lands in lieu of lands entered by settlers subsequent to accrual of rights of railroads; title of settlers.

In the adjustment of all railroad land grants, whether made directly to any railroad company or to any State for railroad purposes, if any of the lands granted be found in the possession of an actual settler whose entry or filing has been allowed under the [pre-emption or] homestead laws of the United States subsequent to the time at which, by the decision of the land-office, the right of said road was declared to have attached to such lands, the grantees, upon a proper relinquishment of the lands so entered or filed for, shall be entitled to select an equal quantity of other lands in lieu thereof from any of the public lands not mineral and within the limits of the grant not otherwise appropriated at the date of selection, to which they shall receive title the same as though originally granted. And any such entries or filings thus relieved from conflict may be perfected into complete title as if such lands had not been granted: Provided, That nothing herein contained shall in any manner be so construed as to enlarge or extend any grant to any such railroad or to extend to lands reserved in any land grant made for railroad purposes: And provided further, That this act shall not be construed so as in any manner to confirm or legalize any decision or ruling of the Interior Department under which lands have been certified to any railroad company when such lands have been entered by a [pre-emption or] homestead settler after the location of the line of the road and prior to the notice to the local land-office of the withdrawal of such lands from market. (18 Stat. 194.)

This was an act entitled "An act for the relief of settlers on railroad lands."

The words "pre-emption or," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See note to chapter 4 of this Title.

The provisions of this act were extended to all persons entitled to the right of homestead or pre-emption under the laws of the United States who have resided upon and improved for five years lands granted to any railroad company whose entries or filings have not been admitted to record, by Act Aug. 29, 1890, c. 819, post, § 4890.

The provisions of this act and all acts amendatory thereof and supplementary thereto apply to grants in aid of the construction of wagon roads, by Act July 1, 1902, c. 1386, post, § 4904.

Any homestead settler whose entry within the limits of the grant to the State of Alabama in aid of the construction of the Mobile & Girard Railroad, by Act June 3, 1856, c. 42, 11 Stat. 18, has been canceled because of a superior claim to the land through purchase from the railroad company, is accorded the privilege of transferring his claim to other public land subject to homestead entry, or, should he elect to retain the tract embraced in his homestead entry, the holder of the patented title through the railroad grant may relinquish or reconvey the land included in such homestead entry, and thereupon shall be entitled to select and receive patent for an equal quantity of public lands subject to homestead entry, by Act Feb. 24, 1905, c. 779, 33 Stat. 813.

Notes of Decisions

When title passes.—The principle is firmly established that the title to lands in the indemnity class does not vest in the railroad company, for the benefit of which they are contingently granted, but, in the fullest legal sense, remains in the United States until they are actually selected and set apart, under the direction of the secretary of the interior, specifically for indemnity purposes. U. S. v. Oregon & C. R. Co. (C. C. 1900) 101 Fed. 316.

§ 4890. (Act Aug. 29, 1890, c. 819.) Rights of entrymen on railroad lands whose entries have not been admitted to record.

The privileges granted by the aforesaid act approved June twenty-second, eighteen hundred and seventy-four, are hereby extended (subject to the provisos, limitations, and restrictions thereof) to all persons entitled to the right of homestead [or pre-emption] under the laws of the United States, who have resided upon and improved for five years lands granted to any railroad company, but whose entries or filings have not for any cause been admitted to record. (26 Stat. 369.)

This was an act entitled "An act to amend an act entitled 'An act for the relief of settlers on railroad lands,' approved June twenty-second eighteen hundred and seventy-four."

The words "or pre-emption," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See note to chapter 4 of this Title.

Act June 22, 1874, c. 400, mentioned in this act, is set forth ante, § 4889.

§ 4891. (Act April 21, 1876, c. 72, § 1.) Homestead entries on railroad lands prior to their withdrawal or after their restoration to market confirmed.

All [pre-emption and] homestead entries, or entries in compliance with any law of the United States, of the public lands, made in good faith, by actual settlers, upon tracts of land of not more than one hundred and sixty acres each, within the limits of any land-grant, prior to the time when notice of the withdrawal of the lands embraced in such grant was received at the local land-office of the district in which such lands are situated, or after their restoration to market by order of the General Land-Office, and where the [pre-emption and] homestead laws have been complied with, and proper proofs thereof have been made by the parties holding such tracts or parcels, they shall be confirmed, and patents for the same shall issue to the parties entitled thereto. (19 Stat. 35.)

This section and the two sections next following were an act entitled "An act to confirm pre-emption and homestead entries of public lands within the limits of railroad-grants in cases where such entries have been made under the regulations of the land department."

The words "pre-emption and," inclosed in brackets in this section, were

superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

Notes of Decisions

Homestead entries.—Homestead entries made prior to the time when notice of withdrawal of the lands was received at the local land office, although after the time when the map of the general route of a railroad was filed in the office of the secretary of the interior, and an order of withdrawal of the lands made, were made valid by this act, if the entries were made in good faith by actual settlers upon tracts of not more than 160 acres each. Northern Pac. R. Co. v. Amacker (1900) 20 Sup. Ct. 236, 238, 175 U. S. 564, 44 L. Ed. 274, affirming Amacker v. Northern Pac. R. Co. (1893) 58 Fed. 850, 7 C. C. A. 518, which reversed U. S. v. Oregon & C. R. Co. (C. C. 1900) 101 Fed. 316, judgment affirmed in Oregon & C. R. Co. v. U. S. (1901) 109 Fed. 514, 48 C. C. A. 520, which is affirmed in part (1903) 23 Sup. Ct. 615, 620, 189 U. S. 103, 116, 47 L. Ed. 726, 732, and reversed in part (1903) 23 Sup. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012.

Construction and application of act.—This act does not apply to a case where, prior to entry the lands had been specially granted by act of congress, and had fully vested in the grantee. Taboreck v. Burlington & M. R. R. Co. (C. C. 1881) 13 Fed. 103. And see Burlington & M. R. Co. v. Lawson (1882) 58 Iowa, 145, 12 N. W. 229.

§ 4892. (Act April 21, 1876, c. 72, § 2.) Homestead entries on abandoned railroad lands.

When at the time of such withdrawal as aforesaid valid [pre-emption or] homestead claims existed upon any lands within the limits of any such grants which afterward were abandoned, and, under the decisions and rulings of the Land Department, were re-entered by [pre-emption or] homestead claimants who have complied with the laws governing [pre-emption or] homestead entries, and shall make the proper proofs required under such laws, such entries shall be deemed valid, and patents shall issue therefor to the person entitled thereto. (19 Stat. 35.)

The words "pre-emption or," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws, by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

§ 4893. (Act April 21, 1876, c. 72, § 3.) Homestead entries on railroad lands subsequent to expiration of grant.

All such [pre-emption and] homestead entries which may have been made by permission of the Land Department, or in pursuance of the rules and instructions thereof, within the limits of any land-grant at a time subsequent to expiration of such grant, shall be deemed valid, and a compliance with the laws and the making of the proof required shall entitle the holder of such claim to a patent therefor. (19 Stat. 36.)

The words "pre-emption and," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097. See notes to chapter 4 of this Title.

§ 4894. (Act Jan. 13, 1881, c. 19.) Rights of permissive settlers on railroad lands restored to public domain.

All persons who shall have settled and made valuable and permanent improvements upon any odd numbered section of land within any railroad withdrawal in good faith and with the permission or license of the railroad company for whose benefit the same shall have been made, and with the expectation of purchasing of such company the land so settled upon, which land so settled upon and improved, may, for any cause, be restored to the public domain, and who, at the time of such restoration, may not be entitled to enter and acquire title to such land under the [pre-emption] homestead[, or timber-culture] acts of the United States, shall be permitted, at any time within three months after such restoration, and under such rules and regulations as the Commissioner of the General Land Office may prescribe, to purchase not to exceed one hundred and sixty acres in extent of the same by legal sub-

divisions, at the price of two dollars and fifty cents per acre, and to receive patents therefor. (21 Stat. 315.)

This was an act entitled "An act for the relief of certain settlers on restored railroad lands."

The word "pre-emption," inclosed in brackets in this section, was superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097; and the words "or timber-culture," also inclosed in brackets in this section, were superseded by the repeal of the timber-culture laws by Act March 3, 1891, c. 561, § 1, post, § 5116.

Notes of Decisions

Lands included in forest reserve.—The right given a settler by this act is not defeated by the fact that after the railroad withdrawal has been set aside the land is included within the boundaries of a forest reservation, created by proclamation of the president, before it has been surveyed so as to give the settler an opportunity to purchase. Holmes v. U. S. (1902) 118 Fed. 995, 55 C. C. A. 489, reversing judgment U. S. v. Holmes (C. C. 1900) 105 Fed. 41.

§ 4895. (Act March 3, 1887, c. 376, § 1.) Adjustment of land grants to railroads by Secretary of Interior.

That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the Supreme Court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted. (24 Stat. 556.)

This was the first section of an act entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes."

Sections 2–5 and 7 of the act are set forth post, §§ 4896–4900.

Section 6 of the act gave purchasers of lands granted to aid in the construction of railroads, at sales of the lands for State and county taxes thereon as the property of any railroad company, a prior right to purchase such lands from the United States, to continue one year from the approval of this act. It is omitted, as temporary merely.

To enable the Secretary of the Interior to complete the adjustment of land grants to aid in the construction of railroads, any railroad corporation required by law to pay the costs of surveying, etc., unsurveyed lands granted to it, was required to deposit a sum sufficient to pay such cost, to be disbursed for the surveying, etc., and conveyance of such lands, by Act June 25, 1910, c. 406, post, §§ 4914–4917.

Notes of Decisions

Scope and purpose of act.—The land grant to the state of Iowa in aid of railroads, not having been adjusted by the Land Department, was within Adjustment Act. Logan v. Davis (1914) 34 Sup. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121, reversing decree (1910) 124 N. W. 808, 147 Iowa, 441.

This act was passed for the purpose of adjusting land grants of railroad companies and restoring to the public domain land improperly certified under the grants, by bills in equity by the attorney general. U. S. v. Flint & P. M. R. Co. (1899) 95 Fed. 551, 556, 37 C. C. A. 156. And see U. S. v. Missouri, K. & T. R. Co. (1891) 12 Sup. Ct. 13, 14, 141 U. S. 358, 35 L. Ed. 766, reversing decree (C. C. 1888) 37 Fed. 68; U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 370, 165 U. S. 463, 41 L. Ed. 789; Adams v. Henderson (1897) 18 Sup. Ct. 179, 182, 168 U. S. 573, 42 L. Ed. 584; U. S. v. Oregon & C. R. Co. (1900) 20 Sup. Ct. 261, 176 U. S. 28, 44 L. Ed. 358; Wilcox v. Eastern Oregon Land Co. (1900) 20 Sup. Ct. 269, 271, 176 U. S. 51, 44 L. Ed. 368; U. S. v. Southern Pac. R. Co. (1902) 22 Sup. Ct. 285, 286, 184 U. S. 49, 46 L. Ed. 425; Oregon & C. R. Co. v. U. S. (1903) 23 Sup. Ct. 615, 620, 189 U. S. 103, 47 L. Ed. 726, affirming decree in part (1901) 109 Fed. 514, 48 C. C. A. 520, which is reversed in part (1903) 23 Sup. Ct. 673, 674, 190 U. S. 186, 47 L. Ed. 1012; U. S. v. Chicago, M. & St. P. Ry. Co. (1904) 25 Sup. Ct. 113, 116, 195 U. S. 524, 49 L. Ed. 306, affirming judgment (1902) 116 Fed. 969, 54 C. C. A. 545; Ramsey v. Tacoma Land Co. (1905) 25 Sup. Ct. 286, 288, 196 U. S. 360, 49 L. Ed. 513; Brandon v. Ard (1908) 29 Sup. Ct. 1, 4, 211 U. S. 11, 53 L. Ed. 68; U. S. v. Chicago, M. & St. P. R. Co. (1910) 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015; Southern Pac. R. Co. v. U. S. (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993; U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96; Id. 67 Fed 969, 15 C. C. A. 117, decree affirmed Winona & St. P. R. Co. v. U. S. (1897) 17 Sup. Ct. 381, 165 U. S. 483, 41 L. Ed. 798; Wagstaff v. Collins (1899) 97 Fed. 3, 38 C. C. A. 19; U. S. v. Chicago, M. & St. P. Ry. Co. (1908) 160 Fed. 818, 87 C. C. A. 592, judgment affirmed (1910) 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015;

Lyle v. Patterson (1910) 176 Fed. 909, 100 C. C. A. 379; U. S. v. Southern Pac. R. Co. (C. C. 1894) 63 Fed. 481, 483; U. S. v. Des Moines Val. R. Co. (C. C. 1895) 70 Fed. 435 (decree affirmed [1897] 84 Fed. 40, 28 C. C. A. 267); U. S. v. Grand Rapids & I. R. Co. (C. C. 1907) 154 Fed. 131, decree affirmed (1908) 165 Fed. 297, 91 C. C. A. 265: Harvey v. Holles (C. C. 1908) 160 Fed. 531; U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 172 Fed. 271; Logan v. Davis (1910) 124 N. W. 808, 147 Iowa, 441; Sage v. Maxwell (1904) 99 N. W. 42, 91 Minn. 527.

The sole scope and purpose of this act is to restore to the Land Department of the government its exclusive jurisdiction to primarily determine all questions affecting rights to the public lands, which through fraud or mistake it has lost by an erroneous certification or patenting with respect to the lands in question; and the act confers no jurisdiction on the courts to determine, in a suit brought thereunder, the right of the railroad company grantee to the lands involved or of an adverse claimant thereto. Sage v. U. S. (1905) 140 Fed. 65, 71 C. C. A. 404, appeal dismissed Slocum v. Same (1908) 28 Sup. Ct. 571, 209 U. S. 552, 52 L. Ed. 922.

§ 4896. (Act March 3, 1887, c. 376, § 2.) Cancellation of patents erroneously issued; reconveyance to United States; suits to cancel patents.

If it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States. (24 Stat. 556.)

The word "respectfully," in the first sentence of this section, was used, apparently, for "respectively."

Notes of Decisions

Purpose and effect of statute.—This section simply confers the right to bring action after demand, and does not authorize a recovery in any event. U. S. v. Chicago, M. & St. P. Ry. Co. (1902) 116 Fed. 969, 54 C. C. A. 545, affirmed (1904) 25 Sup. Ct. 113, 195 U. S. 524, 49 L. Ed. 306.

This act does not create, in the case of land as to which there has been no readjustment, any new right which would avoid the effect of prior adjudications as to the title. U. S. v. Des Moines Val. R. Co. (C. C. 1895) 70 Fed. 435, decree affirmed (1897) 84 Fed. 40, 28 C. C. A. 267.

This act is mandatory, and makes it the duty of the United States to bring a suit to restore title to the United States if the party to whom the land was erroneously certified after a prior certification does not give or procure a relinquishment or reconveyance. (1891) 20 Op. Atty. Gen. 224.

Public lands defined.—The words "public lands" include only such lands as are subject to sale or other disposition under the general land laws, and not lands reserved from sale by competent authority. Northern Lumber Co. v. O'Brien (1905) 139 Fed. 614, 71 C. C. A. 598 (affirming decree [C. C. 1905] 134 Fed. 303, and judgment affirmed [1907] 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438); U. S. v. Grand Rapids & I. R. Co. (C. C. 1907) 154 Fed. 131, decree affirmed (1908) 165 Fed. 297, 91 C. C. A. 265.

Erroneous certification.—See, also, notes to § 4898, post.

Patents issued to persons who have purchased in good faith from railroads lands erroneously certified are only intended to be issued after it shall have been legally determined, in the mode prescribed in this section, that the certification or patent to the railroad company had been erroneously issued. (1887) 19 Op. Atty. Gen. 68.

Certification of land already covered by a homestead or preemption entry is erroneous and without authority of law. (1891) 20 Op. Atty. Gen. 224.

Right to sue for cancellation of patent.—The United States may maintain a bill in equity for the cancellation of patents alleged to have been issued by it to certain railroad companies with-

out authority of law, especially so when homestead and pre-emption rights have attached to the same lands in favor of numerous third persons, whose individual assertion thereof would lead to a multiplicity of suits, all depending upon the same facts and provisions of law. U. S. v. Missouri, K. & T. R. Co. (1891) 12 Sup. Ct. 13, 141 U. S. 358, 35 L. Ed. 766, reversing (C. C. 1888) 37 Fed. 68.

Where it is shown that a tract of land was certified and patented under a railroad grant while an application for a homestead entry thereon was pending on appeal in the Land Department which, through mistake, had not been entered upon the records, thus depriving the Department of the power to determine the homestead claimant's rights on the merits, a case of erroneous patenting is made out, which entitles the government to a cancellation of the patent in a suit brought under this act. Sage v. U. S. (1905) 140 Fed. 65, 71 C. C. A. 404, appeal dismissed Slocum v. Same (1908) 28 Sup. Ct. 571, 209 U. S. 552, 52 L. Ed. 922.

The United States is not entitled in equity to a cancellation of patents to lands issued to a railroad company under a grant, nor to recover the price thereof from the company, under this act, although erroneously certified and patented thereunder, where by reason thereof the company failed to obtain the quantity of land to which it was entitled under the grant. U. S. v. Grand Rapids & I. Ry. Co. (1908) 165 Fed. 297, 91 C. C. A. 265, affirming decree (C. C. 1907) 154 Fed. 131.

A suit cannot be brought in the name of the United States to cancel a patent to lands in which they have no interest. U. S. v. Des Moines Val. R. Co. (C. C. 1895) 70 Fed. 435, decree affirmed (1897) 84 Fed. 40, 28 C. C. A. 267.

When selections under a land grant have been approved by the interior department and confirmed by act of congress, a suit subsequently instituted, in the name of the United States, to cancel a patent issued under the grant cannot be regarded as one brought under this act, which only applies to grants not previously adjusted. Id.

Where the land department has issued patents to a railroad company for lands to which settlers had acquired a prior right under the homestead and pre-emption laws, the United States is under an obligation to convey the lands to the rightful claimants, which gives it the right to maintain a suit in equity for the cancellation of such patents. U. S. v. Oregon & C. R. Co. (C. C. 1900) 101 Fed. 316, judgment affirmed Oregon & C. R. Co. v. U. S. (1901) 109 Fed. 514, 48 C. C. A. 520, which is affirmed in part (1903) 23 Sup. Ct. 615, 620, 189 U. S. 103, 116, 47 L. Ed. 726, 732, and reversed in part (1903) 23 Sup. Ct. 673, 190 U. S. 186, 47 L. Ed. 1012.

Cancellation of patent for mineral lands.—Under this act a patent conveying mineral lands knowingly purchased as agricultural lands will be canceled. U. S. v. Central Pac. R. Co. (C. C. 1898) 84 Fed. 218. And see Western Pac. R. Co. v. U. S. (1883) 2 Sup. Ct. 802, 108 U. S. 510, 27 L. Ed. 806; Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 30 L. Ed. 170.

Defenses.—In a suit by the United States under this act to cancel land certificates, issued under grant to railroad, and to restore the title to the land to the United States, the equities of bona fide purchasers who hold the legal title under the certificates are superior to those of the United States, and constitute a good defense to the suit. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96.

Delay by the United States in suing to cancel an erroneous certification of lands to a state in aid of a railroad, whereby the railroad company is prevented from acquiring indemnity lands in place thereof, raises no equitable estoppel against the United States. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 969, 15 C. C. A. 117.

Where a patent has been issued to a railroad company for land to which an individual had acquired a prior right under the homestead law, the United States is under an obligation to convey the land to the rightful claimant, which entitles it to maintain a suit to cancel the patent, but in such suit, which is in fact one between private parties, involving no public interest or right, the court may properly take into consideration the equities as between the real parties in interest. U. S. v. Chicago, M. & St. P. Ry. Co. (1902) 116 Fed. 969, 54 C. C. A. 545, judgment affirmed (1904) 25 Sup. Ct. 113, 195 U. S. 524, 49 L. Ed. 306. In such suit laches is a defense. U. S. v. Chicago, M. & St. P. Ry. Co. (1902) 116 Fed. 969, 54 C. C. A. 545, judgment affirmed (1904) 25 Sup. Ct. 113, 195 U. S. 524, 49 L. Ed. 306.

Parties.—Bona fide purchasers holding the legal title to land, under a voidable certificate of the land department, are indispensable parties to a suit in equity by the United States to annul that title. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 948, 15 C. C. A. 96.

Where the purchasers are very numerous, and all occupy the same position, a number may be joined as representatives of the class, and the titles of all confirmed, where it appears that they were bona fide purchasers. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed (1904) Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

§ 4897. (Act March 3, 1887, c. 376, § 3.) Erroneous cancellation of entries of bona fide settlers corrected.

If, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: Provided, That he has not located another claim or made an entry in lieu of the one so erroneously canceled: And provided also, That he did not voluntarily abandon said original entry: And provided further, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if there be no such purchasers, then to bona fide settlers residing thereon. (24 Stat. 557.)

Notes of Decisions

Purpose and effect of statute.—By this section Congress provided for a reinstating of the title of one deprived thereof by an erroneous ruling of the land department, but at the same time limited the right of reinstating to cases in which the original entryman had not voluntarily abandoned his entry, or had not since that time made a new entry. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 372, 165 U. S. 463, 41 L. Ed. 789.

The act applies not merely to transactions had before its date, but to any had before final adjustment. U. S. v. Southern Pac. R. Co. (1902) 22 Sup. Ct. 285, 288, 184 U. S. 49, 46 L. Ed. 425.

Bona fide purchasers of unclaimed land.—The term "bona fide purchasers of said unclaimed land," means those persons who, without knowledge of wrong or error, have purchased from the railroad company lands which had been previously entered by a preemption or homestead settler, where entry had been erroneously canceled as described in the first clause of this section, and which land the preemption or homestead settler did not elect to claim after the recovery by the proceedings prescribed by the preceding section. (1887) 19 Op. Atty. Gen. 68.

Right of purchaser to sue for breach of warranty.—See, also, notes to § 4898, post.

The fact that a patent to lands granted to a railroad company is void because pre-emption rights had attached thereto before the definite location of the road will not enable a remote grantee thereof to maintain an action against his immediate grantor for a breach of warranty, when the grantee still retains possession, and has pending in the land department an application for a patent as a bona fide purchaser, under this act. Burr v. Greeley (1892) 52 Fed. 926, 3 C. C. A. 357.

§ 4898. (Act March 3, 1887, c. 376, § 4, as amended, Act Feb. 12, 1896, c. 18.) Patents to purchasers of lands from railroads; payment to United States by railroads of purchase money; suits for purchase money.

As to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land-office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety

days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: And provided, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions. Provided further, That where such purchasers, their heirs or assigns, have paid only a portion of the purchase price to the company, which is less than the Government price of similar lands, they shall be required, before the delivery of patent for their lands, to pay to the Government a sum equal to the difference between the portion of the purchase price so paid and the Government price, and in such case the amount demanded from the company shall be the amount paid to it by such purchaser. (24 Stat. 557. 29 Stat. 6.)

This section was amended by Act Feb. 12, 1896, c. 18, cited above, by adding, at the end of the section, as originally enacted, the last proviso, as set forth here.

Notes of Decisions

I. Purchasers in good faith
1. Purpose and effect of statute.
2. Who are purchasers in good faith.
3. Citizenship of purchasers.
4. Mortgagees as bona fide purchasers.
5. Issuance of patents to purchasers.
6. Conclusiveness of decisions of land department.
7. Land purchased and patented not subject to homestead entry.
8. Right of purchasers to sue for breach of warranty.

II. Recovery of price or value of land from railroads
9. Validity of statute.
10. Nature and form of proceeding.
11. Defenses.
12. Interest.

I. PURCHASERS IN GOOD FAITH

1. Purpose and effect of statute.— Persons who have contracted with a railroad company for unpatented lands so situated with respect to its constructed road as to be apparently within the scope of its grant are protected by this act, not only as to purchases prior to the date of such act, but as to any made before the time of final adjustment. U. S. v. Southern Pac. R. Co. (1902) 22 Sup. Ct. 285, 286, 184 U. S. 49, 46 L. Ed. 425 (modifying decree [1899] 98 Fed. 45, 38 C. C. A. 637); U. S. v. Southern Pac. R. Co. (1899) 98 Fed. 27, 38 C. C. A. 619 (affirming decree [C. C. 1898] 86 Fed. 962); U. S. v. Southern Pac. R. Co. (C. C. 1898) 86 Fed. 962 (decree affirmed Southern Pac. R. Co. v. U. S. [1899] 98 Fed. 27, 38 C. C. A. 619).

Confirmatory acts cannot operate to free the title of a bona fide purchaser from a railroad company of a mineral reservation in the deed to such purchaser, nor would such reservation be affected by the subsequent issuance of a patent. Adams v. Henderson (1897) 18 Sup. Ct. 179, 182, 168 U. S. 573, 42 L. Ed. 584.

Subsequent as well as prior purchasers in good faith are within the protection of the act. Logan v. Davis (1914) 34 S. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121 (reversing decree [1910] 124 N. W. 808, 147 Iowa, 441, following U. S. v. Southern Pac. R. Co. [1902] 22 Sup. Ct. 285, 288, 184 U. S. 49, 46 L. Ed. 425, and distinguishing Knepper v. Sands [1904] 24 Sup. Ct. 744, 747, 194 U. S. 476, 48 L. Ed. 1083). See, also, Benner v. Lane (C. C. 1902) 116 Fed. 407; Linebeck v. Vos (C. C. 1908) 160 Fed. 540; Ostrom v. Wood (C. C. 1905) 140 Fed. 294; McKenna v. Atherton (C. C. 1908) 160 Fed. 547.

A bona fide purchaser of lands erroneously certified to a state under a railroad grant has a good defense against a suit by the United States to cancel the certification. U. S. v. St. Paul & S. C. R. Co. (1895) 67 Fed. 973, 15 C. C. A. 121, decree affirmed (1897) 17 Sup. Ct. 1001, 165 U. S. 482, 41 L. Ed. 797.

A bona fide purchaser of the railroad title to lands patented to the company, but which were in fact excepted from the grant because of prior pre-emption claims that were subsequently canceled, is entitled to hold the lands as against a suit by the United States to annul the patent. U. S. v. Union Pac. Ry. Co. (1895) 67 Fed. 974, 15 C. C. A. 122, affirming decree (C. C. 1894) 61 Fed. 143; appeal dismissed (1896) 16

Sup. Ct. 1207, 163 U. S. 710, 41 L. Ed. 316.

The effect of the adjustment acts was to confirm in bona fide purchasers from a railroad company the title to lands which, when certified under the grant, were public lands of the United States, and not subject to individual claims, although at the time the grant attached they had been withdrawn from its operation, where they were subsequently restored to the public domain, were within the limits of the grant, and were earned by the company. U. S. v. Flint & P. M. Ry. Co. (1899) 95 Fed. 551, 37 C. C. A. 156. See, also, U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 372, 165 U. S. 463, 41 L. Ed. 789; U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 172 Fed. 271.

The legislation of congress in relation to bona fide purchasers of lands which have been erroneously certified or patented under railroad grants is remedial in its nature, and the several acts apply to those purchasing after as well as before their passage. U. S. v. Southern Pac. R. Co. (C. C. 1898) 88 Fed. 832.

This act does not entitle one who purchased unearned lands from a company after the passage of the act to protection as against an actual settler under the homestead laws, whose settlement and improvement of the land antedated such purchase. Manley v. Tow (C. C. 1901) 110 Fed. 241. But see U. S. v. Southern Pac. R. Co. (1902) 22 Sup. Ct. 285, 288, 184 U. S. 49, 46 L. Ed. 425.

It was the purpose of congress by the adjustment acts to deal liberally with bona fide purchasers so far as the technical rights of the Uinted States on the forfeiture of the grants was concerned; but it was not the legislative intent to declare by such acts that purchasers from the defaulting companies of unearned lands should be favored over other good-faith claimants, without regard to the actual equities of the parties, and a contest between such claimants is to be determined according to the established and recognized rules of equity and public policy. Benner v. Lane (C. C. 1902) 116 Fed. 407. See, also, Winona & St. P. R. Co. v. U. S. (1897) 17 Sup. Ct. 381, 382, 165 U. S. 483, 41 L. Ed. 798.

2. Who are purchasers in good faith. —Possession of land within the place limits of a railroad grant, by one claiming under a pre-emption filing, is notice to all persons purchasing under the grant that the land is excepted therefrom, and prevents them from defending, as innocent purchasers, against a suit brought by the United States to cancel the railroad title. U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 969, 15 C. C. A. 117, decree affirmed Winona & St. P. R. Co. v. U. S. (1897) 17 Sup. Ct. 381, 165 U. S. 483, 41 L. Ed. 798.

One purchasing from a railroad company land which, when certified to the state for the benefit of the company, and at the time of the purchase, was occupied under a recorded preemption claim, is not a bona fide purchaser, within the protection of the adjustment acts. Winona & St. P. R. Co. v. U. S. (1897) 17 Sup. Ct. 381, 382, 165 U. S. 483, 41 L. Ed. 798, affirming decree U. S. v. Winona & St. P. R. Co. (1895) 67 Fed. 969, 15 C. C. A. 117. See, also, Benner v. Lane (C. C. 1902) 116 Fed. 407.

A purchaser of land certified by the Secretary of the Interior to the state of Minnesota in aid of railway construction, and conveyed by that state to a railway company, occupies the position of a purchaser in good faith, although the certification was erroneous, and might have been avoided and the land recovered back by the government while in the hands of the railway company, where such purchaser had no notice, actual or constructive, of the claim of the government. U. S. v. Chicago, M. & St. P. Ry. Co. (1904) 25 Sup. Ct. 113, 116, 195 U. S. 524, 49 L. Ed. 306, affirming judgment (1902) 116 Fed. 969, 54 C. C. A. 545.

Constructive notice of defect in railway company's title does not deprive bona fide purchaser, in ignorance thereof and relying on apparent transfer of title by certification, of the protection afforded by this act. Logan v. Davis (1914) 34 Sup. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121, reversing decree (1910) 124 N. W. 808, 147 Iowa, 441.

The provisions of this act and of the supplementary act of March 2, 1896, were designed to protect all persons who purchased from the railroad company in good faith, and in the belief that they would obtain good title; and the fact that such person was chargeable with constructive notice of the invalidity of the company's title does not affect his character as a purchaser in good faith. U. S. v. Southern Pac. R. Co. (1899) 98 Fed. 45, 38 C. C. A. 637.

One who purchased, for a valuable consideration, from a railroad company, without notice that the United States claimed the land, but believing that the title was vested in the company, and at the same time entered into possession and remained therein, is a bona fide purchaser. U. S. v. Southern Pac. R. Co. (C. C. 1896) 76 Fed. 134.

Purchasers of land erroneously patented as agricultural land are not bona fide purchasers without notice, when they knew at the time they purchased the same that it was mineral land; and purchasers who located and worked mineral claims thereon prior to acquiring any interest therein are not purchasers in good faith. U. S. v. Central Pac. R. Co. (C. C. 1898) 84 Fed. 218.

The fact that, at the time a contract was made for the purchase of land from a railroad company, its road was not completed, and its grant not fully earned, though it was built beyond the point where the land was situated, and that it was subsequently determined that the land purchased did not pass to the company, because it had previously received and disposed of as much in quantity as it had earned, cannot charge the purchaser with knowledge of facts which would, as a matter of law, affect the good faith of his purchase. Linkswiler v. Schneider (C. C. 1899) 95 Fed. 203.

A purchaser from a railroad company is chargeable with notice of the rights of one who at the time of the purchase was in the actual occupancy of the land, claiming as a settler under the homestead laws, and he is not a bona fide purchaser, as against such settler, but acquires only the title and rights of his grantor. Manley v. Tow (C. C. 1901) 110 Fed. 241. See, also, McKenna v. Atherton (C. C. 1908) 160 Fed. 547.

Under this act a purchaser of unearned lands which have not been conveyed to the company, and which it has long since forfeited the right to earn, is not a bona fide purchaser as against one who is at the time in the actual occupancy of such lands as a homestead claimant, and of whose occupancy he has actual knowledge. Benner v. Lane (C. C. 1902) 116 Fed. 407.

The land department cannot be held, as matter of law, to have erred in holding one an innocent purchaser from a railroad company of land within its grant, so as to be entitled to the protection of this act, though it failed to entitle itself to the land by completing the road; no one having been in possession when he contracted for the land and received his deed from the company. Brett v. Meisterling (C. C. 1902) 117 Fed. 768.

Where a state resumed title to lands granted by Congress to the state, and by the state to the railroad company, on account of the default of the company, a purchaser of such lands from the company thereafter could acquire no rights and is not protected as a bona fide purchaser by this section as against one who entered the lands under the land laws of the United States, to which the lands were subsequently relinquished by the state, nor is he entitled to purchase such lands from the United States under the following section. Ostrom v. Wood (C. C. 1905) 140 Fed. 294.

In a suit in equity by the United States to cancel a patent to lands, the rule as to what constitutes a bona fide purchaser is no different from what it would be if the complainant were an individual. U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 172 Fed. 271.

3. Citizenship of purchasers.—Innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands are not protected, unless they are citizens, or have declared their intention of becoming citizens. Clark v. Herington (1902) 22 Sup. Ct. 872, 875, 186 U. S. 206, 46 L. Ed. 1128.

A purchaser from the railroad company is not entitled to protection under the legislation of congress, unless he is a citizen of the United States, or has declared his intention to become one. U. S. v. Southern Pac. R. Co. (C. C. 1898) 88 Fed. 832.

That the first grantee of a railroad company of lands erroneously certified under a grant is an alien will not deprive a subsequent grantee, who is a citizen of the United States, of his rights as a bona fide purchaser. Id.

4. Mortgagees as bona fide purchasers.—Where a land grant railroad company to which lands were certified as earned conveyed the legal title in trust for its bondholders, and on the foreclosure of a subsequent mortgage its equity of redemption was sold, leaving the title in the trustees, and subject to the rights of the first bondholders, such sale operated to extinguish all title and interest of the original grantee in the lands, and took the trustees out of the proviso, excepting mortgagees from the provision in favor of bona fide purchasers, and the trustees and purchaser of the equity of redemption became bona fide purchasers. U. S. v. Flint & P. M. Ry. Co. (1899) 95 Fed. 551, 37 C. C. A. 156.

The provision that a mortgage or pledge of the lands by the company shall not be considered as a sale does not mean that a mortgage and sale of the equity shall not be so considered. Id.

One claiming under a mortgage is not protected as a bona fide purchaser. U. S. v. Southern Pac. R. Co. (C. C. 1896) 76 Fed. 134.

5. Issuance of patents to purchasers.—It is the duty of the department to hear and determine the fact whether one was or was not a purchaser in good faith from the railway company; and where it is found that he is a purchaser in good faith, the department must issue a patent for the land to him. Linkswiler v. Schneider (C. C. 1899) 95 Fed. 203, 205.

Patents, the issue whereof is provided for in this section, are only intended to be issued after it shall have been legally determined, in the mode prescribed in the second section of this act that the certification or patent to the railroad company had been erroneously issued. (1887) 19 Op. Atty. Gen. 68.

6. Conclusiveness of decisions of land department.—Decision of Secretary of

Interior, on evidence in a contest before the Land Department, that one of the parties was a purchaser in good faith within this act, is conclusive on the courts, unless founded on errors of law and misconstruction of statute. Logan v. Davis (1914) 34 Sup. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121.

Where jurisdiction over the subject-matter is committed to the officers of the land department, and they are charged with the duty of determining whether the particular land was or was not covered by a grant to a railroad company, such a decision culminating in the issuance of a patent passes title to the property, and a bona fide purchaser under such a patent prior to any attempt to annul it will be protected. United States v. Southern Pac. R. Co. (C. C. 1896) 76 Fed. 134.

The finding of the land department in favor of the good faith of a purchaser will not be disturbed, unless clearly shown to have been based on an erroneous construction of the law. Linkswiler v. Schneider (C. C. 1899) 95 Fed. 203.

7. Land purchased and patented not subject to homestead entry.—Land purchased by defendant's ancestor from the Sioux City & St. Paul Railroad Company and patented to the purchaser under this section held not subject to homestead entry on determination that the railroad was not entitled to the land. Sullivan v. Damon (D. C. 1913) 202 Fed. 285. See, also, Harvey v. Holles (C. C. 1908) 160 Fed. 531; Dockendorf v. Bassett (C. C. 1908) 160 Fed. 543 (affirmed [1910] 176 Fed. 917, 100 C. C. A. 387); Lyle v. Patterson (C. C. 1908) 160 Fed. 545 (affirmed [1910] 176 Fed. 909, 100 C. C. A. 379, affirmed [1913] 33 Sup. Ct. 480, 228 U. S. 211, 57 L. Ed. 804).

8. Right of purchasers to sue for breach of warranty.—Purchasers cannot sue the railroad company for breach of warranty, though the secretary of the interior has prescribed no rules by which purchasers can avail themselves of this act, as their title and possession are secure without making proof of purchase until such rules are prescribed. Montgomery v. Northern Pac. R. Co. (C. C. 1895) 67 Fed. 445.

II. RECOVERY OF PRICE OR VALUE OF LAND FROM RAILROADS

9. Validity of statute.—See, also, notes to § 4902, post.

The adjustment acts do not purport to alter or repeal the original grants, but are independent acts passed by Congress in the exercise of its constitutional power to protect the property of the United States, and their validity is not dependent on any reservation of the power of repeal in the original granting acts. U. S. v. Southern Pac. R. Co. (C. C. 1907) 157 Fed. 96, decree affirmed Southern Pac. R. Co. v. U. S. (1911) 186 Fed. 737, 108 C. C. A. 607, which is modified (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993.

10. Nature and form of proceeding.—Irrespective of the adjustment acts, the federal government had the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith. Southern Pac. R. Co. v. U. S. (1906) 26 Sup. Ct. 296, 298, 200 U. S. 341, 50 L. Ed. 507, affirming decree (1904) 133 Fed. 651, 66 C. C. A. 581.

The United States may maintain a suit in equity to set aside patents erroneously issued to a railroad company for lands under a grant, and to test the bona fides of persons claiming to be bona fide purchasers, and establish and confirm their rights in any of the lands so patented, and may in the same suit require an accounting from the railroad company in respect to such of the lands involved as it has sold, and obtain a decree against it for the sums recoverable therefor under such acts. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

The adjustment acts, which give the United States the right to have canceled patents to lands erroneously issued under a railroad grant, and also to recover from the grantee the government price of lands so patented and sold to bona fide purchasers, are valid, and a suit to enforce such rights may be maintained in a court of equity. U. S. v. Oregon & C. R. Co. (C. C. 1904) 133 Fed. 953, judgment reversed (1906) 143 Fed. 765, 75 C. C. A. 66, and judgment affirmed Oregon & C. R. Co. v. U. S. (1906) 144 Fed. 832, 75 C. C. A. 486, and (1906) 148 Fed. 603, 78 C. C. A. 375.

11. Defenses.—The decree, in a suit by the United States against a railroad company to determine its right to certain lands under a grant, in which the only question determined was that the lands did not pass to defendant under the grant, but were erroneously patented to it, is not a bar to a second suit brought under the adjustment acts to recover from the company the price of the lands on an allegation that they had been sold by defendant to bona fide purchasers whose title had been confirmed under the provisions of such acts. Southern Pac. Ry. Co. v. U. S. (1911) 186 Fed. 737, 108 C. C. A. 607, affirming decree U. S. v. Southern Pac. Ry. Co. (C. C. 1907) 157 Fed. 96, and judgment modified (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993.

12. Interest.—The liability of the Southern Pacific Railroad Company for interest on the statutory minimum price

which the United States is seeking to recover under the adjustment acts where lands within the overlap of a conflicting railroad land grant had been erroneously patented to such railroad, prior to the date of the first act, and had been sold to purchasers whose titles had been confirmed, arose only when suit was begun. Southern Pac. R. Co. v. U. S. (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993, modifying judgment (1911) 186 Fed. 737, 108 C. C. A. 607.

§ 4899. (Act March 3, 1887, c. 376, § 5.) Rights of purchasers from railroads of coterminous lands not within railroad grants.

Where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary Government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases. (24 Stat. 557.)

Notes of Decisions

Operation and effect of statute.—See, also, notes to §§ 4896–4898, ante.

The adjustment acts operate to confirm title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grant, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing also that the lands were public lands, in the statutory sense of the term, and free from individual or other claims. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 373, 165 U. S. 463, 41 L. Ed. 789. See, also, Logan v. Davis (1914) 34 Sup. Ct. 685, 233 U. S. 613, 58 L. Ed. 1121, reversing decree (1910) 124 N. W. 808, 147 Iowa, 441; Wagstaff v. Collins (1899) 97 Fed. 3, 7, 38 C. C. A. 19; Manley v. Tow (C. C. 1901) 110 Fed. 241.

This statute is remedial in its nature and must be construed so as to carry out the intent of Congress to secure to the parties the intended relief. Gertgens v. O'Connor (1903) 24 Sup. Ct. 94, 97, 191 U. S. 237, 48 L. Ed. 163.

The word "grant," in this section, should be construed to include (as it does in the preceding sections of this act) both the primary and the indemnity limits. (1887) 19 Op. Atty. Gen. 68.

The statute does not confer legal title upon the purchaser. Jackson v. La Moure County (1890) 1 N. D. 238, 46 N. W. 449.

Who are bona fide purchasers.—One is not a bona fide purchaser of lands apparently within the scope of a railroad grant, which had not been conveyed to or for the use of such company, so as to be protected by this section, who pays nothing therefor except by giving his legal services and making advances of money in the way of taxes, under his agreement with such grantee to protect it in its purchase money and receive for himself whatever he could obtain over and above that sum. U. S. v. Southern Pac. R. Co. (1902) 22 Sup. Ct. 285, 286, 184 U. S. 49, 46 L. Ed. 425.

A mere license given by a railroad company to settle upon a tract of land supposed to be within a grant made by congress to such company, where the

company expressly declined to enter into a contract of sale, does not constitute the settler a purchaser, within this section. U. S. v. Holmes (C. C. 1900) 105 Fed. 41, judgment reversed Holmes v. U. S. (1902) 118 Fed. 995, 55 C. C. A. 489.

Right to purchase from the United States.—Bona fide purchasers of forfeited lands from a railroad company, who are not in possession and have not attempted to exercise their right under this section to purchase the lands from the United States, are not, by reason of such right to purchase, entitled to maintain an action to quiet title against persons claiming an adverse interest therein. San Jose Land & Water Co. v. San Jose Ranch Co. (1903) 23 Sup. Ct. 487, 490, 189 U. S. 177, 47 L. Ed. 765, affirming decree (1900) 62 Pac. 269, 129 Cal. 673.

The preferential right of purchase from the government given by this section to "bona fide purchasers" from a railway company of lands excepted from the operation of its congressional land grant inures to the benefit of a person seeking to bring settlers on such lands, who was given, by written agreement with the railway company, the right to purchase for himself and others lands within the indemnity limits of its grant when title thereto should be acquired by the company. Gertgens v. O'Connor (1903) 24 Sup. Ct. 94, 97, 191 U. S. 237, 48 L. Ed. 163, affirming judgment O'Connor v. Gertgens (1902) 89 N. W. 866, 85 Minn. 481.

Delay cannot successfully be urged to prevent bona fide purchasers from a railway company of land excepted from its grant from exercising the right to purchase the same from the government, conferred by this section, where the application to purchase was made within 10 months after the land had been stricken from the company's list, pursuant to a decision of the Land Department, and prior to such decision both the railway company and the Land Department had assumed that the land was already the property of the railway company's grantee by virtue of its purchase from that company. Ramsey v. Tacoma Land Co. (1905) 25 Sup. Ct. 286, 287, 196 U. S. 360, 49 L. Ed. 513, reversing decree Ramsay v. Tacoma Land Co. (1903) 71 P. 1024, 31 Wash. 351.

One who was denied the right to enter, as a homestead, lands claimed under a railroad grant, and who thereafter attempted to make an actual settlement on the same, but was prevented by the threats of those claiming under the railroad title, held not to have acquired thereby any rights which he was entitled to perfect under this act. Norton v. Evans (1897) 82 Fed. 804, 27 C. C. A. 168.

To entitle a purchaser of lands from a railroad company to a preference under this section it must appear that at the date of the sale to him by the company the title to the land purchased had been conveyed by the United States to the company or to some one for its use and benefit. A conveyance by the United States of lands to a state as trustee, to be held to ascertain whether they will be earned by the company, is not a conveyance to the company or for its use, within the meaning of such section. Benner v. Lane (C. C. 1902) 116 Fed. 407.

Lands granted by Congress to a state and by the state to a railroad company on condition, and which were afterwards resumed by the state for the failure of the company to comply with such condition and reverted to the United States, are not lands "excepted from the operation of the grant," within the meaning of this section; and a purchaser from the company acquires no right under said section to purchase the lands from the United States. Ostrom v. Wood (C. C. 1905) 140 Fed. 294.

Citizenship of purchaser.—See, also, notes to § 4898, ante.

A state corporation is a citizen of the United States, within the meaning of this section. Ramsey v. Tacoma Land Co. (1905) 25 Sup. Ct. 286, 287, 196 U. S. 360, 49 L. Ed. 513.

Rights of homestead claimants and purchasers.—The protection afforded to bona fide settlers by this section against the preferential right of purchase given by that section to bona fide purchasers from the railway company of lands excepted from the operation of its congressional land grant, does not cover a subsequent settlement of land within the indemnity limits of such grant, made with knowledge that it had been withdrawn from entry, and had been selected to supply deficiencies claimed to exist within the place limits. O'Connor v. Gertgens (1902) 89 N. W. 866, 85 Minn. 481, judgment affirmed Gertgens v. O'Connor (1903) 24 Sup. Ct. 94, 98, 191 U. S. 237, 48 L. Ed. 163.

A homestead settler on public lands acquires no vested rights therein as against the United States, prior to the time when, under the law, he becomes entitled to a patent, which deprives Congress of the power to vest title, in another. Wagstaff v. Collins (1899) 97 Fed. 3, 8, 38 C. C. A. 19.

Complainants' ancestor made a homestead entry on lands which were within the limits of a railroad grant, but, by reason of existing pre-emption rights thereon, at the time the map of definite location was filed, were excepted from the operation of the grant, although the pre-emption claims were afterwards abandoned, and, under the construction then given to such grants by the land department, the lands on such abandonment passed thereunder. Yielding to such construction, the homestead settler surrendered possession to the railroad

company before the time when he could have proved up under his entry, and the company afterwards sold the lands to defendants, who were bona fide purchasers. The lands were subsequently patented under the grant. Held, that the title of the purchasers was confirmed by the adjustment acts, and that complainants could assert no right to the lands by reason of their ancestor's abandoned entry. Id.

A purchaser of land patented under a fraudulent entry held chargeable with notice of the fraud, which entitled the United States to a cancellation of the patent. U. S. v. Krueger (C. C. A. 1915) 228 Fed. 97.

The good faith of a homestead settler is not impeached by the fact that the land, when he settled upon it, was within the limits of a railroad grant, under which it had been withdrawn from market, where he had knowledge that the terms of the grant had not been complied with, nor the land earned thereunder, and good reason to believe that it would soon be restored to the public domain, as in fact it was. Manley v. Tow (C. C. 1901) 110 Fed. 241.

A patent issued to a state for lands coterminous with a completed section of the road, but which had not been earned by reason of the failure of the company to complete the road, and which, for that reason, the state had refused to convey to the company, is limited by the conditions of the grant to the state, and does not operate as a conveyance "to or for the use of" the company, within the meaning of this section, and in a contest between a purchaser from the company and a prior settler claiming under the homestead laws preference should be given to the latter. Id.

The good faith of a homestead settler is not impeached by the fact that the land when he settled upon it was within the limits of a railroad grant, under which it had been withdrawn from market, where he had knowledge that the terms of the grant had not been complied with, nor the land earned thereunder, and good reason to believe that it would be restored to the public domain, as it in fact was. Benner v. Lane (C. C. 1902) 116 Fed. 407.

The right of a bona fide homestead settler upon public land, which, while within the limits of a railroad grant, was never earned nor patented thereunder, and to which the company and the state had forfeited their rights under the terms of the grant many years prior to his settlement, to make entry of such land under the homestead law upon its restoration to the public domain, is superior to the right and equity of one claiming the land under a contract of purchase from the railroad company entered into for speculative purposes, after the land had been improved by the settler, and while he was residing thereon with his family, of which facts the purchaser had actual knowledge. Id.

Recognition of superior title.—An attempt to acquire title from the United States under this section with the view of removing a cloud upon the title is not an act of recognition or acknowledgment of a superior title, either in the United States or in the railroad company, which can operate to interrupt the continuity of an adverse possession. Missouri Valley Land Co. v. Wiese (1908) 28 Sup. Ct. 294, 208 U. S. 234, 52 L. Ed. 466 (affirming judgment Wiese v. Union Pac. Ry. Co. [Neb. 1906] 108 N. W. 175); Missouri Valley Land Co. v. Wrich (1908) 28 Sup. Ct. 299, 208 U. S. 250, 52 L. Ed. 473 (affirming judgment Wrich v. Union Pac. Ry. Co. [Neb. 1906] 108 N. W. 178).

Warranty.—It is no defense to an action against a railroad company for breach of warranty that the plaintiff purchased the land under this section. Montgomery v. Northern Pac. R. Co. (C. C. 1895) 67 Fed. 445.

Water rights.—One who enters on public land and constructs a pipe line thereon, under a claim of ownership of a water right, is entitled to the statutory protection afforded vested ditch and water rights as against subsequent purchasers of the land from a railroad company whose only claim to such land rests upon the right of purchase from the United States, given by this section. San José Land & Water Co. v. San José Ranch Co. (1903) 23 Sup. Ct. 487, 490, 189 U. S. 177, 47 L. Ed. 765.

§ 4900. (Act March 3, 1887, c. 376, § 7.) Limitation of quantity of lands to be conveyed.

No more lands shall be certified or conveyed to any State or to any corporation or individual, for the benefit of either of the companies herein mentioned, where it shall appear to the Secretary of the Interior that such transfers may create an excess over the quantity of lands to which such State corporation or individual would be rightfully entitled. (24 Stat. 558.)

§ 4901. (Act March 2, 1896, c. 39, § 1.) Suits to cancel patents to lands erroneously issued under railroad or wagon road grants; limitations.

Suits by the United States to vacate and annul any patent to

lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry. (29 Stat. 42.)

This section and the two sections next following were an act entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes."

Section 8 of chapter 561 of the Acts of the Fifty-first Congress, mentioned in this section, was Act March 3, 1891, c. 561, § 8, post, § 5114.

Notes of Decisions.

Cancellation of patents—Validity of statute.—The adjustment acts, which give the United States the right to have canceled patents to lands erroneously issued under a railroad grant, and also to recover from the grantee the government price of lands so patented and sold to bona fide purchasers, are valid, and a suit to enforce such rights may be maintained in a court of equity. U. S. v. Oregon & C. R. Co. (C. C. 1904) 133 Fed. 953, judgment reversed (1906) 143 Fed. 765, 75 C. C. A. 66, and judgment affirmed Oregon & C. R. Co. v. U. S. (1906) 144 Fed. 832, 75 C. C. A. 486, and (1906) 148 Fed. 603, 78 C. C. A. 375.

The adjustment acts do not purport to alter or repeal the original grants, but are independent acts passed by Congress in the exercise of its constitutional power to protect the property of the United States, and their validity is not dependent on any reservation of the power of repeal in the original granting acts. U. S. v. Southern Pac. R. Co. (C. C. 1907) 157 Fed. 96, decree affirmed Southern Pac. R. Co. v. U. S. (1911) 186 Fed. 737, 108 C. C. A. 607, which is modified (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993.

—— Right of government to sue in equity.—The proviso in this section is not limited to lands patented prior to the date of the passage of this act, but applies as well to lands patented after that date. U. S. v. St. Paul, M. & M. Ry. Co. (1915) 225 Fed. 27, 139 C. C. A. 301.

The United States may maintain a suit in equity to set aside patents erroneously issued to a railroad company for lands under a grant, and to test the bona fides of persons claiming to be bona fide purchasers, and establish and confirm their rights in any of the lands so patented, and may in the same suit require an accounting from the railroad company in respect to such of the lands involved as it has sold, and obtain a decree against it for the sums recoverable therefor under such acts. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

—— Limitations.—See, also, notes to § 5114, post.

A patent invalid when made, after five years without attack, must be deemed to have the same effect as against the United States in a suit to remove a cloud on title as though it were valid when issued. U. S. v. Chandler-Dunbar Water Power Co. (1908) 28 Sup. Ct. 579, 209 U. S. 447, 52 L. Ed. 881 (affirming decree [1907] 152 Fed. 25, 81 C. C. A. 221). See U. S. v. Winona & St. P. R. R. Co. (1897) 17 Sup. Ct. 368, 371, 165 U. S. 463, 41 L. Ed. 789; Bodcaw Lumber Co. v. Bonnette (1914) 65 So. 493, 135 La. 369.

The statute of limitations does not apply to a suit to enforce a forfeiture of an entire railroad grant, so far as the land is still held by the grantee, for breach of a condition requiring the grantee to sell only to actual settlers, which may have occurred after the patents were issued. U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861.

A suit to cancel a patent on the ground of fraud is not barred by limitation, where the fraud was concealed. U. S. v. Southern Pac. Co. (D. C. 1915) 225 Fed. 197; Same v. Exploration Co., Id. 854.

Where a patent for land granted to

a railroad company excluded and excepted all mineral lands, should any such be found in the tracts described, exclusive of coal and iron lands, and plaintiff prior to patent had located a quartz mine within the grant, a suit to quiet title against one holding under the railroad grant involved only a construction of the patent to the railroad company, and was not a suit to invalidate the same, within this section. Van Ness v. Rooney (Cal. 1911) 116 P. 392.

One who claimed under actual occupancy the land patented to a railroad company in 1871 cannot defeat the bona fide holder, where he did not apply for a homestead until 1909. Iatt Lumber Co. v. Faircloth (1913) 61 South. 866, 132 La. 906.

Confirmation of title of bona fide purchasers—Purpose and effect of statute.—The adjustment acts operate to confirm the title to every purchaser from a railroad company of land certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased the good faith, paid value for the lands, and providing also that the lands were "public lands" in the statutory sense of the term, and free from individual or other claim. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 373, 165 U. S. 463, 41 L. Ed. 789. See, also, U. S. v. Southern Pac. R. Co. (1901) 22 Sup. Ct. 285, 286, 184 U. S. 49, 46 L. Ed. 425; U. S. v. Flint & P. M. Ry. Co. (1899) 95 Fed. 551, 37 C. C. A. 156; Wagstaff v. Collins (1899) 97 Fed. 3, 8, 36 C. C. A. 19; U. S. v. Exploration Co. (1913) 203 Fed. 387, 121 C. C. A. 491; U. S. v. Koleno (1915) 226 Fed. 180, 141 C. C. A. 178; U. S. v. Southern Pac. R. Co. (C. C. 1898) 86 Fed. 962, decree affirmed Southern Pac. R. Co. v. U. S. (1899) 98 Fed. 27, 38 C. C. A. 619.

The effect of the acts for the adjustment of railroad land grants was to confirm in bona fide purchasers from a railroad company the title to lands which, when certified under the grant, were public lands, and not subject to individual claims, although at the time the grant attached they had been withdrawn from its operation, where they were subsequently restored to the public domain, were within the limits of the grant, and were earned by the company. U. S. v. Flint & P. M. Ry. Co. (1899) 95 Fed. 551, 37 C. C. A. 156.

No protection is given to innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands, by this act, where the railroad company has never received any patent or certificate therefor. Clark v. Herington (1902) 22 Sup. Ct. 872, 875, 186 U. S. 206, 46 L. Ed. 1128.

This act confirmed the title of bona fide purchasers. U. S. v. California & O. Land Co. (1904) 24 Sup. Ct. 266, 267, 192 U. S. 355, 48 L. Ed. 476. And see U. S. v. Chicago, M. & St. P. Ry. Co. (1910) 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015; Bodcaw Lumber Co. v. Bonnette (1914) 65 South. 493, 135 La. 369.

All purchasers in good faith, and in the belief that they will obtain a good title from a railroad company of lands which have been patented to it, are protected by the adjustment acts, whether such patents were issued before or after the commencement of suit by the government for the recovery of the lands. U. S. v. Southern Pac. R. Co. (1899) 98 Fed. 27, 38 C. C. A. 619, affirming decree (C. C. 1898) 86 Fed. 962, and decree reversed in Southern Pac. R. Co. v. U. S. (1902) 22 Sup. Ct. 154, 183 U. S. 519, 46 L. Ed. 307.

This act is applicable in a case involving the rights of such purchasers, though a decree had been entered from which an appeal was pending when the act was passed. U. S. v. Southern Pac. R. Co. (C. C. 1898) 88 Fed. 832.

This act does not operate to confirm the title of the grantee company, or to enlarge its rights. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed (1904) Southern Pac. R. Co. v. U. S., 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

Under this act a bona fide purchaser under a land contract cannot resist enforcement for the vendor's defect of title in that at the time of the grant to the vendor the lands involved were claimed by others, and did not pass by the grant, and that, consequently, patents issued thereafter were without authority, and void. Southern Pac. R. Co. v. Choate (1901) 64 P. 292, 132 Cal. 278.

—— Who are bona fide purchasers.—One purchasing for value and in good faith, from a railroad company, lands which, while actually public lands and free from any individual or other claims, were certified by the government to the state for the benefit of the company, is a "bona fide purchaser," within this act, though such lands were, by the true construction of the grant, excepted therefrom. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 371, 165 U. S. 463, 41 L. Ed. 789, affirming decree (1895) 67 Fed. 948, 15 C. C. A. 96.

Purchasers for value and in good faith, of lands patented to the railroad company as within the scope of its grant are bona fide purchasers, and as such are protected by this act, although they had notice of a change of opinion on the part of the officers of the government as to the validity of the title of the railroad company to such lands. U. S. v. Southern Pac. R. Co. (1902) 22

lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the passage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry. (29 Stat. 42.)

This section and the two sections next following were an act entitled "An act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes."

Section 8 of chapter 561 of the Acts of the Fifty-first Congress, mentioned in this section, was Act March 3, 1891, c. 561, § 8, post, § 5114.

Notes of Decisions

Cancellation of patents—Validity of statute.—The adjustment acts, which give the United States the right to have canceled patents to lands erroneously issued under a railroad grant, and also to recover from the grantee the government price of lands so patented and sold to bona fide purchasers, are valid, and a suit to enforce such rights may be maintained in a court of equity. U. S. v. Oregon & C. R. Co. (C. C. 1904) 133 Fed. 953, judgment reversed (1906) 143 Fed. 765, 75 C. C. A. 66, and judgment affirmed Oregon & C. R. Co. v. U. S. (1906) 144 Fed. 832, 75 C. C. A. 486, and (1906) 148 Fed. 603, 78 C. C. A. 375.

The adjustment acts do not purport to alter or repeal the original grants, but are independent acts passed by Congress in the exercise of its constitutional power to protect the property of the United States, and their validity is not dependent on any reservation of the power of repeal in the original granting acts. U. S. v. Southern Pac. R. Co. (C. C. 1907) 157 Fed. 96, decree affirmed Southern Pac. R. Co. v. U. S. (1911) 186 Fed. 737, 108 C. C. A. 607, which is modified (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993.

—— Right of government to sue in equity.—The proviso in this section is not limited to lands patented prior to the date of the passage of this act, but applies as well to lands patented after that date. U. S. v. St. Paul, M. & M. Ry. Co. (1915) 225 Fed. 27, 139 C. C. A. 301.

The United States may maintain a suit in equity to set aside patents erroneously issued to a railroad company for lands under a grant, and to test the bona fides of persons claiming to be bona fide purchasers, and establish and confirm their rights in any of the lands so patented, and may in the same suit require an accounting from the railroad company in respect to such of the lands involved as it has sold, and obtain a decree against it for the sums recoverable therefor under such acts. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

—— Limitations.—See, also, notes to § 5114, post.

A patent invalid when made, after five years without attack, must be deemed to have the same effect as against the United States in a suit to remove a cloud on title as though it were valid when issued. U. S. v. Chandler-Dunbar Water Power Co. (1908) 28 Sup. Ct. 579, 209 U. S. 447, 52 L. Ed. 881 (affirming decree [1907] 152 Fed. 25, 81 C. C. A. 221). See U. S. v. Winona & St. P. R. R. Co. (1897) 17 Sup. Ct. 368, 371, 165 U. S. 463, 41 L. Ed. 789; Bodcaw Lumber Co. v. Bonnette (1914) 65 So. 493, 135 La. 369.

The statute of limitations does not apply to a suit to enforce a forfeiture of an entire railroad grant, so far as the land is still held by the grantee, for breach of a condition requiring the grantee to sell only to actual settlers, which may have occurred after the patents were issued. U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861.

A suit to cancel a patent on the ground of fraud is not barred by limitation, where the fraud was concealed. U. S. v. Southern Pac. Co. (D. C. 1915) 225 Fed. 197; Same v. Exploration Co., Id. 854.

Where a patent for land granted to

a railroad company excluded and excepted all mineral lands, should any such be found in the tracts described, exclusive of coal and iron lands, and plaintiff prior to patent had located a quartz mine within the grant, a suit to quiet title against one holding under the railroad grant involved only a construction of the patent to the railroad company, and was not a suit to invalidate the same, within this section. Van Ness v. Rooney (Cal. 1911) 116 P. 392.

One who claimed under actual occupancy the land patented to a railroad company in 1871 cannot defeat the bona fide holder, where he did not apply for a homestead until 1909. Iatt Lumber Co. v. Faircloth (1913) 61 South. 866, 132 La. 906.

Confirmation of title of bona fide purchasers—Purpose and effect of statute.—The adjustment acts operate to confirm the title to every purchaser from a railroad company of land certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the land department, and notwithstanding the fact that the lands so certified or patented were by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased the good faith, paid value for the lands, and providing also that the lands were "public lands" in the statutory sense of the term, and free from individual or other claim. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 373, 165 U. S. 463, 41 L. Ed. 789. See, also, U. S. v. Southern Pac. R. Co. (1901) 22 Sup. Ct. 285, 286, 184 U. S. 49, 46 L. Ed. 425; U. S. v. Flint & P. M. Ry. Co. (1899) 95 Fed. 551, 37 C. C. A. 156; Wagstaff v. Collins (1899) 97 Fed. 3, 8, 38 C. C. A. 19; U. S. v. Exploration Co. (1913) 203 Fed. 387, 121 C. C. A. 491; U. S. v. Koleno (1915) 226 Fed. 180, 141 C. C. A. 178; U. S. v. Southern Pac. R. Co. (C. C. 1898) 86 Fed. 962, decree affirmed Southern Pac. R. Co. v. U. S. (1899) 98 Fed. 27, 38 C. C. A. 619.

The effect of the acts for the adjustment of railroad land grants was to confirm in bona fide purchasers from a railroad company the title to lands which, when certified under the grant, were public lands, and not subject to individual claims, although at the time the grant attached they had been withdrawn from its operation, where they were subsequently restored to the public domain, were within the limits of the grant, and were earned by the company. U. S. v. Flint & P. M. Ry. Co. (1899) 95 Fed. 551, 37 C. C. A. 156.

No protection is given to innocent purchasers for value of lands unlawfully selected by a railroad company as indemnity lands, by this act, where the railroad company has never received any patent or certificate therefor. Clark v. Herington (1902) 22 Sup. Ct. 872, 875, 186 U. S. 206, 46 L. Ed. 1128.

This act confirmed the title of bona fide purchasers. U. S. v. California & O. Land Co. (1904) 24 Sup. Ct. 266, 267, 192 U. S. 355, 48 L. Ed. 476. And see U. S. v. Chicago, M. & St. P. Ry. Co. (1910) 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015; Bodcaw Lumber Co. v. Bonnette (1914) 65 South. 493, 135 La. 369.

All purchasers in good faith, and in the belief that they will obtain a good title from a railroad company of lands which have been patented to it, are protected by the adjustment acts, whether such patents were issued before or after the commencement of suit by the government for the recovery of the lands. U. S. v. Southern Pac. R. Co. (1899) 98 Fed. 27, 38 C. C. A. 619, affirming decree (C. C. 1898) 86 Fed. 962, and decree reversed in Southern Pac. R. Co. v. U. S. (1902) 22 Sup. Ct. 154, 183 U. S. 519, 46 L. Ed. 307.

This act is applicable in a case involving the rights of such purchasers, though a decree had been entered from which an appeal was pending when the act was passed. U. S. v. Southern Pac. R. Co. (C. C. 1898) 88 Fed. 832.

This act does not operate to confirm the title of the grantee company, or to enlarge its rights. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed (1904) Southern Pac. R. Co. v. U. S., 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

Under this act a bona fide purchaser under a land contract cannot resist enforcement for the vendor's defect of title in that at the time of the grant to the vendor the lands involved were claimed by others, and did not pass by the grant, and that, consequently, patents issued thereafter were without authority, and void. Southern Pac. R. Co. v. Choate (1901) 64 P. 292, 132 Cal. 278.

—— Who are bona fide purchasers.—One purchasing for value and in good faith, from a railroad company, lands which, while actually public lands and free from any individual or other claims, were certified by the government to the state for the benefit of the company, is a "bona fide purchaser," within this act, though such lands were, by the true construction of the grant, excepted therefrom. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 371, 165 U. S. 463, 41 L. Ed. 789, affirming decree (1895) 67 Fed. 948, 15 C. C. A. 96.

Purchasers for value and in good faith, of lands patented to the railroad company as within the scope of its grant are bona fide purchasers, and as such are protected by this act, although they had notice of a change of opinion on the part of the officers of the government as to the validity of the title of the railroad company to such lands. U. S. v. Southern Pac. R. Co. (1902) 22

Sup. Ct. 285, 286, 184 U. S. 49, 46 L. Ed. 425.

The adjustment acts were designed to protect all persons who purchased from the railroad company in good faith, and in the belief that they would obtain title; and the fact that such person was chargeable with constructive notice of the invalidity of the company's title does not affect his character as a purchaser in good faith. U. S. v. Southern Pac. R. Co. (1899) 98 Fed. 45, 38 C. C. A. 637.

One who purchased, for a valuable consideration, from a railroad company, land included in its grant, and received a deed therefor, without notice that the United States claimed the land, but believing that the title was vested in said company, and at the same time entered into possession and remained therein, is a "bona fide purchaser," who is protected, as against a vacation or annulment of the patent issued for such land to the railroad company. U. S. v. Southern Pac. R. Co. (C. C. 1896) 76 Fed. 134.

The fact that a purchaser of lands patented to a railroad company holds under a contract, and has paid only a portion of the purchase money, does not affect his character as a bona fide purchaser, whose title is protected by this act. U. S. v. Southern Pac. R. Co. (C. C. 1898) 88 Fed. 832.

A bona fide purchaser of lands from a patentee under a railroad grant, within the meaning of this act, and whose right and title are thereby confirmed, is one who purchased in good faith, for value, expecting to obtain title through the railroad company, though he may have been chargeable, as matter of law, with constructive notice of the invalidity of the patentee's title. Id.

In a suit in equity by the United States to cancel a patent, the rule as to what constitutes a bona fide purchaser is no different from what it would be if the complainant were an individual. U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1909) 172 Fed. 271.

—— Lands within Indian reservation.—The Northern Pacific Railroad Company and its successor, or their respective vendees of lands patented in the mistaken belief that they were public lands granted to the railroad company, while in fact they formed a part of an Indian reservation, are not entitled to the protection accorded by this act to bona fide purchasers. Northern Pac. R. Co. v. U. S. (1913) 33 Sup. Ct. 368, 227 U. S. 355, 57 L. Ed. 544, affirming decree (1911) 191 Fed. 947, 112 C. C. A. 359.

This act relates to patents issued for lands within the public domain, and land within an Indian reservation is not a part of the public domain, nor subject to grant or sale under any statute providing for the disposal of the public lands of the United States. Northern Pac. Ry. Co. v. U. S. (1911) 191 Fed. 947, 112 C. C. A. 359, affirmed (1913) 33 Sup. Ct. 368, 227 U. S. 355, 57 L. Ed. 544.

§ 4902. (Act March 2, 1896, c. 39, § 2.) Claims of bona fide purchasers; establishment of rights.

If any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minimum Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as hereinbefore provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject-matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six

of the Acts of the second session of the Forty-ninth Congress. (29 Stat. 43.)

Sections 3 and 4, of chapter 376, of the Acts of the Second Session of the Forty-ninth Congress, mentioned in this section, are part of Act March 3, 1887, c. 376, §§ 3, 4, ante, §§ 4897, 4898.

Notes of Decisions

Recovery of minimum government price of lands—Validity of statute.—The provisions of this act for the bringing of suits against railroad companies to recover the minimum government price of lands erroneously patented to such companies under grants, and which they have sold to bona fide purchasers, are not invalid as creating an indebtedness by a retrospective act, nor as condemning the companies to pay a debt without a hearing. Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 651, 66 C. C. A. 581, affirming decree U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, and decree affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

The objection that such statutes are retroactive and void, in so far as they purport to give a right of action to recover the value of land which had been previously patented and sold by the company, cannot be made, where the sum sought to be recovered is less than that received by the company for the land, since it was clearly competent for Congress to require the company to account for the proceeds, as for money had and received for the use of the United States. Oregon & C. R. Co. v. U. S. (1906) 144 Fed. 832, 75 C. C. A. 486.

Scope of section.—This section is broad enough to include all patents erroneously or fraudulently issued under any act of Congress. U. S. v. Pitan (D. C. 1915) 224 Fed. 604. See U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552.

Government's right to sue.—See, also, notes, § 4898, ante.

In a suit to cancel the erroneous certification of lands which have been sold to a bona fide purchaser, a decree will not be granted against the railroad company for the value of the lands, on refusing cancellation, where the government has not asked such decree, and it does not appear that the company has received more lands than were granted, or that there were not within the granted or indemnity limits other lands which the company might have rightfully received but for the erroneous certification. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 373, 165 U. S. 463, 41 L. Ed. 789, affirming decree (1895) 67 Fed. 948, 15 C. C. A. 96.

Irrespective of the adjustment acts, the federal government had the right to sue a railroad company to recover the value of lands erroneously patented to such company, and sold by it to persons who dealt with it in good faith. Southern Pac. R. Co. v. U. S. (1906) 26 Sup. Ct. 296, 298, 200 U. S. 341, 50 L. Ed. 507, affirming decree (1904) 133 Fed. 651, 66 C. C. A. 581.

The adjustment acts authorize a suit by the United States against a railroad company to which land has been erroneously patented under a grant, on a money demand alone to recover the price of such land only after a determination by the Land Department that the land has been sold by the company to a bona fide purchaser, whose purchase is protected by the acts, on a claim made by or on behalf of such purchaser; and where no such claim has been made, but it appears that there is a basis for one, equity has jurisdiction of a suit by the United States against the company to recover the land or the price, as the facts may appear. Oregon & C. R. Co. v. U. S. (1906) 144 Fed. 832, 75 C. C. A. 486, affirming judgment U. S. v. Oregon & C. R. Co. (C. C. 1904) 133 Fed. 953.

Under this section a suit to recover the minimum government price of land erroneously patented to a railroad company may be brought in equity where, although no claim has been presented to the department, it appears that there is basis for one; the proof required being such as would authorize a cancellation of the patent but for the existence of such claim. U. S. v. Oregon & C. R. Co. (C. C. 1903) 122 Fed. 541.

Defenses.—Under a grant to a railroad company of specific lands lying within certain place limits, with the right upon condition to select indemnity lands in lieu thereof, it is no defense to a suit by the United States under this act to recover the government price of lands not in fact within the grant, but which were erroneously patented thereunder and have been sold to bona fide purchasers, that the company has not yet received the full quantity of land to which it is entitled, where there are sufficient other lands within its indemnity limits from which it may select to make up the deficiency. Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 662, 66 C. C. A. 560, affirming decree U. S. v. Southern Pac. R. Co. (C. C. 1903) 123 Fed. 1007, decree affirmed (1906) 26 Sup. Ct. 298, 200 U. S. 354, 50 L. Ed. 512.

The provisions of this act confirming the title of bona fide purchasers of lands from a railroad company to which they were erroneously patented, and also requiring the company to pay the government price for lands so patented

and sold, are within the power of Congress and valid, and it is no defense to an action to recover such price that some of the lands involved were sold by the company for less than the government price, where it received a larger average price for the lands, taken as a whole. Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 662, 66 C. C. A. 560, decree affirmed (1906) 26 Sup. Ct. 298, 200 U. S. 354, 50 L. Ed. 512.

The decree, in a suit by the United States against a railroad company to determine its right to certain lands under a grant, in which the only question determined was that the lands did not pass to defendant under the grant, but were erroneously patented to it, is not a bar to a second suit brought under the adjustment acts to recover from the company the price of the lands on an allegation that they had been sold by defendant to bona fide purchasers whose title had been confirmed under the provisions of such acts. Southern Pac. Ry. Co. v. U. S. (1911) 186 Fed. 737, 108 C. C. A. 607, affirming decree U. S. v. Southern Pac. Ry. Co. (C. C. 1907) 157 Fed. 96, and judgment modified (1913) 33 Sup. Ct. 717, 228 U. S. 618, 58 L. Ed. 993.

The fact that the error in issuing patents to a railroad company for lands to which it was not entitled under its grant was that of the land department constitutes neither a legal nor equitable defense to an action by the United States to recover such lands, or their value, when sold to bona fide purchasers, at least where such error did not prevent the company from obtaining all the lands to which it was entitled under its grant. U. S. v. Southern Pac. R. Co. (C. C. 1902) 117 Fed. 544, decree affirmed Southern Pac. R. Co. v. U. S. (1904) 133 Fed. 651, 66 C. C. A. 581, which is affirmed (1906) 26 Sup. Ct. 296, 200 U. S. 341, 50 L. Ed. 507.

Amount of recovery.—Government is entitled to recover at least the minimum government price of land for fraud in obtaining patent to homestead entry, commuted to a cash entry. U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552; U. S. v. Pitan (D. C. 1915) 224 Fed. 604.

Interest.—The liability of a railroad company for interest on the statutory minimum price which the United States is seeking to recover under the adjustment acts where lands within the overlap of a conflicting railroad land grant had been erroneously patented to such railroad, prior to the date of the first act, and had been sold to purchasers whose titles had been confirmed, arose only when suit was begun. Southern Pac. R. Co. v. U. S. (1913) 33 Sup. Ct. 717, 228 U. S. 618, 57 L. Ed. 993, modifying judgment (1911) 186 Fed. 737, 108 C. C. A. 607, affirming decree United States v. Southern Pac. Ry. Co. (C. C. 1907) 157 Fed. 96.

§ 4903. (Act March 2, 1896, c. 39, § 3.) Claims of bona fide purchasers; investigation before suit.

If at any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified. (29 Stat. 43.)

Notes of Decisions

Corporations—Bona fide purchasers.—See, also, notes to § 4901, ante.

This act expressly recognizes corporations as entitled to claim as bona fide purchasers. U. S. v. Flint & P. M. R Co. (1899) 95 Fed. 551, 557, 37 C. C A. 156.

§ 4904. (Act July 1, 1902, c. 1386.) Provisions for relief of settlers on lands granted in aid of railroads, applicable to grants in aid of wagon roads.

The provision of the Act of June twenty-second, eighteen hundred and seventy-four, entitled "An Act for the relief of settlers on railroad lands," and all Acts amendatory thereof or supplementary thereto, including the Act approved March third, eighteen hundred and eighty-seven, entitled "An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," as modified or supplemented by the Act approved March second, eighteen hundred and ninety-six, entitled "An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes," shall apply to grants of land in aid of the construction of wagon roads. (32 Stat. 733.)

This was an act entitled "An act for the relief of settlers on lands granted in aid of the construction of wagon roads."

Act July 22, 1874, c. 400, and other acts amendatory thereof or supplementary thereto, including Act March 3, 1887, c. 376, and Act March 2, 1896, c. 39, mentioned in this act, are set forth ante, §§ 4889–4903.

§ 4905. (Act Sept. 29, 1890, c. 1040, § 1.) Forfeiture of unearned railroad land grants; restoration to public domain.

There is hereby forfeited to the United States, and the United States hereby resumes the title thereto, all lands heretofore granted to any State or to any corporation to aid in the construction of a railroad opposite to and coterminus with the portion of any such railroad not now completed, and in operation, for the construction or benefit of which such lands were granted; and all such lands are declared to be a part of the public domain: Provided, That this act shall not be construed as forfeiting the right of way or station grounds of any railroad company heretofore granted. (26 Stat. 496.)

This was the first section of an act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes."

Sections 2 and 3 of the act are set forth post, §§ 4906, 4908.

Section 4 of the act repealed certain special grants to Iowa and Minnesota for railroad purposes, and sections 5, 7, and 8 related to grants to particular railroads. These sections are omitted, as special only.

Notes of Decisions

Purpose and effect of statute.—This act must be construed with some strictness. U. S. v. Tennessee & C. R. Co. (C. C. 1895) 71 Fed. 71, 72, affirmed (1897) 81 Fed. 544, 26 C. C. A. 499.

It is a clear implication from the action of Congress in this act that Congress did not intend to insist upon any condition subsequent which existed in the granting act. U. S. v. Tennessee & R. Co. (C. C. 1895) 71 Fed. 71, affirmed (1897) 81 Fed. 544, 26 C. C. A. 499. See, also, U. S. v. Whitney (C. C. 1910) 176 Fed. 593; U. S. v. Washington Improvement & Development Co. (C. C. 1911) 189 Fed. 674.

This act did not operate to confirm the title of the companies to lands opposite completed portions of their roads against all contingencies and reserved conditions whether precedent or subsequent, nor as a waiver of forfeiture for condition broken. U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861.

By this act Congress reinvested in the United States legal title to the unearned lands. Doe ex dem. Vankirk Land & Construction Co. v. Pugh (1903) 34 So. 377, 137 Ala. 346. And see U. S. v. Oregon & C. R. Co. (1900) 20 Sup. Ct. 261, 263, 176 U. S. 28, 44 L. Ed. 358; Wilcox v. Eastern Oregon Land Co. (1900) 20 Sup. Ct. 269, 270, 176 U. S. 51, 44 L. Ed. 368; Nelson v. Northern Pac. R. Co. (1903) 23 Sup. Ct. 302, 306, 188 U. S. 108, 47 L. Ed. 406; U. S. v. Northern Pacific R. Co. (1904) 24 Sup. Ct. 330, 193 U. S. 1, 48 L. Ed. 593; Columbia Valley R. Co. v. Portland & S. Ry. Co. (1908) 162 Fed. 603, 89 C. C. A. 361; U. S. v. Whitney (C. C. 1910) 176 Fed. 593; U. S. v. Washington Improvement & D. Co. (C. C. 1911) 189 Fed. 674; Sullivan v. Van Kirk Land & Construction Co. (1899) 26 So. 925, 124 Ala. 225; Dudley v. Gallups (1901) 29 South. 616, 128 Ala. 236; Van Kirk

Land & Construction Co. v. Green (1902) 31 So. 484, 132 Ala. 348.

Affirmative action necessary for forfeiture.—Land granted to a railroad company does not, ipso facto, revert to the United States by mere failure to complete the road within the period prescribed by congress in the grant; but, to effect a forfeiture, some act is essential on the part of the government evincing an intention to take advantage of such failure. U. S. v. Tennessee & C. R. Co. (1900) 20 Sup. Ct. 370, 373, 176 U. S. 242, 44 L. Ed. 452 (reversing decree [1897] 81 Fed. 544, 26 C. C. A. 499); U. S. v. Northern Pac. R. Co. (1900) 20 Sup. Ct. 706, 707, 177 U. S. 435, 44 L. Ed. 836 (affirming decree [1899] 95 Fed. 864, 37 C. C. A. 290).

Lands subject to forfeiture.—Lands opposite completed road are not forfeited or resumed by this act. U. S. v. Tennessee & C. R. Co. (1900) 20 Sup. Ct. 370, 375, 176 U. S. 242, 44 L. Ed. 452, reversing decree (1897) 81 Fed. 544, 26 C. C. A. 499.

Lands sold by a land grant railroad company prior to the forfeiture act, and which lie opposite to and coterminous with a part of the road which was completed and in operation before that act, are not subject to forfeiture thereunder. U. S. v. Tennessee & C. R. Co. (1897) 81 Fed. 544, 26 C. C. A. 499, decree reversed (1900) 20 Sup. Ct. 370, 176 U. S. 242, 44 L. Ed. 452.

Extension of time for construction.—The state as trustee may extend the time for construction, and if the railroad is finally completed within the time limited by the extension, this act does not affect the railroad's title. Sage v. Crowley (1901) 86 N. W. 409, 83 Minn. 314.

Forfeiture of right of way.—This act does not declare forfeited a right of way over land acquired by condemnation proceedings by a railroad other than the one for which a grant was made, after the grant and before the forfeiture. Southern Ry. Co. v. Choate (1898) 24 South. 726, 119 Ala. 358.

Effect of forfeiture upon title.—Lands which lie within the grant limits of a railroad company, but which do not pass to it, because they fall within a prior grant to another company, do not accrue to it when the grant to the latter company is forfeited by act of congress for failure to build the road in the time specified, but they are thereby restored to the public domain. U. S. v. Northern Pac. R. Co. (1894) 14 Sup. Ct. 598, 604, 152 U. S. 284, 38 L. Ed. 443, reversing decree (C. C. 1888) 41 Fed. 842.

The resumption by act of congress of title to unearned lands did not, by relation, revest in the United States title to timber which had been cut and removed therefrom by third persons while the title to the lands remained in the state. U. S. v. Loughrey (1898) 19 Sup. Ct. 153, 157, 172 U. S. 206, 43 L. Ed. 420, affirming judgment (1896) 71 Fed. 921, 18 C. C. A. 391.

Under this act the lands forfeited were restored to the public domain in precisely the same condition as before they were granted, and became subject to disposition under the general land laws. Johnston v. Morris (1896) 72 Fed. 890, 19 C. C. A. 229.

The forfeiture of unearned railroad grants declared by this act was for the benefit of the United States only, and did not operate in favor of any company claiming such forfeited lands under an overlapping location. Oregon & C. R. Co. v. U. S. (1896) 77 Fed. 67, 23 C. C. A. 15 (reversing judgment U. S. v. Oregon & C. R. Co. [C. C. 1895] 69 Fed. 899, decree affirmed U. S. v. Oregon & C. R. Co. [1900] 20 Sup. Ct. 261, 176 U. S. 28, 44 L. Ed. 358); Oregon Land Co. v. Wilcox (1897) 79 Fed. 719, 25 C. C. A. 164.

§ 4906. (Act Sept. 29, 1890, c. 1040, § 2.) Homestead entries on forfeited lands; preference rights.

All persons who, at the date of the passage of this act, are actual settlers in good faith on any of the lands hereby forfeited and are otherwise qualified, on making due claim on said lands under the homestead law within six months after the passage of this act, shall be entitled to a preference right to enter the same under the provisions of the homestead law and this act, and shall be regarded as such actual settlers from the date of actual settlement or occupation; and any person who has not heretofore had the benefit of the homestead or pre-emption law, or who has failed from any cause to perfect the title to a tract of land heretofore entered by him under either of said laws, may make a second homestead entry under the provisions of this act. The Secretary of the Interior shall make such rules as will secure to such actual settlers these rights. (26 Stat. 496.)

The time within which the preference right granted by this section might be exercised was extended so that the time began to run from the date of

the promulgation by the Commissioner of the General Land Office of instructions to the local land offices for their direction in the disposition of the lands, by Act Feb. 18, 1891, c. 244, post, § 4907.

Notes of Decisions

Rights of way over land.—After entry of forfeited land by settlers, a railroad cannot enter thereon for the purpose of acquiring a right of way as over public land. Johnson v. Bridal Veil Lumbering Co. (1893) 24 Or. 182, 33 Pac. 528.

§ 4907. (Act Feb. 18, 1891, c. 244.) Extension of time for entries on or purchases of forfeited lands.

An act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, be, and the same is hereby, amended so that the period within which settlers, purchasers, and others under the provisions of said act may make application to purchase lands forfeited thereby or to make or move to perfect any homestead entries which are preserved or authorized under said act when such period begins to run from the passage of the act shall begin to run from the date of the promulgation by the Commissioner of the General Land Office of the instructions to the officers of the local land offices, for their direction in the disposition of said lands: Provided, That nothing herein shall extend any time or enlarge any rights given by said act to any railroad company. (26 Stat. 764.)

This was an act entitled "An act to amend an act entitled an act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes."

This section related to the provisions of Act Sept. 29, 1890, c. 1040, § 2, ante, § 4906. See, also, Act June 25, 1892, c. 133, Act Jan. 31, 1893, c. 54, Act Dec. 12, 1893, c. 1, as amended by Act Jan. 23, 1896, c. 8, and Act Feb. 18, 1897, c. 250, post, §§ 4909–4912.

§ 4908. (Act Sept. 29, 1890, c. 1040, § 3.) Repurchase by bona fide purchasers from grantees; removal of crops and improvements by settlers.

In all cases where persons being citizens of the United States, or who have declared their intentions to become such, in accordance with the naturalization laws of the United States, are in possession of any of the lands affected by any such grant and hereby resumed by and restored to the United States, under deed, written contract with, or license from, the State or corporation to which such grant was made, or its assignees, executed prior to January first, eighteen hundred and eighty-eight, or where persons may have settled said lands with bona fide intent to secure title thereto by purchase from the State or corporation when earned by compliance with the conditions or requirements of the granting acts of Congress they shall be entitled to purchase the same from the United States, in quantities not exceeding three hundred and twenty acres to any one such person, at the rate of one dollar and twenty-five cents per acre, at any time within two years from the passage of this act, and on making said payments to receive patents therefor, and where any such person in actual possession of any such lands and having improved the same prior to the first day of January, eighteen hundred and ninety, under deed, written contract, or license as aforesaid, or his assignor, has made partial or full payments to said railroad company prior to said date, on account of the purchase price of said lands from it, on proof of the amount of such payments he shall be entitled to have the same, to the extent and amount of one dollar and twenty-five cents per acre, if so much has been paid, and not more, credited to him on account of and as part of the purchase price herein provided to be paid the United States for said lands, or such per-

sons may elect to abandon their purchases and make claim on said lands under the homestead law and as provided in the preceding section of this act: Provided, That in all cases where parties, persons, or corporations, with the permission of such State or corporation, or its assignees, are in the possession of and have made improvements upon any of the lands hereby resumed and restored, and are not entitled to enter the same under the provisions of this act, such parties, persons, or corporations shall have six months in which to remove any growing crop, and within which time they shall also be entitled to remove all buildings and other movable improvements from said lands: Provided further, That the provisions of this section shall not apply to any lands situate in the State of Iowa on which any person in good faith has made or asserted the right to make a pre-emption or homestead settlement: And provided further, That nothing in this act contained shall be construed as limiting the rights granted to purchasers or settlers by "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," approved March third, eighteen hundred and eighty-seven, or as repealing, altering, or amending said act, nor as in any manner affecting any cause of action existing in favor of any purchaser against his grantor for breach of any covenants of title. (26 Stat. 496.)

See note to section 1 of this act, ante, § 4905.

The time within which the right to purchase granted by this section must be exercised was extended by Act Feb. 18, 1891, c. 244, ante, § 4907, and Act June 25, 1892, c. 133, Act Jan. 31, 1893, c. 54, Act Dec. 12, 1893, as amended by Act Jan. 23, 1896, c. 8, and Act Feb. 18, 1897, c. 250, post, §§ 4909–4912.

Notes of Decisions

Persons entitled to purchase.—This section includes persons who took possession and made improvements under a circular letter of the railroad company announcing that persons making improvements would be given a right of purchase in preference to others. Wiseman v. Eastman (1899) 57 P. 398, 21 Wash. 163.

Persons entitled to purchase forfeited railroad lands of which they "are in possession" under a license from the railroad company may include persons who have made no actual settlement on the lands. Id.

Federal question.—A federal question is not presented by allegations that complainant has duly entered land under the homestead laws and is entitled to possession, and that defendant's possession is wrongful for the reason that they are not within the description of those whose rights are conserved by this section. Butler v. Shafer (C. C. 1895) 67 Fed. 161.

§ 4909. (Act June 25, 1892, c. 133.) Extension of time for purchases of forfeited lands.

That section three of an act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," be, and the same is, amended so as to extend the time within which persons actually residing upon lands forfeited by said act shall be permitted to purchase the same in the quantities and upon the terms provided in said section at any time within three years from the passage of said act. (27 Stat. 59.)

This act related to the provisions of Act Sept. 29, 1890, c. 1040, § 3, ante, § 4908. See, also, Act Jan. 31, 1893, c. 54, Act Dec. 12, 1893, c. 1, as amended by Act Jan. 23, 1896, c. 8, and Act Feb. 18, 1897, c. 250, post, §§ 4910–4912.

§ 4910. (Act Jan. 31, 1893, c. 54.) Extension of time for purchases of forfeited lands.

That section three of an act entitled "An act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," be, and the same is, amended so as to extend the time within which persons entitled to

purchase lands forfeited by said act upon the line of the Northern Pacific Railroad Company between Wallula, Washington, and Portland, Oregon, shall be permitted to purchase the same in the quantities and upon the terms provided in said section to January first, eighteen hundred and ninety-four. (27 Stat. 427.)

This act relates to the provisions of Act Sept. 29, 1890, c. 1040, § 3, ante, § 4908. See, also, Act June 25, 1892, c. 133, ante, § 4909, and Act Dec. 12, 1893, c. 1, as amended by Act Jan. 23, 1896, c. 8, and Act Feb. 18, 1897, c. 250, post, §§ 4911, 4912.

§ 4911. (Act Dec. 12, 1893, c. 1, as amended, Act Jan. 23, 1896, c. 8.) Extension of time for purchases of forfeited lands.

That section three of an Act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several Acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said Act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section, at any time prior to January first, eighteen hundred and ninety-seven: Provided, That actual residence upon the lands by persons claiming the right to purchase the same shall not be required where such lands have been fenced, cultivated, or otherwise improved by such claimants, and such persons shall be permitted to purchase two or more tracts of such lands by legal subdivisions, whether contiguous or not, but not exceeding three hundred and twenty acres in the aggregate. (28 Stat. 15. 29 Stat. 4.)

This act was amended by Act Jan. 23, 1896, c. 8, cited above, by omitting the proviso at the end of the original act, which was as follows:

"Provided, that nothing herein contained shall be so construed as to interfere with any adverse claim that may have attached to the lands or any part thereof," and by inserting instead thereof the proviso as set forth here.

The act related to the provisions of Act Sept. 29, 1890, c. 1040, § 3, ante, § 4908. See, also, Act June 25, 1892, c. 133, and Act Jan. 31, 1893, c. 54, ante, §§ 4909, 4910, and Act Feb. 18, 1897, c. 250, post, § 4912.

§ 4912. (Act Feb. 18, 1897, c. 250.) Extension of time for purchases of forfeited lands.

That section three of an Act entitled "An Act to forfeit certain lands heretofore granted for the purpose of aiding in the construction of railroads, and for other purposes," approved September twenty-ninth, eighteen hundred and ninety, and the several acts amendatory thereof, be, and the same is, amended so as to extend the time within which persons entitled to purchase lands forfeited by said Act shall be permitted to purchase the same, in the quantities and upon the terms provided in said section and the amendments thereto, at any time prior to January first, eighteen hundred and ninety-nine: Provided, That nothing herein contained shall be so construed as to interfere with any adverse claim that may have attached to the lands or any part thereof. (29 Stat. 535.)

Act Sept. 29, 1890, c. 1040, § 3, amended by this section, is set forth ante, § 4908.

See, also, Act June 25, 1892, c. 133, Act Jan. 31, 1893, c. 54, and Act Dec. 12, 1893, c. 1, as amended by Act Jan. 23, 1896, c. 8, ante, §§ 4909–4911.

§ 4913. (Act Sept. 29, 1890, c. 1040, § 6.) Rights of original grantees to forfeited lands.

No lands declared forfeited to the United States by this act shall by reason of such forfeiture inure to the benefit of any State or corporation to which lands may have been granted by Congress, except as herein otherwise provided; nor shall this act be construed to enlarge the area of land originally covered by any such

grant, or to confer any right upon any State, corporation or person to lands which were excepted from such grant. Nor shall the moiety of the lands granted to any railroad company on account of a main and a branch line appertaining to uncompleted road, and hereby forfeited, within the conflicting limits of the grants for such main and branch lines, when but one of such lines has been completed, inure by virtue of the forfeiture hereby declared, to the benefit of the completed line. (26 Stat. 498.)

See note to section 1 of this act, ante, § 4906.

§ 4914. (Act June 25, 1910, c. 406, § 1.) Deposits by railroad companies for costs of surveying, etc., and conveying unsurveyed lands granted to them; disbursement of deposits; repayment of excess.

To enable the Secretary of the Interior to complete the adjustment of land grants made by Congress to aid in the construction of railroads, and to subject the lands granted to taxation by States, Territories, and municipal authorities, any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such company or corporation, or for its use and benefit, by any Act of Congress, shall be, and is hereby, required, within ninety days from demand by the Secretary of the Interior, to deposit in a proper United States depository to the credit of the United States a sum sufficient to pay the cost of surveying, selecting, and conveying any of the unsurveyed lands granted to such company, or for its use and benefit, under any act of Congress: Provided further, That the Secretary of the Interior shall determine and specify in the notice or demand to such company the amount of the required deposit, and may, in his discretion, demand a sum sufficient to cover the cost of the survey, selection, and conveyance of the entire area granted to any company, or for its use and benefit, then unsurveyed, or for such townships or fractional townships as he may prescribe and designate in the notice or demand to such company, as aforesaid: And provided further, That the amount deposited shall, subject to the rules and regulations of the Department of the Interior, under the direction of the Commissioner of the General Land Office, be disbursed for the surveying, including office and field work, selection, and conveyance of the lands granted and designated in the notice of the Secretary of the Interior, as aforesaid: And provided further, That in the event the money deposited by any railroad corporation under the provisions of this act shall exceed the cost of said surveys, the said excess thereof shall be repaid to the corporations so depositing the same, or to its assigns. (36 Stat. 834.)

This section and the three sections next following were an act entitled "An act making an appropriation for the survey of public lands lying within the limits of land grants, to provide for the forfeiture to the United States of unsurveyed land grants to railroads, and for other purposes."

Notes of Decisions

Deposit for survey.—The successor of a land grant railroad company may be required to make a deposit to cover the cost of a survey, where its predecessor has not been expressly exempted by statute from paying the cost. Santa Fé Pac. R. Co. v. Lane (1915) 43 App. D. C. 497.

—— **Amount.**—In fixing the amount of the deposit the Secretary of the Interior acts within his jurisdiction if he follows a possible construction of the statute, and his action is not subject to judicial review, even if, as a result, the corners will be fixed of the government sections without cost to it, and although the railroad company will be required to pay the entire cost of the survey. Santa Fé Pac. R. Co. v. Lane (1915) 43 App. D. C. 497.

§ 4915. (Act June 25, 1910, c. 406, § 2.) Forfeiture of grant on failure to make deposit.

If any railroad corporation required by law to pay the costs of surveying, selecting, or conveying any lands granted to such cor-

poration, or for its use and benefit, by any Act of Congress, shall, for ninety days from notice or demand by the Secretary of the Interior, as provided in this Act, neglect or refuse to deposit an amount sufficient to meet the expense of surveying, selecting, and conveying the unsurveyed lands granted to such company, or for its use and benefit, by any Act of Congress, and designated in the notice or demand by the Secretary of the Interior, as aforesaid, the rights, title, and interests of such company, and all those claiming by, through, or under it, in and to the unsurveyed lands designated in the notice of the Secretary, as aforesaid, shall cease and forfeit to the United States; and the Secretary of the Interior shall notify the Attorney-General, who shall at once commence proceedings to declare the forfeiture and to restore the lands forfeited to the public domain. (36 Stat. 834.)

§ 4916. (Act June 25, 1910, c. 406, § 3.) Right to extend public surveys over lands granted, and other rights of United States, not affected by act; granted lands surveyed subject to taxation by State, etc.

This Act shall not affect the right of the Secretary of the Interior to cause the public surveys to be extended over any lands granted to any railroad or corporation by any Act of Congress in the manner now otherwise provided by law, nor shall any claim, right, interest, or demand of the Government of the United States be waived or annulled by the provisions hereof: Provided, That all granted lands surveyed under the provisions of this Act shall be subject to taxation by States, Territories, and municipal authorities, and the right of the Government to reimburse itself for the survey, selection, and conveyance of such lands otherwise provided by law shall remain in full force and effect. (36 Stat. 834.)

§ 4917. (Act June 25, 1910, c. 406, § 4.) Regulations for carrying out provisions of act.

The Secretary of the Interior shall prescribe such rules and regulations as will be necessary to the carrying out of the foregoing provisions. (36 Stat. 835.)

Those persons who, after August 15, 1887, and before January 1, 1889, had settled upon, improved, and made final proof under the homestead and pre-emption laws, for lands within the "second indemnity belt" of the Northern Pacific Railroad land grant in Minnesota, or their heirs, were entitled to transfer their entries from said tracts to any other vacant public land, subject to entry under the homestead and pre-emption laws, as they might select, and receive final certificates and receipts therefor in lieu of the entries made in said "second indemnity belt," by Act Oct. 1, 1890, c. 1258, § 1, 26 Stat. 647, provided the transfers were made within twelve months from the passage of the act. By section 2 of said act, similar transfers could be made within one year from the passage of the act by persons possessing the requisite qualifications under the pre-emption or homestead laws, who in good faith settled upon and improved lands in said belt, having made final entry of the same, and who, for any reason, other than voluntary abandonment, failed to make proof thereon. In making proof upon the tract to which the transfer was made, credit was to be given for the period of bona fide residence and amount of improvements upon the claims in said belt, and no final entry could be permitted, except upon proof of continuous residence upon the land, the subject of the transfer, for a period of not less than three months prior thereto. Payments for the lands finally selected were to be made under the existing laws. By a subsequent act (Act June 3, 1896, c. 316, 29 Stat. 245), those persons, their heirs or legal representatives, who between said dates settled upon and made final proof and entry for lands within said belt, and whose entries had been canceled without their fault, were entitled to make final homestead entry, and receive patent therefor, of a quantity of any of the unappropriated lands of the United States, subject to homestead entry, equal in acreage to the land entered by them in said belt, without being required to make any settlement or improvement upon, or cultivation of, said land so entered prior to said entry: and persons who had, within said time, for a space of six months, settled upon, cultivated, or improved any of said lands, with a view of entering the same under the homestead or pre-emption laws, and who were not permitted to

make such entries, were entitled to enter, under the homestead laws of the United States, a quantity of the unappropriated public lands of the United States, subject to homestead entry, equal in amount to the lands settled upon by them; and said persons were, when making final proof and entry upon said lands, to receive credit for the settlement, improvement, and cultivation made by them upon lands in said belt; and all laws in force in 1889, governing the commutation of homestead entries, were made applicable to the commutation of said entries. Said entries might be made on certain Chippewa Indian lands. The homestead rights thus conferred were not capable of assignment, and no conveyance, sale, or transfer of said entries was valid if made prior to the issuance of patent therefor. By a still later act (Act July 1, 1898, c. 546, § 1, 30 Stat. 620–622), the Northern Pacific Railroad was entitled, where, prior to January 1, 1898, the whole or any part of an odd-numbered section in either the granted or the indemnity limits of the land grant to said railroad, to which the right of the grantee or its lawful successor was claimed to have attached by definite location or selection, had been purchased directly from the United States, or settled upon or claimed in good faith by any qualified settler under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, and where purchaser, settler, or claimant refused to transfer his entry, upon a relinquishment thereof, to select, in lieu of the land relinquished, an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from adverse claim, or not occupied by settlers at the time of such selection, situated within any state or territory into which such railroad land extended, and patents should issue for the land so selected, as though it had been originally granted. All selections of unsurveyed lands must be of odd-numbered sections, to be identified by the survey when made, and patent therefor was to issue to and be in the name of the corporation surrendering the lands before mentioned, and such patents were not to issue until after the survey. Lists of the lands purchased or settled upon or occupied as aforesaid were to be furnished the railroad. The railroad was to relinquish its title to said lands to the United States, and settlers were required to make proof of title. It was then provided that all qualified settlers, their heirs or assigns, who prior to January 1, 1898, purchased or settled upon or claimed in good faith, under color of title or claim of right under any law of the United States, or any ruling of the Interior Department, any part of an odd-numbered section in either the granted or indemnity limits of the land grant to the Northern Pacific Railroad, to which the right of such grantee, or its lawful successor, was claimed to have attached by definite location or selection made in lieu thereof, might transfer their claims to an equal quantity of public lands, surveyed or unsurveyed, not mineral or reserved, and not valuable for stone, iron, or coal, and free from valid adverse claim, or not occupied by a settler at the time of such entry situated in any state or territory into which such railroad grant extended, and make proof therefor as in other cases provided; and, in making such proof, credit was to be given for the period of their bona fide residence and amount of their improvements upon their respective claims in said granted or indemnity limits of the land grant to said railroad, the same as if made upon the tract to which the transfer was made; and before the Secretary of the Interior caused to be prepared and delivered to said railroad grantee, or its successor in interest, any list or lists of the several tracts which had been purchased or settled upon or occupied as hereinbefore provided, he must notify the purchaser, settler, or claimant, his heirs or assignees, claiming against said railroad, of his right to transfer his entry or claim, and must give him or them option to take lieu lands for those claimed by him or them, or hold his claim and allow said railroad to do so under the terms of this act. The provisions of this last act were extended and made applicable to all instances, where lands in odd-numbered sections within the indemnity limits of the grant to said railroad were patented to settlers under the public land laws in pursuance of applications presented or proceedings initiated in the local land office at a time when the land was embraced in a pending indemnity selection made by said company in conformity with the regulations of the Land Department, which indemnity selection had not since been forfeited or abandoned, by Act March 2, 1901, c. 807, 31 Stat. 950.

The desired extension into the states of North Dakota and South Dakota of the limits of grants of land made to the St. Paul, Minneapolis & Manitoba Railway Company was denied by rulings of the General Land Office; and settlers thereon claiming in good faith under color of title or right given by any of the land laws of the United States were made liable to be evicted from their holdings. For the purpose of relieving said settlers, it was provided that the Secretary of the Interior should cause to be prepared and delivered to the said railroad company a list of the several tracts of lands which had been purchased, claimed, occupied, and improved; that said railroad company should execute and deliver to the Secretary of the Interior a release to the

United States of all its claims upon lands described in said list, and also procure and cause to be released to the United States all liens and claims to said lands derived through or under said company; that thereupon all right, title, and interest of said railroad company to said lands should revert to the United States, and said lands should be treated as if no rights thereto had ever vested in said railroad company; that all qualified persons who had occupied and made improvements on said lands, or who had purchased said lands in good faith, their heirs or assigns, should be permitted to perfect their titles to said lands in the same manner as if the grants had never been made,—by Act Aug. 5, 1892, c. 382, § 1, 27 Stat. 390.

The St. Paul, Minneapolis & Manitoba Railway Company was permitted to select in lieu of certain lands granted to the territory of Minnesota to aid in the construction of certain railroads, by Act March 2, 1857, c. 99, Act March 3, 1865, c. 105, and Act March 3, 1871, c. 144, other lands in North or South Dakota, by Act Aug. 5, 1892, c. 382, §§ 2–4, 27 Stat. 391.

The Secretary of the Interior was authorized and directed to cause all lands within the Bozeman, Helena, Missoula, and Cœur d'Alene Land Districts within the land grant and indemnity land grant limits of the Northern Pacific Railroad, as defined by Act July 2, 1864, c. 217, to be examined and classified by commissioners, with special reference to the mineral or non-mineral character of such lands, and to reject, cancel, and disallow any and all claims or filings made by or on behalf of said railroad on any lands in said land districts which upon examination were classified as mineral lands, by Act Feb. 26, 1895, c. 131, § 1, 28 Stat. 683. Section 2 of said act provided for the appointment of the commissioners mentioned in section 1, fixed their compensation, prescribed the oath to be taken by them, and enumerated their powers and duties. Section 3 of said act provided that all lands should be classified as mineral which by reason of valuable mineral deposits were open to exploration, occupation, and purchase under the provisions of the mining laws, prescribed the description to be made of said lands, defined iron and coal lands, and provided for new examinations and classifications in certain cases. Section 4 of said act provided that the surveyed lands should be the first to be examined and classified. Section 5 of said act provided for a monthly report of the commissioners, its filing, its publication, protests against said reports, hearings on said protests, and appeals from the decision of the register and receiver to the Commissioner of the General Land Office. Section 6 of said act provided for the entry of said classifications on the land records. Section 7 of said act provided that only patents for non-mineral lands should be issued to the Northern Pacific Railroad. Section 8 of said act provided an appropriation for payment of the expenses of carrying out the provisions of the act, and required the Secretary of the Interior to embrace in his annual estimates submitted to Congress a sum sufficient to pay the councils for the fiscal year next ensuing, and annually thereafter until the classification of lands required by the act had been accomplished. Act June 4, 1897, c. 2, § 1, 30 Stat. 11, made changes in the manner of appointing and the qualifications of the commissioners and their compensation. Act March 3, 1899, c. 424, § 1, 30 Stat. 1074, extended the time for the completion of the classification. Act June 6, 1900, c. 791, § 1, 31 Stat. 588, again made changes in the number of commissioners, their qualifications, their compensation, and the manner in which they should act, and extended the time for the completion of the classification.

Subsequent appropriations were made to enable the Commissioner of the General Land Office to complete the examination and classification of lands within the limits of the Northern Pacific grant under said Act July 2, 1864, c. 217, 13 Stat. 365, as provided in said Act Feb. 26, 1895, c. 131, § 1, 28 Stat. 683, such examination and classification when approved by the Secretary of the Interior to have the same force and effect as a classification by the mineral land commissioners provided for in said Act Feb. 26, 1895. The provision for the fiscal year 1917 was by the deficiency appropriation act for the fiscal year 1916, Act Sept. 8, 1916, c. 464, § 1, 39 Stat.

The grants of land to the Oregon and California Railroad Company by Act July 25, 1866, c. 242, 14 Stat. 239, and Act May 4, 1870, c. 69, 16 Stat. 94, were revoked by Act June 9, 1916, c. 137, 39 Stat., and the title to such lands revested in the United States. Section 2 of said Act June 9, 1916, c. 137, provides for the classification of the revested land. Section 3 provides for the exploration entry, etc., under the general mineral laws. Section 4 provides for the sale of the timber on said lands. Section 5 provides for the entry of said lands under the homestead laws and Act Sept. 30, 1913, c. 15, ante, §§ 4528, 4529. Sections 6–10 provide for the disposition of the proceeds of the sale of said lands. Section 11 confers on the Secretary of the Interior authority to carry out the provisions of the act. Section 12 makes an appropriation to enable the Secretary of the Interior to put the provisions of the act into effect.

Provisions relating to the Union Pacific Railroad and other bond-aided railroads are set forth post, under Title LXIV, "Railways."

CHAPTER TEN C

Rights of Way and Other Easements in Public Lands

This chapter, inserted here as additional to the original chapters of this title of the Revised Statutes, includes principally R. S. §§ 2476, 2477, Act March 3, 1875, c. 172, Act March 3, 1891, c. 561, §§ 18–21, and other laws of a general and permanent nature relating to grants of rights of way for railroads, wagon roads, ditches, canals, etc., pipe lines, and electric light and power lines through, and reservoir sites upon, the public lands, national forests, parks, etc.

Provisions relating to rights of way through Indian lands generally are set forth ante, under Title XXVIII, Chapter 4B, "Rights of Way through Indian Lands," and special provisions relating to rights of way in Oklahoma and Alaska are set forth post, under this Title, Chapter 10J, "Public Lands in Oklahoma," and Chapter 10K, "Public Lands in Alaska," respectively.

Sec.
4918. Navigable rivers within public lands to be public highways.
4919. Right of way for highways over public lands.
4920. Extension of roads across military reservations; landing of ferries and erection of bridges thereon; driving cattle, etc.
4921. Right of way through public lands, materials, grounds for stations, etc., granted to railroads.
4922. Rights of several roads through canyons, etc.; grade crossings; effect on wagon roads and highways.
4923. Condemnation of land.
4924. Map of road to be filed; forfeiture of rights granted.
4925. Lands excepted from operation of act.
4926. Right to alter, amend, or repeal act.
4927. Forfeiture of rights granted where railroad or section thereof not constructed in five years after location.
4928. Forfeiture of rights granted where railroad or section thereof not constructed in five years after location.
4929. Stations, etc., of railroads on rights of way granted.
4930. Time for establishment of stations; penalty for failure.
4931. Right of way through certain reserved lands in Minnesota for railroads.
4932. Rights of way of railroads in Oklahoma and Arizona; lands to be subject thereto.
4933. Reservation in patents of right of way for ditches or canals.
4934. Right of way to canal and ditch companies for irrigation purposes.
4935. Map to be filed; approval; damages to settlers.
4936. Application of act to existing and future canals, etc.; forfeiture of rights granted.
4937. Use for canal or ditch only.
4938. Right of way for purposes of water transportation, domestic purposes, or development of power.
4939. Reservoir sites for furnishing water for live stock.
4940. Declaratory statement.
4941. Survey; map of location.
4942. Right to amend or repeal act.
4943. Right of way for tramroads, canals, or reservoirs for certain purposes.
4944. Right of way to electric power companies.
4945. Rights of way over forest reservation or reservoir site for wagon roads, railroads, etc.
4946. Rights of way through public lands, forest and other reservations and Yosemite, Sequoia, and General Grant National Parks, for electrical plants, etc.
4947. Rights of way within and across forest reserve for dams, reservoirs, water plants, ditches, etc., for municipal and mining purposes and for milling and reduction of ores.
4948. Rights of way through public lands, national forests, and reservations, for electrical poles and lines; approval of chief officer of department; forfeiture for non-user; rights of holders of previous permits.
4949. Right of way in Colorado and Wyoming to pipe line companies.
4950. Applications; approval.
4951. Forfeiture of rights granted.
4952. Use for pipe line only.
4953. Right of way in Arkansas to pipe line companies.
4954. Applications; approval.
4955. Use of right of way for pipe line only.
4956. Forfeiture of right for nonuser, etc.
4957. Forfeiture of right for violation of anti-trust law.

§ 4918. (R. S. § 2476.) Navigable rivers within public lands to be public highways.

All navigable rivers, within the territory occupied by the public lands, shall remain and be deemed public highways; and, in all cases where the opposite banks of any streams not navigable belong to different persons, the stream and the bed thereof shall become common to both.

Act May 18, 1796, c. 29, § 9, 1 Stat. 468. Act March 3, 1803, c. 27, § 17, 2 Stat. 235.

Notes of Decisions

I. Navigable rivers as public highways

1. Purpose, meaning, and effect of section.
2. Navigable rivers defined.
3. Public lands defined.

II. Government ownership of submerged lands

4. Policy of government as to disposal and control by states.
5. State ownership.
6. State ownership of river beds.
7. State ownership of lake beds.
8. State ownership of islands.

III. Boundaries of riparian lands

9. Application of local or common-law rule.
10. High-water mark as boundary.
11. High-water mark defined.
12. Low-water mark as boundary.
13. Water's edge or bank as boundary.
14. Thread of stream as boundary.
15. State line as boundary.
16. Ownership of river beds.
17. Boundary between adjacent owners.
18. Ownership of islands.
19. Lakes as boundaries.

IV. Riparian rights

20. Application of local or common-law rules.
21. Nature and extent of rights.
22. Landings and wharves.

I. NAVIGABLE RIVERS AS PUBLIC HIGHWAYS

1. Purpose, meaning, and effect of section.—Congress, in making a distinction between streams navigable and those not navigable, intended to provide that the common-law rule of riparian ownership should apply to lands bordering on the latter, but that the title to lands bordering on navigable streams should stop at the stream, and that all such streams should be deemed to be and remain public highways. St. Paul & P. R. Co. v. Schurmeir (1868) 7 Wall. 272, 288, 19 L. Ed. 74; Shively v. Bowlby (1894) 14 Sup. Ct. 548, 562, 152 U. S. 1, 38 L. Ed. 331; Scott v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107. See, also, Hagerla v. Mississippi River Power Co. (D. C. 1913) 202 Fed. 776.

This section has been interpreted to mean that, instead of the owners of opposite banks of a nonnavigable stream being tenants in common of the bed, each holds in severalty to the center of the stream. Indiana v. Milk (C. C. 1882) 11 Fed. 389. See St. Paul & P. R. Co. v. Schurmeir (1868) 7 Wall. 272, 19 L. Ed. 74.

This section means that navigable streams within the territory to be disposed of shall be deemed public highways, that the public shall enjoy free and uninterrupted navigation, the intention being to reserve the use of rivers for the public without interference with the riparian owner, and the latter to have his right to the bed of the stream without interference with the right of the public. Johnson v. Johnson (1908) 95 P. 499, 14 Idaho, 561; Moss v. Ramey (1908) 95 P. 513, 14 Idaho, 598.

Under this section the waters of navigable rivers within the territory specified are public highways, but the section does not reserve the bed of the stream, but declares that, where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common to both. Id.

This section in no way interferes with the doctrine that the riparian owner takes to the thread of the stream. Id.

2. Navigable rivers defined.—See, also, notes to § 9836 et seq., post.

Rivers are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce over which trade and travel are or may be conducted in the customary modes of trade and travel over water. Packer v. Bird (1891) 11 Sup. Ct. 210, 137 U. S. 661, 34 L. Ed. 819. See, also, The Daniel Ball v. U. S. (1870) 10 Wall. 557, 563, 19 L. Ed. 999; U. S. v. The Montello (1874) 20 Wall. 430, 439, 22 L. Ed. 391; Same v. Roth (1904) 2 Alaska, 257; McManus v. Carmichail (1856) 3 Iowa (3 Clarke) 1; Baldwin v. Erie Shooting Club (1901) 87 N. W. 59, 8 Detroit Leg. N. 535, 127 Mich. 659; State v. Korrer (Minn. 1914) 148 N. W. 617.

The Arkansas river is a navigable stream so far as concerns the question of title to the bed thereof. U. S. v. Mackey (D. C. 1913) 214 Fed. 137, appeal of certain parties dismissed Gladys Belle Oil Co. v. Same (C. C. A. 1914) 216 Fed. 129, decree reversed U. S. v. Same (C. C. A. 1914) 216 Fed. 126. And see State v. Akers (1914) 140 P. 637, 92 Kan. 169.

The action of the Land Department of the United States government in meandering a river and conveying the land bordering thereon with reference to the meander line is conclusive

that the stream was navigable, in such sense that the title of the riparian owners resting on such survey extended only to high-water mark. Board of Park Com'rs v. Taylor (1906) 108 N. W. 927, 133 Iowa, 453.

3. Public lands defined.—The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general law. Mann v. Tacoma Land Co. (1894) 14 Sup. Ct. 820, 153 U. S. 273, 38 L. Ed. 714; Morris v. U. S. (1899) 19 Sup. Ct. 649, 174 U. S. 196, 43 L. Ed. 946. And see Baer v. Moran Bros. Co. (1891) 2 Wash. St. 608, 27 Pac. 470.

II. GOVERNMENT OWNERSHIP OF SUBMERGED LANDS

4. Policy of government as to disposal and control by states.—This section was enacted in pursuance of the policy of leaving the administration and disposition of the sovereign rights in navigable waters and in the soil under them to the control of the states respectively when organized and admitted into the union. Shively v. Bowlby (1894) 14 Sup. Ct. 548, 560, 152 U. S. 1, 38 L. Ed. 331. See, also, Morris v. U. S. (1899) 19 Sup. Ct. 649, 174 U. S. 196, 43 L. Ed. 946; District of Columbia v. Cropley (1904) 23 App. D. C. 232; Sutter v. Heckman (1900) 1 Alaska, 81; U. S. v. Roth (1904) 2 Alaska, 257; Broward v. Mabry (1909) 50 South. 826, 58 Fla. 398; Mendota Club v. Anderson (1899) 78 N. W. 185, 101 Wis. 479.

By the acts of congress regulating the survey and disposal of the public lands, the federal government has renounced title to the soil covered by the navigable waters. City of Mobile v. Eslava (Ala. 1839) 9 Port. 577, 33 Am. Dec. 325. See, also, McManus v. Carmichael (1856) 3 Iowa (3 Clarke) 1.

Navigable waters in the territories are held as highways of travel and commerce by the government, but with the soil beneath them they pass to the new states on their admission to the Union in virtue of their sovereignty, subject to the regulation of commerce by Congress. State v. Jones (Iowa, 1909) 122 N. W. 241.

5. State ownership.—The ownership of and dominion and sovereignty over lands covered by tide waters within the limits of the several states belong to the respective states within which they are found. Illinois Cent. R. Co. v. State of Illinois (1892) 13 Sup. Ct. 110, 111, 146 U. S. 387, 36 L. Ed. 1018; Shively v. Bowlby (1894) 14 Sup. Ct. 548, 565, 152 U. S. 1, 38 L. Ed. 331; U. S. v. Ashton (C. C. 1909) 170 Fed. 509 (appeal dismissed Bird v. Same [1911] 31 Sup. Ct. 718, 220 U. S. 604, 55 L. Ed. 605); Cain v. Simonson (Ala. 1905) 39 South. 571; Ward v. Mulford (1867) 32 Cal. 365; San Francisco Sav. Union v. R. G. R. Petroleum & Mining Co. (1904) 77 P. 823, 144 Cal. 134, 66 L. R. A. 242, 103 Am. St. Rep. 72; People v. Kerber (Cal. 1908) 93 P. 878; Chicago Transit Co. v. Campbell (1903) 110 Ill. App. 366; Milne v. Girodeau (1838) 12 La. 324; Hinman v. Warren (1877) 6 Or. 408; Parker v. Taylor (1879) 7 Or. 435; Muckle v. Good (1904) 77 P. 743, 45 Or. 230; Hume v. Rogue River Packing Co. (Or. 1907) 92 P. 1065; Cook v. Dabney (Or. 1914) 139 P. 721; Eisenbach v. Hatfield (1891) 2 Wash. St. 236, 26 Pac. 539, 12 L. R. A. 632.

The lands under navigable waters, including the shore or spaces between ordinary high and low water marks, are the property of the state or of the people, held for the use of all the people. State v. Gerbing (Fla. 1908) 47 So. 353; Ferry Pass Inspectors' & Shippers' Ass'n v. White's River Inspectors' & Shippers' Ass'n (1909) 48 So. 643, 57 Fla. 399; Merrill-Stevens Co. v. Durkee (1912) 57 So. 428, 62 Fla. 549; Bass v. Ramos (1909) 50 So. 945, 58 Fla. 161; Broward v. Mabry (1909) 50 South. 826, 58 Fla. 398; Symmes v. Prairie Pebble Phosphate Co. (1912) 60 South. 223, 64 Fla. 480; Martin v. O'Brien (1857) 34 Miss. 21; State v. Korrer (Minn. 1914) 148 N. W. 617.

The United States has never had title to submerged lands under navigable waters. Niles v. Cedar Point Club (1898) 85 Fed. 45, 29 C. C. A. 5, decree affirmed Niles v. Cedar Point Club (1899) 20 Sup. Ct. 124, 175 U. S. 300, 44 L. Ed. 171. See Pollard v. Hagan (1845) 3 How. 212, 221, 11 L. Ed. 565; Weber v. Harbor Com'rs (1873) 18 Wall. 57, 65, 21 L. Ed. 798; McCready v. Virginia (1876) 94 U. S. 391, 24 L. Ed. 248; Wilton v. Van Hessen (1911) 94 N. E. 134, 249 Ill. 182.

The federal government has granted to the state of Washington title to all tide and shore lands, and to the beds of all navigable streams and lakes. Town of West Seattle v. West Seattle Land & Improvement Co. (1905) 80 P. 549, 38 Wash. 359; Hauge v. Walton (1913) 131 P. 248, 72 Wash. 554. See, also, Eisenbach v. Hatfield (1891) 2 Wash. St. 236, 26 Pac. 539, 12 L. R. A. 632; State v. Prosser (1891) 2 Wash. St. 530, 27 Pac. 550; State v. Harbor Line Com'rs (1892) 4 Wash. St. 816, 30 Pac. 734.

A survey made under national authority fixes, prima facie, the limits of the public land which may be disposed of by the United States, and outside that limit only can the state claim ownership of the shores and beds of navigable water. Corrigan v. Brown (C. C. 1907) 169 Fed. 477. See, also, Mann v. Tacoma Land Co. (1894) 14 Sup. Ct. 820, 822, 153 U. S. 273, 38 L. Ed. 714.

6. State ownership of river beds.—The state holds title to the beds of

navigable streams below the natural highwater mark, for the benefit of the whole people, subject to the rights of the United States. State v. Southern Sand & Material Co. (Ark. 1914) 167 S. W. 854; Callahan v. Price (1915) 146 P. 732, 26 Idaho, 745; State v. Akers (1914) 140 P. 637, 92 Kan. 169. See St. Clair County v. Lovingston (1874) 23 Wall. 46, 68, 23 L. Ed. 59; Barney v. Keokuk (1876) 94 U. S. 324, 337, 24 L. Ed. 224; Illinois Central R. Co. v. Chicago (1900) 20 Sup. Ct. 509, 514, 176 U. S. 646, 44 L. Ed. 622.

The state owns the bed of a navigable stream to the line of ordinary high water. State v. Nolegs (1914) 139 P. 943, 40 Okl. 479; Parker v. West Coast Packing Co. (1889) 17 Or. 510, 21 Pac. 822; Coquille Mill & Mercantile Co. v. Johnson (Or. 1908) 98 P. 132; Micelli v. Andrus (1912) 120 P. 737, 61 Or. 78; Eagle Cliff Fishing Co. v. McGowan (1914) 137 P. 766, 70 Or. 1.

The beds of all meandered streams and navigable waters belong to the state within which they lie. Russell v. Jersey Co. Ass'n (1853) 56 U. S. (15 How.) 426, 14 L. Ed. 757; Barney v. Keokuk (1876) 94 U. S. 324, 338, 24 L. Ed. 224; Musser v. Hershey (1876) 42 Iowa, 356; La Plaisance Bay Harbor Co. v. Council of City of Monroe (Mich. 1843) Walk. Ch. 155.

The soil between the lines that describe low-water mark in a navigable stream belongs to the state. Smith v. Maryland (1855) 59 U. S. (18 How.) 71, 15 L. Ed. 269; St. Louis, I. M. & S. Ry. Co. v. Ramsey (1890) 53 Ark. 314, 13 S. W. 931, 8 L. R. A. 559, 22 Am. St. Rep. 195; Lake Superior Land Co. v. Emerson (1888) 38 Minn. 406, 38 N. W. 200, 8 Am. St. Rep. 679.

The soil under the water of a navigable river, as well as the water, is held by the state for the use and in trust for the public, so long as the river continues navigable. State v. Muncie Pulp Co. (1907) 104 S. W. 437, 119 Tenn. 47. See Hardin v. Jordan (1891) 11 Sup. Ct. 808, 838, 140 U. S. 371, 372, 35 L. Ed. 428; Board of Com'rs of Caddo Levee Dist. v. Glassel (La. 1908) 45 So. 370.

The title to the beds of streams of water in which the tide ebbs and flows is in the public. Ross v. Faust (1876) 54 Ind. 471, 23 Am. St. Rep. 655.

The public has no proprietorship in the soil under small streams, which are navigable only in a modified sense for floatage of logs and lumber, as it has under navigable waters at the common law, where the tide ebbs and flows. Attorney General v. Evart Booming Co. (1876) 34 Mich. 462.

The title to the bed of a fresh-water navigable river below low-water mark is held by the state in trust for the people for the purposes of navigation. State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow (1902) 69 S. W. 374, 169 Mo. 109.

The title to the bed of a navigable river is in the state, and the rights of a riparian proprietor on such stream are bounded by the banks of the river. Kinkead v. Turgeon (1905) 104 N. W. 1061, 1 L. R. A. (N. S.) 762, 74 Neb. 573, reversed on rehearing (1906) 109 N. W. 744, 74 Neb. 573, 7 L. R. A. (N. S.) 316.

The ownership of the soil under navigable waters in the Louisiana Purchase passed from the federal government to the states created therefrom, subject to the public rights and the paramount power of Congress over navigation. State v. Nolegs (1914) 139 P. 943, 40 Okl. 479.

The state of Oregon, upon its admission into the Union, became the owner of the bed and bank of the Willamette river up to the line of ordinary high water. Pacific Milling & Elevator Co. v. City of Portland (1913) 133 P. 72, 65 Or. 349, 46 L. R. A. (N. S.) 363.

Where the state has disclaimed all title in tidelands patented by the United States, the bed of all unmeandered nonnavigable streams in which the tide ebbs and flows passed to the patentee of the federal government. Wilson v. Prickett (Wash. 1914) 139 P. 754.

7. State ownership of lake beds.—The title and dominion over lands covered by the Great Lakes belongs to the state in which the lands are located. People v. Kirk (1896) 45 N. E. 830, 162 Ill. 138, 53 Am. St. Rep. 277; Revell v. People (1898) 52 N. E. 1052, 177 Ill. 468, 43 L. R. A. 790, 69 Am. St. Rep. 257; State v. Venice of America Land Co. (1910). 125 N. W. 770, 160 Mich. 680. See, also, Illinois Cent. R. Co. v. State of Illinois (1892) 13 Sup. Ct. 110, 111, 146 U. S. 387, 36 L. Ed. 1018.

Where the government in surveying the land around a lake did not extend its surveys across the lake, nor include the bed in any of the grants made of the upland surrounding it, but in disposing of such upland treated the lake as a navigable body of water, the title to the bed and shores was held in trust by the government for the state in which the lake was located, and, so far as it could do so, passed the title to such bed and shores to the state on its admission into the Union. Brace & Hergert Mill Co. v. State (1908) 95 P. 278, 49 Wash. 326. See, also, Gifford v. Horton (1909) 103 P. 988, 54 Wash. 595.

A state, by virtue of its sovereignty, has an interest in the condition of a non-navigable lake within its borders sufficient to enable it to maintain a suit to enjoin the drainage of such lake by an intruder without title, whether the state or the United States owns the bed of the lake. Marshall Dental Mfg. Co. v. Iowa (1913) 33 Sup. Ct. 168, 226 U. S. 460, 57 L. Ed. 300.

Government grants for lands border-

ing upon navigable waters extend only to high-water mark, for the title to the shore and to the lands under such waters is in the state within which the waters are situated, as an incident of sovereignty. Niles v. Cedar Point Club (1898) 85 Fed. 45, 29 C. C. A. 5.

The same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and the lands are held by the same right in the one case as in the other and subject to the same trusts and limitations. Chicago Transit Co. v. Campbell (1903) 110 Ill. App. 366.

The United States government never had control or ownership of the lake beds in a state, the title thereto being vested in the state. Rood v. Wallace (1899) 79 N. W. 449, 109 Iowa, 5.

Riparian owners along the Great Lakes own only to the meander line, and the title outside such line, subject to the rights of navigation, is held in trust by the state for the use of its citizens. Ainsworth v. Munaskong Hunting & Fishing Club (1909) 123 N. W. 802, 159 Mich. 61.

Submerged lands of lakes within the boundaries of the state belong to the state in trust for public use, substantially the same as lands under navigable waters at common law. Conneaut Lake Ice Co. v. Quigley (1909) 74 A. 648, 225 Pa. 605; Village of Pewaukee v. Savoy (1899) 103 Wis. 271, 79 N. W. 436, 50 L. R. A. 836, 74 Am. St. Rep. 859.

One who acquired title from the United States to upland bordering on the shore of an inland fresh water navigable lake, prior to the admission of the state into the Union, did not thereby acquire any vested common-law rights which could not be lessened by the state Constitution or state statutes asserting title on the part of the state. State v. Superior Court of Grant County (Wash. 1912) 126 P. 945.

The interior department has no power to grant a patent for land a part of which is covered by a navigable lake, and such patent, in so far as it purports to convey portions of the lake, is inoperative and void. Mendota Club v. Anderson (1899) 78 N. W. 185, 101 Wis. 479.

The title to navigable lakes and ponds is in the state, and a riparian proprietor takes only to the water's edge. Id.

The title of the state to submerged lands under the waters of navigable lakes will be extended so as to include lands covered by an artificial raising of the level of the lake if such artificial condition be continued so long as to become the natural condition. Village of Pewaukee v. Savoy (1899) 79 N. W. 436, 103 Wis. 271, 50 L. R. A. 836, 74 Am. St. Rep. 859.

Land covered by the waters of lakes or ponds, or by water partaking of like character as regards public rights, though in form conveyed by a federal or state patent, is vested in the state the same after such conveyance as before, such conveyance, as to such land, being absolutely void. Illinois Steel Co. v. Bilot (1901) 84 N. W. 855, 109 Wis. 418, rehearing denied (1901) 85 N. W. 402, 109 Wis. 418, 83 Am. St. Rep. 905.

The title to land covered by waters of lakes or ponds, in the territory out of which the state of Wisconsin was formed, prior to such formation, was in the United States in trust to preserve to the people of prospective states the enjoyment of the waters covering the same to the line of ordinary high-water mark, and passed to the state when it was admitted into the Union. Id.

The title to the bed of Lake Michigan below ordinary high-water mark is in the state. C. Beck Co. v. City of Milwaukee (Wis. 1909) 120 N. W. 293; Damman v. Same (1909) 120 N. W. 298.

8. State ownership of islands.—A large island on the Idaho side of the Snake river, a navigable stream, being in existence when Idaho became a state, did not pass to the state on admission, but remained the property of the United States. Scott v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107 (reversing decree Lattig v. Scott [1910] 107 P. 47, 17 Idaho, 506); Moss v. Ramey (1916) 36 Sup. Ct. 183; Callahan v. Price (1915) 146 P. 732, 26 Idaho, 745.

The title to islands formed in navigable streams since the admission of Kansas into the Union is held by the state for the benefit of all the people. Winters v. Myers (1914) 140 P. 1033, 92 Kan. 414; Steckel v. Vancil (1914) 141 P. 550, 92 Kan. 591.

Islands in the Arkansas river not surveyed or claimed by the government belong to the state. Hurst v. Dana (1911) 122 P. 1041, 86 Kan. 947.

III. BOUNDARIES OF RIPARIAN LANDS

9. Application of local or common-law rule.—See, also, notes to § 4804, ante.

Grants by the United States of its public lands bounded on streams or other waters, made without reservation or restriction, are to be construed as to their effect according to the law of the state in which the lands lie. Barney v. Keokuk (1876) 94 U. S. 324, 24 L. Ed. 224; City of St. Louis v. Rutz (1891) 11 Sup. Ct. 337, 343, 138 U. S. 226, 34 L. Ed. 941; Hardin v. Jordan (1891) 11 Sup. Ct. 808, 811, 140 U. S. 371, 35 L. Ed. 428; Shively v. Bowlby

(1894) 14 Sup. Ct. 548, 563, 152 U. S. 1, 38 L. Ed. 331; St. Anthony Falls Water Power Co. v. Board of Water Com'rs of City of St. Paul, Minn. (1897) 18 Sup. Ct. 157, 168 U. S. 349, 42 L. Ed. 497; Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 661, 190 U. S. 452, 47 L. Ed. 1134 (dissenting opinion); Marshall Dental Mfg. Co. v. State of Iowa (1913) 33 Sup. Ct. 168, 169, 226 U. S. 460, 57 L. Ed. 300 (affirming decree State v. Jones [1909] 122 N. W. 241, 143 Iowa, 398); Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co. (1912) 194 Fed. 643, 115 C. C. A. 1; Hobart v. Hall (C. C. 1909) 174 Fed. 433 (judgment affirmed Hall v. Hobart [1911] 186 Fed. 426, 108 C. C. A. 348); In re Valley (D. C. 1902) 116 Fed. 983; U. S. v. Mackey (D. C. 1913) 214 Fed. 137 (appeal of certain parties dismissed Gladys Belle Oil Co. v. Same [C. C. A. 1914] 216 Fed. 129, decree reversed U. S. v. Same [C. C. A. 1914] 216 Fed. 126); Foss v. Johnstone (1910) 110 Pac. 294, 158 Cal. 119; Lattig v. Scott (1910) 107 P. 47, 17 Idaho, 506; Producers' Oil Co. v. Hanszen (1913) 61 South. 754, 132 La. 691; State v. Korrer (Minn. 1914) 148 N. W. 617; Brace & Hergert Mill Co. v. State (1908) 95 P. 278, 49 Wash. 326; Farris v. Bentley (1910) 124 N. W. 1003, 141 Wis. 671. See, also, Whiteside v. Norton (1913) 205 Fed. 5, 123 C. C. A. 313, 45 L. R. A. (N. S.) 112.

Whether the title of a proprietor of land on the margin of a navigable river extends to high-water mark, low-water mark, or the middle of the stream, is to be determined by the laws of the state in which the land is situated. Rundle v. Delaware & R. Canal Co. (1852) 55 U. S. (14 How.) 80, 14 L. Ed. 335; Kaukauna Water Power Co. v. Green Bay & M. Canal Co. (1891) 142 U. S. 254, 12 Sup. Ct. 173, 35 L. Ed. 1004; Webb v. City of Demopolis (1892) 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; Haight v. City of Keokuk (1856) 4 Iowa (4 Clarke) 199; Lamprey v. State (1893) 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670; Burton v. Isaacson (1913) 142 N. W. 925, 122 Minn. 483.

10. High-water mark as boundary.—On navigable streams, riparian owners own to high-water mark. U. S. v. Mackey (D. C. 1913) 214 Fed. 137 (appeal of certain parties dismissed Gladys Belle Oil Co. v. Same [C. C. A. 1914] 216 Fed. 129, and decree reversed U. S. v. Same [C. C. A. 1914] 216 Fed. 126); Wright v. Seymour (1886) 69 Cal. 122, 10 Pac. 323; Callahan v. Price (1915) 146 P. 732, 26 Idaho, 745; Wood v. Chicago, R. I. & P. R. Co. (1883) 60 Iowa, 456, 15 N. W. 284; Serrin v. Grefe (1885) 67 Iowa, 196, 25 N. W. 227; Steele v. Sanchez, 72 Iowa, 65 (1887) 33 N. W. 366, 2 Am. St. Rep. 233; Chicago, B. & Q. Ry. Co. v. Porter (1887) 72 Iowa, 426, 34 N. W. 286; Board of Park Com'rs v. Taylor (1906) 108 N. W. 927, 133 Iowa, 453; Watt v. Robbins (1913) 160 Iowa, 587, 142 N. W. 387; Hohl v. Iowa Cent. Ry. Co. (1913) 143 N. W. 850; Hume v. Rogue River Packing Co. (Or. 1907) 92 P. 1065; Micelli v. Andrus (1912) 120 P. 737, 61 Or. 78.

An upland owner of land bordering on a navigable stream owns only to the high-water line, and the stream and the river and its banks and bed belong to the state. Shively v. Bowlby (1894) 152 U. S. 1, 14 Sup. Ct. 548, 38 L. Ed. 331 (affirming Bowlby v. Shively [1892] 22 Or. 410, 30 Pac. 154); Hobart v. Hall (C. C. 1909) 174 Fed. 433; Callahan v. Price (1915) 146 P. 732, 26 Idaho, 745; Astoria Exch. Co. v. Shively (1895) 27 Or. 104, 39 Pac. 398; State v. Portland General Electric Co. (1908) 95 P. 722, 52 Or. 502 (rehearing denied [1908] 52 Or. 502, 98 P. 160); Switzler v. Earnheart (Or. 1911) 117 P. 296; Sun Dial Ranch v. May Land Co. (1912) 119 P. 758, 61 Or. 205; Micelli v. Andrus (Or. 1912) 120 P. 737.

A riparian proprietor on a navigable stream has absolute title to the line of ordinary high-water mark by virtue of a chain of title reaching back to the sovereign, and owns to the center of the stream by grace of the state, subject, however, to public rights, substantially the same as those incident to navigable waters at common law, unaffected by the size of the river. Gniadck v. Northwestern Improvement & Boom Co. (1898) 75 N. W. 894, 73 Minn. 87; Franzini v. Layland (1903) 97 N. W. 499, 120 Wis. 72.

United States grants of public lands bordering upon navigable rivers convey title to the line of ordinary high-water mark of such rivers, regardless of the river meander lines, thus making such high-water mark the boundary of such grants in all cases where the meander line was run above such high-water mark. Washougal & L. Transp. Co. v. The Dalles, P. & A. Nav. Co. (1902) 68 P. 74, 27 Wash. 490.

11. High-water mark defined.—The line of ordinary high water is the line to which the water rises in ordinary seasons or the line at which the water continues long enough to mark upon the soil and vegetation a distinct character. Sun Dial Ranch v. May Land Co. (Or. 1912) 119 P. 758; Pacific Milling & Elevator Co. v. City of Portland (1913) 133 P. 72, 65 Or. 349, 46 L. R. A. (N. S.) 363; Diana Shooting Club v. Husting (1914) 145 N. W. 816, 156 Wis. 261, Ann. Cas. 1915C, 1148.

"High-water mark" means ordinary high-water mark—the point at which the sovereign ownership of the state begins. Rondell v. Fay (1867) 32 Cal. 354.

Ordinary high-water mark of a river

is a line which is shown by the character and condition of the soil and vegetation to be the limit to which high water ordinarily reaches, such vegetation not including those trees which grow and flourish best in the immediate vicinity of running streams, and which can withstand the effect of water encompassing the lower part of their trunks without injury, and for a longer period than other kinds of trees. Welch v. Browning (1901) 87 N. W. 430, 115 Iowa, 690.

12. Low-water mark as boundary.—The title of an owner of land bordering on a navigable stream extends to low-water mark. Bullock v. Wilson (Ala. 1835) 2 Port. 436; Williams v. Glover (1880) 66 Ala. 189; Webb v. City of Demopolis (1892) 95 Ala. 116, 13 South. 289, 21 L. R. A. 62; Stinson v. Butler (Ind. 1837) 4 Blackf. 285; Bainbridge v. Sherlock (1868) 29 Ind. 364, 95 Am. Dec. 644; Martin v. City of Evansville (1869) 32 Ind. 85; Mathis v. Board of Assessors (1894) 46 La. Ann. 1570, 16 South. 454; Schurmeier v. St. Paul & P. R. Co. (1865) 10 Minn. 82 (Gil. 59) 83 Am. Dec. 59 (affirmed St. Paul & P. R. Co. v. Schurmeier [1868] 74 U. S. [7 Wall.] 272, 19 L. Ed. 74); Brisbine v. St. Paul & S. C. R. Co. (1876) 23 Minn. 114; Union Depot St. Ry. & Transfer Co. v. Brunswick (1883) 31 Minn. 297, 17 N. W. 626, 47 Am. Rep. 789; State v. Korrer (Minn. 1914) 148 N. W. 617; State ex rel. Citizens' Electric Lighting & Power Co. v. Longfellow (1902) 69 S. W. 374, 169 Mo. 109; Gibson v. Kelly (1895) 15 Mont. 417, 39 Pac. 517; Shoemaker v. Hatch (1878) 13 Nev. 261; Blanchard's Lessee v. Porter (1841) 11 Ohio, 138.

Where a tract of land is bounded by a river, it extends at least to low-water mark; and the rule applies to government as well as to individual grants, notwithstanding such river is a public highway. Hobart v. Hall (C. C. 1909) 174 Fed. 433 (judgment affirmed Hall v. Hobart [1911] 186 Fed. 426, 108 C. C. A. 348); Schurmeier v. St. Paul & P. R. Co. (1865) 10 Minn. 82 (Gil. 59) 82 Am. Dec. 59 (affirmed [1868] 74 U. S. [7 Wall.] 272, 19 L. Ed. 74); State v. Korrer (Minn. 1914) 148 N. W. 617.

13. Water's edge or bank as boundary.—A riparian owner on a navigable stream owns to the water's edge only. Cox v. Arnold (1895) 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Frank v. Goddin (1906) 91 S. W. 1057, 193 Mo. 390, 112 Am. St. Rep. 493.

A patent by the federal government, which in terms bounds the land on the margin of a stream navigable in fact and above tidewater carries title only to the water's edge. Packer v. Bird (1891) 11 Sup. Ct. 210, 137 U. S. 661, 34 L. Ed. 819.

Grants by the United States of land adjoining an unnavigable lake did not convey the land under water, where under the state law riparian owners take title only to the water's edge. Marshall Dental Mfg. Co. v. State of Iowa (1913) 33 Sup. Ct. 168, 226 U. S. 460, 57 L. Ed. 300, affirming decree State v. Jones (1909) 122 N. W. 241, 143 Iowa, 398.

Where land bounded on a navigable river has been surveyed, and the river meandered, the owner claiming under a patent from the government takes title only to the bank. Wood v. Fowler (1882) 26 Kan. 682, 40 Am. Rep. 330.

A grant, from the United States, of land on a large river, like the Missouri, navigable in fact, though not subject to the ebb and flow of the tide, will, even when containing no reservation or condition, pass to the grantee title only to the water's edge. Cooley v. Golden (1893) 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300.

14. Thread of stream as boundary.—The title to land bounded on a river, not navigable at common law, but navigable in fact, extends to the middle of the stream. Middleton v. Pritchard (1842) 4 Ill. (3 Scam.) 510, 38 Am. Dec. 112; Braxon v. Bressler (1872) 64 Ill. 488; Chicago & P. R. Co. v. Stein (1874) 75 Ill. 41; Houck v. Yates (1876) 82 Ill. 179; People v. Economy Light & Power Co. (1909) 89 N. E. 760, 241 Ill. 290; Lorman v. Benson (1860) 8 Mich. 18, 77 Am. Dec. 435; Ryan v. Brown (1869) 18 Mich. 196, 100 Am. Dec. 154; Webber v. Pere Marquette Boom Co. (1886) 30 N. W. 469, 62 Mich. 626; Fuller v. Bilz (Mich. 1910) 126 N. W. 712, 17 Detroit Leg. N. 372; Morgan v. Reading (1844) 11 Miss. (3 Smedes & M.) 366; Gavit's Adm'rs v. Chambers (1828) 3 Ohio (3 Ham.) 495; Lamb v. Rickets (1842) 11 Ohio, 311; Walker v. Board of Public Works (1847) 16 Ohio, 540; Pollock v. Cleveland Ship Building Co. (1895) 2 Ohio Dec. 305; Id. (1895) 1 Ohio N. P. 296; June v. Purcell (1881) 36 Ohio St. 396; Walker v. Shepardson (1855) 4 Wis. 486, 65 Am. Dec. 324; Mariner v. Schulte (1855) 13 Wis. 692; Green Bay & Mississippi Canal Co. v. Telulah Paper Co. (1909) 122 N. W. 1062, 140 Wis. 417. See, also, City of St. Louis v. Rutz (1891) 11 Sup. Ct. 337, 343, 138 U. S. 226, 34 L. Ed. 941; Stolp v. Hoyt (1867) 44 Ill. 219; Wiggenhorn v. Kountz (1888) 23 Neb. 690, 37 N. W. 603, 8 Am. St. Rep. 150.

A riparian owner on a meandered stream or body of water, whether navigable or nonnavigable, takes title to the center or thread of the stream. Johnson v. Johnson (1908) 95 P. 499, 14 Idaho, 561; Moss v. Ramey (1908) 95 P. 513, 14 Idaho, 598; Lattig v. Scott (1910) 107 P. 47, 17 Idaho, 506; Ulbright v. Baslington (1911) 119 P. 292, 20 Idaho, 539; A. B. Moss & Bro.

v. Ramey (Idaho, 1913) 136 P. 608; Stoner v. Rice (1889) 22 N. E. 968, 121 Ind. 51, 6 L. R. A. 387; State v. Tuesburg Land Co. (Ind. App. 1915) 109 N. E. 530, rehearing denied (1916) 111 N. E. 342.

Where the government conveys land on the bank of a navigable stream without reservation, the land over which the stream flows, as far as the middle line of the stream, passes. Scranton v. Wheeler (1893) 57 Fed. 803, 6 C. C. A. 585 (judgment reversed [1896] 16 Sup. Ct. 1206, 163 U. S. 703, 41 L. Ed. 318); Butler v. Grand Rapids & I. R. Co. (1891) 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Chandos v. Mack (1890) 77 Wis. 573, 46 N. W. 803, 10 L. R. A. 207, 20 Am. St. Rep. 139; Franzini v. Layland (1903) 97 N. W. 499, 120 Wis. 72; Farris v. Bentley (1910) 124 N. W. 1003, 141 Wis. 671.

Under the common law a riparian owner of lands on one side of a navigable stream above the flow of the tide holds to the thread of the stream, subject to the public easement of navigation, and if the river suddenly changes its channel, the boundary does not change, and he still holds to the same line. People v. Grand Rapids-Muskegon Power Co. (1910) 129 N. W. 211, 17 Detroit Leg. N. 1054; Kinkead v. Turgeon (1906) 109 N. W. 744, 74 Neb. 573, 7 L. R. A. (N. S.) 316, reversing judgment on rehearing (1905) 104 N. W. 1061, 74 Neb. 573.

Government lots bordering on a nonnavigable stream are bounded by the thread of the stream, and not by the meander line on the bank. Kirby v. Potter (1903) 72 P. 338, 138 Cal. 686.

The riparian owner on a stream navigable only in a modified sense for floating logs and lumber presumably owns to the center of the stream. Attorney General v. Evart Booming Co. (1876) 34 Mich. 461.

15. State line as boundary.—Where a river separates Wisconsin from another state, the title, by grace of the former, to land owned by a riparian owner on its side of the stream, goes to its boundary line, regardless of whether that is nearer to or further from the shore than the filum aquæ of the stream. Franzini v. Layland (1903) 97 N. W. 499, 120 Wis. 72.

16. Ownership of river beds.—The fact that rivers are and must remain public highways is not inconsistent with the view that riparian owners have the fee of the bed of the stream. Schurmeier v. St. Paul & R. R. Co. (1865) 10 Minn. 82 (Gil. 59), 83 Am. Dec. 59, affirmed St. Paul & P. R. Co. v. Schurmeir (1868) 74 U. S. (7 Wall.) 272, 19 L. Ed. 74. See, also, June v. Purcell (1881) 36 Ohio St. 396.

The disposal by the United States after the admission of Idaho to statehood of fractional subdivisions on the east bank of the Snake river, where it forms the boundary between Idaho and Oregon, carried with it no right to the bed of the river save as the law of Idaho may have attached such a right to private riparian ownership on a navigable stream. Scott v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107.

A patent of the United States, conveying land lying upon the borders of a navigable river within the boundaries of a state, conveys no title to land lying under the stream, since the United States has no title thereto. Scranton v. Wheeler (1893) 57 Fed. 803, 6 C. C. A. 585, judgment reversed (1896) 16 Sup. Ct. 1206, 163 U. S. 703, 41 L. Ed. 318.

A patent for land does not by implication convey title to the soil under a navigable stream, although such stream is embraced within the limits of the grant, so as to affect the status of the stream as a navigable waterway. Carver v. San Pedro, L. A. & S. L. R. Co. (C. C. 1906) 151 Fed. 334.

A grantee from the United States of land in Minnesota bounded by a stream navigable in fact, like the Mississippi river, where there is no reservation, takes the absolute title in fee to high-water mark, or at furthest to low-water mark, and also a right or title to the land under water between such boundary and the middle thread of the stream, which is proprietary and exclusive as to all others than the state or the general government, and as to them except as they may exercise their sovereign ownership for protecting or improving the public right of navigation. The riparian owner or his grantee has the exclusive right to reclaim, occupy, and use for any purpose not inconsistent with such public right such land under water. Hobart v. Hall (C. C. 1909) 174 Fed. 433, judgment affirmed Hall v. Hobart (1911) 186 Fed. 426, 108 C. C. A. 348.

A grantee from the government of lands bounded by a navigable stream takes an absolute title in fee to the water's edge, and the state acquires a right or title to the soil or land under the water between the edge of the stream and the middle thread of the main navigable channel, in trust to preserve and improve the public right of navigation. Such right or title of the state, though paramount, is not proprietary, the riparian owner having a proprietary, though limited, title or ownership of such soil, or bed to the thread of the navigable channel subject to the public navigation right. Norton v. Whiteside (C. C. 1911) 188 Fed. 356, decree modified Whiteside v. Norton (C. C. A. 1913) 205 Fed. 5.

The owner of land bounded on a navigable river above tide waters which has, either expressly or impliedly, been recognized by the government as a public highway, has no title to the soil in the bed of the river beyond low-water

mark. Bullock v. Wilson (Ala. 1835) 2 Port. 436.

The owner of opposite lots on opposite sides of a meandered stream owns the land under the river subject to the public right of navigation. Washington Ice Co. v. Shortall (1881) 101 Ill. 46, 40 Am. Rep. 196; McCartney v. Chicago & E. R. Co. (1884) 112 Ill. 611; Walker v. Board of Public Works (1847) 16 Ohio, 540; Jones v. Pettibone (1853) 2 Wis. 308; Olson v. Merrill (1877) 42 Wis. 203; Delaplaine v. Chicago & N. W. Ry. Co. (1877) 42 Wis. 214, 24 Am. Rep. 386; Diedrich v. Northwestern Union Ry. Co. (1877) 42 Wis. 248, 24 Am. Rep. 399.

The common-law rule that the soil under tideless public rivers belongs to the owner of the adjacent bank to the thread of the stream prevails in Michigan and is applicable to the Detroit river. Lorman v. Benson (1860) 8 Mich. 18, 77 Am. Dec. 435.

A United States patent of land on a navigable stream conveys to the patentee no title to the bed of the stream. This rests in the state as a sovereign right. Union Depot St. Ry. & Transfer Co. v. Brunswick (1883) 31 Minn. 301, 17 N. W. 626, 47 Am. Rep. 789.

A grant from the United States of land on a river navigable in fact, though not subject to the ebb and flow of the tide, will not, even when containing no reservation or condition, pass to the grantee title to the land beneath the water, though the state has adopted the common law. Cooley v. Golden (1893) 117 Mo. 33, 23 S. W. 100, 21 L. R. A. 300, affirming (1893) 52 Mo. App. 229.

Owners of land situate on the banks of nontidal navigable streams, can recover for sand tortiously taken from the bed of the river. June v. Purcell (1881) 36 Ohio St. 396.

The title to the bed of a small stream which is only navigable for the purpose of floating timber is in the riparian owner. Sumner Lumber & Shingle Co. v. Pacific Coast Power Co. (1913) 131 P. 220, 72 Wash. 631.

The owner of the bank of a navigable stream, by purchase from the United States, is presumed to be the owner of the bed of the stream in front of his purchase, to the middle thereof. Norcross v. Griffiths (1886) 65 Wis. 599, 27 N. W. 606.

Riparian owners on navigable streams have only a qualified title to the beds thereof. Diana Shooting Club v. Husting (1914) 145 N. W. 816, 156 Wis. 261, Ann. Cas. 1915C, 1148.

17. Boundary between adjacent owners.—The boundary line between adjacent riparian owners of land under water of a stream is not dependent on the direction of the line on the upland, but the line from the shore must run perpendicular to the course of the stream. Clark v. Campau (1869) 19 Mich. 325; Bay City Gaslight Co. v. Industrial Works (1873) 28 Mich. 182; A. M. Campau Realty Co. v. City of Detroit (Mich. 1910) 127 N. W. 365, 17 Detroit Leg. N. 620.

Where a party owns land on the bank of a navigable stream, his rights in the stream are bounded by the center line or thread of the stream, and lines run from the points where the boundaries of his land reach the stream to the center line of the stream, at such a point as to form right angles therewith. Farris v. Bentley (1910) 124 N. W. 1003, 141 Wis. 671.

18. Ownership of islands.—Where, according to the local law, the patentee's title extends to the middle of the stream and includes an unsurveyed island within those limits, the United States cannot divest such title to the island by subsequent survey and patent thereof to another, in the absence of a showing that it was left unsurveyed by fraud or mistake. Grand Rapids & I. R. Co. v. Butler (1895) 15 Sup. Ct. 991, 992, 159 U. S. 87, 40 L. Ed. 85; Whitaker v. McBride (1905) 25 Sup. Ct. 530, 531, 197 U. S. 510, 49 L. Ed. 857; Johnson v. Johnson (1908) 95 P. 499, 14 Idaho, 561; Moss v. Ramey (1908) 95 P. 513, 14 Idaho, 598; Butler v. Grand Rapids & I. R. Co. (1891) 85 Mich. 246, 48 N. W. 569, 24 Am. St. Rep. 84; Chandos v. Mack (1890) 77 Wis. 573, 46 N. W. 803, 20 Am. St. Rep. 139, 10 L. R. A. 207; Farris v. Bentley (1910) 124 N. W. 1003, 141 Wis. 671. See, also, St. Paul & P. R. Co. v. Schurmeir (1868) 7 Wall. 272, 19 L. Ed. 74; Middleton v. Pritchard (1842) 3 Scam. (4 Ill.) 510, 38 Am. Dec. 112; Webber v. Pere Marquette Boom Co. (1886) 30 N. W. 469, 62 Mich. 626. And see Harding v. Minneapolis N. Ry. Co. (1897) 84 Fed. 287, 28 C. C. A. 419 (certiorari denied [1898] 18 Sup. Ct. 942, 169 U. S. 737, 42 L. Ed. 1217); State of Iowa v. Carr (1911) 191 Fed. 257, 112 C. C. A. 477.

Patents for fractional lots on a navigable stream do not embrace an island lying between such lots and the thread of the stream. Moss v. Ramey (1916) 36 Sup. Ct. 183; Callahan v. Price (1915) 146 P. 732, 26 Idaho, 745.

A patent from the United States, describing the land granted as bounded by the St. Mary's river, carries with it the title to small, unsurveyed islands on the American side of the international boundary line where, under the laws of the state, a grant of land bounded by a stream, whether navigable in fact or not, carries with it the bed of the stream to the center of the thread. U. S. v. Chandler-Dunbar Water Power Co. (1908) 28 Sup. Ct. 579, 209 U. S. 447, 52 L. Ed. 881.

Error in omitting island in navigable stream from field notes and plat of the government survey of 1868 did not devest the United States of title. Scott

v. Lattig (1913) 33 Sup. Ct. 242, 227 U. S. 229, 57 L. Ed. 490, 44 L. R. A. (N. S.) 107, reversing decree Lattig v. Scott (1910) 107 P. 47, 17 Idaho, 506.

The riparian owner of land in Minnesota on a navigable stream or his grantee has the exclusive right to reclaim, occupy, and use for any purpose not inconsistent with the public right of navigation any island or part thereof between his shore line and the middle thread of the stream, whether such island existed at the time of the survey and was omitted therefrom in good faith and without palpable mistake, or was afterward formed by the gradual action of the waters. Hobart v. Hall (C. C. 1909) 174 Fed. 433, judgment affirmed Hall v. Hobart (1911) 186 Fed. 426, 108 C. C. A. 348.

Where the government, in the exercise of its right to improve the navigation of a river, changed the channel to the opposite side of an island formed on and rising from the bed of the stream, such change transferred title to the island to the opposite riparian proprietor. Norton v. Whiteside (C. C. 1911) 188 Fed. 356, decree modified (1913) 205 Fed. 5, 123 C. C. A. 313, 45 L. R. A. (N. S.) 112.

While the right either to submerged land or to an island formed thereon in a navigable river is a property right, and may be severed from the shore land by the owner thereof, it is a right arising out of and existing by virtue of riparian proprietorship, and its nature continues the same whether severed from the riparian proprietorship or not. Id.

The right or title to use or occupy an island in a navigable stream arises from the right or title to use or occupy the submerged land on which it is formed; the character and extent of the title remaining the same. Id.

Where, by the terms of a patent, land is bounded by a navigable river, the title extends no further than the edge of the stream, and does not include an island, though the channel between that and the mainland may not be navigable. Packer v. Bird (1886) 71 Cal. 134, 11 Pac. 873.

An island in Snake river, surrounded by well-defined channels and existing when the state was admitted into the Union, and larger in area than a legal subdivision under the United States land surveys, did not pass to the riparian owner of abutting subdivisions, but the title thereof remained in the United States. A. B. Moss & Bro. v. Ramey (Idaho, 1913) 136 P. 608.

Where the patents issued by the government, conveying different descriptions of land bordering on an unmeandered lake, would all include in the descriptions an island in such lake, within their extended lines, and there was nothing to indicate an intention to reserve the island from the conveyances, the title to the island passed to the patentees. Church v. Case (1899) 81 N. W. 334, 122 Mich. 554, 6 Detroit Leg. N. 857.

Where a government patent to land describes the same by lots, and refers to the official plat which shows that the land is bounded by a navigable river, the title does not include an island, though the channel between it and the mainland be not navigable. State v. Nolegs (1914) 139 P. 943, 40 Okl. 479.

19. Lakes as boundaries.—See, also, notes to § 4804, ante.

A riparian proprietor on a meandered lake, where the lake is circular in form, must, in determining the boundary line between his land and that of an adjoining riparian proprietor, extend the side line or boundary line on a deflected course from the intersection of such side line with the meander line to the center of the lake. Ulbright v. Baslington (1911) 119 P. 292, 20 Idaho, 539. See, also, Hardin v. Jordan (1891) 11 Sup. Ct. 808, 817, 140 U. S. 397, 35 L. Ed. 439, overruling Hardin v. Jordan (1883) 16 Fed. 823.

This section does not affect the question of whether the patentee to land on a nonnavigable lake belonging to the United States takes title to the adjoining submerged land. Hardin v. Shedd (1903) 23 Sup. Ct. 685, 190 U. S. 508, 47 L. Ed. 1156.

A federal patent to lands bordering an inland navigable lake held not to convey anything below the ordinary high-water mark. Donovan-Hopka-Ninneman Co. v. Hope Lumber Mfg. Co. (1912) 194 Fed. 643, 115 C. C. A. 1.

A grant on a natural pond or lake extends only to the water's edge. Indiana v. Milk (C. C. 1882) 11 Fed. 389.

Under a patent from the United States, the title to bed of lakes not within the meandered lines, and not surveyed or described in the plat as land, but as lake, passed as riparian rights to the adjoining owners. Glasscock v. National Box Co. (Ark. 1912) 148 S. W. 248.

The ownership of lands bordering on a lake carries with it at least the ownership of the land under the shallow water so far out as it is susceptible of beneficial private use, subordinate to the paramount public right of navigation, and the other public rights incident thereto. Rice v. Ruddiman (1862) 10 Mich. 125.

The submerged lands adjoining riparian land on the Great Lakes are appurtenant to the upland, as far as their limits can be reasonably identified. Lincoln v. Davis (1884) 53 Mich. 375, 19 N. W. 103, 51 Am. Rep. 116.

The title of the riparian owner extends to the middle line of a navigable inland lake. Webber v. Pere Marquette Boom Co. (1886) 62 Mich. 626, 30 N. W. 469. CONTRA, Boorman v. Sunnuchs (1877) 42 Wis. 233.

The owner of a fractional subdivision of a section meandered by the United

States survey along the margin of an inland navigable lake is entitled to so much of the land under said lake as lies within the lines of his fractional subdivision, extending into the lake to the limit of the entire subdivision. Clute v. Fisher (1887) 65 Mich. 48, 31 N. W. 614.

The soil under the water of the inland lakes in Michigan belongs to the riparian owners. Id.

Where a navigable lake is of such size that entire sectional subdivisions are included therein, the owner of a fractional subdivision of a section meandered by the United States survey along the margin of the lake does not own all of the lake bed lying within the extended lines of his subdivision. Jones v. Lee (1889) 77 Mich. 35, 43 N. W. 855; Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co. (1894) 102 Mich. 227, 60 N. W. 681, 47 Am. St. Rep. 516, 25 L. R. A. 815.

Where a lake is navigable in fact, its waters and bed belong to the state in its sovereign capacity, and the riparian patentee takes a fee to the water's edge only. Lamprey v. State (1893) 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541; Conneaut Lake Ice Co. v. Quigley (1909) 74 A. 648, 225 Pa. 605.

Where a meandered lake is "nonnavigable" in fact, the patentee of the riparian land takes the fee to the center of the lake; but, if the lake is "navigable" in fact, its waters and bed belong to the state, in its sovereign capacity, and the riparian patentee takes the fee only to the water line, but with all the rights incident to riparian ownership on navigable waters, including the right to accretions or relictions formed in front of his land by the action or recession of the water. Lamprey v. State (1893) 52 Minn. 181, 53 N. W. 1139, 38 Am. St. Rep. 541, 18 L. R. A. 670.

Where the meander line of an inland, meandered, navigable lake is not a boundary line of a fractional lot abutting thereon, the title of the contiguous owners extends to all lands between such line and the shore of the lake, as though it were the result of accretions or relictions, and the boundaries of adjoining tracts as to the land beyond the meander line are fixed by extending their side lines on a deflected course from their intersection with the meander line toward a point in the center of the lake. Hanson v. Rice (1903) 92 N. W. 982, 88 Minn. 273.

IV. RIPARIAN RIGHTS

20. Application of local or common-law rules.—The question of the title of a riparian owner is one of local law. Whitaker v. McBride (1905) 25 Sup. Ct. 530, 531, 197 U. S. 510, 49 L. Ed. 857; Producers' Oil Co. v. Hanszen (1913) 61 So. 754, 132 La. 691; Webber v. Pere Marquette Boom Co. (1886) 30 N. W. 469, 62 Mich. 626. See, also, Whiteside v. Norton (1913) 205 Fed. 5, 123 C. C. A. 313, 45 L. R. A. (N. S.) 112.

The same rules govern the rights of riparian owners on lakes as govern the rights of riparian owners on streams. Kirwan v. Murphy (1897) 83 Fed. 275, 28 C. C. A. 348 (appeal dismissed [1898] 18 Sup. Ct. 592, 170 U. S. 205, 42 L. Ed. 1009); Lamprey v. State (1893) 52 Minn. 181, 53 N. W. 1139, 18 L. R. A. 670, 38 Am. St. Rep. 541.

The rights of a riparian owner on a navigable stream are governed by the laws of the state in which the stream is situated. Weems Steamboat Co. v. People's Steamboat Co. (1909) 29 Sup. Ct. 661, 214 U. S. 345, 53 L. Ed. 1024, 16 Ann. Cas. 1222. See, also, Eisenbach v. Hatfield (1891) 2 Wash. St. 236, 26 Pac. 539.

An island in a navigable river, which had been surveyed prior to the admission of the state, so long as it remained undisposed of by the United States, was governed by the rules of the common law with respect to riparian rights and the effect of erosion or submergence, and not by the law of the state. Widdicombe v. Rosemiller (C. C. 1902) 118 Fed. 295.

Within the territory occupied by the public lands, where the opposite banks of any stream not navigable belong to different persons, the stream and the bed thereof shall become common property; otherwise there is no national law of riparian rights. These are fixed, measured, and governed by the local law. McFarland v. Alaska Perseverance Mining Co. (1907) 3 Alaska, 308.

21. Nature and extent of rights.—Riparian rights include the private right of access to and from the stream. Yates v. Milwaukee (1870) 10 Wall. 497, 504, 19 L. Ed. 984; Murray v. Gordon (1913) 182 Ill. App. 460; Eagle Cliff Fishing Co. v. McGowan (1914) 137 P. 766, 70 Or. 1. See, also, U. S. v. Roth (1904) 2 Alaska, 257; Moore v. Willamette Transportation & Locks Co. (1879) 7 Or. 355.

A patentee from the United States government has all the rights of a riparian owner in the channel lying opposite his banks, although his land may be itself surrounded by two channels of the river. Whitaker v. McBride (1905) 25 Sup, Ct. 530, 532, 197 U. S. 510, 49 L. Ed. 857, affirming judgment, McBride v. Whitaker (1902) 90 N. W. 966, 65 Neb. 137.

Riparian rights arise by implication of law, but give no title to the land under navigable waters except such as may be lawfully acquired by accretion, reliction, and other similar rights. Broward v. Mabry (1909) 50 So. 826, 58 Fla. 398.

22. Landings and wharves.—See, also, notes to § 9836 et seq., post.

Accretions formed after the entry on government land bounded by a meandered line on a river or lake belong to the party holding title under the entry. Granger v. Swart (C. C. 1865) Fed. Cas. No. 5,685. See, also, Jefferies v. East Omaha Land Co. (1890) 10 Sup. Ct. 518, 522, 134 U. S. 178, 33 L. Ed. 872; Shively v. Bowlby (1894) 14 Sup. Ct. 548, 561, 152 U. S. 1, 38 L. Ed. 331; Smith v. Johnson (C. C. 1896) 71 Fed. 647; Widdicombe v. Rosemiller (C. C. 1902) 118 Fed. 295; St. Louis, I. M. & S. Ry. Co. v. Ramsey (1890) 53 Ark. 314, 13 S. W. 931, 22 Am. St. Rep. 195, 8 L. R. A. 559; Lovingston v. St. Clair County (1872) 64 Ill. 56, 16 Am. Rep. 516; Fuller v. Shedd (1896) 161 Ill. 462, 44 N. E. 286, 52 Am. St. Rep. 380, 33 L. R. A. 146; State v. Livingston (Iowa, 1914) 145 N. W. 91; Wood v. McAlpine (1911) 118 P. 1060, 85 Kan. 657 (judgment affirmed on rehearing [1912] 121 P. 916, 86 Kan. 804); Buse v. Russell (1885) 86 Mo. 209; Naylor v. Cox (1893) 114 Mo. 232, 21 S. W. 589; Cox v. Arnold (1895) 129 Mo. 337, 31 S. W. 592, 50 Am. St. Rep. 450; Hahn v. Dawson (1896) 134 Mo. 581, 36 S. W. 233; Wiggenhorn v. Kountz (1888) 23 Neb. 690, 37 N. W. 603, 8 Am. St. Rep. 150; Bissel v. Fletcher (1889) 27 Neb. 582, 43 N. W. 350; Minto v. Delany (1879) 7 Or. 337; Moore v. Willamette Transportation & Locks Co. (1879) 7 Or. 355; Sun Dial Ranch v. May Land Co. (Or. 1912) 119 P. 758; Poynter v. Chipman (1893) 8 Utah, 442, 32 Pac. 690; Knudsen v. Omanson (1894) 10 Utah, 124, 37 Pac. 250; Spinning v. Pugh (Wash. 1911) 118 P. 635.

A riparian proprietor on a navigable stream may construct suitable landings and wharves for the convenience of commerce and navigation, as riparian proprietors on navigable waters affected by the ebb and flow of the tide may do. St. Paul & P. R. Co. v. Schurmeier (1868) 7 Wall. 272, 287, 19 L. Ed. 74. See, also, U. S. v. Roth (1904) 2 Alaska, 257.

§ 4919. (R. S. § 2477.) Right of way for highways over public lands.

The right of way for the construction of highways over public lands, not reserved for public uses, is hereby granted.

Act July 26, 1866, c. 262, § 8, 14 Stat. 253.

Any bona fide settler under the pre-emption, homestead, or other settlement law may transfer any portion of his claim for the right of way of railroads, canals, reservoirs, or ditches for irrigation or drainage across it, without vitiating his right to complete and perfect title to his claim, by Rev. St. § 2288, ante, § 4535.

Notes of Decisions

Grant of right of way.—By this section the United States grants a right of way for the construction of highways over public lands not reserved for public use. Van Brocklin v. Anderson (1886) 6 Sup. Ct. 670, 676, 117 U. S. 151, 29 L. Ed. 845; U. S. v. Rindge (D. C. 1913) 208 Fed. 611; Duffield v. Ashurst (1909) 12 Ariz. 360, 100 Pac. 820; Town of Red Bluff v. Walbridge (1911) 116 Pac. 77, 15 Cal. App. 770; Molyneux v. Grimes (1908) 78 Kan. 830, 98 Pac. 278; Van Wanning v. Deeter (Neb. 1907) 112 N. W. 902 (affirming judgment on rehearing [1907] 110 N. W. 703); Wallowa County v. Wade (1903) 72 Pac. 793, 43 Or. 253; Wells v. Pennington County (1891) 2 S. D. 1, 48 N. W. 305; Smith v. Same (1891) 2 S. D. 14, 48 N. W. 309; Riverside Tp. v. Newton (1898) 75 N. W. 899, 11 S. D. 120; City of Deadwood v. Whittaker (1900) 81 N. W. 908, 12 S. D. 515; Petersen v. Baker (1905) 81 Pac. 681, 39 Wash. 275; Stofferan v. Okanogan County (1913) 136 Pac. 484, 76 Wash. 265.

In the absence of a reservation in a grant of public land, there is no implied reservation of a right of way over the land granted to afford access by the public to other land belonging to the government. U. S. v. Rindge (D. C. 1913) 208 Fed. 611.

The word "highways" should be construed in accordance with recognized local laws. City of Butte v. Mikosowitz (1909) 102 P. 503, 39 Mont. 350.

A reservation of public lands for Indians is a reservation for public use within this section. Stofferan v. Okanogan County (1913) 136 P. 484, 76 Wash. 265.

Nature of grant.—This section was a grant in præsenti, and when accepted by the public it took effect as of the date of the grant. Tholl v. Koles (1902) 65 Kan. 802, 70 Pac. 881; Butte v. Mikosowitz (1909) 102 Pac. 593, 39 Mont. 350; Walcott Tp. of Richland County v. Skauge (1897) 71 N. W. 544, 6 N. D. 382; Rolling v. Emrich (1904) 99 N. W. 464, 122 Wis. 134. See, also, Walbridge v. Russell County (1906) 74 Kan. 341, 86 Pac. 473; Molyneux v. Grimes (1908) 78 Kan. 830, 98 Pac. 278; Wallowa County v. Wade (1903) 72 Pac. 793, 43 Or. 253; Montgomery v. Somers (1907) 90 Pac. 674, 50 Or. 259; Okanogan County v. Cheetham (1905) 80 Pac. 262, 37 Wash. 682, 70 L. R. A. 1027.

The grant remains in abeyance until a highway is established and takes ef-

fect from that time. McAllister v. Okanogan County (1909) 100 P. 146, 51 Wash. 647; Stofferan v. Same (1913) 136 P. 484.

A roadway used by the public over public land does not become a public highway from mere user for 20 years, or by prescription. Cross v. State (1906) 41 South. 875, 147 Ala. 125.

This section does not operate to grant rights of way and establish highways contrary to the local laws. Tucson Consol. Copper Co. v. Reese (1909) 12 Ariz. 226, 100 Pac. 777.

Validity and effect of grant as against subsequent claimants.—A grant of right of way under this section is valid as against a subsequent conveyance by the government of the land by metes and bounds to a private person. Verdier v. Port Royal R. Co. (1881) 15 S. C. 476; Sams v. Port Royal & A. Ry. Co. (1881) 15 S. C. 484. And the status of the highway is not changed by the subsequent establishment of a forest reserve. Duffield v. Ashhurst (1909) 100 Pac. 820, 12 Ariz. 360.

Under this section a patent is not necessary, the offer and its acceptance by the construction of the road are equivalent to a grant that is good as against the government, and also as against a subsequent patentee, unless the latter's patent antedates the grant by relation, or unless his equities preclude the acquisition of adverse rights. Flint & P. M. Ry. Co. v. Gordon (1879) 2 N. W. 648, 41 Mich. 420.

A right of way perfected by a railway company under this section cannot be defeated by mere relation back from a homesteader's subsequent patent to the time of his antecedent entry on the land. Id.

A settler on public lands on which there is a road in common use as a highway takes subject to the public easement of such way as a road, though it was never established by the public authorities under the general road laws. Van Wanning v. Deeter (Neb. 1907) 110 N. W. 703, judgment affirmed on rehearing (1907) 112 N. W. 902.

Persons filing on public lands take the same subject to the right of way along section lines for highway purposes. Wells v. Pennington Co. (1891) 2 S. D. 1, 48 N. W. 305, 39 Am. St. Rep. 758; Keen v. Fairview Tp. (1896) 8 S. D. 558, 67 N. W. 623.

Railroad right of way.—A railroad is a "highway," within the meaning of this section. Tennessee & C. R. Co. v. Taylor (1893) 102 Ala. 224, 14 South. 379. But see Burlington, K. & S. W. R. Co. v. Johnson (1887) 38 Kan. 142, 16 Pac. 125.

A homesteader is entitled to compensation for improvements made on land over which a railroad company after the homestead entry, but before patent, obtained a right of way under this section. Flint & P. M. Ry. Co. v. Gordon (1879) 2 N. W. 648, 41 Mich. 420.

Under this section a railroad company, by constructing its line over public lands after they had been entered as a homestead, but before the homestead title had been perfected, acquires title to the right of way. Id.

Railways, though not strictly "highways" like plank and macadamized roads, are highways within this section. Id.

§ 4920. (Act July 5, 1884, c. 214, § 6.) Extension of roads across military reservations; landing of ferries and erection of bridges thereon; driving cattle, etc.

The Secretary of War shall have authority, in his discretion, to permit the extension of State, county, and Territorial roads across military reservations; to permit the landing of ferries, the erection of bridges thereon; and permit cattle, sheep or other stock animals to be driven across such reservation, whenever in his judgment the same can be done without injury to the reservation or inconvenience to the military forces stationed thereon. (23 Stat. 104.)

The other sections of this act related to abandoned military reservations, and are set forth post, §§ 5003–5006.

Notes of Decisions

License to occupy military reservation.—From this act it may be regarded as certain that it was the view of Congress that an explicit authority was necessary for even a transient occupation of a military reservation for other than its special purpose. (1897) 21 Op. Atty. Gen. 537.

§ 4921. (Act March 3, 1875, c. 152, § 1.) Right of way through public lands, materials, grounds for stations, etc., granted to railroads.

The right of way through the public lands of the United States is hereby granted to any railroad company duly organized under the laws of any State or Territory, except the District of Columbia, or by the Congress of the United States, which shall have filed with

the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the central line of said road; also the right to take, from the public lands adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also ground adjacent to such right of way for station-buildings, depots, machine shops, side-tracks, turn-outs, and water-stations, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road. (18 Stat. 482.)

This section and the five sections next following were an act entitled "An act granting to railroads the right of way through the public lands of the United States."

Rights of way to railroads through Alaska were granted by Act May 14, 1898, c. 299, post, §§ 5083–5092.

Rights of way to railroads and telegraph and telephone lines through Indian reservations, lands, or allotments were granted by Act March 2, 1899, c. 374, ante, §§ 4181–4188.

Rights of way for railway, telegraph, and telephone lines in the Indian Territory, and in Indian reservations, etc., in Oklahoma, were granted to railway companies, by Act Feb. 28, 1902, c. 134, §§ 13–23, 32 Stat. 47–50.

Grants of rights of way for electrical poles and lines for transmission, etc., of electrical power, and for telephone and telegraph purposes, over public lands, national forests, and reservations of the United States, were authorized by provisions of Act March 4, 1911, c. 238, post, § 4948.

Grants of rights of way for pipe lines for conveyance of oil and gas through Indian reservations and other Indian lands were authorized by Act March 11, 1904, c. 505, ante, §§ 4192, 4193.

Right of way for pipe lines for oil or gas through public lands in the State of Arkansas was granted by Act April 12, 1910, c. 155, post, §§ 4953–4957.

Where, under this act and other acts, railroads had been constructed and were in operation in Arizona or Oklahoma, which passed through any lands theretofore reserved for said Territories, such lands were required to be disposed of subject to the right of way to the extent granted by this act, by Act June 26, 1906, c. 3548, post, § 4932.

Notes of Decisions

Railroad right of way—Nature and purpose of grant.—The grant of a right of way by this act is a grant in præsenti, differing only from an absolute present grant, in that the thing granted is indefinite and the name of the grantee unknown. Denver & R. G. R. Co. v. Alling (1878) 99 U. S. 463, 470, 25 L. Ed. 438; Noble v. Union River Logging R. R. Co. (1893) 13 S. Ct. 271, 147 U. S. 165, 37 L. Ed. 123; Jamestown & N. R. Co. v. Jones (1900) 20 Sup. Ct. 568, 570, 177 U. S. 125, 44 L. Ed. 698; Wallula Pac. Ry. Co. v. Portland & S. Ry. Co. (C. C. 1906) 154 Fed. 902; U. S. v. Whitney (C. C. 1910) 176 Fed. 593; Denver & R. G. R. Co. v. Wilson (1900) 62 Pac. 843, 28 Colo. 6; Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 P. 56; Chicago, K. & N. R. Ry. Co. v. Van Cleave (1894) 52 Kan. 665, 33 Pac. 472; Northern Pac. Ry. Co. v. Barlow (1913) 26 N. D. 159, 143 N. W. 903. See, also, Wallula Pac. Ry. Co. v. Portland & S. Ry. Co. (C. C. 1906) 154 Fed. 902; U. S. v. Chicago, M. & St. P. Ry. Co. (D. C. 1913) 207 Fed. 164, 169, 175. But see Spokane Falls & N. Ry. Co. v. Ziegler (1894) 61 Fed. 392, 393, 9 C. C. A. 548, on rehearing (1894) 64 Fed. 960, 12 C. C. A. 488.

A limited fee on an implied condition of reverter on failure to use the land for the purposes stated is granted by Railway Right of Way Act. Rio Grande Western Ry. Co. v. Stringham (1915) 36 Sup. Ct. 5.

The title to a railroad right of way, acquired over public lands under a grant by Congress, cannot be acquired against the grantee by limitation. Denver & R. G. R. Co. v. Mills (1915) 222 Fed. 481, 138 C. C. A. 77. See, also, H. A. & L. D. Holland Co. v. Northern Pac. Ry. Co. (C. C. A. 1914) 214 Fed. 920, affirming decrees (D. C. 1913) 208 Fed. 598.

The grant made by this act was meant for railroad companies intending to operate roads as common carriers for the benefit and convenience of the public, and not for the benefit of the companies solely. (1890) 19 Op. Atty. Gen. 546.

This grant is a base, qualified, or limited fee, and is more than an easement, and a reversionary interest remains in the United States to be conveyed by it to the person to whom the land may be patented, whose rights will be subject to those of the railroad. Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 P. 56.

A railroad on compliance with this act becomes a grantee as specifically

and definitely as if it had been named in the act. Id.

The grant made by this act has the attributes of a fee; that is, perpetuity and exclusive use and possession. Id.

The acts of Congress relative to the public lands, providing for entries thereof, and authorizing easements and rights of way thereover, must be construed together in the light of the conditions as they existed when the several acts were passed, as well as of the purposes declared by the acts and effect given to the provisions of each act in so far as possible. Minidoka & S. W. R. Co. v. Weymouth (Idaho, 1911) 113 P. 455.

This act is in the nature of a general offer, which takes effect and becomes operative as a grant to a particular company only when the company accepts its terms by a compliance with the conditions precedent prescribed in the act, and as of the date of such compliance. Red River & Lake of the Woods R. Co. v. Sture (1884) 32 Minn. 95, 20 N. W. 229.

A railroad company which has built a road prior to the act may take advantage of it. Rio Grande Western Ry. Co. v. Stringham (Utah, 1910) 110 P. 868.

A short, narrow tramway, up the side of a mountain, used only for taking ore from and supplies to mines, the ore cars being hauled up by horses and let down by gravity, is not a "railroad" within this act. Denver & R. G. R. Co. v. Bolognese (Utah, 1914) 143 P. 129.

—— Lands subject to grant of right of way.—See, also, notes to § 4925, post.

Public lands withdrawn from entry under Reclamation Act as lands susceptible of irrigation from the contemplated works, but which remain subject to homestead entry under specified conditions, and upon which such entries have been made by entrymen who are in possession, but have not yet fulfilled the conditions to entitle them to patents, are still "public lands" within the meaning of this act. U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323. See, also, Minidoka & S. W. R. Co. v. Weymouth (1911) 113 Pac. 455, 19 Idaho, 234.

The words "public lands" are used in this act to describe such lands as are subject to sale or other disposal under the general laws, and not those already appropriated by a homestead entry. St. Louis & S. F. R. Co. v. Budd (Ark. 1915) 165 S. W. 265, adopting definition in Newhall v. Sanger (1875) 92 U. S. 761, 763, 23 L. Ed. 769. See, also, Enid & A. Ry. Co. v. Kephart (Okl. 1907) 91 P. 1049; Larsen v. Oregon Ry. & Nav. Co. (1890) 19 Or. 240, 23 Pac. 974.

This definition is also given in Union Pac. R. Co. v. Harris (1910) 30 Sup. Ct. 138, 139, 215 U. S. 386, 54 L. Ed. 246; Union Pac. Ry. Co. v. Karges (C. C. 1909) 169 Fed. 459.

The act does not entitle railway company to a right of way over lands which are in the possession of a qualified preemptor who has made final proof, tendered the purchase money, and demanded his final receipt. Spokane Falls & N. Ry. Co. v. Ziegler (1894) 61 Fed. 392, 9 C. C. A. 548, judgment affirmed (1897) 17 Sup. Ct. 728, 167 U. S. 65, 42 L. Ed. 79. See, also, Lilienthal v. Southern California Ry. Co. (C. C. 1893) 56 Fed. 701.

The act does not limit the right of railroad corporations to acquire ground for right of way and stations to surveyed lands. Ex parte Davidson (C. C. 1893) 57 Fed. 883.

Lands within a reservation withdrawn under the reclamation act for the furtherance of an irrigation project and resting under valid, subsisting homestead filings are no longer "public lands," and are therefore exempt from the operation of the railroad right of way act. U. S. v. Minidoka & S. W. R. Co. (C. C. 1910) 176 Fed. 762.

On the abandonment of a mining claim, it becomes public land to which a right of way attaches, so that a relocation is subject to the easement. Bonner v. Rio Grande S. R. Co. (1903) 72 Pac. 1065, 31 Colo. 446.

Where a railroad company fails to comply with the provisions of this act, the company has no right to run its road through the land of a homesteader who had complied with the terms of the homestead law, although the homesteader had not at the time received his patent from the government. Savannah, F. & W. Ry. Co. v. Davis (1889) 25 Fla. 917, 7 South. 29.

Land included under a railroad land grant is not "public lands," within the meaning of this act. Washington & I. R. Co. v. Northern Pac. R. Co. (1889) 2 Idaho, 513, 21 Pac. 658.

A settler who has entered public land of the United States under the homestead law has, even before patent issued, an inchoate title to the land, which is property, and, as against him, a railway company has no right of way over the land under this act unless such right was acquired by a compliance with the provisions of the act before his settlement. Red River & Lake of the Woods R. Co. v. Sture (1884) 32 Minn. 95, 20 N. W. 229. See, also, Comford v. Great Northern Ry. Co. (1909) 120 N. W. 875, 18 N. D. 570.

Where a homesteader abandoned his homestead after a railroad company had purchased a right of way from him, the company's title to its right of way became valid, so far as the United States and all grantees therefrom with notice of the location and possession of the road were concerned. Alexander v. Kansas City, Ft. S. & M. R. Co. (1897) 40 S. W. 104, 138 Mo. 464.

A railroad company appropriating

land for its right of way across land covered by homestead entry is an unlawful trespasser, and obtains no right either in law or equity. Enid & A. Ry. Co. v. Kephart (Okl. 1907) 91 P. 1049.

A railroad cannot, after entry of forfeited land by settlers, enter thereon under this act for the purpose of acquiring a right of way as over public land. Johnson v. Bridal Veil Lumbering Co. (1893) 24 Or. 182, 33 Pac. 528.

The fact that a settler commutes his homestead entry does not change it into a pre-emption, allowing the rights of the railroad entering thereon, under this act for the purpose of acquiring a right of way, to become paramount. Id.

—— Filing articles of incorporation and proof of organization as condition precedent to acquisition of right of way.—To entitle a railroad company to a right of way through the public lands, it must appear that such company complied with this act by filing with the secretary of the interior a copy of its articles of incorporation, and due proof of its organization under the same, and by claiming the benefits of said act by filing with the register of the land office of the proper district a profile of its road, or, if the profile is not filed, by constructing the road. Jamestown & N. R. Co. v. Jones (1900) 20 Sup. Ct. 568, 570, 177 U. S. 125, 44 L. Ed. 698; Denver & R. G. R. Co. v. Hanoum (1893) 19 Colo. 162, 34 Pac. 838; Same v. Wilson (1900) 62 Pac. 843, 28 Colo. 6; Larsen v. Oregon Ry. & Nav. Co. (1890) 19 Or. 240, 23 Pac. 974; Enoch v. Spokane Falls & N. Ry. Co. (1893) 6 Wash. 393, 33 Pac. 966; Reidt v. Same (1893) 6 Wash. 623, 34 Pac. 150. See, also, Washington & I. R. Co. v. Cœur D'Alene Ry. & Nav. Co. (1894) 60 Fed. 981, 9 C. C. A. 303; Washington & I. R. Co. v. Cœur d'Alene Ry. & Nav. Co. (C. C. 1892) 52 Fed. 765; Ex parte Davidson (C. C. 1893) 57 Fed. 883; Oregon Trunk Line v. Deschutes R. Co. (C. C. 1909) 172 Fed. 738; Taggart v. Great Northern Ry. Co. (D. C. 1912) 208 Fed. 455 (judgment affirmed [1914] 211 Fed. 288, 129 C. C. A. 356); Savannah, F. & W. Ry. Co. v. Davis (1890) 25 Fla. 917, 7 So. 29; Alexander v. Kansas City, Ft. S. & M. R. Co. (1897) 138 Mo. 464, 40 S. W. 104; Comford v. Great Northern Ry. Co. (1909) 120 N. W. 875, 18 N. D. 570; Pennsylvania Min. & Imp. Co. v. Everett M. C. Ry. Co. (1902) 69 Pac. 628, 29 Wash. 102.

By this section the United States grants a right of way to a railroad company which shall have filed with the Secretary of the Interior a copy of its articles of incorporation and proof of its organization. Frizzele v. Oregon Ry. & Nav. Co. (1892) 22 Or. 463, 30 Pac. 313. And see Washington & I. R. Co. v. Cœur D'Alene R. & Nav. Co. (1895) 16 Sup. Ct. 231, 237, 160 U. S. 77, 40 L. Ed. 355; Missouri Pac. Ry. Co. v. Fitzgerald (1896) 16 Sup. Ct. 389, 393, 160 U. S. 556, 40 L. Ed. 536; Spokane Falls & N. Ry. Co. v. Ziegler (1897) 17 Sup. Ct. 728, 730, 167 U. S. 65, 42 L. Ed. 79; Telluride Power Transmission Co. v. Rio Grande W. R. Co. (1900) 20 Sup. Ct. 245, 247, 175 U. S. 639, 44 L. Ed. 305; Northern Pacific Ry. Co. v. Slaght (1907) 27 Sup. Ct. 442, 444, 205 U. S. 122, 51 L. Ed. 738; Spokane & B. C. Ry. Co. v. Washington & G. N. Ry. Co. (1911) 31 Sup. Ct. 182, 219 U. S. 166, 55 L. Ed. 159 (affirming decree [1908] 95 Pac. 64, 49 Wash. 280); Stalker v. Oregon Short Line R. Co. (1912) 32 Sup. Ct. 636, 637, 225 U. S. 142, 56 L. Ed. 1027; St. Louis & S. F. Ry. Co. v. Tapp (1897) 42 S. W. 667, 64 Ark. 357; Moran v. Chicago, B. & Q. R. Co. (1909) 120 N. W. 192, 83 Neb. 680.

The railroad company, and not the contractor, who builds the road, must comply with the requirements of the statute. Fitzgerald v. Missouri Pac. Ry. Co. (C. C. 1891) 45 Fed. 812.

When a railroad company, organized under a territorial statute requiring its route to be set out in some detail in its articles of incorporation, subsequently changes its route, by filing supplemental articles, so as to cross certain public lands, it is "organized," for the purpose of building a road over such lands, only from the date of the supplemental articles, and can only acquire a right of way on furnishing due proof, in the manner specified, of such organization. Washington & I. R. Co. v. Cœur d'Alene Ry. & Nav. Co. (C. C. 1892) 52 Fed. 765.

The "due organization," and the furnishing of "due proof" thereof, are conditions precedent to the acquirement of such right of way. Id.

Where the only evidence that a railroad has filed the documentary proof of organization is a copy, certified by the commissioner of the general land office, of a communication from the president of the railroad to the secretary of the interior, stating that the former transmits therewith the necessary documents, which communication is indorsed as received at the interior department on a certain date, such date is the earliest at which the railroad can have acquired the right of way. Id.

A survey by a railroad which has not yet complied with the conditions of the statute confers no rights, as against another railroad which has complied with such conditions, but has as yet made no survey. Id.

Where, in a suit to quiet title to a railroad right of way, it appeared that the Secretary of the Interior had approved the articles of incorporation, maps, etc., of plaintiff company, the appellate court will presume on appeal that such approval was duly noted upon the plats as the act required, in the absence of a showing to the contrary.

Rio Grande Western Ry. Co. v. Stringham (Utah, 1910) 110 P. 868.

Taking materials from adjacent lands —Nature and extent of right.—Timber taken under this act may be used for the construction of station buildings, depots, machine shops, side tracks, turnouts, and water tanks, which are all necessary for the construction of the railroad as a completed structure. U. S. v. Denver & R. G. R. Co. (1893) 14 Sup. Ct. 11, 15, 150 U. S. 1, 37 L. Ed. 915. And see U. S. v. Chaplin (C. C. 1887) 31 Fed. 890, decree modified (C. C. 1888) 34 Fed. 838.

A railroad company constructing its line in conformity with this act is authorized to take timber from lands adjacent to any part of its completed main line for use in the original construction of a branch line which it is authorized by its charter to build, although such branch is not constructed for several years after the main line. U. S. v. Price Trading Co. (1901) 109 Fed. 239, 48 C. C. A. 331.

Where timber has been wrongfully cut from public lands of the United States, and while in the hands of a purchaser has been claimed as the property of the United States by its agent, the title of the government cannot be devested by a subsequent sale of the timber by such purchaser to a railroad company for use in the construction of its road, although the company would have had the right to cut it for such purpose had it been standing. Id.

The right to take timber and other materials for the construction purposes confers no right to cut timber for such purposes prior to the filing of the required papers, nor does the subsequent use in the construction of the road of timber so cut render the cutting lawful, or devest the title of the United States thereto, since the act does not give the right to appropriate timber already cut. U. S. v. Eccles (C. C. 1901) 111 Fed. 490.

After a railroad line is once completed, it has no right under this act to take timber for new switches and side tracks. Denver & R. G. R. Co. v. U. S. (C. C. 1888) 34 Fed. 838.

The use by logging railroad company of government timber standing along the line of its road is unauthorized. (1890) 19 Op. Atty. Gen. 546.

—— Meaning of adjacent.—Timber taken from land adjacent to the right of way of a railroad may be used in the construction of any portion of its line, even though not lying near the spot where the timber was taken. U. S. v. Denver & R. G. R. Co. (1893) 14 Sup. Ct. 11, 14, 150 U. S. 1, 37 L. Ed. 975, affirming Denver & R. G. R. Co. v. U. S. (C. C. 1888) 34 Fed. 838, and modifying U. S. v. Chaplin (C. C. 1887) 31 Fed 890. See, also, U. S. v. Lynde (C. C. 1891) 47 Fed. 297. But see Denver & R. G. Ry. Co. v. U. S. (1903) 124 Fed. 156, 163, 59 C. C. A. 579; U. S. v. Denver & R. G. Ry. Co. (D. C. 1887) 31 Fed. 886.

Lands 20 miles distant from a railroad right of way are not "adjacent." U. S. v. St. Anthony R. Co. (1904) 24 Sup. Ct. 333, 338, 192 U. S. 524, 48 L. Ed. 548, reversing U. S. v. St. Anthony R. Co. (1902) 114 Fed. 722, 52 C. C. A. 354.

The grant of the right to take from the public lands "adjacent to the line of the said road" timber necessary for its construction restricts the right to lands in proximity or near to the road, and does not authorize the taking of timber from lands 50 miles distant, though there be no available timber nearer. Stone v. U. S. (1897) 17 Sup. Ct. 778, 782, 167 U. S. 178, 42 L. Ed. 127, affirming (1894) 12 C. C. A. 451, 64 Fed. 667.

The meaning of "adjacent" is a mixed question of law and fact for the jury, and a proper test is whether the timber is within reasonable hauling distance by wagons. Bacheldor v. U. S. (1897) 83 Fed. 986, 28 C. C. A. 246, reversing judgment U. S. v. Bacheldor (N. M. 1897) 48 P. 310.

The meaning of the word "adjacent," as applied to public lands, should be determined by the evidence in each particular case. U. S. v. St. Anthony R. Co. (1902) 114 Fed. 722, 52 C. C. A. 354, judgment reversed (1904) 24 Sup. Ct. 333, 192 U. S. 524, 48 L. Ed. 548.

The term "adjacent," in a grant of the right to take material for construction from the public lands adjacent to the line of a railroad, includes public lands other than those immediately contiguous to or adjoining the line of said road. U. S. v. Lynde (C. C. 1891) 47 Fed. 297.

Lands more than three miles from the line of the right of way, measured at right angles thereto, are not adjacent, while those within that limit are adjacent. U. S. v. Denver & R. G. R. Co. (C. C. 1911) 190 Fed. 825.

—— Effect of special grant.—A railroad company which had been granted a right of way, with the right to take timber adjacent thereto by a special act prior to the enactment of this section, may, after the prior act has expired, by limitation, comply with the provisions of this act and become entitled to remove timber for construction of its road. U. S. v. Denver & R. G. R. Co. (1893) 14 Sup. Ct. 11, 12, 150 U. S. 1, 37 L. Ed. 975; Denver & R. G. R. Co. v. U. S. (C. C. 1888) 34 Fed. 838; U. S. v. Denver & R. G. Ry. Co. (D. C. 1887) 31 Fed. 886.

—— Remedy for unlawful taking of timber.—Where persons sued for the value of timber cut from public lands defend on the ground that the timber was taken for use in the construction of a railroad, the burden rests on them to bring themselves within the provisions of the statute; and when it

appears that at least a part of the timber was cut before the railroad company had filed its articles and proof of organization with the secretary of the interior, so as to be entitled to take timber for its use, it is incumbent on the defendants to show what part, if any, was cut after that time. U. S. v. Eccles (C. C. 1901) 111 Fed. 490.

The adjudication of the meaning of the word "adjacent," in an action in personam for damages for unlawful taking of timber, while on a material issue, was a mere incident of the litigation, which was not brought to fix the status of the lands, and is not conclusive in a subsequent suit, especially one involving other lands. U. S. v. Denver & R. G. R. Co. (C. C. 1911) 190 Fed. 825.

The burden of proving that a railroad company authorized by act of congress to cut timber on the public domain for certain purposes had exceeded its grant is on the government. Denver & R. G. R. Co. v. U. S. (1898) 54 P. 241, 9 N. M. 382.

Grounds for stations—Conditions precedent to right.—No right to take grounds for station purposes attaches until the railroad company has acquired the right of way by compliance with the statute. Silienthal v. Southern California Ry. Co. (C. C. 1893) 56 Fed. 701.

§ 4922. (Act March 3, 1875, c. 152, § 2.) Rights of several roads through canyons, etc.; grade crossings; effect on wagon roads and highways.

Any railroad company whose right of way, or whose track or road-bed upon such right of way, passes through any canyon, pass, or defile, shall not prevent any other railroad company from the use and occupancy of the said canyon, pass, or defile, for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade. And the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any wagon or other public highway now located therein, nor prevent the location through the same of any such wagon road or highway where such road or highway may be necessary for the public accommodation; and where any change in the location of such wagon road is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall before entering upon the ground occupied by such wagon road, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile. (18 Stat. 482.)

Notes of Decisions

Purpose and effect of section.—The location of railroads in mountain gorges, on the public domain, is subject to this section. Denver & R. G. Ry. Co. v. Denver, S. P. & P. R. Co. (C. C. 1883) 17 Fed. 867. See, also, Oregon Trunk Line v. Deschutes R. Co. (C. C. 1909) 172 Fed. 738.

Conflicting claims.—The conflicting claims of two railroad companies to use a canyon determined. Denver & R. G. R. Co. v. Alling (1878) 99 U. S. 463, 470, 25 L. Ed. 438. See, also, In re Denver & R. G. R. Co. (1879) 101 U. S. 711, 714, 25 L. Ed. 872.

Two railroads granted a right of way through a cañon can construct their lines irrespective of the width of way granted. Cañon City & S. J. Ry. Co. v. Denver & R. G. Ry. Co. (C. C. 1878) Fed. Cas. No. 2,387.

§ 4923. (Act March 3, 1875, c. 152, § 3.) Condemnation of land.

The legislature of the proper Territory may provide for the manner in which private lands and possessory claims on the public lands of the United States may be condemned; and where such provision shall not have been made, such condemnation may be made in accordance with section three of the act entitled "An act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes,

approved July first, eighteen hundred and sixty-two," approved July second, eighteen hundred and sixty-four. (18 Stat. 482.)

The acts referred to in this section were Act July 1, 1862, c. 120, 12 Stat. 489, and Act July 2, 1864, c. 216, 13 Stat. 357.

Notes of Decisions

Possessory claims.—A claim of one who has settled on and improved public lands with the declared intention of patenting title is a "possessory claim" within the meaning of this act. Washington & I. R. Co. v. Osborn (1895) 16 Sup. Ct. 219, 221, 160 U. S. 103, 40 L. Ed. 356; Spokane Falls & N. Ry. Co. v. Ziegler (1897) 17 Sup. Ct. 728, 730, 167 U. S. 65, 42 L. Ed. 79. See, also, Union Pac. R. Co. v. Harris (1910) 30 Sup. Ct. 138, 215 U. S. 386, 54 L. Ed. 246; Washington & I. R. Co. v. Osborne (1889) 2 Idaho, 527, 21 Pac. 421; Enoch v. Spokane Falls & N. Ry. Co. (1893) 6 Wash. 393, 33 Pac. 966; Reidt v. Same (1893) 6 Wash. 623, 34 Pac. 150.

§ 4924. (Act March 3, 1875, c. 152, § 4.) Map of road to be filed; forfeiture of rights granted.

Any railroad-company desiring to secure the benefits of this act, shall, within twelve months after the location of any section of twenty miles of its road, if the same be upon surveyed lands, and, if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a profile of its road; and upon approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office; and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road. (18 Stat. 483.)

The forfeiture of rights granted by this act provided by this section, where the railroad or any section thereof has not been constructed within five years after its location is declared and enforced by Act June 26, 1906, c. 3550, and Act Feb. 25, 1909, c. 191, post, §§ 4927, 4928.

Notes of Decisions

I. Filing and approval of profile or map of road
1. Compliance with statute essential.
2. Effect of land officer's neglect of duty.
3. Location of right of way by construction of road.
4. Method of securing station grounds.
5. Sufficiency of profile or map.
6. Effect of filing and approval of maps upon title to land.
7. Change of location of road.
8. Annulment of approval.
9. Conclusiveness of decision of Secretary of Interior.
10. Conflicting claims to right of way and priorities.
11. Contests and jurisdiction of courts.
12. Effect of appropriation of lands.
13. Title by limitation.

II. Abandonment or forfeiture of rights
14. What constitutes abandonment.
15. Forfeiture.

I. FILING AND APPROVAL OF PROFILE OR MAP OF ROAD

1. Compliance with statute essential.—No rights under this act can be initiated before a profile map of the road has been filed in the local land office and approved by the Secretary of the Interior—unless actual construction is sooner begun. Minneapolis, St. P. & S. S. M. Ry. Co. v. Doughty (1908) 28 Sup. Ct. 291, 208 U. S. 251, 52 L. Ed. 474, affirming judgment Doughty v. Minneapolis, St. P. & S. S. M. Ry. Co. (1906) 107 N. W. 971. See, also, Savannah, F. & W. Ry. Co. v. Davis (1889) 25 Fla. 917, 7 South. 29; Red River & Lake of the Woods R. Co. v. Sture (1884) 32 Minn. 95, 20 N. W. 229; Larson v. Oregon Ry. & Nav. Co. (1890) 19 Or. 240, 23 Pac. 974.

The filing and approval of a profile of the road is an essential prerequisite to the acquisition of a right of way, and is especially requisite and important where the lands are included in an irrigation and reclamation project, since the Secretary may withhold his approval except on conditions which will insure that the road will not interfere with such project. U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

A railroad company acquires no right or title as against the United States to a right of way over public lands under this act until it has either constructed its road, or filed a profile thereof approved by the Secretary of the Interior. Chicago, M. & St. P. Ry. Co. of Idaho v. U. S. (1914) 218 Fed. 288, 134 C. C. A. 84, affirming decree U. S. v. Chicago, M. & St. P. R. Co. of Idaho (D. C. 1913) 207 Fed. 164.

The railroad company, and not the contractor who builds the road, is bound to comply with the requirements of the statute. Fitzgerald v. Missouri Pac. Ry. Co. (C. C. 1891) 45 Fed. 812.

The filing of the profile is a condition precedent to the initiation of any right in favor of the railroad company. Lilienthal v. Southern California Ry. Co. (C. C. 1893) 56 Fed. 701.

Prior to the filing of a right of way map of definite location and the approval thereof, as provided in this section, the lands covered by the map are free from the right of way and subject to mineral location. Southern California Ry. Co. v. O'Donnell (1906) 85 P. 932, 3 Cal. App. 382.

Where a railroad selects land in the mode prescribed by the Interior Department and advises the department of such selection by filing its maps, it has done all the law requires of it, and the grant then becomes a fixity, not only as to the grantee, but as to the thing granted. Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 P. 56.

That the profile of a surveyed line of a railroad over public lands was sent directly to the Secretary of the Interior, instead of being transmitted to him through the district land office is immaterial as far as establishing the right of the railroad in such right of way. Moran v. Chicago, B. & Q. R. Co. (1909) 120 N. W. 192, 83 Neb. 680.

The grant of right of way and station grounds on public lands to railroad companies by this act becomes operative only when a company specifically indicated as grantee has definitely located the same. Comford v. Great Northern Ry. Co. (N. D. 1909) 120 N. W. 875.

A homesteader, settling on public lands prior to filing by a railroad company with the register of the land office of a profile showing a selection of land outside of its right of way as station grounds, has a superior right to it, unless prior to his settlement it has done acts unmistakably evidencing intent to appropriate the land for station grounds. Id.

The grant passes title to the railroad company on the filing of the profile, not on the filing of the articles and proof of organization. Enoch v. Spokane Falls & N. Ry. Co. (1893) 6 Wash. 393, 33 Pac. 966; Reidt v. Same (1893) 6 Wash. 623, 34 Pac. 150.

2. Effect of land officer's neglect of duty.—Where a railroad desiring to avail itself of this act complies with the act and the regulations of the Interior Department, its right cannot be defeated through the neglect of the local land office officers to make the notation, etc., required to be made on the plats and books of that office. Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 P. 56.

3. Location of right of way by construction of road.—A definite location of the right of way of a railroad, which will entitle it to the benefits of this act is made by the actual construction of the road, although a profile map of the road has not been filed. Jamestown & N. R. Co. v. Jones (1900) 20 Sup. Ct. 568, 177 U. S. 125, 44 L. Ed. 698, reversing judgment (1898) 76 N. W. 227, 7 N. D. 619; Denver & R. G. R. Co. v. Hanoum (1893) 19 Colo. 162, 34 Pac. 838; Johnson v. Spokane International Ry. Co. (1913) 137 Pac. 894, 25 Idaho, 389; Northern Pac. Ry. Co. v. Barlow (N. D. 1913) 143 N. W. 903. See, also, Minneapolis, St. P. & S. S. M. Ry. Co. v. Doughty (1908) 28 Sup. Ct. 291, 208 U. S. 251, 52 L. Ed. 474; Washington & I. R. Co. v. Cœur d'Alene Ry. & Nav. Co. (C. C. 1892) 52 Fed. 765; Oregon Short Line R. Co. v. Quigley (1905) 80 Pac. 401, 10 Idaho, 770.

Where a railway company located its right of way across public lands, and cleared and graded same before a homesteader made his entry thereon, the homesteader took subject to the railway grant of right of way. Johnson v. Spokane International Ry. Co. (1913) 137 P. 894, 25 Idaho, 389.

The definite location required to bring into operation such act may be made by the company's acts operating as unmistakable evidence of appropriation, such as the construction of its railroad, station buildings, and other appurtenances, or by filing with the register of the land office where land is located a profile of its route and station grounds, approved by the Secretary of the Interior, in compliance with this section. Comford v. Great Northern Ry. Co. (1909) 120 N. W. 875, 18 N. D. 570.

Actual construction of a railroad definitely locates only a right of way extending 100 feet on each side, under such act, and definite location of station grounds outside of such right of way must be made by other and further acts of the company, operating as unmistakable notice to an intending settler of an appropriation by it for that purpose. Id.

Construction of stockyards within limits of the right of way of a railroad cannot be held to operate as notice, to an intending homestead settler on public land of an appropriation by the railroad company of land outside its right of way for station grounds. Id.

Where a railroad had filed its articles of incorporation and proofs of its organization as required, its right of way became definitely located by the construction of the road, and its title thereto was good as against a mining claim subsequently located, though the profile map had not been accepted because the land was unsurveyed. Pennsylvania Min. & Imp. Co. v. Everett & M. C. Ry. Co. (1902) 69 Pac. 628, 29 Wash.

102, following Jamestown & N. R. Co. v. Jones (1900) 20 Sup. Ct. 568, 570, 177 U. S. 125, 44 L. Ed. 698.

4. Method of securing station grounds.—No right to grounds for station purposes attaches until the railroad company has acquired the right of way by compliance with the provisions of the act. Lilienthal v. Southern California Ry. Co. (C. C. 1893) 56 Fed. 701.

The act contains no requirements for the filing of maps and plats designating the station grounds selected, and all proceedings relative thereto are governed by the rules of the Interior Department. Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 Pac. 56.

5. Sufficiency of profile or map.—A "profile" within this section is the outline of a vertical section through a country or line of work, showing actual or projected elevations and hollows. U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

The maps filed by a railway company and approved are not insufficient, though they do not show the elevations, depressions, and grades of the line where the regulations of the General Land Office expressly declared that "profile," as used in such act, was understood to intend a map of alignment or definite location. Taggart v. Great Northern R. Co. (1914) 211 Fed. 288, 129 C. C. A. 356, affirming (D. C. 1912) 208 Fed. 455.

Where a railroad company exhibits a copy of the profile of its line through the Grande Cañon, approved by the secretary of the interior, it will be considered as made in accordance with this act. Cañon City & S. J. Ry. Co. v. Denver & R. G. Ry. Co. (C. C. 1878) Fed. Cas. No. 2,387.

6. Effect of filing and approval of maps upon title to land.—Where, though the maps showing the definite location of a line of railroad had not been approved when a homestead entry was made, they had been filed and proceedings for final approval were pending, the final approval subsequently made related back to the filing, and the lands acquired under the homestead entry were subject to such right of way. Stalker v. Oregon Short Line R. Co. (1912) 32 Sup. Ct. 636, 225 U. S. 142, 56 L. Ed. 1027 (affirming judgment Oregon Short Line R. Co. v. Stalker [1908] 94 Pac. 56, 59, 14 Idaho, 362, 371); Taggart v. Great Northern R. Co. (1914) 211 Fed. 288, 129 C. C. A. 356.

Legal title to right of way sought by a railroad company under the grant of this act vests on the approval of the Secretary of the Interior of the profile of the road, and not prior thereto. Phœnix & E. R. Co. v. Arizona Eastern R. Co. (1906) 84 Pac. 1097, 9 Ariz. 434; Denver & R. G. R. Co. v. Wilson (1900) 62 Pac. 843, 28 Colo. 95.

The approval of the map and profile of the right of way of a railroad over public lands under this act perfects the grant of the right of way, which, by relation, takes effect as of the date of the location of the road. Kinion v. Kansas City, Ft. S. & M. R. Co. (1893) 118 Mo. 577, 24 S. W. 636; Lewis v. Rio Grande W. Ry. Co. (1898) 54 Pac. 981, 17 Utah, 504. See, also, Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 Pac. 56; Alexander v. Kansas City, Ft. S. & M. R. Co. (1897) 138 Mo. 464, 40 S. W. 104.

A railroad company cannot attack the title of another company to a right of way over the public lands, confirmed to it by the Secretary of the Interior under the statute, unless it shows that at the time of the grant it had itself an interest in such right of way, and was lawfully entitled to it instead of the grantee. Oregon Trunk Line v. Deschutes R. Co. (C. C. 1909) 172 Fed. 738.

The approval of the map showing such profile is equivalent to a patent, and vests in the corporation title to the definite right of way shown thereon. Such title, however, dates from the time of such approval, and does not relate back to the date of the filing of the articles of incorporation or to the time of survey, and, as between two companies each seeking to secure the same right of way in whole or in part, the one whose map is first approved obtains the title. Id. See, also, Wallula Pac. Ry. Co. v. Portland & S. Ry. Co. (C. C. 1906) 154 Fed. 902.

A patentee of land from the United States, under a homestead entry, takes subject to the right of way of a railroad company acquired before his entry, under this act. Hamilton v. Spokane & P. Ry. Co. (1891) 2 Idaho, 898, 28 Pac. 408.

A settler's filing which is afterwards relinquished, does not affect the right of way of a railroad company, acquired, after the filing. Id.

The grant made by this act takes effect only on the approval of the location of the road by the secretary of the interior. Chicago, K. & N. Ry. Co. v. Van Cleave (1894) 52 Kan. 665, 33 Pac. 472.

Parties entering land over which an approved survey extended after the approved map is filed in the district land office take subject to the right of way. Moran v. Chicago, B. & Q. R. Co. (1909) 120 N. W. 192, 83 Neb. 680.

Certified copies of official papers tending to show a railroad company's compliance with this act in acquiring a right of way, which were approved by the Secretary of the Interior prior to settlement on the lands, were admissible in evidence against the settler, though the exact date of their filing did not appear. Frizzelle v. Oregon Ry. & Nav. Co. (1892) 22 Or. 463, 30 Pac. 313.

Where a railroad company which had constructed its road over public land prior to this act filed its articles of incorporation, maps, etc., after the pas-

sage of the act, their approval by the Secretary of the Interior determined that the act applied also to companies having constructed roads prior to the act. Rio Grande Western Ry. Co. v. Stringham (1910) 110 Pac. 868, 38 Utah, 113.

On approval by the Secretary of the Interior of the profile of a proposed railroad through public lands in accordance with this act the title to the right of way vested in the railroad company, and a subsequent patent of land including the right of way, though not made subject thereto, did not devest the title so acquired. Id.

7. Change of location of road.—The first platting being the result of a mistake not discovered till the completion of the railroad on the route finally adopted, and not being intended to deceive any one, another company, claiming the same right of way, cannot, if not misled or prejudiced by such mistake, complain of the change of route. Washington & I. R. Co. v. Cœur d'Alene Ry. & Nav. Co. (1895) 16 Sup. Ct. 231, 160 U. S. 77, 40 L. Ed. 355, affirming decree (1894) 60 Fed. 981, 9 C. C. A. 303.

A railroad company which, in pursuance of this act, has adopted one line of survey along the route provided for in its articles of incorporation, and has filed a plat thereof, may subsequently, and within the time allowed by law adopt another route, and, instead of filing a second plat, may construct the road on the line surveyed and adopted, so long as the rights of others have not intervened. Id.

A railroad company which has obtained approval, under this section, of a profile of its road by the Interior Department, may change a portion of its location, providing such change does not affect intervening rights. Phœnix & E. R. Co. v. Arizona Eastern R. Co. (1906) 84 P. 1097, 9 Ariz. 434.

A rival company which is not misled by the acts of a company seeking to change the location of its right of way through the public lands, and which has not acquired intervening rights, cannot complain of such change. Id.

8. Annulment of approval.—The secretary of the interior has no authority to annul the action of his predecessor in office approving the location of a railroad right of way on the ground that such approval was obtained by misrepresentation, and that the railroad was not used as a common carrier. Noble v. Union River Logging R. Co. (1893) 13 Sup. Ct. 271, 272, 147 U. S. 165, 37 L. Ed. 123, affirming (1892) 20 D. C. 555.

Where the Secretary's approval was based upon a mistake of fact caused by the representation of the railroad company, it is competent for him to recall and annul his action approving the line of definite location of the road and entering the same on the public plats. (1890) 19 Op. Atty. Gen. 546.

9. Conclusiveness of decision of Secretary of Interior.—The existence of the railroad with the duties of a common carrier is a quasi jurisdictional fact which the Secretary of the Interior has authority to determine and his action is not subject to a collateral attack. Noble v. Union River Logging R. Co. (1893) 13 Sup. Ct. 271, 272, 147 U. S. 165, 37 L. Ed. 123.

A ruling by the Secretary of the Interior that this act may be taken advantage of by a company which had constructed its road prior to its enactment cannot be reviewed in a suit by such a company to quiet its title. Rio Grande Western Ry. Co. v. Stringham (Utah, 1910) 110 P. 868.

10. Conflicting claims to right of way and priorities.—A company which surveys a line over public lands beyond the termini fixed by its charter, and afterwards files supplemental articles of incorporation authorizing an extension covering the survey, acquires no right of way beyond such termini, under this act, as against another company which, having full powers, makes a survey over the same land after the other company's survey, but before the filing of its supplemental articles. Washington & I. R. Co. v. Cœur d'Alene R. & Nav. Co. (1895) 16 Sup. Ct. 231, 237, 160 U. S. 77, 40 L. Ed. 346, affirming (1894) 9 C. C. A. 303, 60 Fed. 981.

As between two rival railroad companies, each claiming a right of way on the same route over public lands under the statute, that one is prior in right which first definitely adopts the line on which its road is to be built by appropriate corporate action, and then files its map of the location so adopted, since that is an essential act to initiate any right to a particular location. It is immaterial which first entered on the land to make surveys or to do other work thereon prior to such definite location. Utah, N. & C. R. Co. v. Utah & C. Ry. Co. (C. C. 1901) 110 Fed. 879.

11. Contests and jurisdiction of courts.—Where rival claimants for the same right of way through the public lands, under this act, have filed profiles covering it, it is the duty of the Secretary of the Interior to determine from the facts which company has superior claim to the approval of its profile. Phœnix & E. R. Co. v. Arizona Eastern R. Co. (1906) 84 P. 1097, 9 Ariz. 434.

While a contest is pending before the Secretary of the Interior between rival railroad companies seeking approval of conflicting profiles of their roads through public lands, under this act, the court should not assume jurisdiction to determine the ultimate right of possession of the rights of way in controversy. Id.

Pending a determination of a contest before the Secretary of the Interior between rival railroad companies seeking approval of conflicting profiles of their rights, the court ought, in the interest of the public as well as in the interest of the company showing the greater immediate equity on application of the company interested by appropriate temporary orders, to protect it in the construction of the road. Id.

12. Effect of appropriation of lands.—Where a railroad company appropriates land under this act, the land so appropriated is withdrawn from the public domain, and cannot be settled on, though the railroad company has not perfected its title by compliance with this section. Ex parte Davidson (C. C. 1893) 57 Fed. 883.

Where a railroad built its line through public land, and, where the land had been filed upon, condemned a way 100 feet wide and filed a map under this act, and at that time there was nothing of record in the United States Land Office showing that the land in controversy was within a Mexican grant, as against one claiming under the grant, which was valid, the railroad acquired a right of way 100 feet wide, and not merely the land occupied by its roadbed. Ainsa v. New Mexico & A. R. Co. (Ariz. 1911) 114 P. 971.

Where railroad filed a plat which was approved by the Secretary of the Interior, and thereafter the road was constructed; a part of it passing through a mining claim, from the locators of which the railroad company accepted a deed for a right of way, on abandonment of the claim, it became public land, to which the right of way attached, so that the relocation was subject to the easement of the railroad company. Bonner v. Rio Grande S. R. Co. (1903) 72 P. 1065, 31 Colo. 446.

13. Title by limitation.—Decrees in condemnation and the filing and approval of a map under this act constitutes color of title. Ainsa v. New Mexico & A. R. Co. (1911) 114 Pac. 971, 13 Ariz. 320.

Filing of map of survey with the Secretary of the Interior by a railroad claiming a right of way under this act is not such an occupancy as would ripen into title by limitations, or estop subsequent grantees of a prior homestead from contesting the validity of its claim. St. Louis & S. F. R. Co. v. Budd (Ark. 1914) 165 S. W. 265, 112 Ark. 105.

II. ABANDONMENT OR FORFEITURE OF RIGHTS

14. What constitutes abandonment.—Where the successor of a railroad company, whose maps of its right of way had been filed and approved, revised the survey and location of the road and filed maps of such revision and amended definite location, showing a right of way, the center line of which, in crossing a particular lot, did not vary to exceed 20 feet from that of the old right of way, and was required by the Commissioner of the General Land Office to file a relinquishment under seal of all rights under the original approval of the maps filed by its predecessor, whereupon it filed a relinquishment of all its right to the right of way pertaining to the line of railway shown upon such maps, excepting and excluding however, all of such right of way as was or might be situated within the limits of the right of way pertaining to the revised and relocated line of railway, after which the new maps were approved, the company did not abandon its rights acquired by the filing of the original maps to so much of the right of way shown thereon as was within the right of way shown on new maps. Taggart v. Great Northern R. Co. (1914) 211 Fed. 288, 129 C. C. A. 356, affirming judgment (D. C. 1912) 208 Fed. 455.

15. Forfeiture.—The proviso that "if any section of said road shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any such uncompleted section of said road," is a condition subsequent, and the failure to complete the road within the time limited does not operate ipso facto as a revocation of the grant, but merely authorizes the government to forfeit it by judicial proceeding or by an act of congress resuming title to the lands. Utah, N. & C. R. Co. v. Utah & C. Ry. Co. (C. C. 1901) 110 Fed. 879. See, also, Columbia Valley R. Co. v. Portland & S. Ry. Co. (1908) 162 Fed. 603, 89 C. C. A. 361.

Similar provisions in special acts have been so construed by the supreme court. See Bybee v. Oregon & C. R. Co. (1891) 11 Sup. Ct. 641, 642, 139 U. S. 663, 35 L. Ed. 305, and authorities there cited; Atlantic & P. R. Co. v. Mingus (1897) 17 Sup. Ct. 348, 351, 165 U. S. 413, 41 L. Ed. 770; U. S. v. Northern Pac. R. Co. (1900) 20 Sup. Ct. 706, 708, 177 U. S. 435, 44 L. Ed. 836, and authorities there cited. See, also, Columbia Valley R. Co. v. Portland & S. Ry. Co. (1908) 93 Pac. 1067, 48 Wash. 472.

Upon filing and approval of the required map, the raliroad company's title can be divested only by a forfeiture declared by the government for breach of condition or by a voluntary act of the company itself. Taggart v. Great Northern Ry. Co. (D. C. 1912) 208 Fed. 455, judgment affirmed (1914) 211 Fed. 288, 129 C. C. A. 356.

The question of forfeiture of the grant can be raised by the United States alone. Oregon Short Line R. Co. v. Stalker (Idaho, 1908) 94 P. 56.

§ 4925. (Act March 3, 1875, c. 152, § 5.) Lands excepted from operation of act.

This act shall not apply to any lands within the limits of any military, park, or Indian reservation, or other lands especially reserved from sale, unless such right of way shall be provided for by treaty-stipulation or by act of Congress heretofore passed. (18 Stat. 483.)

Certain lands in Minnesota, reserved for flowage purposes, were declared to be subject to the provisions of this act by Act Feb. 27, 1901, c. 614, post, § 4931.

The Portland, Vancouver & Northern Railway Company was granted a license to cross the Vancouver Barracks Military Reservation, at Vancouver, Washington, by Act June 22, 1916, c. 164, 39 Stat.

Notes of Decisions

Forest reservations.—See, also, notes to § 4945, post.

Lands within a national forest reserve are not subject to appropriation by a railroad company for right of way and other railroad purposes under the right of way act which by this section excepts from its operation lands "especially reserved from sale." Chicago, M. & St. P. Ry. Co. of Idaho v. U. S. (1914) 218 Fed. 288, 134 C. C. A. 84, affirming decree U. S. v. Chicago, M. & St. P. Ry. Co. of Idaho (D. C. 1913) 207 Fed. 164.

The Secretary of the Interior may grant or refuse to grant a railroad corporation a right of way over forest reservations. U. S. v. Bailey (C. C. 1910) 178 Fed. 302.

Lands included in reclamation project.—Lands withdrawn under the reclamation act for purposes of irrigation under an irrigation system constructed by the government, which lands are subject to homestead entry under act of Congress, are public lands within the railroad right of way. Minidoka & S. W. R. Co. v. Weymouth (Idaho, 1911) 113 P. 455. See, also, U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323; Same v. Minidoka & S. W. R. Co. (C. C. 1910) 176 Fed. 762.

§ 4926. (Act March 3, 1875, c. 152, § 6.) Right to alter, amend, or repeal act.

Congress hereby reserves the right at any time to alter, amend, or repeal this act, or any part thereof. (18 Stat. 483.)

See notes to section 1 of this act, ante, § 4921.

§ 4927. (Act June 26, 1906, c. 3550.) Forfeiture of rights granted where railroad or section thereof not constructed in five years after location.

Be it enacted, &c., That each and every grant of right of way and station grounds heretofore made to any railroad corporation under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby freed and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: Provided, That in any case under this Act where construction of the railroad is progressing in good faith at the date of the approval of this Act the forfeiture declared in this Act shall not take effect as to such line of railroad. (34 Stat. 482.)

This was an act entitled "An act to declare and enforce the forfeiture provided by section four of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States.'"

Act March 3, 1875, c. 152, mentioned in this act, section 4 of which pro-

vided for forfeiture of the rights granted thereby, as declared by this act, is set forth ante, §§ 4921–4926.

Subsequent provisions similar to those of this act were made by Act Feb. 25, 1909, c. 191, post, § 4928.

Notes of Decisions

Purpose and effect statute.—This act was a legislative adjudication of forfeiture, which became effective at once, without judicial proceedings, as to all lands within its terms. Columbia Valley R. Co. v. Portland & S. Ry. Co. (1908) 162 Fed. 603, 89 C. C. A. 361.

Land grants can only be forfeited for breach of conditions subsequent by direct legislative act by judicial proceedings expressly authorized by law. U. S. v. Washington Improvement & Development Co. (C. C. 1911) 189 Fed. 674.

This forfeiture is complete without any judicial or other or further proceedings on the part of the government, and the questions of fact upon which the forfeiture depends may be inquired into and determined in any judicial proceedings in which rights claimed under the original grants are involved. Columbia Valley R. Co. v. Portland & S. Ry. Co. (Wash. 1908) 93 P. 1067.

Federal question.—A federal question is presented by a bill by a railroad company alleging that it acquired a right of way under the right of way act and is proceeding to construct its road, but did not complete the same within the time limited by the act, and that defendant, claiming a forfeiture, has taken possession of a portion of the right of way. Columbia Val. R. Co. v. Portland & S. Ry. Co. (1908) 162 Fed. 603, 89 C. C. A. 361.

§ 4928. (Act Feb. 25, 1909, c. 191.) Forfeiture of rights granted where railroad or section thereof not constructed in five years after location.

Each and every grant of right of way and station grounds heretofore made to any railroad corporation under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled "An Act granting to railroads the right of way through the public lands of the United States," where such railroad has not been constructed and the period of five years next following the location of said road, or any section thereof, has now expired, shall be, and hereby is, declared forfeited to the United States, to the extent of any portion of such located line now remaining unconstructed, and the United States hereby resumes the full title to the lands covered thereby free and discharged from such easement, and the forfeiture hereby declared shall, without need of further assurance or conveyance, inure to the benefit of any owner or owners of land heretofore conveyed by the United States subject to any such grant of right of way or station grounds: Provided, That no right of way on which construction is progressing in good faith at the time of the passage of this Act shall be in any wise affected, validated or invalidated, by the provisions of this Act. (35 Stat. 647.)

This was an act entitled, "An act to declare and enforce the forfeiture provided by section four of the act of Congress approved March third, eighteen hundred and seventy-five, entitled 'An act granting to railroads the right of way through the public lands of the United States.'"

Act March 3, 1875, c. 152, mentioned in this act, is set forth ante, §§ 4921–4926.

Previous provisions similar to those of this act were made by Act June 26, 1906, c. 3550, ante, § 4927.

§ 4929. (Act Aug. 8, 1894, c. 236, § 1.) Stations, etc., of railroads on rights of way granted.

All railroad companies operating railroads through the Territories of the United States over a right of way obtained under any grant or Act of Congress giving to said railroad companies the right of way over the public lands of the United States shall be required to establish and maintain passenger stations and freight depots at or within one-fourth of a mile of the boundary limits of all town sites already established in said Territories on the line of said railroads by authority of the Interior Department. (28 Stat. 263.)

This section and the section next following were an act entitled "An act to require railroad companies operating railroads in the Territories over a

right of way granted by the Government to establish stations and depots at all town sites on the lines of said roads established by the Interior Department."

§ 4930. (Act Aug. 8, 1894, c. 236, § 2.) Time for establishment of stations; penalty for failure.

Said railroad companies are hereby required within three months from the passage of this Act to establish at or within one-fourth of a mile of the boundary limits of all town sites provided for in the preceding section, passenger stations, freight depots, and other accommodations necessary for receiving and discharging passengers and freight at such points; and upon failure of said companies to establish such stations and depots within said time said companies shall be liable to a fine of five hundred dollars for each day thereafter until said stations and depots shall be established, which shall be recovered in a suit brought by the United States in the United States courts in any Territory through which said railroads may pass. (28 Stat. 263.)

§ 4931. (Act Feb. 27, 1901, c. 614.) Right of way through certain reserved lands in Minnesota for railroads.

That all lands in the State of Minnesota described in and withdrawn from sale by the proclamations of the President of the United States for the reason that said lands would be required for or subject to flowage in the construction of dams, reservoirs, and other works proposed to be erected for the improvement of the navigation of the Mississippi River and certain of its tributaries, be, and the same are hereby, declared to be, and to have been at all times heretofore, subject to the provisions of a certain Act of Congress entitled "An Act granting to railroads the right of way through the public lands of the United States," approved March third, eighteen hundred and seventy-five, as fully, effectually, and to the same extent as though said lands had not been described in said proclamations, or withdrawn from sale thereby, but had remained with the body of public lands subject to private entry and sale: Provided, however, That any and all parts of said lands acquired by any railroad company under said Act of Congress shall at all times be subject to the right of flowage which at any time may become necessary in the construction or maintenance of dams, reservoirs, or other works which may be constructed or erected by or under the authority of the United States for the improvement of the navigation of the Mississippi River and its tributaries: Provided further, That the railroad companies availing themselves of this Act shall, in addition to filing the maps now required by law to be filed, also file maps of definite location with elevation of rail of their lines of railroad over said water-reserve lands in the office of the Secretary of War; and no location shall be permitted which takes for right of way or stations or interferes with submergence of lands needed for the use of the present reservoir system, or in the construction of dams or other works, or any proposed or probable extension of the same, or which will obstruct or increase the cost of the present or prospective reservoir system: Provided further, That the plan for the location and construction of any such railway, or any part thereof, shall be first submitted to the Secretary of War and approved by him and by the Chief of Engineers of the United States Army. (31 Stat. 815.)

This was an act entitled "An act to amend an act granting to railroads the right of way through the public lands of the United States, approved March third, eighteen hundred and seventy-five."

Act March 3, 1875, c. 152, mentioned in this act, is set forth ante, §§ 4921–4926.

§ 4932. (Act June 26, 1906, c. 3548.) Rights of way of railroads in Oklahoma and Arizona; lands to be subject thereto.

Where, under the Act of Congress approved March third, eighteen hundred and seventy-five, entitled, "An Act granting to railroads the right of way through the public lands of the United States," or under special Acts of Congress, or under the laws of the Territories of Oklahoma and Arizona, railroads have been constructed and are now in operation in Oklahoma or Arizona which may pass through any of the lands heretofore reserved for said Territories, such lands shall be disposed of subject to such railroad right or easement, but only to the extent of the right of way conferred by the said Act of March third, eighteen hundred and seventy-five, for such railroad purposes. (34 Stat. 481.)

This was an act entitled "An act to confirm the right of way of railroads now constructed and in operation in the Territories of Oklahoma and Arizona."

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267, and Arizona also was admitted by Act June 20, 1910, c. 310, 36 Stat. 557.

Act March 3, 1875, c. 152, mentioned in this act, is set forth ante, §§ 4921–4926.

§ 4933. (Act Aug. 30, 1890, c. 837, § 1.) Reservation in patents of right of way for ditches or canals.

In all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right of way thereon for ditches or canals constructed by the authority of the United States. (26 Stat. 391.)

This was a proviso in the sundry civil appropriation act for the fiscal year 1891, cited above.

Notes of Decisions

Validity of statute.—This statute is not void for indefiniteness, but is within the powers of Congress and valid. U. S. v. Van Horn (D. C. 1912) 197 Fed. 611.

Right of way for ditches.—The word "constructed," as used in this act, did not limit the reservation to a right of way for ditches already constructed, but extended as well to those "to be constructed" by the government in furtherance of its irrigation scheme for the reformation of arid lands. Green v. Willhite (C. C. 1906) 160 Fed. 755.

This provision held applicable to preemptions acquired on unallotted lands of an Indian reservation. U. S. v. Van Horn (D. C. 1912) 197 Fed. 611.

Remedy for protection of right of way.—Equity has jurisdiction of a suit by the United States to establish and protect its right to a right of way for an irrigation canal under the reservation contained in this statute. U. S. v. Van Horn (D. C. 1912) 197 Fed. 611.

Railroad rights of way.—That the United States may in the future reasonably require rights of way for ditches, in furthering a reclamation project, in addition to those now occupied by existing canals, and that it may be entitled to reserve land therefor under this provision, did not prevent a railroad company from occupying lands in præsenti legally conveyed to it within a reclamation reservation by a homestead entryman. U. S. v. Minidoka & S. W. R. Co. (C. C. 1910) 176 Fed. 762. And see U. S. v. Minidoka & S. W. R. Co. (1911) 190 Fed. 491, 111 C. C. A. 323.

This provision does not apply to or include easements in railroad rights of way granted for specific purposes where the fee does not pass, and where no patents are issued, and where the amount of land covered by the easement is not limited in area or extent. Minidoka & S. W. R. Co. v. Weymouth (1911) 113 P. 455, 19 Idaho, 234.

This provision does not apply to railroad rights of way acquired under the general right of way act. Id.

§ 4934. (Act March 3, 1891, c. 561, § 18.) Right of way to canal and ditch companies for irrigation purposes.

The right of way through the public lands and reservations of the United States is hereby granted to any canal or ditch company formed for the purpose of irrigation and duly organized under the laws of any State or Territory, which shall have filed, or may hereafter file, with the Secretary of the Interior a copy of its

articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof; also the right to take, from the public lands adjacent to the line of the canal or ditch, material, earth, and stone necessary for the construction of such canal or ditch: Provided, That no such right of way shall be so located as to interfere with the proper occupation by the Government of any such reservation, and all maps of location shall be subject to the approval of the Department of the Government having jurisdiction of such reservation, and the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories. (26 Stat. 1101.)

This section and the three sections next following were part of the act repealing the timber culture laws.

Other sections of the act are set forth or referred to post, § 5116.

Rights of way within and across forest reserves, for construction and maintenance of dams, reservoirs, water plants, ditches, etc., for municipal and mining purposes, and for milling and reduction of ores, were granted by Act Feb. 1, 1905, c. 288, § 4, post, § 4947.

Notes of Decisions

Purpose and effect of statute.—This section gives a right of way through the public lands and reservations for ditches and reservoirs, conditioned on the approval by the secretary of the interior. U. S. v. Rickey Land & Cattle Co. (C. C. 1908) 164 Fed. 496; Nippel v. Forker (1899) 56 P. 577, 26 Colo. 74. See, also, U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123 (decree affirmed Conrad Inv. Co. v. U. S. [1908] 161 Fed. 829, 88 C. C. A. 647); Same v. Whitney (C. C. 1910) 176 Fed. 593.

Territorial as well as state legislation with respect to the regulation of the use of public waters was authorized by the provisions of this act. Gutierres v. Albuquerque Land & Irrigation Co. (1903) 23 Sup. Ct. 338, 341, 188 U. S. 545, 47 L. Ed. 588. And see U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 561, 126 C. C. A. 376.

This act applies only to public lands which was vacant at the time of its passage. Nippel v. Forker (1897) 47 Pac. 766, 9 Colo. App. 106.

This act applies to canals and ditches the main purpose of which is irrigation, and for which an easement attaches which becomes permanent on the approval of the Secretary of the Interior after the land has been surveyed. U. S. v. Lee (N. M. 1910) 110 P. 607.

Repeal.—This section was not superseded or repealed by Act May 11, 1898, amending Act Jan. 21, 1895, post, § 4943, providing for rights of way through public lands for tramroads, canals, reservoirs, and other purposes. U. S. v. Portneuf-Marsh Valley Irr. Co. (1914) 213 Fed. 601, 130 C. C. A. 181, affirming judgment (D. C. 1913) 205 Fed. 416.

Reservations—Meaning.—The term "reservations" in this act includes Indian reservations; and the Department of Justice may not maintain an action to recover damages for the appropriation of Indian reservation land for a reservoir by an irrigation corporation. U. S. v. Portneuf-Marsh Valley Irr. Co. (1914) 213 Fed. 601, 130 C. C. A. 181, affirming judgment (D. C. 1913) 205 Fed. 416.

Nature and extent of right.—The right of way constitutes but an easement granted for, and limited to, the purpose mentioned in the statute. Whitmore v. Pleasant Valley Coal Co. (1904) 75 P. 748, 27 Utah, 284.

Right of way through forest reserve.—A right of way for an irrigation project cannot be acquired over a forest reservation, without the approval of the proper executive officers. U. S. v. Henrylyn Irr. Co. (D. C. 1912) 205 Fed. 970. See, also, U. S. v. Lee (1910) 110 Pac. 607, 15 N. M. 382.

Interference with navigation.—Congress did not intend to grant the right to appropriate waters on the sources of navigable streams to such an extent as to destroy their navigability. U. S. v. Rio Grande Dam & Irrigation Co. (1899) 19 Sup. Ct. 770, 776, 174 U. S. 690, 43 L. Ed. 1136. See, also, Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 661, 190 U. S. 452, 47 L. Ed. 1134 (dissenting opinion); Boquillas Land & Cattle Co. v. Curtis (1909) 29 Sup. Ct. 493, 494, 213 U. S. 339, 53 L. Ed. 822.

The Secretary of the Interior has no power, under the provisions of this act to authorize the damming of the Rio Grande river for irrigation purposes. (1897) 21 Op. Atty. Gen. 518.

Water rights and rights of way recognized by mining laws.—See, also, notes to § 4647, ante.

The grant of rights of way for canals and ditches for the use of water for mining, etc., was not repealed by this

act. U. S. v. Utah Power & Light Co. (D. C. 1913) 208 Fed. 821. See, also, Id. (1913) 209 Fed. 554, 126 C. C. A. 376.

Water rights and rights of way recognized or confirmed by the mining laws were not forfeited by failure to comply with this act. Cottonwood Ditch Co. v. Thom (1909) 104 Pac. 281, 39 Mont. 121, affirming judgment (1909) 101 Pac. 825, 39 Mont. 115. See, also, Rasmussen v. Blust (1909) 122 N. W. 862, 85 Neb. 198, 133 Am. St. Rep. 650, reversing judgment (1909) 120 N. W. 184, 83 Neb. 678.

Remedy for protection of water rights of government.—Any invasion of the prior right of the United States to the waters of a stream is a trespass, and the government may maintain a suit in equity to protect its right against any one or all of such trespasses. U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, decree affirmed Conrad Inv. Co. v. U. S. (1908) 161 Fed. 829, 88 C. C. A. 647.

§ 4935. (Act March 3, 1891, c. 561, § 19.) Map to be filed; approval; damages to settlers.

Any canal or ditch company desiring to secure the benefits of this act shall, within twelve months after the location of ten miles of its canal, if the same be upon surveyed lands, and if upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its canal or ditch and reservoir; and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such rights of way shall pass shall be disposed of subject to such right of way. Whenever any person or corporation, in the construction of any canal, ditch, or reservoir, injures or damages the possession of any settler on the public domain, the party committing such injury or damage shall be liable to the party injured for such injury or damage. (26 Stat. 1102.)

*See notes to section 18 of this act, ante, § 4934.

Notes of Decisions

Filing and approval of map—Nature of grant.—The grant is in præsenti, and title to land shown on the applicant's maps vests in him on the approval thereof by the Secretary of the Interior. U. S. v. Whitney (C. C. 1910) 176 Fed. 593.

This act applies to canals and ditches the main purpose of which is irrigation, and for which an easement attaches which becomes permanent on the approval of the Secretary of the Interior after the land has been surveyed. U. S. v. Lee (N. M. 1910) 110 P. 607.

—— **Filing application for right of way after withdrawal of land.**—An appropriation of water duly made and maintained under the laws of California, gives no right of way over the public lands of the United States for a reservoir or canal to use the water. The withdrawal of the land after the appropriation and before the filing of an application for such right of way for irrigation purposes under this act, defeats such subsequent filing. U. S. v. Rickey Land & Cattle Co. (C. C. 1908) 164 Fed. 496.

—— **Approval of map of location.**—The approval of the map of location filed is essential, and where it was refused as to a reservoir, because the site had been previously withdrawn from sale or entry and reserved by the United States, the company acquired no right or easement by the filing of its maps. U. S. v. Rickey Land & Cattle Co. (C. C. 1908) 164 Fed. 496. See, also, Nippel v. Forker (1899) 56 P. 577, 26 Colo. 74.

—— **Effect of approval upon water rights of United States.**—The action of the Secretary of the Interior or other departmental officer of the government in approving the maps of location of irrigation canals or ditches over public lands or reservations, as provided for by this act cannot give the companies constructing the same any right to appropriate the waters of a stream, nor estop the United States to assert a priority of right thereto, where it exists, against either such companies or users who may be supplied by them. U. S. v. Conrad Inv. Co. (C. C. 1907) 156 Fed. 123, decree affirmed Conrad Inv. Co. v. U. S. (1908) 161 Fed. 829, 88 C. C. A. 647.

—— **Water rights and rights of way recognized by mining laws.**—Water rights and rights of way recognized or confirmed by the mining laws were not forfeited by failure to comply with this act. Cottonwood Ditch Co. v. Thom (1909) 104 P. 281, 39 Mont. 121, affirming judgment (1909) 101 P. 825, 39 Mont. 115. See, also, Rasmussen v. Blust (1909) 122 N. W. 862, 85 Neb. 198, reversing judgment (1909) 120 N. W. 184.

Possessory rights of settlers—Application and effect of statute.—This act applies only to public land which was vacant and unoccupied at the time of its passage, and does not authorize one proceeding under its provisions to interfere with the possessory rights of settlers, though without title, acquired before its passage. Nippel v. Forker (1897) 47 P. 766, 9 Colo. App. 106.

—— **Effect of filing and approval of map.**—The filing of a plat of a reservoir under this act with the land department of the United States, and its approval by the department, operates only as a license or quitclaim so far as the rights of the government in the land affected are concerned, and does not affect prior rights acquired by individuals. Nippel v. Forker (1897) 47 P. 766, 9 Colo. App. 106.

An approval by the Secretary of the Interior of a map of a reservoir site, "subject, to all vested existing rights," does not give the company whose map is so approved any rights, as against an occupant, to lands entered and occupied as an agricultural claim. Baldridge v. Leon Lake Ditch & Reservoir Co. (1905) 80 P. 477, 20 Colo. App. 518.

—— **Compensation for injury.**—Rights cannot be acquired under this act to the damage of the possessory rights of settlers acquired after its passage, without making compensation for the injury. Nippel v. Forker (1897) 47 P. 766, 9 Colo. App. 106.

§ 4936. (Act March 3, 1891, c. 561, § 20.) Application of act to existing and future canals, etc.; forfeiture of rights granted.

The provisions of this act shall apply to all canals, ditches, or reservoirs, heretofore or hereafter constructed, whether constructed by corporations, individuals, or association of individuals, on the filing of the certificates and maps herein provided for. If such ditch, canal, or reservoir, has been or shall be constructed by an individual or association of individuals, it shall be sufficient for such individual or association of individuals to file with the Secretary of the Interior, and with the register of the land office where said land is located, a map of the line of such canal, ditch, or reservoir, as in case of a corporation, with the name of the individual owner or owners thereof, together with the articles of association, if any there be. Plats heretofore filed shall have the benefits of this act from the date of their filing, as though filed under it: Provided, That if any section of said canal, or ditch, shall not be completed within five years after the location of said section, the rights herein granted shall be forfeited as to any uncompleted section of said canal, ditch, or reservoir, to the extent that the same is not completed at the date of the forfeiture. (26 Stat. 1102.)

See notes to section 18 of this act, ante, § 4934.

Notes of Decisions

Conditions subsequent.—The requirement that, if any section of the canal shall not be completed within five years after location, the rights granted shall be forfeited as to any uncompleted section of the canal, ditch or reservoir, is in the nature of a condition subsequent; and a failure to comply does not ipso facto operate to divest the grantee of title and revest it in the government, but, to be effectual, the default must be followed by a declaration of forfeiture by some competent authority, and, the grant being of a public nature, the declaration can only be by act of Congress or in an appropriate judicial proceeding. U. S. v. Whitney (C. C. 1910) 176 Fed. 593.

Enforcement of forfeiture.—The provisions of this act are permanent and operate continuously to convey the title to public lands to all persons complying therewith, and the forfeiture clause is also in the nature of a general law and of a permanent character, so that it seems that the attorney general may enter the courts and there seek the enforcement of public rights and the restoration of the title to public property. U. S. v. Whitney (C. C. 1910) 176 Fed. 593.

Where a grantee of public land for an irrigation reservoir site failed to complete his improvement for five years, so that the same was subject to forfeiture under this section, it was not necessary to the enforcement of a forfeiture that it should be first declared by act of Congress, but a forfeiture could be enforced by the executive in judicial proceedings. Id. See, also, U. S. v. Washington Improvement & D. Co. (C. C. 1911) 189 Fed. 674.

—— **Limitations.**—The federal government is not estopped to rely upon the five-year limitation for constructing an irrigation canal or reservoir, by obtaining an injunction interfering with such construction, where between the dissolution of the preliminary injunc-

tion and the granting of the perpetual injunction more than five years elapsed, during which the construction was not impeded or hindered. Rio Grande Dam & Irrigation Co. v. U. S. (1909) 30 Sup. Ct. 97, 101, 215 U. S. 266, 54 L. Ed. 190, affirming decree U. S. v. Rio Grande Dam & Irrigation Co. (1906) 85 Pac. 393, 13 N. M. 386.

§ 4937. (Act March 3, 1891, c. 561, § 21.) Use for canal or ditch only.

Nothing in this act shall authorize such canal or ditch company to occupy such right of way except for the purpose of said canal or ditch, and then only so far as may be necessary for the construction, maintenance, and care of said canal or ditch. (26 Stat. 1102.)

See notes to section 18 of this act, ante, § 4934.

Notes of Decisions

Nature and extent of right.—The right of way constitutes but an easement granted for, and limited to the purpose mentioned in the statute, and the owner of such easement has no right to occupy or use the surface of the land for any other purpose. Whitmore v. Pleasant Valley Coal Co. (1904) 75 P. 748, 27 Utah, 284.

Erection of buildings.—The acquirement of a right of way under this act gives the owner no right to erect a saloon thereon. Whitmore v. Pleasant Valley Coal Co. (1904) 75 P. 748, 27 Utah, 284.

§ 4938. (Act May 11, 1898, c. 292, § 2.) Right of way for purposes of water transportation, domestic purposes, or development of power.

The rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation. (30 Stat. 404.)

This section was part of an act entitled "An act to amend an act to permit the use of the right of way through public lands for tramroads, canals and reservoirs, and for other purposes," cited above.

Section 1 of that act amended Act Jan. 21, 1895, c. 37, and is incorporated in that act as set forth post, § 4943.

Act March 3, 1891, c. 561, §§ 18–21, mentioned in this section is set forth ante, §§ 4934–4937.

Notes of Decisions

Purpose of legislation.—By this legislation Congress intended to assume complete control over the manner of rights of way for the generation and distribution of electric power. U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

§ 4939. (Act Jan. 13, 1897, c. 11, § 1.) Reservoir sites for furnishing water for live stock.

Any person, live-stock company, or transportation corporation engaged in breeding, grazing, driving, or transporting live stock may construct reservoirs upon unoccupied public lands of the United States, not mineral or otherwise reserved, for the purpose of furnishing water to such live stock, and shall have control of such reservoir, under regulations prescribed by the Secretary of the Interior, and the lands upon which the same is constructed, not exceeding one hundred and sixty acres, so long as such reservoir is maintained and water kept therein for such purposes: Provided, That such reservoir shall not be fenced and shall be open to the free use of any person desiring to water animals of any kind. (29 Stat. 484.)

This section and the three sections next following were an act entitled "An act providing for the location and purchase of public lands for reservoir sites."

§ 4940. (Act Jan. 13, 1897, c. 11, § 2.) Declaratory statement.

Any person, live-stock company, or corporation desiring to avail themselves of the provisions of this Act shall file a declaratory statement in the United States land office in the district where the land is situated, which statement shall describe the land where such reservoir is to be or has been constructed; shall state what business such corporation is engaged in; specify the capacity of the reservoir in gallons, and whether such company, person, or corporation has filed upon other reservoir sites within the same county; and if so, how many. (29 Stat. 484.)

§ 4941. (Act Jan. 13, 1897, c. 11, § 3.) Survey; map of location.

At any time after the completion of such reservoir or reservoirs which, if not completed at the date of the passage of this Act, shall be constructed and completed within two years after filing such declaratory statement, such person, company, or corporation shall have the same accurately surveyed, as hereinafter provided, and shall file in the United States land office in the district in which such reservoir is located a map or plat showing the location of such reservoir, which map or plat shall be transmitted by the register and receiver of said United States land office to the Secretary of the Interior and approved by him, and thereafter such land shall be reserved from sale by the Secretary of the Interior so long as such reservoir is kept in repair and water kept therein. (29 Stat. 484.)

§ 4942. (Act Jan. 13, 1897, c. 11, § 4.) Right to amend or repeal act.

Congress may at any time amend, alter, or repeal this Act. (29 Stat. 484.)

See notes to section 1 of this act, ante, § 4939.

§ 4943. (Act Jan. 21, 1895, c. 37, as amended, Act May 11, 1898, c. 292, § 1.) Right of way for tramroads, canals, or reservoirs for certain purposes.

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber.

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses. (28 Stat. 635. 30 Stat. 404.)

This was an act entitled "An act to permit the use of the right of way through the public lands for tram-roads, canals, and reservoirs, and for other purposes."

The section immediately following was added to this act by amendment by Act May 14, 1896, c. 179, § 2.

This section was again amended by Act May 11, 1898, c. 292, § 1, by adding the second paragraph of the section as set forth here.

Rights of way within and across forest reserves, for construction and maintenance of dams, reservoirs, water plants, ditches, etc., for municipal and mining purposes, and for milling and reduction of ores, were granted by Act Feb. 1, 1905, c. 281, § 4, post, § 4947.

Notes of Decisions

Repeal of statutes.—This legislation did not repeal or supersede the right of act of March 3, 1891, ante, § 4934. U. S. v. Portneuf-Marsh Valley Irr. Co. (1914) 213 Fed. 601, 130 C. C. A. 181, affirming judgment (D. C. 1913) 205 Fed. 416. See, also, U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 561, 126 C. C. A. 376.

§ 4944. (Act May 14, 1896, c. 179, § 2.) Right of way to electric power companies.

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power. (29 Stat. 120.)

See notes to preceding section.

Notes of Decisions

Mode of acquiring rights.—This section, as to electric power companies, supersedes the provisions for rights of way made by the mining laws, and rights can only be acquired by them under its provisions. U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 126 C. C. A. 376, overruling (D. C. 1913) 208 Fed. 821.

§ 4945. (Act March 3, 1899, c. 427, § 1.) Rights of way over forest reservation or reservoir site for wagon roads, railroads, etc.

That in the form provided by existing law the Secretary of the Interior may file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any forest reservation or reservoir site when in his judgment the public interests will not be injuriously affected thereby. (30 Stat. 1233.)

This was a provision of the deficiency appropriation act for the fiscal year 1899, cited above.

Notes of Decisions

Approval of railroad right of way.—See, also, note to § 5126, post.

Whatever right of way may be acquired by a railroad company within a forest reservation is conditioned upon the consent of the Secretary of the Interior. U. S. v. Chicago, M. & St. P. Ry. Co. of Idaho (D. C. 1913) 207 Fed. 164, affirmed in Chicago, M. & St. P. Ry. Co. of Idaho v. U. S. (1914) 218 Fed. 288, 134 C. C. A. 84. See, also, U. S. v. Bailey (C. C. 1910) 178 Fed. 302.

—— **Bond.**—The Secretary of the Interior is authorized to impose, as a condition of his granting a railroad right of way over a forest reservation, that the railroad corporation execute a bond to pay to the United States all damages to public lands, timber, natural curiosities, or other public property on the reservation by reason of the railroad's occupation. U. S. v. Bailey (C. C. 1910) 178 Fed. 302. And see Chicago, M. & St. P. Ry. Co. of Idaho v. U. S. (1914) 218 Fed. 288, 134 C. C. A. 84, affirming decree U. S. v. Chicago, M. & St. P. Ry. Co. of Idaho (D. C. 1913) 207 Fed. 164.

§ 4946. (Act Feb. 15, 1901, c. 372.) Rights of way through public lands, forest and other reservations, and Yosemite, Sequoia, and General Grant National Parks, for electrical plants, etc.

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and

for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: Provided, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: Provided further, That all permits given hereunder for telegraph and telephone purposes shall be subject to the provision of title sixty-five of the Revised Statutes of the United States, and amendments thereto, regulating rights of way for telegraph companies over the public domain: And provided further, That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park. (31 Stat. 790.)

This was an act entitled "An act relating to rights of way through certain parks, reservations and other public lands."

Further provisions granting rights of way through public lands, national forests, and reservations, for electrical poles and lines, were made by Act March 4, 1911, c. 238, post, § 4948.

Further provisions granting rights of way within and across forest reserves, for the construction and maintenance of dams, reservoirs, water plants, ditches, etc., for purposes similar to those specified in this section, were contained in Act Feb. 1, 1905, c. 281, § 4, post, § 4947.

The Secretary of the Interior may require the payment of such price as he deems proper for privileges accorded under this section on the land segregated from the Yosemite National Park and made a part of the Sierra National forest, by Act Feb. 7, 1905, c. 547, § 1, post, § 5212.

A right of way across the public lands in Tuolumne, Stanislaus, San Joaquin, and Alameda counties in California, and across the Stanislaus National Forest and the Yosemite National Park for aqueducts, canals, pipe lines, etc., for conveying water for domestic and municipal purposes, and for power and electric plants, etc., and roads, railroads, and other means of transportation, and also reservoir and dam sites in the Hetch Hetchy Valley and Lake Eleanor Basin in Yosemite National Park, and Cherry Valley in the Stanislaus National Forest, were granted to the City and County of San Francisco, under certain conditions and restrictions, by Act Dec. 19, 1913, c. 3, 38 Stat. 242.

The Secretary of War was authorized to grant to the city of Philadelphia a right of way across the Fort Mifflin Military Reservation by Act Aug. 23, 1916, c. 398, 39 Stat.

The provisions of this section are not affected by Act Aug. 25, 1916, c. 408, creating a National Park Service, and conferring on the director thereof and the Secretary of the Interior the control, management, etc., of National parks, monuments, and certain reservations, set forth ante, §§ 787d–787g, by § 4 thereof, ante, § 787g.

Notes of Decisions

Effect of statute.—This act refers to the granting of a mere license revocable at any time of the right to construct canals, telephone, and telegraph lines, etc., over the public lands, which may be used for parks and reservations, and is not inconsistent with the right of way act of 1891. U. S. v. Lee (1910) 110 P. 607, 15 N. M. 382.

Repeal of grant made by mining laws.—The grant of rights of way for canals and ditches for the use of water for mining, etc., was not repealed by this act. U. S. v. Utah Power & Light Co.

(D. C. 1913) 208 Fed. 821. See, also, Id. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

Permits to use land and charges therefor.—The Secretary of Agriculture is authorized by this act to make the granting of permits for the use of lands or resources within the national forest reserves for the purposes contemplated by the act, which include irrigation, mining, and quarrying, etc., dependent upon the payment of such charges as he may deem reasonable. (1905) 26 Op. Atty. Gen. 421.

Whether charges based upon the grounds specifically enumerated by the Secretary of Agriculture, to wit, the use of the ground and rights of way without regard to their special value for the particular purposes contemplated by the permit, and for "conservation," being the special value of the land for the particular purpose contemplated in excess of its value for general purposes, would or would not be reasonable, is not a question which can properly be determined by the Attorney General. Id.

§ 4947. (Act Feb. 1, 1905, c. 288, § 4.) Rights of way within and across forest reserves for dams, reservoirs, water plants, ditches, etc., for municipal and mining purposes and for milling and reduction of ores.

Rights of way for the construction and maintenance of dams, reservoirs, water plants, ditches, flumes, pipes, tunnels, and canals, within and across the forest reserves of the United States, are hereby granted to citizens and corporations of the United States for municipal or mining purposes, and for the purposes of the milling and reduction of ores, during the period of their beneficial use, under such rules and regulations as may be prescribed by the Secretary of the Interior, and subject to the laws of the State or Territory in which said reserves are respectively situated. (33 Stat. 628.)

This section was part of an act which transferred the execution of the laws relating to forest reserves from the Secretary of the Interior to the Secretary of Agriculture, other sections of which are set forth post, §§ 5142, 5152.

Previous provisions authorizing grants of rights of way through forest and other reservations and certain national parks for various works, including canals, ditches, etc., and water plants, dams, and reservoirs, etc., were made by Act Feb. 15, 1901, c. 372, ante, § 4946.

Notes of Decisions

Approval of right of way.—A right of way for an irrigation project cannot be acquired over a national forest reservation without the approval of the proper executive officers of the government. U. S. v. Henrylyn Irr. Co. (D. C. 1912) 205 Fed. 970. See, also, U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

Remedy for protection of public land.—The United States may maintain a suit to enjoin the unauthorized construction of irrigation canals and tunnels within a national forest reservation. U. S. v. Henrylyn Irr. Co. (D. C. 1912) 205 Fed. 970.

The right to such an injunction is not affected by the fact that the Secretary of the Interior may have improperly delayed or refused to act on an application made for right of way through the reservation for such canals and tunnels. Id.

§ 4948. (Act March 4, 1911, c. 238.) Rights of way through public lands, national forests, and reservations, for electrical poles and lines; approval of chief officer of department; forfeiture for non-user; rights of holders of previous permits.

That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: Provided, That such right of way shall be allowed

within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: Provided, That all or any part of such right of way may be forfeited and annulled by declaration of the head of the department having jurisdiction over the lands for nonuse for a period of two years or for abandonment.

That any citizen, association, or corporation of the United States to whom there has heretofore been issued a permit for any of the purposes specified herein under any existing law, may obtain the benefit of this Act upon the same terms and conditions as shall be required of citizens, associations, or corporations hereafter making application under the provisions of this statute. (36 Stat. 1253.)

These were provisions of the agricultural appropriation act for the fiscal year 1912, cited above.

Previous provisions granting rights of way for electrical poles and lines through public lands, forest and other reservations, and certain parks were contained in Act Feb. 15, 1901, c. 372, ante, § 4946.

Notes of Decisions

Authority of Secretary of Agriculture.—The authority to grant easements for rights of way for electrical, telephone, and telegraph purposes, as contemplated by this act, is vested in the Secretary of Agriculture when and in so far as the lands to be affected constitute portions of the national forests. (1912) 29 Op. Atty. Gen. 303. See, also, U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

§ 4949. (Act May 21, 1896, c. 212, § 1.) Right of way in Colorado and Wyoming to pipe line companies.

The right of way through the public lands of the United States situate in the State of Colorado and in the State of Wyoming outside of the boundary lines of the Yellowstone National Park is hereby granted to any pipe line company or corporation formed for the purpose of transporting oils, crude or refined, which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of the ground occupied by said pipe line and twenty-five feet on each side of the center line of the same; also the right to take from the public lands adjacent to the line of said pipe line material, earth, and stone necessary for the construction of said pipe line. (29 Stat. 127.)

This section and the three sections next following were an act entitled "An act to grant right of way over the public domain for pipe lines in the States of Colorado and Wyoming."

Grants of rights of way for pipe lines for conveyance of oil and gas through Indian reservations and other Indian lands were authorized by Act March 11, 1904, c. 505, ante, §§ 4192, 4193.

Right of way for pipe lines for oil or gas through public lands in the State of Arkansas was granted by Act April 12, 1910, c. 155, post, §§ 4953–4957.

§ 4950. (Act May 21, 1896, c. 212, § 2.) Applications; approval.

Any company or corporation desiring to secure the benefits of this Act shall, within twelve months after the location of ten miles of the pipe line, if the same be upon surveyed lands and if the same be upon unsurveyed lands, within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its line, and upon the approval thereof by the Secretary of the Interior the same shall be noted upon the plats in said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way. (29 Stat. 127.)

§ 4951. (Act May 21, 1896, c. 212, § 3.) Forfeiture of rights granted.

If any section of said pipe line shall not be completed within five years after the location of said section the right herein granted shall be forfeited, as to any incomplete section of said pipe line, to the extent that the same is not completed at the date of the forfeiture. (29 Stat. 127.)

§ 4952. (Act May 21, 1896, c. 212, § 4.) Use for pipe line only.

Nothing in this Act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care. (29 Stat. 127.)

§ 4953. (Act April 12, 1910, c. 155, § 1.) Right of way in Arkansas to pipe line companies.

A right of way through the public lands of the United States in the State of Arkansas is hereby granted for pipe-line purposes to any citizen of the United States or any company or corporation authorized by its charter to transport oil, crude or refined, or natural gas which shall have filed or may hereafter file with the Secretary of the Interior a copy of its articles of incorporation, and due proof of organization under the same, to the extent of the ground occupied by the said pipe line and ten feet on each side of the center line of same. (36 Stat. 296.)

This section and the four sections next following were an act entitled "An act to grant right of way over the public domain in the State of Arkansas for oil or gas pipe lines."

Similar provisions for grants of rights of way for pipe lines through public lands in Colorado and Wyoming were made by Act May 21, 1896, c. 212, ante, §§ 4949–4952.

§ 4954. (Act April 12, 1910, c. 155, § 2.) Applications; approval.

Any citizen of the United States, company, or corporation desiring to secure the benefits of this Act shall within twelve months after the location of ten miles of the pipe line, if the same be upon surveyed land, and if the same be upon unsurveyed lands within twelve months after the survey thereof by the United States, file with the register of the land office for the district where such land is located a map of its lines, and upon the approval thereof by the Secretary of the Interior, the same shall be noted upon the plats in said office, and thereafter all such land over which such line shall pass shall be disposed of subject to such right of way. (36 Stat. 296.)

§ 4955. (Act April 12, 1910, c. 155, § 3.) Use of right of way for pipe line only.

Nothing in this Act shall authorize the use of such right of way except for the pipe line, and then only so far as may be necessary for its construction, maintenance, and care. (36 Stat. 296.)

§ 4956. (Act April 12, 1910, c. 155, § 4.) Forfeiture of right for nonuser, etc.

If any section of said pipe line shall not be completed within one year after the approval by the Secretary of the Interior of said section, or if any section of said pipe line shall be abandoned or shall not be used for a period of two years, the right of way herein granted as to any uncompleted, abandoned or unused section of said pipe line shall be forfeited to the extent that the same is not completed or is abandoned or unused at the date of the forfeiture, without further action or declaration on the part of the Government or any proceedings or judgment of any court. (36 Stat. 296.)

§ 4957. (Act April 12, 1910, c. 155, § 5.) Forfeiture of right for violation of anti-trust law.

If any citizen, company, or corporation taking advantage of the benefits of this Act, shall violate the Act of July second, eight-

een hundred and ninety, entitled "An Act to protect trade and commerce against unlawful restraints and monopolies" (commonly known as the Sherman antitrust act), or any amendment thereof, the right of way herein granted shall be forfeited without further action or declaration on the part of the Government or any proceedings or judgment of any court. (36 Stat. 296.)

The Sherman antitrust act, mentioned in this section, is Act July 2, 1890, c. 647, post, §§ 8820–8823.

CHAPTER TEN D

Grants of Swamp and Overflowed Lands

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes R. S. §§ 2479–2484, 2488, 2490, and other laws supplementary thereto, relating to grants of swamp and overflowed lands to the several States.

Sec.
4958. Grant of swamp and overflowed lands to certain States to aid in construction of levees, etc.
4959. Secretary of the Interior to make lists of such lands, for transmission to the governors of the States.
4960. Legal subdivisions mostly wet and unfit for cultivation.
4961. Indemnity to States where lands have been sold by United States.
4962. Patents to issue for swamp lands to purchasers and locators, prior to issuing of patents to States, etc.
4963. Selection of swamp and overflowed lands confirmed.
4964. Swamp and overflowed lands to be certified to State within one year, in certain cases.
4965. Act Sept. 28, 1850, c. 84, 9 Stat. 519, extended to Minnesota and Oregon.
4966. Homestead entries by purchasers from State of Missouri of lands, as swamp lands, declared not to be such.
4967. Grant to Missouri of lands selected as swamp and overflowed lands.
4968. Title of purchasers of unconfirmed swamp lands in Arkansas confirmed.
4969. Relinquishment by Arkansas of swamp lands and other public lands granted.

§ 4958. (R. S. § 2479.) Grant of swamp and overflowed lands to certain States to aid in construction of levees, etc.

To enable the several States (but not including the States of Kansas, Nebraska, and Nevada) to construct the necessary levees and drains, to reclaim the swamp and overflowed lands therein—the whole of the swamp and overflowed lands, made unfit thereby for cultivation, and remaining unsold on or after the twenty-eighth day of September, A. D. eighteen hundred and fifty, are granted and belong to the several States respectively, in which said lands are situated: Provided, however, That said grant of swamp and overflowed lands, as to the State of California, Minnesota, and Oregon, is subject to the limitations, restrictions and conditions hereinafter named and specified, as applicable to said three last-named States respectively.

Act Sept. 28, 1850, c. 84, §§ 1, 4, 9 Stat. 519, 520. Act March 12, 1860, c. 5, § 1, 12 Stat. 3.

Subsequent acts admitting new States to the Union declared that the provisions of this section were not extended to such States, and, in lieu of any claim by them under those provisions, made grants to each State for various purposes, as follows: North Dakota, South Dakota, Montana, and Washington, respectively, Act Feb. 22, 1889, c. 180, §§ 17, 19, 25 Stat. 681; Act March 3, 1893, c. 208, 27 Stat. 592; Act March 3, 1893, c. 210, § 1, 27 Stat. 661; and Act June 4, 1897, c. 2, § 1, 30 Stat. 56. Idaho, Act July 3, 1890, c. 656, §§ 11, 12, 14, 26 Stat. 216, 217. Wyoming, Act July 10, 1890, c. 664, §§ 11, 12, 14, 26 Stat. 224, and Act April 23, 1900, c. 254, 31 Stat. 139. Utah, Act July 16, 1894, c. 138, §§ 12, 13, 28 Stat. 110. Oklahoma, Act June 16,

1906, c. 3335, § 12, 34 Stat. 274. New Mexico, Act June 21, 1898, c. 489, §§ 6–12, 30 Stat. 485; Act June 20, 1910, c. 310, § 7, 36 Stat. 562. Arizona, Act June 20, 1910, c. 310, § 25, 36 Stat. 573.

Notes of Decisions

1. Purpose and policy of government.
2. Nature of grant.
3. Subsequent disposal of lands by government.
4. Lands subject to grant.
5. —— School lands.
6. —— Swamp and overflowed lands within statute.
7. —— Lake beds.
8. —— Islands.
9. —— Lands artificially covered by water.
10. Judicial notice of grant.

1. Purpose and policy of government.—This legislation declares a policy on the part of the government to aid the states in reclaiming swamp and overflowed lands, and is a recognition of the rights and duties of the respective states, in consideration of such grants, to make and maintain the necessary improvements. Leovy v. U. S. (1900) 20 Sup. Ct. 797, 798, 177 U. S. 621, 44 L. Ed. 914. See, also, Manigault v. Springs (1905) 26 Sup. Ct. 127, 131, 199 U. S. 473, 50 L. Ed. 274; Kimball v. Reclamation Fund Com'rs (1873) 45 Cal. 344; Packard v. Johnson (Cal. 1884) 4 Pac. 632; Same v. Moss, Id. 638; Sherman v. A. P. Cook Co. (1893) 98 Mich. 61, 57 N. W. 23; State v. County Court of Wayne County (1889) 98 Mo. 362, 11 S. W. 758.

The swamp land acts were not intended to operate against the will of the state. Vicksburg, S. & P. R. Co. v. Tibbs (1904) 36 South. 223, 112 La. 51.

The purpose of this act was the reclamation of the lands included in it. Sterling v. Jackson (1888) 69 Mich. 488, 37 N. W. 845, 13 Am. St. Rep. 405.

2. Nature of grant.—See, also, notes to § 4959, post.

The swamp land act operated as a present grant, subject to a subsequent determination as to what lands were swamp and overflowed at its date. Rice v. Sioux City & St. P. R. Co. (1884) 4 Sup. Ct. 177, 178, 110 U. S. 695, 28 L. Ed. 289; Wright v. Roseberry (1887) 7 Sup. Ct. 985, 986, 121 U. S. 488, 30 L. Ed. 1039; U. S. v. Louisiana (1887) 8 Sup. Ct. 17, 19, 123 U. S. 32, 31 L. Ed. 69; Tubbs v. Wilhoit (1891) 11 Sup. Ct. 279, 138 U. S. 134, 34 L. Ed. 887; Rogers Locomotive Machine Works v. American Emigrant Co. (1896) 17 Sup. Ct. 188, 164 U. S. 559, 41 L. Ed. 552; Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 209, 168 U. S. 589, 42 L. Ed. 591 (affirming judgment [1895] 68 Fed. 155, 15 C. C. A. 335); Little v. Williams (1913) 34 Sup. Ct. 68, 231 U. S. 335, 58 L. Ed. 256 (affirming Same v. State [1908] 113 S. W. 340, 88 Ark. 37); Cahn v. Barnes (C. C. 1881) 5 Fed. 326, 330; San Francisco Savings Union v. Irwin (C. C. 1886) 28 Fed. 708 (affirmed Irwin v. San Francisco Savings Union [1890] 10 Sup. Ct. 1064, 136 U. S. 578, 34 L. Ed. 540); Kirby v. Lewis (C. C. 1889) 39 Fed. 66; Kittel v. Trustees of Internal Imp. Fund of Florida (C. C. 1905) 139 Fed. 941; Kerns v. Lee (C. C. 1906) 142 Fed. 985; Sawyer v. Osterhaus (D. C. 1914) 212 Fed. 765; (1858) 9 Op. Atty. Gen. 254; (1887) 18 Op. Atty. Gen. 522; (1906) 25 Op. Atty. Gen. 626; Fletcher v. Pool (1859) 20 Ark. 100; Hempstead v. Underhill's Heirs (1859) Id. 337; Branch v. Mitchell (1866) 24 Ark. 431; Ringo's Ex'r v. Rotan's Heirs (1874) 29 Ark. 56; Hendry v. Willis (1878) 33 Ark. 833; Hibben v. Malone (1908) 109 S. W. 1008, 85 Ark. 584; Owens v. Jackson (1858) 9 Cal. 322; Summers v. Dickinson, Id. 554; Kernan v. Griffith (1864) 27 Cal. 87; Sacramento Valley Reclamation Co. v. Cook (1882) 61 Cal. 341; Tubbs v. Wilhoit (1887) 73 Cal. 61, 14 Pac. 361; Shanklin v. McNamara (1891) 87 Cal. 371, 26 Pac. 345; McCabe v. Goodwin (1895) 106 Cal. 486, 39 Pac. 941; Foss v. Johnstone (1910) 110 Pac. 294, 158 Cal. 119; Whiteside County Sup'rs v. Burchell (1863) 31 Ill. 68; Dart v. Hercules (1864) 34 Ill. 395; Keller v. Brickey (1875) 78 Ill. 133; Matthews v. Goodrich (1885) 1 N. E. 175, 102 Ind. 557; State v. Portsmouth Sav. Bank (1886) 106 Ind. 435, 7 N. E. 379; Tolleston Club of Chicago v. State (1894) 38 N. E. 214, 141 Ind. 197 (rehearing denied [1895] 40 N. E. 690, 141 Ind. 197); Allison v. Halfacre (1861) 11 Iowa, 450; Montgomery County v. Burlington & M. R. R. Co. (1874) 38 Iowa, 208; Chicago, R. I. & P. R. Co. v. Brown (1875) 40 Iowa, 333; Whitehead v. Plummer (1888) 76 Iowa, 181, 40 N. W. 709; Snell v. Dubuque & S. C. Ry. Co. (1889) 78 Iowa, 88, 42 N. W. 588; Id. (1890) 80 Iowa, 767, 45 N. W. 763; Hays v. McCormick (1891) 83 Iowa, 89, 49 N. W. 69; Bailey v. Callanan (1893) 87 Iowa, 107, 53 N. W. 1074; Smith v. Miller (1897) 70 N. W. 123, 75 N. W. 499, 105 Iowa, 688; Hart v. Delphey (1912) 136 N. W. 702, 157 Iowa, 316; Hartigan v. Weaver (1910) 52 South. 674, 126 La. 492; Busch v. Donohue (1875) 31 Mich. 481; Sterling v. Jackson (1888) 37 N. W. 845, 69 Mich. 488, 13 Am. St. Rep. 405; People v. Warner (1898) 74 N. W. 705, 116 Mich. 228, 4 Detroit Leg. N. 1180; State v. Lake St. Clair Fishing & Shooting Club (1901) 87 N. W. 117, 127 Mich. 580; Daniel v. Purvis (1874) 50 Miss. 261; Clarkson v. Buchanan (1873) 53 Mo. 563; Cramer v. Keller (1889) 98 Mo. 279, 11 S. W. 734; Simpson v. Stoddard County (1903) 73 S. W. 700, 173 Mo. 421; Gaston v. Stott (1873) 5 Or. 48; Warner Valley Stock Co. v. Calderwood (1899) 59 Pac. 115, 36 Or. 228; Morrow v. Warner Valley Stock Co. (1909)

101 Pac. 171, 56 Or. 312; Dixon v. Same (1909) 101 Pac. 189, 56 Or. 364; Green v. Same (1909) 101 Pac. 189, 56 Or. 361; Harrington v. Same (1909) 101 Pac. 189, 56 Or. 362; Foskett v. Same (1909) 101 Pac. 190, 56 Or. 366; Befay v. Wheeler (1893) 84 Wis. 135, 53 N. W. 1121; Diana Shooting Club v. Lamoreaux (1902) 89 N. W. 880, 114 Wis. 44, 91 Am. St. Rep. 898. See, also, Burlington & M. River R. Co. v. Fremont County (1869) 9 Wall. 89, 91, 19 L. Ed. 563; French v. Fyon (1876) 93 U. S. 169, 170, 23 L. Ed. 812; Martin v. Marks (1877) 97 U. S. 345, 347, 24 L. Ed. 940; Adams County v. Burlington & M. R. R. Co. (1884) 5 Sup. Ct. 77, 112 U. S. 123, 28 L. Ed. 678; Heath v. Wallace (1891) 11 Sup. Ct. 380, 138 U. S. 573, 34 L. Ed. 1063; Cook County v. Calumet & C. Canal & Dock Co. (1891) 11 Sup. Ct. 435-441, 138 U. S. 635, 34 L. Ed. 1110; Chandler v. Calumet & Hecla Min. Co. (1893) 13 Sup. Ct. 798, 799, 149 U. S. 79, 37 L. Ed. 657 (affirming judgment [C. C. 1888] 36 Fed. 665); McCormick v. Hayes (1895) 16 Sup. Ct. 37, 39, 159 U. S. 332, 40 L. Ed. 171; Warner Valley Stock Co. v. Smith (1897) 17 Sup. Ct. 225, 226, 165 U. S. 28, 41 L. Ed. 621; Brown v. Hitchcock (1899) 19 Sup. Ct. 485, 487, 173 U. S. 473, 43 L. Ed. 772; Louisiana v. Garfield (1908) 29 Sup. Ct. 31, 32, 211 U. S. 70, 53 L. Ed. 92; U. S. v. Chicago, M. & St. P. R. Co. (1910) 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015 (affirming judgment [1908] 160 Fed. 818, 87 C. C. A. 592); Marshall Dental Mfg. Co. v. State of Iowa (1913) 33 Sup. Ct. 168, 226 U. S. 460, 57 L. Ed. 300; Chapman & Dewey Lumber Co. v. St. Frances Levee Dist. (1914) 34 Sup. Ct. 297, 299, 232 U. S. 186, 58 L. Ed. 564; Augusta, T. & G. R. Co. v. Kittel (1892) 52 Fed. 63, 2 C. C. A. 615; State of Iowa v. Carr (1911) 191 Fed. 257, 112 C. C. A. 477; Lee Wilson Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; Ozark Land Co. v. Leonard (C. C. 1885) 24 Fed. 660, 661; Hough v. Buchanan (C. C. 1886) 27 Fed. 328; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630; Chism v. Price (1891) 54 Ark. 251, 15 S. W. 1031 (affirming [1891] 54 Ark. 251, 15 S. W. 883); Robinson v. Forrest (1865) 29 Cal. 317; Bristol v. Carroll County (1880) 95 Ill. 84; Edmondson v. Corn (1878) 62 Ind. 17; Moulierre v. Coco (1906) 41 South. 113, 116 La. 845; Railroad Lands Co. v. City of Shreveport (1906) 41 South. 443, 117 La. 140; Union Sawmill Co. v. Taylor (1913) 63 South. 594, 133 La. 1088; Dale v. Turner (1876) 34 Mich. 405; State v. Flint & P. M. R. Co. (1891) 89 Mich. 481, 51 N. W. 103; Sherman v. A. P. Cook Co. (1893) 98 Mich. 61, 57 N. W. 23; Olds v. Commissioner of State Land Office (1907) 112 N. W. 952, 14 Detroit Leg. N. 451; Henderson v. Blair (1912) 59 South. 856, 102 Miss. 640.

The grant to each of the states of swamp lands within its borders had reference only to the states then existing, and no state subsequently admitted acquired any rights under it. Rice v. Sioux City & St. P. R. Co. (1884) 4 Sup. Ct. 177, 178, 110 U. S. 695, 28 L. Ed. 289, affirming Sioux City & St. P. R. Co. v. Rice (C. C. 1881) 9 Fed. 368, and following French v. Fyan (1876) 93 U. S. 169, 170, 23 L. Ed. 812.

In construing acts granting swamp lands to a state, nothing is to be inferred against the state. State v. Portsmouth Sav. Bank (1886) 106 Ind. 435, 7 N. E. 379.

3. Subsequent disposal of lands by government.—Notwithstanding a grant to a state of public lands under a generic description, but dependent upon ascertainment and definition, until title is vested in the state, the United States retains full and complete power to devote any portion of such lands to any necessary public purpose. Sawyer v. Osterhous (D. C. 1914) 212 Fed. 765.

The title of the state to the swamp and overflowed lands accrued from the date of the swamp land act. And a title derived from the state will take precedence over a grant by the United States subsequent to that time. Ringo's Ex'r v. Rotan's Heirs (1874) 29 Ark. 56.

After title to land had vested in the state by virtue of the swamp land act, a patent by the United States to an individual to land, in that state, covered by the above act, was of no effect. Matthews v. Goodrich (1885) 102 Ind. 557, 1 N. E. 175.

The United States, having granted to Iowa swamp lands on the Missouri river, had a legal right to subsequently convey other lands between said grant and the river, which existed at the time of the original survey, and were not afterwards formed by accretion. Smith v. Miller (1897) 70 N. W. 123, 75 N. W. 499, 105 Iowa, 688.

From the lands granted by the swamp land act reservations for lighthouse purposes could not be made by the Commissioners of the General Land Office after it became a law. Sterling v. Jackson (1888) 37 N. W. 845, 69 Mich. 488, 13 Am. St. Rep. 405.

A grant by the United States of land covered by the swamp land act made after the passage of said act and before the certification of the land to the state, as required by the act, is a nullity. Sherman v. A. P. Cook Co. (1893) 57 N. W. 23, 98 Mich. 61. And see Railroad Lands Co. v. City of Shreveport (1906) 41 South. 443, 117 La. 140; Busch v. Donohue (1875) 31 Mich. 481.

A grant of land to the state under the Swamp Land Act reserved it from sale by ordinary entry with United States register or receiver. Foster v. Evans (1872) 51 Mo. 39. See, also,

Thibodeaux v. Broussard (1880) 32 La. Ann. 881.

After the swamp land act took effect the power of disposal in the general government was gone, and any subsequent inadvertent sale thereof by the land officers passed no title. Campbell v. Wortman (1874) 58 Mo. 258.

4. **Lands subject to grant.**—This act did not affect land on which, before its passage, a military land warrant was located. Culver v. Uthe (1890) 10 Sup. Ct. 415, 416, 133 U. S. 655, 33 L. Ed. 776.

The swamp land act was not intended to apply to lands held by the United States charged with equitable claims of others. City & County of San Francisco v. Le Roy (1891) 11 Sup. Ct. 364, 368, 138 U. S. 656, 34 L. Ed. 1096. See, also, Shanklin v. McNamara (1891) 87 Cal. 371, 26 Pac. 345.

Neither the United States nor the state can, by any ex parte survey or other proceeding of like character, determine or affect the rights of the other in swamp lands granted to the state by act of congress; they must be determined by judicial proceedings. Kernan v. Griffith (1864) 27 Cal. 87.

Public lands reserved from sale for military purposes by executive orders of the president in 1842 and 1849, were effectually segregated from the public domain, and passed beyond the control of the general land office, and the certification of such lands to the state as swamp lands had no binding force or effect. Florida Town Imp. Co. v. Bigalsky (1902) 33 South. 450, 44 Fla. 771.

The term "unsold" will not be technically construed to apply to everything not sold for money. Gormley v. Uthe (1886) 116 Ill. 643, 7 N. E. 73.

All the soil within her territory, lying beneath the waters of sounds, etc., bordering on the Gulf of Mexico and within the ebb and flow of the tide, were acquired by the state on admission to the Union, and the United States never assumed to grant such soil. State v. Bayou Johnson Oyster Co. (1912) 58 South. 405, 130 La. 604.

A land grant confirmed by Congress in 1820 cannot be affected by a state selection of the same land in 1850 under the swamp land grant of March 2, 1849, and the approval of the selection by the Commissioners of the General Land Office. Louisville & N. R. Co. v. Penn (1915) 68 So. 859, 137 La. 526.

The determination of the question whether the land covered by a homestead entry was swamp or not was for the General Land Office, in accordance with rules and procedure prescribed by it and in force at the time of the homesteader's entry. Hivanen v. Duluth & I. R. R. Co. (Minn. 1911) 129 N. W. 510.

5. —— **School lands.**—The state's right to school sections could not be affected by the swamp land act. State v. Jennings (1903) 35 South. 986, 47 Fla. 302, 307; Trustees of Schools v. Schroll (1887) 120 Ill. 509, 12 N. E. 243, 60 Am. Rep. 575.

6. —— **Swamp and overflowed lands within statute.**—Swamp lands may be considered such as require drainage to fit them for cultivation, while overflowed lands are those which are subject to periodical overflows, requiring levees or embankments to keep out the water to render them suitable for cultivation. San Francisco Sav. Union v. Irwin (C. C. 1886) 28 Fed. 708, 712 (affirmed [1890] 10 Sup. Ct. 1064, 136 U. S. 578, 34 L. Ed. 540); State v. Gerbing (Fla. 1908) 47 South. 353; Keller v. Brickey (1875) 78 Ill. 133. See, also, Heath v. Wallace (1891) 11 Sup. Ct. 380, 384, 138 U. S. 573, 34 L. Ed. 1063; Miller v. Tobin (C. C. 1883) 18 Fed. 609, 610; Merrill v. Tobin (C. C. 1887) 30 Fed. 738; Same v. Shea, Id. 743; Young v. Hanson (1895) 95 Iowa, 717, 64 N. W. 654; McDade v. Bossier Levee Board (1902) 33 South. 628, 109 La. 625; Sterling v. Jackson (1888) 69 Mich. 488, 37 N. W. 845.

Lands which, by reason of swamp or overflow, become unfit for cultivation, are within the act. Merrill v. Tobin (C. C. 1887) 30 Fed. 738; Same v. Shea, Id. 743; Keeran v. Allen (1867) 33 Cal. 542. See, also, Keeran v. Griffith (1868) 34 Cal. 580; Sacramento Sav. Bank v. Hynes (1875) 50 Cal. 195; Olds v. Commissioner of State Land Office (1907) 112 N. W. 952, 14 Detroit Leg. N. 451.

Lands subject only to overflow of tide water are not swamp lands within the Swamp Land Act. Sawyer v. Osterhaus (D. C. 1914) 212 Fed. 765.

Whether the state has an inchoate title to swamp lands depends entirely on the question whether they are swamp lands. Kile v. Tubbs (1863) 23 Cal. 431. See, also, Bourne v. Ragan (1896) 96 Iowa, 566, 65 N. W. 826.

The test as to whether certain public lands are swamp and overflowed is whether or not they are unfit for cultivation in grain or other staple productions by reason of the overflow. Keeran v. Griffith (1866) 31 Cal. 461. See, also, American Emigrant Co. v. Rogers Locomotive Mach. Works (1891) 83 Iowa, 612, 50 N. W. 52.

The test is not whether they may be profitably, but successfully, cultivated. Wright v. Carpenter (1874) 47 Cal. 436; Foscalina v. Doyle, Id. 437; Thompson v. Thornton (1875) 50 Cal. 142.

The question whether a given subdivision of swamp and waste land belonged to the state is a question of fact, and is determined, not by official certificates, but by the same evidence as if it arose on a conveyance between private

persons. Keeran v. Griffith (1866) 31 Cal. 461.

Permanently overflowed swamps or shallow lakes, destined to become dry as the necessary effect of the building of the levees, in aid of the construction of which the swamp land grants were made, passed as land to the state under those grants. McDade v. Bossier Levee Board (1902) 33 South. 628, 109 La. 625.

7. —— **Lake beds.**—The state of Indiana acquired title to the bed of Beaver lake, which is overflowed land, by virtue of the "swamp land grant of 1850." A more liberal rule of construction is allowable in interpreting a grant from one state or political community to another than is permitted in interpreting a mere private grant, e. g. a grant by a government to a private individual of land upon a navigable river is limited to the shore, while such a grant to a political community extends to the middle of the stream. State v. Milk (C. C. 1882) 11 Fed. 389.

Where swampy land adjacent to Lake Erie was surveyed by the federal government, bounded by the meander line of the lake, such survey is conclusive that the land is not a part of the bed of the lake. Brown v. Parker (1901) 86 N. W. 989, 127 Mich. 390, 8 Detroit Leg. N. 386.

Land which at the time of the swamp land act was connected with an island in a navigable lake, but was so low that it was ordinarily but a few inches above the water, and in times of high water wholly submerged, was not a part of the bed of the lake, but was swamp land, within the act, so as to pass to the state. State v. Lake St. Clair Fishing & Shooting Club (1901) 87 N. W. 117, 127 Mich. 580, 8 Detroit Leg. N. 373.

8. —— **Islands.**—An island near the middle of a navigable river bounding the state of Iowa did not pass under the swamp land act, where it was not in existence when the act was passed. Holman v. Hodges (1901) 84 N. W. 950, 112 Iowa, 714, 58 L. R. A. 673, 84 Am. St. Rep. 367.

The swamp land act did not limit the lands conveyed to those which might be in the future fitted for cultivation, but included partly submerged islands. People v. Warner (1898) 74 N. W. 705, 116 Mich. 228, 4 Detroit Leg. N. 1180.

9. —— **Lands artificially covered by water.**—Lands of the United States at the date of the swamp land act, approved by the officers of the general land department, as lands of the character intended to be granted thereby, were, by such act, segregated from the public domain, and vested in the state, whether they were, at the date of such act, artificially covered by navigable water by trespasses on the domain or not. Diana Shooting Club v. Lamoreaux (1902) 89 N. W. 880, 114 Wis. 44, 91 Am. St. Rep. 898.

Artificial flooding of the public lands of the United States does not affect the title thereto. Id.

10. **Judicial notice of grant.**—Judicial notice is taken of acts of congress granting swamp lands to the state. Hamilton v. Shoaff (1884) 99 Ind. 63; Nitche v. Earle (1889) 117 Ind. 270, 19 N. E. 749.

§ 4959. (R. S. § 2480.) Secretary of the Interior to make lists of such lands, for transmission to the governors of the States.

It shall be the duty of the Secretary of the Interior, to make accurate lists and plats of all such lands, and transmit the same to the governors of the several States in which such lands may lie, and at the request of the governor of any State in which said swamp and overflowed lands may be, to cause patents to be issued to said State therefor, conveying to said State the fee-simple of said land.

The proceeds of said lands, whether from sale or by direct appropriation in kind, shall be applied exclusively, as far as necessary, to the reclaiming said lands, by means of levees and drains.

Act Sept. 28, 1850, c. 84, § 2, 9 Stat. 519.

Notes of Decisions

I. Listing and identification of lands
1. Identification and listing essential.
2. Authority of secretary of interior.
3. Effect of departmental neglect.
4. Conclusiveness and effect of decisions as to character of lands.
5. Plats and surveys as evidence.

II. Patents
6. Nature, office, and effect of patent.
7. Necessity for patent.
8. Disposal of lands by state before patent.
9. Impeachment of patent.

III. Disposal of lands and proceeds
10. Nature of grant as affecting disposal of lands and proceeds by state.
11. Application of proceeds.
12. Enforcement of conditions of grant.

I. LISTING AND IDENTIFICATION OF LANDS

1. **Identification and listing essential.**—The swamp land grant to the states did not attach to any particular lands until they had been identified as swamp

lands by the Secretary of the Interior or other competent authority of the United States. Martin v. Marks (1877) 97 U. S. 345, 347, 24 L. Ed. 940; Wright v. Roseberry (1887) 7 Sup. Ct. 985, 989, 121 U. S. 488, 30 L. Ed. 1039; Irwin v. San Francisco Savings Union (1890) 10 Sup. Ct. 1064, 136 U. S. 578, 34 L. Ed. 540; Rogers v. Locomotive Mach. Works & American Emigrant Co. (1896) 17 Sup. Ct. 188, 191, 164 U. S. 559, 41 L. Ed. 552; Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 209, 168 U. S. 589, 42 L. Ed. 591 (affirming judgment [1895] 68 Fed. 155, 15 C. C. A. 335); U. S. v. Chicago, M. & St. P. R. Co. (1910) 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015 (affirming decree [1908] 160 Fed. 818, 87 C. C. A. 592); Little v. Williams (1913) 34 Sup. Ct. 68, 231 U. S. 335, 58 L. Ed. 256; U. S. v. Chicago, M. & St. P. Ry. Co. (1908) 160 Fed. 818, 87 C. C. A. 592 (affirming decree [C. C. 1906] 148 Fed. 884, and judgment affirmed [1910] 31 Sup. Ct. 7, 218 U. S. 233, 54 L. Ed. 1015); Kirby v. Lewis (C. C. 1889) 39 Fed. 66; Kittel v. Trustees of Internal Imp. Fund of Florida (C. C. 1905) 139 Fed. 941; Kerns v. Lee (C. C. 1906) 142 Fed. 985; U. S. v. Chicago, M. & St. P. Ry. Co. (C. C. 1906) 148 Fed. 884; Fletcher v. Pool (1859) 20 Ark. 100; Hempstead v. Underhill's Heirs, Id. 337; Hendry v. Willis (1878) 33 Ark. 833; Little v. Williams (1908) 113 S. W. 340, 88 Ark. 37; Thompson v. Prince (1873) 67 Ill. 281; State v. Portsmouth Sav. Bank (1886) 106 Ind. 435, 7 N. E. 379; Allison v. Halfacre (1861) 11 Iowa, 450; Bailey v. Callanan (1893) 87 Iowa, 107, 53 N. W. 1074; Carr v. Moore (1903) 93 N. W. 52, 119 Iowa, 152, 97 Am. St. Rep. 292; Hart v. Delphey (1912) 136 N. W. 702, 157 Iowa, 316; Moulierre v. Coco (1906) 41 So. 113, 116 La. 845; Busch v. Donohue (1875) 31 Mich. 481; State v. Lake St. Clair Fishing & Shooting Club (1901) 87 N. W. 117, 127 Mich. 580, 8 Detroit Leg. N. 373; Funston v. Metcalf (1866) 40 Miss. 504; Dowd v. Louisville, N. O. & T. Ry. Co. (1890) 68 Miss. 159, 8 South. 295 (following Funston v. Metcalf [1866] 40 Miss. 504); Birch v. Gillis (1877) 67 Mo. 102; Stephenson v. Stephenson (1879) 71 Mo. 127; Prior v. Lambeth (1883) 78 Mo. 538; Morrow v. Warner Valley Stock Co. (1909) 101 P. 171, 56 Or. 312; Dixon v. Same (1909) 101 P. 189, 56 Or. 364; Green v. Same (1909) 101 P. 189, 56 Or. 361; Harrington v. Same (1909) 101 P. 189, 56 Or. 362; Foskett v. Same (1909) 101 Or. 190, 56 Or. 366. See, also, French v. Fyan (1876) 93 U. S. 169, 170, 23 L. Ed. 812; Buena Vista County v. Iowa Falls & S. C. R. Co. (1884) 5 Sup. Ct. 84, 85, 112 U. S. 165, 28 L. Ed. 680 (affirming Buena Vista County v. Iowa Falls & S. C. R. Co. [1880] 55 Iowa, 157, 7 N. W. 474); Ehrhardt v. Hogaboom (1885) 5 Sup. Ct. 1157, 115 U. S. 67, 29 L. Ed. 346; Kerns v. Lee (C. C. 1906) 142 Fed. 985; Sawyer v. Osterhaus (D. C. 1914) 212 Fed. 765; Williamson & Bro. v. Baugh (1903) 76 S. W. 423, 71 Ark. 491; Dart v. Hercules (1864) 34 Ill. 395; McDade v. Bossier Levee Board (1902) 33 So. 628, 109 La. 625; Elms v. Elliott (1912) 57 So. 307, 129 La. 978; People v. Warner (1898) 74 N. W. 705, 116 Mich. 228, 4 Detroit Leg. N. 1180; Lockwood v. Hannibal & St. J. R. Co. (1877) 65 Mo. 233; Cooper v. Same, Id. 238; Funkhouser v. Peck (1877) 67 Mo. 19; Stephenson v. Stephenson (1879) 71 Mo. 127; (1906) 25 Op. Atty. Gen. 626.

The states acquired only an inchoate title under the swamp land act to lands which were never listed as swamp lands, although they may have been such in fact. Chapman & Dewey Lumber Co. v. St. Francis Levee Dist. (1914) 34 Sup. Ct. 297, 299, 232 U. S. 186, 58 L. Ed. 564. See, also, Little v. Williams (1913) 34 Sup. Ct. 68, 231 U. S. 335, 58 L. Ed. 256; Ogden v. Buckley (1902) 89 N. W. 1115, 116 Iowa, 352.

The fact that the land was never selected by the state, as required by the swamp land act, is not conclusive that it was not swamp land, but its actual character may be shown. Hays v. McCormick (1891) 83 Iowa, 89, 49 N. W. 69.

A survey of swamp and overflowed lands granted to the state by congress is a sufficient selection and identification of same to segregate them from the public domain, and render them liable to sale or entry as property of the state. Betz v. Illinois Cent. R. Co. (1898) 24 So. 644, 52 La. Ann. 893.

The approval of a list of lands by the Secretary of the Interior did not vest in the state the fee simple to lands claimed and held by individuals. Louisville & N. R. Co. v. Penn (1915) 68 So. 859, 137 La. 526.

The swamp land act merely intended that the ascertainment and location of the lands should be made by the authority and with the approval of the secretary of the interior; hence the confirmation by the secretary of the interior of a list of such lands, made by a commissioner appointed by the governor, was a substantial compliance and a sufficient designation. Fore v. Williams (1858) 35 Miss. 533.

2. Authority of secretary of interior. —The secretary of the interior has power to inquire into and determine rights claimed in public lands until the legal title has passed out of the government. Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 168 U. S. 589, 42 L. Ed. 591 (affirming judgment [1895] 68 Fed. 155, 15 C. C. A. 335); Brown v. Hitchcock (1899) 19 Sup. Ct. 485, 486, 173 U. S. 473, 43 L. Ed. 772; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630. And the

secretary or his successor in office has the power, at any time prior to the issue of a patent, to vacate and annul the list and plat transmitted to the governor. It is within the power of the secretary of the interior to revoke and cancel his approval. But whether a succeeding secretary of the interior, in reaching a different conclusion from his predecessor, erred, is not a question for the courts to determine. Warner Val. Stock Co. v. Smith (1896) 9 App. D. C. 187; Brown v. Bliss (1898) 13 App. D. C. 279.

Where no patent has been issued, the legal title remains in the United States, so that the rights of a purchaser from the state must be decided by the land department, rather than by the courts. Brown v. Hitchcock (1899) 19 Sup. Ct. 485, 487, 173 U. S. 473, 43 L. Ed. 772.

When a granting act provides for the issue of patents to public lands, the title remains in the government until the patent issues, during which the interior department retains jurisdiction to inquire into the extent and validity of the rights claimed under the grant as against the government. Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 209, 168 U. S. 589, 42 L. Ed. 591; Brown v. Hitchcock (1899) 19 Sup. Ct. 485, 487, 173 U. S. 473, 43 L. Ed. 772.

The courts are without power to interfere with the exercise by the secretary of the interior of the discretion vested in him to determine whether lands are in fact "swamp and overflowed," and whether they are such as the government may have reserved, sold, or disposed of prior to the confirmation of title. Warner Val. Stock Co. v. Smith (1896) 9 App. D. C. 187.

Only the Secretary of the Interior has power to approve and give validity to selections made. Cramer v. Keller (1889) 98 Mo. 279, 11 S. W. 734.

3. Effect of departmental neglect.—This act effected an immediate transfer of interest, which cannot be defeated nor in any way impaired by the delay or refusal of the secretary of the interior to have the required list made and patent issued. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 989, 121 U. S. 488, 30 L. Ed. 1039; U. S. v. Louisiana (1887) 8 Sup. Ct. 17, 19, 123 U. S. 32, 31 L. Ed. 69; San Francisco Sav. Union v. Irwin (C. C. 1886) 28 Fed. 708; Chicago, R. I. & P. R. Co. v. Brown (1875) 40 Iowa, 333; Hays v. McCormick (1891) 83 Iowa, 89, 49 N. W. 69; Clarkson v. Buchanan (1873) 53 Mo. 563.

The right of the state to land does not depend on the action of the secretary of the interior, or on the act of congress, and such right cannot be defeated by the delay of the secretary. Hannibal & St. J. R. Co. v. Smith (1869) 9 Wall. 95, 99, 19 L. Ed. 599.

When the secretary of the interior has failed to act on the lists of swamp lands, and proof thereof filed in his office, the character of the land may be determined by a court of competent jurisdiction, in a suit by a grantee of the state to quiet title thereto. American Emigrant Co. v. Fuller (1891) 83 Iowa, 599, 50 N. W. 48.

Unsurveyed swamp land should not be treated as excluded in the grant thereof to the several states, because not in the list filed by the interior department embracing such lands. People v. Warner (1898) 74 N. W. 705, 116 Mich. 228, 4 Detroit Leg. N. 1180.

4. Conclusiveness and effect of decisions as to character of lands.—A decision of the secretary of the interior as to whether certain lands are within the terms of the swamp land grant is conclusive in the absence of fraud, and cannot be collaterally attacked. French v. Fyon (1876) 93 U. S. 169, 171, 23 L. Ed. 812; Wright v. Roseberry (1887) 7 Sup. Ct. 985, 986, 121 U. S. 488, 30 L. Ed. 1039; Heath v. Wallace (1891) 11 Sup. Ct. 380, 384, 138 U. S. 573, 34 L. Ed. 1063; Chandler v. Calumet & H. Min. Co. (1893) 13 Sup. Ct. 798, 800, 149 U. S. 79, 37 L. Ed. 657 (affirming judgment [C. C. 1888] 36 Fed. 665); McCormick v. Hayes (1895) 16 Sup. Ct. 37, 39, 159 U. S. 332, 40 L. Ed. 171; Rogers Locomotive Machine Works v. American Emigrant Co. (1896) 17 Sup. Ct. 188, 193, 164 U. S. 559, 41 L. Ed. 552 (reversing [1891] 50 N. W. 52, 83 Iowa, 612); Johnson v. Drew (1898) 18 Sup. Ct. 800, 802, 171 U. S. 93, 43 L. Ed. 88; Little v. Williams (1913) 34 Sup. Ct. 68, 231 U. S. 335, 58 L. Ed. 256; Cahn v. Barnes (C. C. 1881) 5 Fed. 326, 330; San Francisco Sav. Union v. Irwin (C. C. 1886) 28 Fed. 708; Pengra v. Munz (C. C. 1887) 29 Fed. 830; California & Oregon Land Co. v. Munz (C. C. 1887) Id. 837; Crane Creek Shooting-Club Co. v. Cedar Point Club Co. (C. C. 1891) 46 Fed. 273; (1890) 19 Op. Atty. Gen. 684; Hendry v. Willis (1878) 33 Ark. 833; Williamson & Bro. v. Baugh (1903) 76 S. W. 423, 71 Ark. 491; Little v. Williams (1908) 113 S. W. 340, 88 Ark. 37; Sacramento Valley Reclamation Co. v. Cook (1882) 61 Cal. 341; Foss v. Johnstone (Cal. 1910) 110 P. 294; Connors v. Meservey (1888) 76 Iowa, 691, 39 N. W. 388; Rood v. Wallace (1899) 79 N. W. 449, 109 Iowa, 5; Chauvin v. Louisiana Oyster Commission (1908) 46 So. 38, 121 La. 10; Jasper County v. Mickey (Mo. 1887) 4 S. W. 424; Warner Valley Stock Co. v. Calderwood (1899) 59 P. 115, 36 Or. 228; Morrow v. Warner Valley Stock Co. (Or. 1909) 101 P. 171; Dixon v. Same, Id. 189; Greene v. Same, Id.; Harrington v. Same, Id.; Foskett v. Same, Id. 190; Diana Shooting Club v. Lamoreaux (1902) 89 N. W. 880, 114 Wis. 44, 91 Am. St. Rep. 898. See, also, Buena Vista Petroleum Co. v. Tulare Oil &

Mining Co. (C. C. 1895) 67 Fed. 226, 228; Kerns v. Lee (C. C. 1906) 142 Fed. 985; Keeran v. Griffith (1868) 34 Cal. 580; Read v. Caruthers (1873) 47 Cal. 181; Bates v. Halstead (1900) 62 P. 305, 130 Cal. 62, 80 Am. St. Rep. 70; Florida Town Imp. Co. v. Bigalsky (1902) 33 So. 450, 44 Fla. 771; Crapo v. Township of Troy Tp. (1894) 98 Mich. 635, 57 N. W. 806; Lamprey v. Danz (1902) 90 N. W. 578, 86 Minn. 317; Hivanen v. Duluth & I. R. R. Co. (Minn. 1911) 129 N. W. 510; Fore v. Williams (1858) 35 Miss. 533.

The decision of the secretary of the interior that lands which had been reserved by the President did not pass to the state by virtue of the swamp land grant is to be treated as res ajudicata as to all the lands embraced within the belt of territory to which it specifically relates and refers. (1881) 17 Op. Atty. Gen. 27. See, also, State of Illinois v. U. S. (1885) 20 Ct. Cl. 342.

The lands described in the list transmitted by the secretary of the interior, to the governor, became vested in the state, whether swamp or overflowed lands or not. Bristol v. Carroll County (1880) 95 Ill. 84.

5. Plats and surveys as evidence.—The survey and plat affords a strong presumption against the navigability of the water. Toledo Liberal Shooting Co. v. Erie Shooting Club (1898) 90 Fed. 680, 681, 33 C. C. A. 233.

The plat of the survey by the United States is admissible in evidence to show the line of the legal subdivision, but not to show that the lands in question are swamp and overflowed. Richardson v. Forrest (1865) 29 Cal. 317.

The land register's certificate is presumptive evidence that a list of swamp lands is a legal and correct one. Clarkson v. Buchanan (1873) 53 Mo. 563.

II. PATENTS

6. Nature, office, and effect of patent.—The office of the patent is to make the description of the lands definite and conclusive as between the United States and the state, for identification is necessary to determine whether any particular tract comes within the general description of swamp and overflowed land so as to pass by the grant. Owens v. Jackson (1858) 9 Cal. 322; Kernan v. Griffith (1864) 27 Cal. 87; Foss v. Johnstone (Cal. 1910) 110 Pac. 294; Henderson v. Blair (1912) 59 South. 856, 102 Miss. 640. See, also, French v. Fyan (1876) 93 U. S. 169, 170, 23 L. Ed. 812; Chandler v. Calumet & Hecla Min. Co. (1893) 13 Sup. Ct. 798, 803, 149 U. S. 79, 37 L. Ed. 657 (affirming [C. C. 1888] 36 Fed. 665); Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 209, 168 U. S. 589, 42 L. Ed 591; Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 652, 190 U. S. 452, 47 L. Ed. 1134; Hough v. Buchannan (C. C. 1886) 27 Fed. 328; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630; (1858) 9 Op. Atty. Gen. 254; Matthews v. Goodrich (1885) 1 N. E. 175, 102 Ind. 557; Daniel v. Purvis (1874) 50 Miss. 261; Warner Valley Stock Co. v. Morrow (1906) 86 Pac. 369, 48 Or. 258.

On the land being identified and the patent issued to the state, the title relates back to the date of the act. Smith v. Goodell (1872) 66 Ill. 450; Busch v. Donohue (1875) 31 Mich. 481; Cramer v. Keller (1889) 98 Mo. 279, 11 S. W. 734.

The unsurveyed area within the exterior lines of a township, designated upon the official plat as a meandered body of water called "Sunk Lands," was not conveyed by a patent which described the land conveyed as the whole of the township, containing a specified number of acres (which corresponded to the total acreage of the surveyed areas), according to the official survey, although at the time of the survey and the date of the swamp land act such unsurveyed area was in fact not a lake or permanent body of water, but was only temporarily overflowed, and was not distinctly lower or materially different from the adjoining lands. Chapman & Dewey Lumber Co. v. St. Francis Levee Dist. (1914) 34 Sup. Ct. 297, 232 U. S. 186, 58 L. Ed. 564, reversing decree Chapman & Dewey Lumber Co. v. Board of Directors, St. Francis Levee Dist. (1911) 100 Ark. 94, 139 S. W. 625.

The patent did not affect the title held by the state to the lands under navigable waters by virtue of the sovereignty of the state. State v. Gerbing (Fla. 1908) 47 So. 353.

The patent is evidence that the title to the land vested absolutely in the state as of the date of the act. Hamilton v. Shoaff (1884) 99 Ind. 63; Matthews v. Goodrich (1885) 1 N. E. 175, 102 Ind. 557. And the title is not affected by a subsequent act of congress granting a company the right to drain such land and authorizing its survey and sale. Tolleston Club v. State (1894) 141 Ind. 197, 38 N. E. 214. It is simply evidence of the grant, and not of the date such grant took effect. Sterling v. Jackson (1888) 37 N. W. 845, 69 Mich. 488, 13 Am. St. Rep. 405. It is prima facie evidence that the selection of the land had been duly approved by the secretary of the interior. Cramer v. Keller (1889) 98 Mo. 279, 11 S. W. 734.

The patent did not so become operative from date of the law as to annul the title of a purchaser under an entry and patent subsequent to said date, but prior to any designation of the land by the secretary as swamp land. Prior v. Lambeth (1883) 78 Mo. 538.

A title by patent from the United States is a title by record without a

delivery to the patentee. Warner Valley Stock Co. v. Morrow (1906) 86 P. 369, 48 Or. 258.

7. Necessity for patent.—The swamp land act, while a grant in præsenti, did not pass the legal title of the lands transferred thereby to the states until the lands had been selected as such and the patents were delivered. Rogers Locomotive Machine Works v. American Emigrant Co. (1896) 17 Sup. Ct. 188, 191, 164 U. S. 559, 41 L. Ed. 552; Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 168 U. S. 589, 42 L. Ed. 591 (affirming judgment [1895] 68 Fed. 155, 15 C. C. A. 335); Brown v. Hitchcock (1899) 19 Sup. Ct. 485, 173 U. S. 473, 43 L. Ed. 772; Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351; Kittel v. Trustees of Internal Imp. Fund of Florida (C. C. 1905) 139 Fed. 941; Kerns v. Lee (C. C. 1906) 142 Fed. 985; Sawyer v. Osterhaus (D. C. 1914) 212 Fed. 765; U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630; Henry v. Brannan (1906) 42 South. 995, 149 Ala. 323; Little v. Williams (1908) 113 S. W. 340, 88 Ark. 37 (judgment affirmed [1913] 34 Sup. Ct. 68, 231 U. S. 335, 58 L. Ed. 256); Kile v. Tubbs (1863) 23 Cal. 431; Brown v. Bliss (1898) 13 App. D. C. 279; Thompson v. Prince (1873) 67 Ill. 281; State v. Tuesburg Land Co. (Ind. App. 1915) 109 N. E. 530 (rehearing denied [Ind. App. 1916] 111 N. E. 342); Ogden v. Buckley (1902) 89 N. W. 1115, 116 Iowa, 352; Schlosser v. Hemphill (1902) 90 N. W. 842, 118 Iowa, 452; State v. Jones (Iowa, 1909) 122 N. W. 241; Same v. Jones (1859) 9 Wis. 236.

It has been held that a present title was conveyed, without a patent or formal conveyance, by swamp land act. Montgomery County v. Burlington & M. R. R. Co. (1874) 38 Iowa, 208; Chicago, R. I. & P. R. Co. v. Brown (1875) 40 Iowa, 333; Bailey v. Callanan (1893) 87 Iowa, 107, 53 N. W. 1074; Henderson v. Blair (1912) 59 So. 856, 102 Miss. 640; Clarkson v. Buchanan (1873) 53 Mo. 563; Campbell v. Wortman (1874) 58 Mo. 258; Masterson v. Marshall (1877) 65 Mo. 94; Simpson v. Stoddard County (1903) 73 S. W. 700, 173 Mo. 421; Gaston v. Stott (1873) 5 Or. 48. And that swamp land act vested the title in the lands of its own force, without any necessity for the issuance of a land patent. Fore v. Williams (1858) 35 Miss. 533; Funston v. Metcalf (1866) 40 Miss. 504.

The swamp land act is a present grant to the state, and the title of the state does not depend on the actual issuance to it of a patent. Foss v. Johnstone (Cal. 1910) 110 P. 294; Keller v. Brickey (1875) 78 Ill. 133; Edmondson v. Corn (1878) 62 Ind. 17. CONTRA, Grantham v. Atkins (1872) 63 Ill. 359; Thompson v. Prince (1873) 67 Ill. 281.

Whether the state obtained title to public land by a patent from the federal government depends upon the federal laws. State v. Tuesburg Land Co. (Ind. App. 1915) 109 N. E. 530, rehearing denied (Ind. App. 1916) 111 N. E. 342.

8. Disposal of lands by state before patent.—Plaintiff in ejectment may introduce a patent from the state and evidence that the lands are swamp lands, though they have not been patented or listed to the state. Irwin v. San Francisco Sav. Union (1890) 10 Sup. Ct. 1064, 136 U. S. 578, 34 L. Ed. 540.

The state had the right to deal with all swamp lands and grant the same before patent to it by the United States, subject to the right of the secretary of the interior to determine what lands were within the act. Kittel v. Trustees of Internal Imp. Fund of Florida (C. C. 1905) 139 Fed. 941. See, also, Brown v. Hitchcock (1899) 19 Sup. Ct. 485, 486, 173 U. S. 473, 43 L. Ed. 772.

A purchaser from the state of swamp lands, who receives from the state a certificate of purchase prior to the state obtaining a patent from the federal government, obtains the equitable title. Hibben v. Malone (1908) 109 S. W. 1008, 85 Ark. 584. But see Kile v. Tubbs (1863) 23 Cal. 431.

The swamp land act conveyed the title, so that conveyances by the state, after the grant, but before receiving patent, were valid. Allison v. Halfacre (1861) 11 Iowa, 450. See, also, Kirby v. Lewis (C. C. 1889) 39 Fed. 66. But see Henry v. Brannan (Ala. 1906) 42 So. 995.

A state acquired and could pass no title to land which had never been determined by competent federal authority to be swamp land. Carr v. Moore (1903) 93 N. W. 52, 119 Iowa, 152.

9. Impeachment of patent.—The patent cannot be impeached by showing that the land was not in fact swamp land. French v. Fyan (1876) 93 U. S. 169, 171, 23 L. Ed. 812; Steel v. St. Louis Smelting & Refining Co. (1882) 1 Sup. Ct. 389, 393, 106 U. S. 447, 27 L. Ed. 226; (1890) 19 Op. Atty. Gen. 684.

A homesteader is not precluded from attacking the patent to the state because he had not made final proof of his claim at the time the patent was issued, provided his acts, if unobstructed, would entitle him to complete his claim in future. Duluth & I. R. R. Co. v. Roy (1899) 19 Sup. Ct. 549, 550, 173 U. S. 587, 43 L. Ed. 820, affirming judgment (1897) 72 N. W. 794, 69 Minn. 547.

III. DISPOSAL OF LANDS AND PROCEEDS

10. Nature of grant as affecting disposal of lands and proceeds by state.—See, also, notes to § 4598, ante.

The grant to the states of swamp and overflowed lands was an absolute

gift to the states, without any limitation in the nature of a trust, or anything to prevent the application by the state of the swamp land fund to general purposes, and the grant conferred on the states complete dominion over the lands and absolute proprietorship therein, at least so far as third persons are concerned. American Emigrant Co. v. Adams County (1879) 100 U. S. 61, 69, 25 L. Ed. 563; Mills County v. Burlington & M. R. Co. (1883) 2 Sup. Ct. 654, 660, 662, 107 U. S. 557, 27 L. Ed. 578; Hagar v. Reclamation Dist. No. 108 (1884) 4 Sup. Ct. 663, 669, 111 U. S. 701, 28 L. Ed. 569 (affirming decree Reclamation Dist. No. 108 v. Hagar [C. C. 1880] 4 Fed. 366); U. S. v. Louisiana (1888) 8 Sup. Ct. 1047, 1049, 127 U. S. 182, 32 L. Ed. 66; Boynton v. Haggart (1903) 120 Fed. 819, 57 C. C. A. 301 (writ of certiorari denied Haggart v. Boynton [1903] 24 Sup. Ct. 845, 191 U. S. 573, 48 L. Ed. 307); Chandler v. Calumet & Hecla Min. Co. (C. C. 1888) 36 Fed. 665, 667 (affirmed [1893] 13 Sup. Ct. 798, 149 U. S. 79, 37 L. Ed. 657); Trustees of Internal Improvement Fund v. Root (1912) 58 So. 371, 63 Fla. 666; Whiteside County Sup'rs v. Burchell (1863) 31 Ill. 68; Illinois Cent. R. Co. v. Union County (1879) 94 Ill. 70; Barrett v. Brooks (1866) 21 Iowa, 144; Keltner v. Story County (1869) 28 Iowa, 35; Montgomery County v. Burlington & M. R. R. Co. (1874) 38 Iowa, 208; Hall v. Board of Com'rs of Bossier Levee Dist. (1904) 35 So. 976, 111 La. 913; McRae v. State Land Office Com'r (1891) 89 Mich. 463, 50 N. W. 1091; Dunklin County v. Dunklin County District Court (1856) 23 Mo. 449; Mosher v. Bacon (Mo. 1910) 129 S. W. 680.

Under the swamp land grants, the state was authorized to decide on the necessity of draining same. State v. Donald (1915) 151 N. W. 331, 160 Wis. 21.

11. Application of proceeds.—The proceeds of sales of swamp lands cannot be diverted from the purposes for which they were granted to the state. State v. Hastings (1860) 11 Wis. 448.

12. Enforcement of conditions of grant.—Congress alone has the power to enforce the conditions of the grant by revocation or otherwise in a clear case of violation of the conditions. American Emigrant Co. v. Adams County (1879) 100 U. S. 61, 69, 25 L. Ed. 563. See, also, Hagar v. Reclamation Dist. No. 108 (1884) 111 U. S. 701, 4 Sup. Ct. 663, 28 L. Ed. 569, affirming decree Reclamation Dist. No. 108 v. Hagar (C. C. 1880) 4 Fed. 366.

§ 4960. (R. S. § 2481.) Legal subdivisions mostly wet and unfit for cultivation.

In making out lists and plats of the lands aforesaid all legal subdivisions, the greater part whereof is wet and unfit for cultivation, shall be included in said lists and plats, but when the greater part of a subdivision is not of that character, the whole of it shall be excluded therefrom.

Act Sept. 28, 1850, c. 84, § 3, 9 Stat. 519.

Notes of Decisions

Subdivisions of land.—The legal subdivisions contemplated by law were 40-acre tracts. Buena Vista County v. Iowa Falls & S. C. R. Co. (1884) 5 Sup. Ct. 84, 85, 112 U. S. 165, 28 L. Ed. 680.

The "legal subdivisions" are the subdivisions made under the authority of congress alone, the smallest of which are quarter quarter sections, or 40 acre lots, unless a fractional quarter section is subdivided. Robinson v. Forrest (1865) 29 Cal. 317. See, also, Bates v. Halstead (1900) 62 Pac. 305, 130 Cal. 62, 80 Am. St. Rep. 70.

The grant carried all the land in a subdivision, whether dry or overflowed. Hall v. Board of Com'rs of Bossier Levee Dist. (1904) 35 So. 976, 111 La. 913.

Survey essential.—The survey into "legal subdivisions" of land claimed as swamp lands is an essential prerequisite to the passage of the title thereto from the government. Boynton v. Miller (1867) 22 Iowa, 579. See, also, Kerns v. Lee (C. C. 1906) 142 Fed. 985.

Character of lands.—See, also, notes to § 4958, ante.

The determination of the secretary of the interior as to the character of the land is conclusive as against collateral attack. Wright v. Rosebery (1887) 7 Sup. Ct. 985, 989, 121 U. S. 488, 30 L. Ed. 1039.

A claimant must offer to prove that the greater part of the legal subdivision was wet and unfit for cultivation. Hogaboom v. Ehrhardt (1881) 58 Cal. 231.

The state acquired no title to a 40-acre tract, less than one-third of which was marked as "swamp" on the government plot, and all of which was in fact fit for cultivation. Fredericks v. Zumwalt (1901) 66 Pac. 38, 134 Cal. 44.

The test of fitness of land for cultivation is whether it is arable and adapted to raising crops requiring annual planting and tillage. American Emigrant Co. v. Rogers Locomotive Mach. Works (1891) 83 Iowa, 612, 50 N. W. 52.

§ 4961. (R. S. § 2482.) Indemnity to States where lands have been sold by United States.

Upon proof by the authorized agent of the State, before the Commissioner of the General Land-Office, that any of the lands purchased by any person from the United States, prior to March 2d, 1855, were "swamp-lands," within the true intent and meaning of the act entitled "An act to enable the State of Arkansas and other States to reclaim the swamp-lands within their limits," approved September twenty-eight, eighteen hundred and fifty, the purchase-money shall be paid over to the State wherein said land is situate; and when the lands have been located by warrant or scrip, the said State shall be authorized to locate a like quantity of any of the public lands subject to entry, at one dollar and twenty-five cents per acre, or less, and patents shall issue therefor. The decision of the Commissioner of the General Land-Office shall be first approved by the Secretary of the Interior.

Act March 2, 1855, c. 147, § 2, 10 Stat. 634, 635.

A permanent appropriation to pay to the States the proceeds of swamp lands within their limits erroneously sold by the United States was made by Rev. St. § 3689, post, § 6799.

Notes of Decisions

Purpose and effect of statute.—This act is a plain recognition of the prior right of the state to the swamp land within her limits. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 994, 121 U. S. 488, 30 L. Ed. 1039; Kirby v. Lewis (C. C. 1889) 39 Fed. 66, 71; Bruce v. Patton (1891) 54 Ark. 455, 16 S. W. 195; (1866) 11 Op. Atty. Gen. 467; (1877) 15 Op. Atty. Gen. 340; (1885) 18 Op. Atty. Gen. 170, 522.

State's claim against United States for moneys received on sales.—The payment to the state of the moneys received by the United States on the sales of swamp lands within the limits of the state depends on proof of the sales before the commissioner of the general land office, and until such proof is made or offered, or until in some other equally convincing mode the swampy character of the lands sold has been established to the satisfaction of the commissioner, no definite ascertainment of the amount due to the state is had, and no action therefor accrues. U. S. v. Louisiana (1887) 8 Sup. Ct. 17, 19, 123 U. S. 32, 31 L. Ed. 69.

§ 4962. (R. S. § 2483.) Patents to issue for swamp lands to purchasers and locators, prior to issuing of patents to States, etc.

The President of the United States shall cause patents to be issued to the purchaser or purchasers, locator or locators, who made entries of the public lands claimed as swamp lands, either with cash or land-warrants, or scrip, or under any homestead or pre-emption laws prior to the issue of patents to the State or States: Provided, That in all cases where any State through its constituted authorities, may have sold or disposed of any tract or tracts of land prior to the entry, sale or location of the same under the pre-emption or other laws of the United States, no patent shall be issued by the President for such tract or tracts of land, until such State through its constituted authorities, shall release its claim thereto in such form as shall be prescribed by the Secretary of the Interior. In all cases where such State did not within ninety days from the second day of March, 1855, the date of an act entitled, "An act for the relief of purchasers and locators of swamp and overflowed lands" through its constituted authorities, return to the General Land-Office of the United States, a list of all the lands sold as aforesaid, together with the dates of such sales and the names of the purchasers, the President shall issue patents to persons who made such entries of the public lands so claimed as swamp-land.

Act March 2, 1855, c. 147, § 1, 10 Stat. 634.

Notes of Decisions

Purpose and effect of statute.—This act is a plain recognition of the prior right of the state to swamp land within her limits. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 994, 121 U. S. 488, 30 L. Ed. 1039. See, also, Tubbs v. Wilhoit (1891) 11 Sup. Ct. 279, 280, 138 U. S. 134, 34 L. Ed. 887; Cook

County v. Calumet & C. Canal & Dock Co. (1891) 11 Sup. Ct. 435, 436, 437, 439, 138 U. S. 635, 34 L. Ed. 1110.

The purpose of congress was to make the donation to the state subject to intervening purchasers from the United States. Dale v. Turner (1876) 34 Mich. 405. See, also, Ives v. Ely (1885) 57 Mich. 569, 24 N. W. 812; Huggett v. Case (1886) 61 Mich. 480, 28 N. W. 670.

Cancellation of intervening entry.—The entry of swamp land in good faith, while the title was in question as between the state and federal governments, is sufficient to give an equitable claim, which the commissioner of the general land office cannot extinguish without the claimant's consent, or some proceeding against him. Ives v. Ely (1885) 57 Mich. 569, 24 N. W. 812.

§ 4963. (R. S. § 2484.) Selection of swamp and overflowed lands confirmed.

All lands selected and reported to the General Land-Office as swamp and overflowed land by the several States entitled to the provisions of said act of Sept. 28, 1850, prior to March third, A. D. eighteen hundred and fifty-seven, are confirmed to said States respectively so far as the same remained vacant and unappropriated and not interfered with by an actual settlement under any law of the United States.

Act March 3, 1857, c. 117, 11 Stat. 251.

Notes of Decisions

Purpose and effect of statute.—The intent of this act was to invest the several states absolutely with such lists of swamp and overflowed land as had before that time been made out and reported to the commissioners of the general land office. Burlington & M. R. R. Co. v. Fremont County (1869) 9 Wall. 89, 91, 19 L. Ed. 563; Fremont County v. Burlington & M. R. R. Co. (1867) 22 Iowa, 91. See, also, Tubbs v. Wilhoit (1891) 11 Sup. Ct. 279, 280, 138 U. S. 134, 34 L. Ed. 887; Cotton Belt Lumber Co. v. Kelly (1905) 86 S. W. 436, 74 Ark. 400 (rehearing denied Kelly v. Cotton Belt Lumber Co. [1905] 86 S. W. 827, 74 Ark. 400); State v. Jennings (1903) 35 So. 986, 47 Fla. 302, 307; Frederick v. Goodbee (La. 1908) 45 So. 606; Dale v. Turner (1876) 34 Mich. 405; Stephenson v. Stephenson (1879) 71 Mo. 127; Cramer v. Keller (1889) 98 Mo. 279, 11 S. W. 734.

The selections confirmed could not be set aside by the land department, nor could title to the land embraced therein be thereafter conveyed by the government, unless they came within the exceptions of the act. Martin v. Marks (1877) 97 U. S. 345, 347, 24 L. Ed. 940. See, also, Kerns v. Lee (C. C. 1906) 142 Fed. 985.

This act continued in force the act of March 2, 1855, and extended to all entries and locations of lands claimed as swamp, made since its passage. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 995, 121 U. S. 488, 30 L. Ed. 1039. See, also, McCormick v. Hayes (1895) 16 Sup. Ct. 37, 39, 159 U. S. 332, 40 L. Ed. 171.

A selection of swamp and overflowed land must be presumed to have included land overflowed, nothing to the contrary appearing, and was confirmed by this section. Kean v. Calumet Canal & Improvement Co. (1903) 23 Sup. Ct. 651, 652, 190 U. S. 452, 47 L. Ed. 1134.

Swamp land act was a present grant to the several states of the swamp lands therein situated, and when the selections were confirmed title referred back to the date of the grant, September 28, 1850. Tolleston Club of Chicago v. State (1894) 38 N. E. 214, 141 Ind. 197, rehearing denied (1895) 40 N. E. 690, 141 Ind. 197.

Lands passing under confirmation.—This act does not apply to unsurveyed land, although within a township the remainder of which had been surveyed, selected by the state, and afterwards patented. U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630. It did not apply to nor embrace the school section granted to the state prior to the swamp land act. State v. Jennings (1903) 35 So. 986, 47 Fla. 302, 307. It vested the selected lands absolutely in the state, whether actually swamp or not. American Emigrant Co. v. Chicago, R. I. & P. R. Co. (1877) 47 Iowa, 515. It applies only to lands that were vacant and not appropriated. Lands which had been sold by the United States, or entered with land warrants, before patents issued to the state, are exempt from its operation. Cramer v. Keller (1889) 98 Mo. 279, 11 S. W. 734.

Mistakes in surveys.—This act did not operate as a conclusive confirmation to the state of all lands erroneously listed to the state by the secretary of the interior as swamp lands at a time when it was known both to the state authorities and to Congress that there had been errors and frauds in the original survey and that a new survey was in progress. The act did not deprive the land department of authority to correct such lists in accordance

with a new survey. Michigan Land & Lumber Co. v. Rust (1897) 18 Sup. Ct. 208, 209, 168 U. S. 589, 42 L. Ed. 591, affirming judgment (1895) 68 Fed. 155, 15 C. C. A. 335. See, also, Michigan Land & Lumber Co. v. Pack (1895) 68 Fed. 170, 15 C. C. A. 350.

State's right to indemnity.—The state is entitled to the purchase money of swamp lands entered with cash and to indemnity for such swamp lands as were located with warrant or scrip prior to the passage of this act. (1866) 11 Op. Atty. Gen. 467. See, also, (1877) 15 Op. Atty. Gen. 340; (1885) 18 Op. Atty. Gen. 170, 522.

Federal question.—A decision that a county did not obtain title under the grant of the state, because the lands had been sold by the United States before the grant, does not involve a federal question. Cook County v. Calumet & C. Canal & Dock Co. (1891) 11 Sup. Ct. 435–440, 138 U. S. 635, 34 L. Ed. 1110.

§ 4964. (R. S. § 2488.) Swamp and overflowed lands to be certified to State within one year, in certain cases.

It shall be the duty of the Commissioner of the General Land-Office, to certify over to the State of California as swamp and overflowed lands, all the lands represented as such upon the approved township surveys and plats, whether made before or after the 23d day of July, 1866, under the authority of the United States.

The surveyor-general of the United States for California, shall under the direction of the Commissioner of the General Land-Office, examine the segregation maps and surveys of the swamp and overflowed lands, made by said State; and where he shall find them to conform to the system of surveys adopted by the United States, he shall construct and approve township plats accordingly, and forward to the General Land-Office for approval.

In segregating large bodies of land, notoriously and obviously swamp and overflowed, it shall not be necessary to subdivide the same, but to run the exterior lines of such body of land.

In case such State surveys are found not to be in accordance with the system of United States surveys, and in such other townships as no survey has been made by the United States, the Commissioner shall direct the surveyor-general, to make segregation surveys, upon application to the surveyor-general, by the governor of said State, within one year of such application, of all the swamp and overflowed land in such townships, and to report the same to the General Land-Office, representing and describing what land was swamp and overflowed, under the grant, according to the best evidence he can obtain.

If the authorities of said State, shall claim as swamp and overflowed, any land not represented as such upon the map or in the returns of the surveyors, the character of such land at the date of the grant September twenty-eight, eighteen hundred and fifty, and the right to the same shall be determined by testimony, to be taken before the surveyor-general, who shall decide the same, subject to the approval of the Commissioner of the General Land-Office.

Act July 23, 1866, c. 219, § 4, 14 Stat. 219.

R. S. § 2489, required the local land offices in California immediately to forward lists and maps of all swamp and overflowed lands claimed by the State or surveyed as provided in the ten preceding sections of the Revised Statutes, for final disposition and determination, which final disposition should be made by the Commissioner of the General Land Office without delay. That section is omitted as temporary merely, and executed.

Notes of Decisions

Scope and effect of statute.—By this act Congress changed the provisions of law for the identification of swamp and overflowed lands in the state of California, and no longer left their identification to the secretary of the interior, but provided for such identification by the joint action of the state and federal authorities. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 995, 121 U. S. 488, 30 L. Ed. 1039. See, also, Tubbs v. Wilhoit (1891) 11 Sup. Ct. 279, 138 U. S. 134, 34 L. Ed. 887.

Necessity and effect of certification.—The title to swamp and overflowed lands vested upon the approval of the plats, and not from the date of the land commissioner's certificate. Tubbs v. Wilhoit (1887) 78 Cal. 61, 14 Pac. 361, judgment affirmed in Tubbs v.

Wilhoit (1891) 11 Sup. Ct. 279, 138 U. S. 134, 34 L. Ed. 887. See, also, Wright v. Roseberry (1887) 7 Sup. Ct. 985, 986, 121 U. S. 488, 30 L. Ed. 1039 (reversing [1883] 63 Cal. 252);. Sacramento Sav. Bank v. Hynes (1875) 50 Cal. 195.

Segregation survey.—A survey of land by a county surveyor, on an application to purchase, and plat and field notes made and filed by him in the surveyor general's office, approved by him, and conforming to the federal government survey of the township, and describing the land as swamp and overflowed, is not a "segregation survey," within the meaning of this section. Heath v. Wallace (1891) 11 Sup. Ct. 380, 384, 138 U. S. 573, 34 L. Ed. 1063, affirming (1886) 71 Cal. 50, 11 Pac. 842. See, also, Wright v. Roseberry (1887) 7 Sup. Ct. 985, 995, 121 U. S. 488, 30 L. Ed. 1039; Tubbs v. Wilhoit (1891) 11 Sup. Ct. 279, 138 U. S. 134, 34 L. Ed. 887; Sutton v. Fassett (1875) 51 Cal. 12; Foss v. Johnstone (Cal. 1910) 110 P. 294.

A description of land in the United States government survey as "subject to periodical overflow" cannot be said to mean the same as "swamp and overflowed lands," so as to pass title to the land to the state under this act. Heath v. Wallace (1886) 71 Cal. 50, 11 Pac. 842, judgment affirmed in Heath v. Wallace (1891) 11 Sup. Ct. 380, 382, 138 U. S. 573, 34 L. Ed. 1063.

The filing and approval by the surveyor general of a township plat on which certain lands are designated as swamp and overflowed lands, pursuant to this act, operates as a determination by the United States that the lands were on the date of the latter act swamp and overflowed lands, and that the title thereto vested in the state on that date. McCabe v. Goodwin (1895) 106 Cal. 486, 39 Pac. 941. See, also, Sacramento Valley Reclamation Co. v. Cook (1882) 61 Cal. 341.

§ 4965. (R. S. § 2490.) Act Sept. 28, 1850, c. 84, 9 Stat. 519, extended to Minnesota and Oregon.

The provisions of the act of Congress entitled "An act to enable the State of Arkansas and other States to redeem" the swamp lands within their limits, approved September 28, A. D. 1850, extend to the States of Minnesota and Oregon: Provided, That the grant shall not include any lands which the Government of the United States may have sold or disposed of under any law, enacted prior to March 12, 1860, prior to the confirmation of title to be made under the authority of said act—and the selections to be made from lands already surveyed in each of the States last named, under the authority of the act aforesaid, shall have been made within two years from the adjournment of the legislature of each State, at its next session after the 12th day of March, A. D. 1860—and as to all lands surveyed or to be surveyed, thereafter, within two years from such adjournment, at the next session after notice by the Secretary of the Interior to the governor of the State, that the surveys have been completed and confirmed.

Act March 12, 1860, c. 5, §§ 1, 2, 12 Stat. 3.

Notes of Decisions

Revision of laws.—It was not within the province of the revisers to change the law. Morrow v. Warner Valley Stock Co. (Or. 1909) 101 P. 171; Dixon v. Same, Id. 189; Greene v. Same, Id.; Harrington v. Same, Id.; Foskett v. Same, Id. 190.

Purpose and effect of statute.—This act recognizes the right of states to make selections of the swamp lands, or rather to provide for their identification, without waiting for the action of the secretary of the interior. Wright v. Roseberry (1887) 7 Sup. Ct. 985, 995, 121 U. S. 488, 30 L. Ed. 1039. And see Buena Vista v. Iowa Falls & S. C. R. Co. (1884) 5 Sup. Ct. 84, 88, 112 U. S. 165, 28 L. Ed. 680; Warner Valley Stock Co. v. Smith (1897) 17 Sup. Ct. 225, 226, 165 U. S. 28, 41 L. Ed. 621; Kirby v. Lewis (C. C. 1889) 39 Fed. 66, 77; U. S. v. Barnhart (D. C. 1887) 33 Fed. 459.

Nature of grant.—See, also, notes to § 4958, ante.

The grant to each of the states of swamp lands within its borders had reference only to the states then existing. Rice v. Sioux City & St. P. R. Co. (1884) 4 Sup. Ct. 177, 178, 110 U. S. 695, 28 L. Ed. 289.

This act was a grant in præsenti; the intention of congress being to give the beneficial title immediately to the state of all the lands thereby granted, as against claimants attempting to initiate rights afterwards, except under laws theretofore enacted. The subsequent creation of an Indian reservation did not prevent the fulfillment of the government's grant. (1906) 25 Op. Atty. Gen. 626.

The state lost no rights by not complying strictly with the statute. Gaston v. Stott (1873) 5 Or. 48.

The proviso of this act limited the

perfect grant of the indefeasible estate conferred by the first act. Id.

This act was a grant in præsenti of land that was in fact swamp land at the date of the act; so one claiming such land under a patent from the state of Oregon has a complete remedy at law against a claimant under a patent from the government, and cannot bring a suit in equity against the latter to compel the conveyance to him of the latter's title. Miller v. Tobin (1887) 16 Or. 540, 16 Pac. 161.

Since this act constitutes a grant in præsenti, and, when the swampy character of the land has been established, the grant carries title to a state as of the date of the act, a patent of swamp lands to the state, vested it with title from that date; and hence a purchaser of such land, succeeding to the title of the state, was entitled to the same, as against a homestead settler thereon before the issuance of the patent. Warner Valley Stock Co. v. Calderwood (1899) 59 P. 115, 36 Or. 228.

The state's legal title will not relate back to date of the act, thereby giving stability to its deeds made prior to receipt of the patent by it, where it would invalidate title of persons who had taken the lands under the homestead and pre-emption laws after passage of the swamp land act, but before issuance of the patent. Morrow v. Warner Valley Stock Co. (Or. 1909) 101 P. 171; Dixon v. Same, Id. 189; Greene v. Same, Id.; Harrington v. Same, Id.; Foskett v. Same, Id. 190.

Reservation of swamp lands for forest reserve.—The authority of the forester of the department of agriculture to select lands to constitute a forest reserve did not authorize him to reserve the swamp lands conveyed to the state of Minnesota by this act. (1906) 25 Op. Atty. Gen. 626.

Listing and identification of lands.—See, also, notes to § 4959, ante.

The listing of land by the state, even though such listing be deemed by itself sufficient to vest the state with the fee, is void as far as it includes land the fee to which has already vested by another grant taking effect in præsenti. Pengra v. Munz (C. C. 1887) 29 Fed. 830; California & Oregon Land Co. v. Munz, Id. 837.

The legal title did not pass in præsenti, but the selection of land by the state within the time limited was a condition precedent, upon failure of which the grant lapsed. Id.

The state had no duty to perform in selections, and a selection of swamp lands made by its officers under an act of its legislature was not binding upon the United States, unless approved and confirmed by the secretary of the interior, and gave the state no equitable title to or vested right in any of the lands so selected, which it could convey to another, where the selection has not been ratified and confirmed by the secretary. Kerns v. Lee (C. C. 1906) 142 Fed. 985.

The requirement that the selection of swamp lands should be made within two years was not a condition or limitation of the grant. (1906) 25 Op. Atty. Gen. 626.

A determination by the secretary of the interior, on an application for a patent, that the lands applied for were subject to homestead entry, was conclusive as against one to whom the land had previously been conveyed by the state under a list of swamp lands the approval of which had afterwards been revoked. Small v. Lutz (1902) 69 P. 825, 41 Or. 570.

Prior to selection and approval by the secretary of the interior of swamp and overflowed lands, the United States could dispose of such lands under general laws, and the state could not, by any contract with third parties prior to action by the secretary of the interior, interfere with the acts of intending settlers under the land laws. Morrow v. Warner Valley Stock Co. (Or. 1909) 101 P. 171; Dixon v. Same, Id. 189; Greene v. Same, Id.; Harrington v. Same, Id.; Foskett v. Same, Id. 190.

Swamp lands could not be selected by the state and approved by the secretary of the interior until a survey thereof was made. State v. Warner Valley Stock Co. (1910) 106 P. 780, 56 Or. 283, rehearing denied (1910) 108 P. 861, 56 Or. 283.

Patents.—A patent under the wagon grant is conclusive evidence that the premises were not swamp land. Cahn v. Barnes (C. C. 1881) 5 Fed. 326, 328.

A bill in equity will not lie against the state for the purpose of vacating a patent, on the mere ground that the land patented was not in fact swamp land. (1890) 19 Op. Atty. Gen. 684.

The final act of confirmation of title referred to in this act is the patent. Warner Val. Stock Co. v. Smith (1896) 9 App. D. C. 187.

A patent of swamp land to the state is conclusive against collateral attack. Warner Valley Stock Co. v. Calderwood (1899) 59 Pac. 115, 36 Or. 228.

§ 4966. (Act Feb. 23, 1875, c. 99.) Homestead entries by purchasers from State of Missouri of lands, as swamp lands, declared not to be such.

In all cases in the State of Missouri where lands have heretofore been selected and claimed as swamp and overflowed lands by said State, and the various counties therein, by virtue of any act

of Congress, and said lands have been withheld from market in consequence thereof by the General Government, and the said State and counties have sold said lands to actual settlers, and said settlers have improved the same to the value of one hundred dollars; said settlers, their heirs, assigns, and legal representatives, who have continued to reside thereon, shall have priority of right to [preëmpt or] homestead all such lands as may be rejected by the United States as not being in fact swamp and overflowed lands; and it shall be the duty of the Secretary of the Interior to make such rules and regulations as may be necessary to carry into effect the provisions of this act: Provided, That nothing herein contained shall prejudice the rights of any person who may have made actual settlement upon such lands under the preëmption or homestead laws prior to the passage of this act. (18 Stat. 334.)

This was an act entitled "An act for the relief of actual settlers on lands claimed to be swamp and overflowed lands in the State of Missouri."

The words "preëmpt or," inclosed in brackets in this section, were superseded by the repeal of the pre-emption laws by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097.

§ 4967. (Act March 3, 1877, c. 116.) Grant to Missouri of lands selected as swamp and overflowed lands.

That all lands in the State of Missouri selected as swamp and overflowed lands, and regularly reported as such to the General Land Office, and now withheld from market as such, so far as the same remain vacant and unappropriated and not interfered with by any preemption, homestead, or other claim under any law of the United States, and the claim whereto has not been heretofore rejected by the Commissioner of the General Land Office, or other competent authority, be, and the same are hereby, confirmed to said State, and all title thereto vested in said State; and it is hereby made the duty of the Secretary of the Interior to cause patents to issue for the same. (19 Stat. 395.)

This was an act entitled "An act granting to the State of Missouri all lands therein selected as swamp and overflowed lands."

§ 4968. (Act April 29, 1898, c. 229, § 3.) Title of purchasers of unconfirmed swamp lands in Arkansas confirmed.

That the title of all persons who have purchased from the State of Arkansas any unconfirmed swamp land and hold deeds for the same be, and the same is hereby, confirmed and made valid as against any claim or right of the United States, and without the payment by said persons, their heirs or assigns, of any sum whatever to the United States or to the State of Arkansas. (30 Stat. 368.)

This section and the section next following were part of an act to approve a compromise and settlement between the United States and the State of Arkansas, cited above.

Notes of Decisions

Purchasers protected.—See, also, notes to § 4969, post.

One who is not a bona fide purchaser is not entitled to be protected by this act. U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630, affirmed Lee Wilson & Co. v. U. S. (1915) 227 Fed. 827, 142 C. C. A. 351.

§ 4969. (Act April 29, 1898, c. 229, § 4.) Relinquishment by Arkansas of swamp lands and other public lands granted.

The State of Arkansas does hereby relinquish and quitclaim to the United States all lands heretofore confirmed, certified, or patented to the State which have been entered under the public land laws; and does hereby cede, relinquish, and quitclaim to the United States all right, title, and interest under the Acts of September twenty-eighth, eighteen hundred and fifty, March second, eighteen hundred

and fifty-five, and March third, eighteen hundred and fifty-seven, in and to all lands in the State which have been heretofore granted, confirmed, certified, or patented by the United States under any other Acts, and the title to such lands is hereby confirmed in the grantees, their heirs, successors, or assigns, anything in this Act or any other Act to the contrary notwithstanding: Provided, That this Act shall be of no force or effect until the State of Arkansas shall have accepted and approved the conditions, limitations, and provisions herein contained by an act of the general assembly or by an instrument in writing duly executed by the governor under the authority conferred upon him by the legislature of said State, and filed with the Secretary of the Treasury and the Secretary of the Interior within one year from the approval of this Act: Provided further, That whereas the general assembly of the State of Arkansas did, on the tenth day of March, eighteen hundred and ninety-seven, accept and approve the conditions, limitations, and provisions herein contained before the passage of this Act, making the same effective and conclusive, therefore this Act shall be in full force and effect from and after its passage. (30 Stat. 368.)

See note to preceding section.

Notes of Decisions

Compromise of claims against government.—The inchoate title of the state of Arkansas to unidentified swamp and overflowed lands was extinguished by a compromise and settlement between the state and the United States, approved by the state legislature and by congress. Chapman & Dewey Lumber Co. v. St. Francis Levee Dist. (1914) 34 Sup. Ct. 297, 232 U. S. 186, 58 L. Ed. 564.

Claims adjusted.—A levee district to which had passed the state's inchoate title to listed lands under the swamp land act is bound by the subsequent action of the state in relinquishing its inchoate title to the United States. Chapman & Dewey Lumber Co. v. St. Francis Levee Dist. (1914) 34 Sup. Ct. 297, 232 U. S. 186, 58 L. Ed. 564. See, also, U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630.

CHAPTER TEN E

Drainage under State Laws

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes the provisions of Act May 20, 1908, c. 181, relating to the drainage of public lands in Minnesota under the laws of that State.

Sec.
4970. Public lands in Minnesota made subject to state laws for drainage of swamp or overflowed lands for agricultural purposes.
4971. Apportionment of cost of drainage works; act not to create any obligation on the United States.
4972. Sale of lands for enforcement of charges assessed.
4973. Statement of sale of land under act to be certified to register and receiver.
4974. Patents to purchasers of unentered lands at sale under act; limitations; disposal of excess of purchase money.
4975. Patents to purchasers of unpatented lands at sale of sum received; forfeiture on nonpayment; disposal of proceeds.
4976. Notices required by drainage laws to be delivered to register and receiver and to entrymen of unpatented lands affected; rights of United States and of such entrymen to be heard, etc.

§ 4970. (Act May 20, 1908, c. 181, § 1.) Public lands in Minnesota made subject to state laws for drainage of swamp or overflowed lands for agricultural purposes.

All lands in the State of Minnesota, when subject to entry, and all entered lands for which no final certificates have issued, are hereby made and declared to be subject to all of the provisions of the laws of said State relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in

the same manner in which lands of a like character held in private ownership are or may be subject to said laws: Provided, That the United States and all persons legally holding unpatented lands under entries made under the public-land laws of the United States are accorded all the rights, privileges, and benefits given by said laws to persons holding lands of a like character in private ownership. (35 Stat. 169.)

This section and the six sections next following were part of an act entitled "An act to authorize the drainage of certain lands in the State of Minnesota."

Section 8 of that act opened to homestead entries certain ceded Chippewa Indian lands in Minnesota. It is omitted, as special and local only.

Notes of Decisions

Disposal of lands.—Lands in Minnesota ceded to the United States by the Chippewa Indians, which were formerly covered by Mud Lake, but are now reclaimed by drainage, should be surveyed and disposed of for the benefit of the Indians. (1912) 29 Op. Atty. Gen. 455.

§ 4971. (Act May 20, 1908, c. 181, § 2.) Apportionment of cost of drainage works; act not to create any obligation on the United States.

The cost of constructing canals, ditches, and other drainage works incurred in connection with any drainage project under said laws shall be equitably apportioned among all lands held in private ownership, all lands covered by unpatented entries, and all unentered public lands affected by such project; and officially certified lists showing the amount of the charges assessed against each smallest legal subdivision of such lands shall be furnished to the register and receiver of the land district in which the lands affected are located as soon as said charges are assessed, but nothing in this Act shall be construed as creating any obligation on the United States to pay any of said charges. (35 Stat. 169.)

§ 4972. (Act May 20, 1908, c. 181, § 3.) Sale of lands for enforcement of charges assessed.

All charges legally assessed may be enforced against any unentered lands, or against any lands covered by an unpatented entry, by the sale of such lands subject to the same manner and under the same proceedings under which such charges would be enforced against lands held in private ownership. (35 Stat. 170.)

§ 4973. (Act May 20, 1908, c. 181, § 4.) Statement of sale of land under act to be certified to register and receiver.

When any unentered lands, or any lands covered by an unpatented entry, have been sold in the manner mentioned in this Act, a statement of such sale showing the price at which each legal subdivision was sold shall be officially certified to the register and receiver immediately after the completion of such sale. (35 Stat. 170.)

§ 4974. (Act May 20, 1908, c. 181, § 5, as amended Act Sept. 5, 1916, c. 437.) Patents to purchasers of unentered lands at sale under act; limitations; disposal of excess of purchase money.

At any time after any sale of unentered lands has been made in the manner and for the purposes mentioned in this Act patent shall issue to the purchaser thereof upon payment to the receiver of the minimum price of $1.25 per acre, or such other price as may have been fixed by law for such lands, together with the usual fees and commissions charged in entry of like lands under the homestead laws. But purchasers at a sale of unentered lands shall have the qualification of homestead entrymen, and not more than one hundred and sixty acres of such lands shall be sold to any one

purchaser under the provisions of this Act. This limitation shall not apply to sales to the State, but shall apply to purchases from the State of unentered lands bid in for the State. Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this Act which shall be in excess of the drainage charges then delinquent shall be paid to and used by the county in which such land is located for the purpose of maintenance, improving, and extending such drainage works within the area benefited by the drainage project in which such land shall have been assessed for such drainage charge. (35 Stat. 170. 39 Stat.)

The amendment of this section by Act Sept. 5, 1916, c. 437, cited above, changed the last sentence which, as originally enacted, read as follows: "Any part of the purchase money arising from the sale of any lands in the manner and for the purposes provided in this Act which shall be in excess of the payments herein required and of the total drainage charges assessed against such lands shall also be paid to the receiver before patent is issued."

§ 4975. (Act May 20, 1908, c. 181, § 6, as amended, Act Sept. 5, 1916, c. 437.) Patents to purchasers of unpatented lands at sale of sum received; forfeiture on nonpayment; disposal of proceeds.

Any entered lands sold in the manner and for the purposes mentioned in this Act may be patented to the purchaser thereof at any time after the expiration of the period of redemption provided for in the drainage laws under which it may be sold (there having been no redemption) upon the payment to the receiver of the fees and commissions and the price mentioned in the preceding section, or so much thereof as has not already been paid by the entryman; and if the sum received at any such sale shall be in excess of the payments herein required and of the drainage assessments and cost of the sale, such excess shall be paid to the proper county officer for the benefit of and payment to the entryman. That unless the purchasers of unentered lands shall, within ninety days after the sale provided for in section three, pay to the proper receiver the fees, commissions, and purchase price to which the United States may be entitled, as provided in section five, and unless the purchasers of entered lands shall, within ninety days after the right of redemption has expired, make like payments, as provided for in this section, any person having the qualifications of a homestead entrymen may pay to the proper receiver for not more than one hundred and sixty acres of land for which such payment has not been made: First, the unpaid fees, commissions, and purchase price to which the United States may then be entitled; and, second, the sum due at the sale for drainage charges; and, in addition thereto, if bid in by the State, interest on the amount bid by the State at the rate of seven per centum per annum from the date of such sale, and thereupon the person making such payment shall become subrogated to the rights of such purchaser to receive a patent for said land. When any payment is made to effect such subrogation the receiver shall transmit to the treasurer of the county where the land is situated the amount paid for drainage charges, together with the interest paid thereon. (35 Stat. 170. 39 Stat.)

As originally enacted, this section required the purchaser of forfeited lands to pay "* * * second, the sum at which the land was sold at the sale for drainage charges * * *" and the receiver was to transmit to the county treasurer such amount "together with the interest paid thereon, if any, less any sum in excess of what may be due for such drainage charge, if the land when sold was unentered."

§ 4976. (Act May 20, 1908, c. 181, § 7.) Notices required by drainage laws to be delivered to register and receiver and to entrymen of unpatented lands affected; rights of United States and of such entrymen to be heard, etc.

A copy of all notices required by the drainage laws mentioned in this Act to be given to the owners or occupants of lands held in private ownership shall, as soon as such notices issue, be delivered to the register and receiver of the proper district land office in cases where unentered lands are affected thereby and to the entrymen whose unpatented lands are included therein, and the United States and such entrymen shall be given the same rights to be heard by petition, answer, remonstrance, appeal, or otherwise as are given to persons holding lands in private ownership; and all entrymen shall be given the same rights of redemption as are given to the owners of lands held in private ownership. (35 Stat. 171.)

CHAPTER TEN F

Protection of Timber and Depredations

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes R. S. §§ 2458–2463, and subsequent provisions relating to the protection of timber upon the public lands, outside of the national forests, and to the purposes for which and the conditions under which such timber may be cut.

The laws relating to the national forests are set forth post, under Title XXXII A, "The National Forests."

Sec.
4977. Live-oak and red-cedar lands.
4978. Selection of live-oak and red-cedar tracts.
4979. Protection of live-oak and red-cedar timber.
4980. Cutting or destruction of live-oak or red-cedar, penalty.
4981. Vessels employed in carrying away live-oak and red-cedar, forfeiture of.
4982. Clearance of vessels laden with live-oak; prosecution of depredators.
4983. Examination of lands in Florida reserved for naval purposes.
4984. Lands no longer needed for naval purposes restored to entry and sale; prior right of settlers to purchase.
4985. Restoration to public domain of certain naval reservations; preference right of entry; certain lands to be disposed of under town-site laws.
4986. Disposition of moneys collected for depredations on public lands.
4987. Seizure of timber cut on public lands to be exported.
4988. Relief from prosecutions on payment for timber cut, etc.; repeal.
4989. Timber on certain mineral lands may be cut for certain purposes.
4990. Registers and receivers to notify Commissioner of General Land Office of unlawful cutting of timber.
4991. Violations of act punishable.
4992. Timber on certain public lands may be cut for certain purposes.
4993. Removal of timber cut in Wyoming to Idaho.
4994. Limitations of use of timber taken from public lands not to apply to certain territory.
4995. Sale of timber killed or damaged by forest fires; proceeds of sales of damaged timber upon existing claims.
4996. Disposal of proceeds of sale of burnt timber upon existing claim where claim is patented; disposal of proceeds where claim is rejected.

§ 4977. (R. S. § 2458.) Live-oak and red-cedar lands.

The Secretary of the Navy is authorized, under the direction of the President, to cause such vacant and unappropriated lands of the United States as produce the live-oak and red-cedar timbers to be explored, and selection to be made of such tracts or portions thereof, where the principal growth is of either of such timbers, as in his

judgment may be necessary to furnish for the Navy a sufficient supply of the same.

Act March 1, 1817, c. 22, § 1, 3 Stat. 347. Act May 15, 1820, c. 136, 3 Stat. 607. Act March 3, 1827, c. 94, § 3, 4 Stat. 242.

§ 4978. (R. S. § 2459.) Selection of live-oak and red-cedar tracts.

The President is authorized to appoint surveyors of public lands, who shall perform the duties prescribed in the preceding section, and report to him the tracts by them selected, with the boundaries ascertained and accurately designated by actual survey or watercourses; and the tracts of land thus selected with the approbation of the President shall be reserved, unless otherwise directed by law, from any future sale of the public lands, and be appropriated to the sole purpose of supplying timber for the Navy of the United States; but nothing in this section contained shall be construed to prejudice the prior rights of any person claiming lands, which may be reserved in the manner herein provided.

Act March 1, 1817, c. 22, § 1, 3 Stat. 347.

§ 4979. (R. S. § 2460.) Protection of live-oak and red-cedar timber.

The President is authorized to employ so much of the land and naval forces of the United States as may be necessary effectually to prevent the felling, cutting down, or other destruction of the timber of the United States in Florida, and to prevent the transportation or carrying away any such timber as may be already felled or cut down; and to take such other and further measures as may be deemed advisable for the preservation of the timber of the United States in Florida.

Act Feb. 23, 1822, c. 9, 3 Stat. 651.

§ 4980. (R. S. § 2461.) Cutting or destruction of live-oak or red-cedar, penalty.

If any person shall cut, or cause or procure to be cut, or aid, assist, or be employed in cutting, or shall wantonly destroy, or cause or procure to be wantonly destroyed, or aid, assist, or be employed in wantonly destroying any live-oak or red-cedar trees, or other timber standing, growing, or being on any lands of the United States, which, in pursuance of any law passed, or hereafter to be passed, have been reserved or purchased for the use of the United States, for supplying or furnishing therefrom timber for the Navy of the United States; or if any person shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing from any such lands which have been reserved or purchased, any live-oak or red-cedar trees, or other timber, unless duly authorized so to do, by order, in writing, of a competent officer, and for the use of the Navy of the United States; or if any person shall cut, or cause or procure to be cut, or aid, or assist, or be employed in cutting any live-oak or red-cedar trees, or other timber on, or shall remove, or cause or procure to be removed, or aid, or assist, or be employed in removing any live-oak or red-cedar trees or other timber, from any other lands of the United States, acquired, or hereafter to be acquired, with intent to export, dispose of, use, or employ the same in any manner whatsoever, other than for the use of the Navy of the United States; every such person shall pay a fine not less than triple the value of the trees or timber so cut, destroyed, or removed, and shall be imprisoned not exceeding twelve months.

Act March 2, 1831, c. 66, § 1, 4 Stat. 472.
See notes to Rev. St. § 2463, post, § 4982.

Notes of Decisions

I. Timber trespass as offense
1. Application of statute.
2. Modification and repeal of statute.
3. Criminal liability and prosecutions therefor.
4. Timber protected by statute.

I. Timber trespass as offense—Cont'd
5. Boxing trees.
6. Cutting of timber by settlers or miners.
7. Intent as element of offense.
8. Justification or defense.
9. Indictment or information.
10. Penalty.
11. Contracts void.

II. Civil action for trespass
12. Civil liability and remedy.
13. Property in timber cut by trespasser.
14. Cutting of timber by settlers.
15. Possession and title to sustain action.
16. Defenses.
17. Measure of damages.
18. Exemplary damages.
19. Nominal damages.

I. TIMBER TRESPASS AS OFFENSE

1. Application of statute.—This section does not apply to Indian reservations in Wisconsin. U. S. v. Konkapot (C. C. 1890) 43 Fed. 64.

The provisions of the statute are intended to protect and preserve live oak, red cedar, and other like timber, whether the same shall be upon land reserved or purchased by the United States for the purpose of supplying such timber for the navy, or whether it be upon other lands of the United States, provided only that the timber is live oak, or red cedar, or other like timber, such as would be useful to the navy for naval purposes. (1889) 19 Op. Atty. Gen. 381.

2. Modification and repeal of statute.—This section must be construed in connection with the homestead and mining laws, and in so far as these laws confer rights and privileges to use timber, its provisions are modified. Shiver v. U. S. (1895) 16 Sup. Ct. 54, 55, 159 U. S. 491, 40 L. Ed. 231; Grubbs v. Same (1900) 105 Fed. 314, 44 C. C. A. 513; U. S. v. Young (C. C. 1882) 11 Fed. 493, 494; Same v. Williams (C. C. 1883) 18 Fed. 475, 477; Same v. Murphy (C. C. 1887) 32 Fed. 376, 378; Same v. Ellis (C. C. 1903) 122 Fed. 1016 (following Same v. Ball [C. C. 1887] 31 Fed. 667; Id. 670, and writ of error dismissed [1891] 11 Sup. Ct. 1029, 140 U. S. 701, 35 L. Ed. 602); Same v. Nelson (D. C. 1878) Fed. Cas. No. 15,864. See, also, U. S. v. Smith (C. C. 1882) 11 Fed. 487, 490; Same v. Hacker (D. C. 1896) 73 Fed. 292, 296; King-Ryder Lumber Co. v. Scott (1904) 84 S. W. 487, 73 Ark. 329, 70 L. R. A. 873.

So much of this section as relates to the cutting or removing of timber from the public domain with intent to export or dispose of the same, together with the penalty of imprisonment, has been repealed. Morgan v. U. S. (1906) 148 Fed. 189, 78 C. C. A. 323, writ of certiorari denied U. S. v. Morgan (1906) 27 Sup. Ct. 784, 203 U. S. 595, 51 L. Ed. 333.

3. Criminal liability and prosecutions therefor.—See, also, notes to § 10216, post.

The cutting and using of oak and hickory or any other timber on public lands is indictable and punishable by fine and imprisonment. U. S. v. Briggs (1850) 9 How. 351, 354, 13 L. Ed. 170; Forsythe v. U. S. (1850) 9 How. 571, 577, 13 L. Ed. 262; Spencer v. Same (1874) 10 Ct. Cl. 255; (1832) 2 Op. Atty. Gen. 494. And see U. S. v. Briggs (1847) 5 How. 208, 12 L. Ed. 119; Same v. Barber (1891) 11 Sup. Ct. 751, 140 U. S. 177, 35 L. Ed. 398; Turner v. U. S. (1895) 66 Fed. 286, 13 C. C. A. 442; Id., 66 Fed. 287, 288, 13 C. C. A. 442; Id., 66 Fed. 289, 13 C. C. A. 445. (1832) 2 Op. Atty. Gen. 524.

There are three elements of the offense: (1) Cutting timber; (2) from lands known to be public lands; (3) with intent to export or dispose of the same; and when these three elements are shown to exist the crime is complete. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230.

The criminal liability created by this section is to be prosecuted and punished by indictment. U. S. v. Scott (C. C. 1889) 39 Fed. 900.

A criminal prosecution may be maintained for a violation of this section. U. S. v. Stone (D. C. 1892) 49 Fed. 848.

4. Timber protected by statute.—The term "timber," as used in the statute, does not apply alone to large trees fitted for house or shipbuilding, but includes trees of any size, of a character or sort that may be used in any kind of manufacture or the construction of any article. U. S. v. Stores (C. C. 1882) 14 Fed. 824.

Mesquite, a small tree indigenous to deserts, used only for firewood, and not used in the manufacture of any useful article, is not "timber," within the statute. Bustamente v. U. S. (Ariz. 1895) 42 Pac. 111. And see U. S. v. Soto (1901) 64 Pac. 419, 7 Ariz. 230.

The question as to whether or not a mesquite tree is "timber" is a question for the jury. U. S. v. Soto (1901) 64 Pac. 419, 7 Ariz. 230. It is not intended to confine the protection to timber of size and kind adapted to house or shipbuilding. Id.

5. Boxing trees.—See, also, notes § 10218, post.

This section is not violated by boxing pine trees on the public lands for the purpose of the manufacture of turpentine, since it is not a cutting of the trees, within the statute. Bryant v. U. S. (1901) 105 Fed. 941, 45 C. C. A. 145; Leatherbury v. U. S. (C. C. 1887) 32 Fed. 780, reversing U. S. v. Leatherberry (D. C. 1886) 27 Fed. 606.

While the object of this act was and is to preserve the timber on all the public lands not reserved for the use of the

navy, trespasses other than the cutting or removing of the trees or timber with intent to export, dispose of, etc., are not contemplated nor provided for. Leatherbury v. U. S. (C. C. 1887) 32 Fed. 780, 782.

6. Cutting of timber by settlers or miners.—See, also, notes to § 4532, ante.

Persons occupying under the homestead and mining acts, before becoming the owners of the land, may cut and use the timber thereon, so far as the same may be necessary to accomplish the purpose for which the land is occupied, but no further. Shiver v. U. S. (1895) 16 Sup. Ct. 54, 55, 159 U. S. 491, 40 L. Ed. 231; U. S. v. Murphy (C. C. 1887) 32 Fed. 376, 384; Same v. Nelson (D. C. 1878) Fed. Cas. No. 15,864; The Timber Cases (D. C. 1881) 11 Fed. 81; Ladda v. Hawley (1880) 57 Cal. 51, 55.

A homesteader is liable to prosecution if he cuts timber for profit. Shiver v. U. S. (1895) 16 Sup. Ct. 54, 55, 159 U. S. 491, 40 L. Ed. 231; Orrell v. Bay Mfg. Co. (1904) 36 So. 561, 83 Miss. 800, 70 L. R. A. 881.

Lands duly entered for a homestead are, as between the United States and the settler, public lands within this section. Shiver v. U. S. (1895) 16 Sup. Ct. 54, 56, 159 U. S. 491, 40 L. Ed. 231. See, also, U. S. v. Fickett (1913) 205 Fed. 134, 123 C. C. A. 366.

This section has no application to the cutting of timber by a bona fide homesteader, and in a prosecution thereunder for the cutting of timber from a homestead by, or under authority from, the homesteader, the vital question is as to whether the homestead was taken and is being held in good faith, with intent to acquire title thereto by a compliance with the requirements of the homestead act. Grubbs v. U. S. (1900) 105 Fed. 314, 44 C. C. A. 513.

A homestead entry works no change in the title of lands which can prevent a prosecution for cutting timber thereon. U. S. v. Stores (C. C. 1882) 14 Fed. 824.

7. Intent as element of offense.—Where the cutting is admitted, the only intent necessary to show is the intent to export or dispose of the timber. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230. See, also, Id. (1902) 117 Fed. 577, 54 C. C. A. 349.

The statutes make it a misdemeanor for any person to cut timber on public lands with intent to export or dispose of the same. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230.

8. Justification or defense.—The exclusive right to occupy and work a mineral claim, given to the locator by the mining law, does not segregate such claim from the public domain, so as to exclude such land from the operation of this section. Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230. See U. S. v. Nelson (D. C. 1878) Fed. Cas. No. 15,864; Same v. Rizzinelli (D. C. 1910) 182 Fed. 675.

Defendant cannot prove in justification a custom in the vicinity of entering upon lands and cutting timber before a patent was obtained. Teller v. U. S. (1901) 113 Fed. 273, 276, 51 C. C. A. 230.

That the trees cut were used for firewood or burnt into charcoal is no justification. U. S. v. Stores (C. C. 1882) 14 Fed. 824.

That there was no criminal intent in the cutting is no defense. U. S. v. Murphy (C. C. 1887) 32 Fed. 376.

9. Indictment or information.—An information containing all the averments necessary to charge an offense under the acts of congress is good, though drawn to conform to this section. Stubbs v. U. S. (1901) 111 Fed. 366, 49 C. C. A. 392. See, also, (1900) 104 Fed. 988, 44 C. C. A. 292.

The intent to use the timber for any other than United States naval purposes must be alleged. U. S. v. Garretson (C. C. 1890) 42 Fed. 22.

An indictment, which charges both the cutting and removal in the same count, is not bad as charging two offenses in one count. U. S. v. Stone (D. C. 1892) 49 Fed. 848.

It is not necessary that the indictment shall set out the use to which defendant appropriated the timber, other than to aver that it was not for the use of the navy, nor to show that he does not come within the provisions of some of the statutes modifying this section. Id.

10. Penalty.—Where indictments against two persons for cutting timber from government land are consolidated, and the jury returns a single verdict fixing the amount of damages, the court is justified in assessing against each separately the triple damages authorized by the statute, and is not required to impose a joint penalty. Turner v. U. S. (1895) 66 Fed. 280, 13 C. C. A. 436.

11. Contracts void.—A contract between two individuals for the purchase and sale of timber on government land is void. Ladda v. Hawley (1880) 57 Cal. 51; Swanger v. Mayberry (1881) 59 Cal. 91; Stevens v. Perrier (1873) 12 Kan. 297.

A sale of timber to carry out in good faith the acquisition of a homestead is not void. King-Ryder Lumber Co. v. Scott (1904) 84 S. W. 487, 73 Ark. 329, 70 L. R. A. 873.

II. CIVIL ACTION FOR TRESPASS

12. Civil liability and remedy.—See, also, notes to § 10216, post.

The United States may maintain an action for cutting and carrying away trees from public lands. Cotton v. U. S. (1850) 11 How. 229, 231, 13 L. Ed. 675; U. S. v. Cook (1873) 19 Wall. 591, 594, 22 L. Ed. 210. See, also, U.

S. v. Mock (1893) 13 Sup. Ct. 848, 850, 149 U. S. 273, 37 L. Ed. 732; Same v. Humphries (1893) 13 Sup. Ct. 850, 149 U. S. 277, 37 L. Ed. 734; Northern Pac. R. Co. v. Lewis (1896) 16 Sup. Ct. 831, 833, 162 U. S. 366, 40 L. Ed. 1002; Pine River Logging & Improvement Co. v. U. S. (1902) 22 Sup. Ct. 920, 925, 186 U. S. 279, 46 L. Ed. 1164; U. S. v. Denver & R. G. R. Co. (1903) 24 Sup. Ct. 33, 35, 191 U. S. 84, 48 L. Ed. 106; Same v. Teller (1901) 106 Fed. 447, 45 C. C. A. 416; English v. U. S. (1902) 116 Fed. 625, 54 C. C. A. 81; Sauntry v. Same (1902) 117 Fed. 132, 55 C. C. A. 148; Teller v. Same (1902) 117 Fed. 577, 54 C. C. A. 349; Potter v. Same (1903) 122 Fed. 49, 58 C. C. A. 231; U. S. v. Blendauer (1904) 128 Fed. 910, 913, 63 C. C. A. 636 (overruling [D. C. 1903] 122 Fed. 703); Same v. Bitter Root Development Co. (1904) 133 Fed. 274, 66 C. C. A. 652 (decree affirmed [1906] 26 Sup. Ct. 318, 200 U. S. 451, 50 L. Ed. 550); St. Louis Stave & Lumber Co. v. U. S. (1910) 177 Fed. 178, 100 C. C. A. 640; H. D. Williams Cooperage Co. v. Same (1915) 221 Fed. 234, 137 C. C. A. 90; U. S. v. Taylor (C. C. 1888) 35 Fed. 484; Same v. Scott (C. C. 1889) 39 Fed. 900; Norris v. U. S. (C. C. 1891) 44 Fed. 735; Id., 739; U. S. v. Baxter (C. C. 1891) 46 Fed. 350 (writ of error dismissed [1892] 12 Sup. Ct. 989, 145 U. S. 657, 36 L. Ed. 858); Same v. Bean (D. C. 1903) 120 Fed. 719; Same v. McCaskill (D. C. 1912) 200 Fed. 332; Spencer v. U. S. (1874) 10 Ct. Cl. 255; (1843) 4 Op. Atty. Gen. 247; Id., 339; U. S. v. Kelly (1888) 3 Wash. T. 421, 17 Pac. 878.

The title to the land may be determined in replevin for the timber. U. S. v. Steenerson (1892) 50 Fed. 504, 1 C. C. A. 552.

Where the government claims ownership of logs cut, its remedy is replevin or trespass. Handford v. U. S. (1899) 92 Fed. 881, 35 C. C. A. 75.

13. Property in timber cut by trespasser.—A party acquires no title to timber which he wrongfully cuts on the public domain. U. S. v. Cook (1873) 19 Wall. 591, 22 L. Ed. 210; Shiver v. U. S. (1893) 16 Sup. Ct. 54, 55, 150 U. S. 491, 40 L. Ed. 231; Northern Pac. R. Co. v. Lewis (1896) 16 Sup. Ct. 831, 835, 162 U. S. 366, 40 L. Ed. 1002; Spencer v. U. S. (1874) 10 Ct. Cl. 255.

14. Cutting of timber by settlers.—See, also, notes to § 4532, ante.

Even a settler who takes up a claim on public lands, intending to perfect his right, is not authorized, until he has perfected his claim, to cut the timber, except so far as is necessary and reasonable to prepare for cultivation so much of the land as he intends immediately to cultivate; and, if he cuts additional timber with intent to defraud the government, a purchaser from him acquires no title thereto. But if, in improving the land, he cuts and disposes of surplus timber without intent to defraud, one who purchases from him under the belief that there is no such intent is protected. Stone v. U. S. (1897) 17 Sup. Ct. 778, 784, 167 U. S. 178, 42 L. Ed. 127, affirming (1894) 64 Fed. 667, 12 C. C. A. 451. See, also, H. D. Williams Cooperage Co. v. U. S. (1915) 221 Fed. 234, 137 C. C. A. 90; U. S. v. Williams (C. C. 1883) 18 Fed. 475; Same v. Ellis (C. C. 1903) 122 Fed. 1016 (following U. S. v. Ball [C. C. 1887] 31 Fed. 667; Id., 670, and writ of error dismissed [1891] 11 Sup. Ct. 1029, 140 U. S. 701, 35 L. Ed. 602); Same v. McEntee (D. C. 1877) Fed. Cas. No. 15,673; (1843) 4 Op. Atty. Gen. 221; (1845) 4 Op. Atty. Gen. 405.

Whether claimants under the homestead and pre-emption laws, who, after occupation for a time, abandon the lands, intended in cutting timber to defraud the government, is a question for the jury. Stone v. U. S. (1897) 17 Sup. Ct. 778, 784, 167 U. S. 178, 42 L. Ed. 127, affirming judgment (1894) 64 Fed. 667, 12 C. C. A. 451.

Where defendant claims that he purchased the timber from settlers under the pre-emption and homestead laws, the burden is on him to show the good faith of such settlers, and their right to cut and sell such timber. Stone v. U. S. (1894) 64 Fed. 667, 12 C. C. A. 451.

Trespassers on the lands of the United States occupy the same position with trespassers on the lands of private individuals. Turley v. Tucker (1840) 6 Mo. 583, 35 Am. Dec. 449.

15. Possession and title to sustain action.—An entryman who makes full payment for land and obtains a receiver's receipt, entitling him to a patent, becomes the equitable owner of the land as of the date of his application to purchase including timber cut from the land after that date. Teller v. U. S. (1902) 117 Fed. 577, 54 C. C. A. 349.

Possession by a homestead claimant, and a receiver's receipt issued since bringing the action, do not devest the government of possession or title so that it cannot bring trespass for cutting timber on the land. U. S. v. Taylor (C. C. 1888) 35 Fed. 484.

The United States cannot recover in conversion the value of property unlawfully taken from public land from the second innocent purchaser of such property after its sale by the trespasser. U. S. v. Waters-Pierce Oil Co. (C. C. 1910) 180 Fed. 309, judgment modified (1912) 196 Fed. 767, 116 C. C. A. 391.

The United States cannot maintain an action to recover the value of timber cut and removed from unsurveyed land within the limits of a railroad grant, and which, when surveyed, would

be within the limits of an odd-numbered section, to which the government had parted with its title. U. S. v. Mullan Fuel Co. (D. C. 1902) 118 Fed. 663.

16. Defenses.—An equittal of a person indicted under this section for taking timber from public lands is not a bar to a civil action against him by the United States to recover the value of such timber. Stone v. U. S. (1897) 17 Sup. Ct. 778, 780, 167 U. S. 178, 42 L. Ed. 127.

It is no defense that the trespasser had an intent to purchase the land, and that it was the custom in the community to begin the cutting of timber on government land intended to be purchased before actually entering or doing any act indicative of such intention. Teller v. U. S. (1902) 117 Fed. 577, 54 C. C. A. 349.

It is not a defense that defendant purchased the timber in good faith from the person who cut and removed it. U. S. v. Bagnell Timber Co. (1910) 178 Fed. 795, 102 C. C. A. 243.

17. Measure of damages.—A willful trespasser is liable for the full value of the property at the time of commencing the suit, without deduction for labor or expense bestowed thereon; but an unintentional trespasser is only liable for the value of the timber at the time of conversion, less the value of any labor or expense, and a purchaser from a willful trespasser, without notice of the wrong, is liable only for the value thereof at the time of purchase, and not for any labor or expense he may bestow upon it thereafter. E. E. Bolles Wooden-Ware Co. v. U. S. (1882) 1 Sup. Ct. 398, 106 U. S. 432, 27 L. Ed. 230; Pine River Logging & Improvement Co. v. Same (1902) 22 Sup. Ct. 920, 925, 186 U. S. 279, 46 L. Ed. 1164; U. S. v. Teller (1901) 106 Fed. 447, 45 C. C. A. 416; Potter v. U. S. (1903) 122 Fed. 49, 58 C. C. A. 231; St. Louis Stave & Lumber Co. v. Same (1910) 177 Fed. 178, 100 C. C. A. 640; Parish v. Same (1911) 184 Fed. 590, 106 C. C. A. 570; White v. Same (1913) 202 Fed. 501, 121 C. C. A. 33; H. D. Williams Cooperage Co. v. Same (1915) 221 Fed. 234, 137 C. C. A. 90; U. S. v. Williams (C. C. 1883) 18 Fed. 475; Same v. Heilner (C. C. 1886) 26 Fed. 80; Same v. Ordway (C. C. 1887) 30 Fed. 36; Same v. Scott (C. C. 1889) 39 Fed. 900; Same v. Perkins (C. C. 1891) 44 Fed. 670; Same v. Northern Pac. R. Co. (C. C. 1895) 67 Fed. 890; Same v. Eccles (C. C. 1901) 111 Fed. 490; Same v. McCaskill (D. C. 1912) 200 Fed. 332; Same v. Hammond (D. C. 1914) 226 Fed. 849; Same v. Flint Lumber Co. (Ark. 1908) 112 S. W. 217. See, also, U. S. v. Mock (1893) 13 Sup. Ct. 848, 850, 149 U. S. 273, 37 L. Ed. 732; Stone v. U. S. (1894) 64 Fed. 667, 12 C. C. A. 451; U. S. v. Bitter Root Dev. Co. (1904) 133 Fed. 274, 66 C. C. A. 652; Bly v. U. S. (C. C. 1877) Fed. Cas. No. 1,581; U. S. v. Norris (C. C. 1890) 41 Fed. 424; Same v. Baxter (C. C. 1891) 46 Fed. 350 (writ of error dismissed [1892] 12 Sup. Ct. 989, 145 U. S. 657, 36 L. Ed. 858); Same v. McKee (D. C. 1904) 128 Fed. 1002.

18. Exemplary damages.—The government is entitled to exemplary damages if the wrongful acts were done willfully, or if such acts were the result of a negligence so gross as to show willfulness, or a reckless indifference to the rights of the government. U. S. v. Taylor (C. C. 1888) 35 Fed. 484.

An action by the United States for an alleged willful trespass in the cutting and removal of timber from public lands is one in which exemplary as well as actual damages may be recovered; and it is competent for the defendant, in support of a plea of good faith and to prevent such damages, to show that he acted under the advice of counsel. U. S. v. Mullan Fuel Co. (D. C. 1902) 118 Fed. 663.

19. Nominal damages.—For merely entering land, chipping trees, and removing crude turpentine, the government is entitled to nominal damages, though no actual damage were done. U. S. v. Taylor (C. C. 1888) 35 Fed. 484.

§ 4981. (R. S. § 2462.) Vessels employed in carrying away live-oak and red-cedar, forfeiture of.

If the master, owner, or consignee of any vessel shall knowingly take on board any timber cut on lands which have been reserved or purchased as in the preceding section prescribed, without proper authority, and for the use of the Navy of the United States; or shall take on board any live-oak or red-cedar timber cut on any other lands of the United States, with intent to transport the same to any port or place within the United States, or to export the same to any foreign country, the vessel on board of which the same shall be taken, transported, or seized, shall, with her tackle, apparel, and furniture, be wholly forfeited to the United States, and the captain or master of such vessel wherein the same was exported to any foreign coun-

try against the provisions of this section shall forfeit and pay to the United States a sum not exceeding one thousand dollars.

Act March 2, 1831, c. 66, § 2, 4 Stat. 472.

Any timber cut on the public lands was liable to seizure wherever found if exported from the Territories of the United States, by Act April 30, 1878, c. 76, § 2, post, § 4984.

See, also, notes to Rev. St. § 2463, post, § 4982.

Notes of Decisions

Pleading and proof.—A libel against a vessel for transporting timber cut from public lands must allege that the timber was taken from lands reserved for naval purposes, or that it was live oak or red cedar. U. S. v. The Helena (C. C. 1851) Fed. Cas. No. 15,342, reversing (D. C. 1850) Fed. Cas. No. 15,341.

In a libel for the forfeiture of a vessel, confessions of the consignee are not admissible to charge the offense on the owner or captain. The Cherokee (D. C. 1853) Fed. Cas. No. 2,639.

A forfeiture cannot be enforced against a vessel for taking on board timber removed from public lands, except on pleading and proof that the acts charged were done by the master willfully. Id.

§ 4982. (R. S. § 2463.) Clearance of vessels laden with live-oak; prosecution of depredators.

It shall be the duty of all collectors of the customs within the States of Alabama, Mississippi, Louisiana, and Florida, before allowing a clearance to any vessel laden in whole or in part with live-oak timber, to ascertain satisfactorily that such timber was cut from private lands, or, if from public ones, by consent of the Navy Department. And it is also made the duty of all officers of the customs, and of the land officers within those States, to cause prosecutions to be seasonably instituted against all persons known to be guilty of depredations on, or injuries to, the live oak growing on the public lands.

Act March 2, 1833, c. 67, § 3, 4 Stat. 647.

Provisions substantially the same as those of the first part of this section were made by R. S. § 4205, post, § 7796.

The cutting or destruction of timber or trees upon lands of the United States which had been reserved or purchased for any public use was made an offense by Act March 3, 1875, c. 151, 18 Stat. 481, provisions of which were incorporated into the Criminal Code, and which was repealed by section 341 of said Code, post, § 10515.

The penalties recoverable under this and the two preceding sections were to be disposed of, one-half to the informers or captors, and one-half to the Secretary of the Navy for the use of the Navy pension fund, and the Secretary was authorized to remit, in whole or in part, said penalties, by Rev. St. § 4751, which was superseded by Act April 30, 1878, c. 76, § 2, and Act June 3, 1878, c. 151, § 5, post, §§ 4987, 4988.

Provisions for restoration to sale and entry of lands reserved for naval purposes in Florida were made by Act March 3, 1879, c. 189, post, §§ 4983, 4984, and of similar lands in Alabama and Mississippi by Act March 3, 1895, c. 182, post, § 4985.

Notes of Decisions

Refusal of clearance.—Collectors may withhold clearances from any vessels on which there is reason to believe live oak or red cedar, cut from the public lands, is freighted. (1845) 4 Op. Atty. Gen. 403.

§ 4983. (Act March 3, 1879, c. 189, § 1.) Examination of lands in Florida reserved for naval purposes.

That the Secretary of the Navy be, and he is hereby, authorized to cause an examination to be made of the condition of all lands in the State of Florida which have been set apart or reserved for naval purposes, excepting the reservation upon which the navy-yard at Pensacola is located, and to ascertain whether or not such reserved lands are or will be of any value to the Government of the United States for naval purposes. (30 Stat. 470.)

This section and the section next following were an act entitled "An act to authorize the Secretary of the Navy to transfer to the Secretary of the

Interior, for entry and sale, all lands in the State of Florida not needed for naval purposes."

Section 3 of the act made an appropriation to carry out the provisions of the act.

Similar provisions relating to lands in Alabama and Mississippi were made by Act March 2, 1895, c. 182, post, § 4985.

§ 4984. (Act March 3, 1879, c. 189, § 2.) Lands no longer needed for naval purposes restored to entry and sale; prior right of settlers to purchase.

All of said lands which, in the judgment of the Secretary of the Navy, are no longer required for naval purposes shall, as soon as practicable, be certified by him to the Secretary of the Interior, and be subject to entry and sale in the same manner and under the same conditions as other public lands of the United States: Provided, that all persons who have, in good faith, made improvements on said reserved lands so certified at the time of the passage of this act, and who occupy the same, shall be entitled to purchase the part or parts so occupied or improved by them, not to exceed one hundred and sixty acres to any one person at one dollar and twenty-five cents per acre within such reasonable time as may be fixed by the Secretary of the Interior. (20 Stat. 471.)

§ 4985. (Act March 2, 1895, c. 182.) Restoration to public domain of certain naval reservations; preference right of entry; certain lands to be disposed of under town-site laws.

That the Secretary of the Navy be, and he is hereby, authorized to cause to be certified to the Secretary of the Interior, for restoration to the public domain, the whole or such portion or portions of the several tracts of land in the States of Alabama and Mississippi heretofore set apart and reserved for naval uses as are no longer required for the purposes for which they were reserved, or for any purposes connected with the naval service; and upon such certification the tracts of land described therein shall be duly restored to and become a part of the public lands of the United States and a preference right of entry for a period of six months from the date of this Act shall be given all bona fide settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this Act: Provided, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry; and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior: Provided, That so much of the said lands as are situated on Back Bay, near the city of Biloxi, in the State of Mississippi, shall be disposed of under the town-site law and not as agricultural lands. (28 Stat. 814.)

This was an act entitled "An act to authorize the Secretary of the Navy to certify to the Secretary of the Interior, for restoration to the public domain, lands in the States of Alabama and Mississippi not needed for naval purposes."

Similar provisions relating to lands in Florida reserved for naval purposes were made by Act March 3, 1879, c. 189, ante, §§ 4983, 4984.

§ 4986. (Act April 30, 1878, c. 76, § 2.) Disposition of moneys collected for depredations on public lands.

All moneys heretofore, and that shall hereafter be, collected for depredations upon the public lands shall be covered into the Treas-

ury of the United States as other moneys received from the sale of public lands. (20 Stat. 46.)

This was a proviso annexed to an appropriation for certain expenses of the General Land Office, in section 2 of the act cited above.

See notes to R. S. § 2463, ante, § 4982.

Notes of Decisions

Rights of informers.—This section did not affect the part payable to informers. (1883) 17 Op. Atty. Gen. 592. See, also (1889) 19 Op. Atty. Gen. 381.

§ 4987. (Act April 30, 1878, c. 76, § 2.) Seizure of timber cut on public lands to be exported.

If any timber cut on the public lands shall be exported from the Territories of the United States, it shall be liable to seizure by United States authority wherever found. (20 Stat. 46.)

This was a further proviso annexed to the same appropriation mentioned in the note to the preceding provision of this act, ante, § 4986.

Notes of Decisions

Authority to make seizure.—The land department has authority to make seizure, through its officers or agents, of timber unlawfully cut on the public lands. Stephenson v. Little (1862) 10 Mich. 433; (1886) 18 Op. Atty. Gen. 434.

Disposal of timber.—Timber unlawfully cut on the public lands, which has been seized by duly authorized agents of the land department, and is in their custody, may be disposed of by that department; and whether this be done by public or private sale, with or without previous advertisement, is a matter entirely discretionary therewith. (1886) 18 Op. Atty. Gen. 434. See, also (1890) 19 Op. Atty. Gen. 710.

§ 4988. (Act June 3, 1878, c. 151, § 5.) Relief from prosecutions on payment for timber cut, etc.; repeal.

Any person prosecuted in said States and Territory for violating section two thousand four hundred and sixty-one of the Revised Statutes of the United States who is not prosecuted for cutting timber for export from the United States, may be relieved from further prosecution and liability therefor upon payment, into the court wherein said action is pending, of the sum of two dollars and fifty cents per acre for all lands on which he shall have cut or caused to be cut timber, or removed or caused to be removed the same: Provided, That nothing contained in this section shall be construed as granting to the person hereby relieved the title to said lands for said payment; but he shall have the right to purchase the same upon the same terms and conditions as other persons, as provided hereinbefore in this act: And further provided, That all moneys collected under this act shall be covered into the Treasury of the United States. And section four thousand seven hundred and fifty-one of the Revised Statutes is hereby repealed, so far as it relates to the States and Territory herein named. (20 Stat. 90.)

This section was part of an act entitled "An act for the sale of timber lands in the States of California, Oregon, Nevada, and in Washington Territory," cited above.

The words of this said section, "said States and Territory," refer to the three States and the Territory named in said title of the act. But the act was made applicable to all the public land states, by amendment by Act Aug. 4, 1892, c. 375, § 2, 27 Stat. 348.

Sections 1–3 of this act, as so amended, are set forth ante, §§ 4671–4673.

Section 4 of this act made punishable the cutting, etc., of timber upon the public lands except for the necessary clearing of an agricultural or mining claim, or for improvements thereon, or for the use of the United States. It was superseded by similar provisions contained in Crim. Code, § 49, post, § 10216.

Section 6 of the act repealed all acts, etc., inconsistent with the provisions of this act.

All citizens of the United States, and other persons, bona fide residents of Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, were authorized to cut, for building, agricultural, mining, or other domestic purposes, any tim-

ber growing on the public lands, said lands being mineral, and not subject to entry under laws other than the mining laws, by Act June 3, 1878, c. 150, post, §§ 4989–4991. See, also, Act March 3, 1891, c. 561, § 8 (as amended by Act March 3, 1891, c. 559, Act Feb. 13, 1893, c. 103, Act March 3, 1901, c. 855), Act July 1, 1898, c. 546, § 1, and Act March 3, 1901, c. 862, post, §§ 4992–4996.

R. S. § 4751, mentioned and repealed in part by this section, provided that all penalties and forfeitures incurred under the provisions of R. S. §§ 2461–2463, ante, §§ 4980–4982, should be sued for, recovered, distributed, and accounted for under the direction of the Secretary of the Navy, and should be paid, one-half to the informers or captors, where seized, and one-half to the Secretary of the Navy for the use of the Navy pension fund, and authorized the Secretary to mitigate, in whole or in part, any fine, forfeiture, or penalty so incurred. Act April 30, 1878, c. 76, § 2, ante, § 4983, provided that all moneys heretofore and hereafter collected for depredations upon the public lands should be covered into the Treasury of the United States, as other moneys received from the sale of public lands, thus superseding R. S. § 4751. This Act (Act June 3, 1878, c. 151) being applicable to all the public land states, R. S. § 4751, was repealed thereby as to all of said states.

The use of earth, stone, and timber from the public lands in the construction of irrigation works under the Reclamation Act of June 17, 1902, c. 1093, ante, §§ 4700–4708, was authorized by Act Feb. 8, 1905, c. 552, ante, § 4741.

An act punishing the cutting, chipping, or boxing of trees on the public lands, etc., Act June 4, 1906, c. 2571, 34 Stat. 208, was incorporated in the Criminal Code, in section 51 thereof, post, § 10218, and was repealed by section 341 of said Code, post, § 10515.

Appropriations for expenses of protecting timber on the public lands, etc., are made in the annual sundry civil appropriation acts. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Provisions for the sale of the mature living and dead and down timber on unallotted lands of any Indian reservation, and of the timber on any Indian allotment held under a trust or other patent containing restrictions on alienations, were made by Act June 25, 1910, c. 431, §§ 7, 8, ante, §§ 4230, 4231.

The sale of timber upon the public lands, destroyed or damaged by forest fires, was authorized by Act March 4, 1913, c. 165, post, §§ 4995, 4996.

Setting on fire any timber, underbrush, or grass on the public domain, or leaving a fire to burn unattended near any inflammable material, or failing to extinguish a fire built near inflammable material upon the public domain, was made punishable by Act Feb. 24, 1897, c. 313, 29 Stat. 594, as amended by Act May 5, 1900, c. 349, 31 Stat. 169. These provisions were incorporated in Crim. Code, §§ 52–54, post, §§ 10219–10221, and the act as amended was repealed by Crim. Code, § 341, post, § 10515.

Notes of Decisions

Application and effect of section.—This section applied to the Pacific States and Washington Territory, and repealed section 4751 of the Revised Statutes, only so far as concerned such states and territory. (1883) 17 Op. Atty. Gen. 592. See, also, U. S. v. Smith (C. C. 1882) 11 Fed. 487.

Effect on civil liability.—A party prosecuted for cutting timber on the public lands is only relieved from a criminal prosecution by compliance with this section. He is not relieved from his civil common-law liability to the United States as owner of the land for the value of the timber cut. U. S. v. Scott (C. C. 1889) 39 Fed. 900; Same v. Stone (D. C. 1892) 49 Fed. 848. See, also, Morgan v. U. S. (1906) 148 Fed. 189, 78 C. C. A. 323; (1878) 16 Op. Atty. Gen. 189.

§ 4989. (Act June 3, 1878, c. 150, § 1.) Timber on certain mineral lands may be cut for certain purposes.

All citizens of the United States and other persons, bona fide residents of the State of Colorado, or Nevada, or either of [the Territories of] New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, or Montana, and all other mineral districts of the United States, shall be, and are hereby, authorized and permitted to fell and remove, for building, agricultural, mining, or other domestic purposes, any timber or other trees growing or being on the public lands, said lands being mineral, and not subject to entry under existing laws of the United States, except for mineral entry, in either of said States, Territories, or districts of which such citizens or persons may be at the time bona-fide residents, subject to such rules and regulations as the Secretary of the Interior may prescribe for the protection of the timber and of the undergrowth growing upon such lands,

and for other purposes: Provided, the provisions of this act shall not extend to railroad corporations. (20 Stat. 88.)

This section and the two sections next following were an act entitled "An act authorizing the citizens of Colorado, Nevada and the Territories to fell and remove timber on the public domain for mining and domestic purposes."

The words "the Territories of," inclosed in brackets in this section, were superseded by the admission of the several Territories named into the Union as States, as follows: Montana and North and South Dakota, by Act Feb. 22, 1889, c. 180, 25 Stat. 676; Idaho, by Act July 3, 1890, c. 656, 26 Stat. 215; Wyoming, by Act July 10, 1890, c. 664, 26 Stat. 222; Utah, by Act July 16, 1894, c. 138, 28 Stat. 107; and New Mexico and Arizona, by Act June 20, 1910, c. 310, 36 Stat. 557, and Res. Aug. 21, 1911, No. 8, 37 Stat. 39.

Notes of Decisions

I. Timber cutting on mineral lands

1. Construction and purpose of act.
2. Policy of law.
3. Privilege of cutting not repealed.
4. Persons authorized to cut.
5. Districts in which cutting is permitted.
6. Lands on which cutting is permitted—Mineral character.
7. —— Extent of minerals and proof.
8. —— Agricultural land.
9. Uses for which cutting is permitted.
10. —— Domestic purposes.
11. —— Reduction, smelting, roasting, etc.
12. Regulations as to cutting—Authority and effect.
13. —— Validity.
14. —— Regulations as to sawmill owners.
15. —— Regulations as to size of trees.

II. Actions for trespass

16. Right of United States to recover.
17. Liability of railroad company.
18. Plea and proof of good faith.
19. Presumptions and burden of proof.
20. Measure of damages.

I. TIMBER CUTTING ON MINERAL LANDS

1. Construction and purpose of act.—Where persons have cut timber from lands belonging to the United States, there is no presumption that they have complied with and come under the conditions of this act. On the contrary, the right to cut being narrow and exceptional, the presumption, in the absence of any evidence of right, is that the cutting was illegal. Northern Pac. R. Co. v. Lewis (1896) 16 Sup. Ct. 831, 833, 162 U. S. 366, 40 L. Ed. 1002, reversing judgment (1892) 51 Fed. 658, 2 C. C. A. 446. See, also, U. S. v. Denver & R. G. R. Co. (1903) 24 Sup. Ct. 33, 35, 191 U. S. 84, 48 L. Ed. 106; Anderson v. U. S. (1907) 152 Fed. 87, 81 C. C. A. 311. And see Stubbs v. U. S. (1900) 104 Fed. 988, 44 C. C. A. 292, judgment reversed on rehearing (1901) 111 Fed. 366, 49 C. C. A. 392.

Persons cutting trees growing on the lands of the United States, without permission, are mere trespassers, performing an illegal act, and acquire no right, title, or interest in the wood by reason of the severance. Northern Pac. R. Co. v. Lewis (1896) 16 Sup. Ct. 831, 833, 162 U. S. 366, 40 L. Ed. 1002, reversing judgment (1892) 2 C. C. A. 446, 51 Fed. 658.

The intention of congress in enacting this law was to enable settlers in the regions where timber is scarce to utilize it for domestic and mining purposes, and especially to develop the mineral resources of the rough, mountainous districts, where agricultural pursuits could not be profitably followed. U. S. v. Rossi (1904) 133 Fed. 380, 66 C. C. A. 442. See, also, U. S. v. Price Trading Co. (1901) 109 Fed. 239, 48 C. C. A. 331; Anderson v. U. S. (1907) 152 Fed. 87, 81 C. C. A. 311.

It seems to have been the intention of congress to enlarge the uses which might be made of timber taken from public lands, and for that purpose congress modified the existing statute on this subject. Morgan v. U. S. (1906) 148 Fed. 189, 78 C. C. A. 323.

2. Policy of law.—The policy of permitting the carrying on of extensive businesses in the manufacture and sale of lumber, not only to the miners, but for all the uses of the cities which may grow up by reason of the mining industry, and without compensation to the government for the timber cut for such lumber, rests with congress, and not with the courts. U. S. v. Rossi (1904) 133 Fed. 380, 66 C. C. A. 442; U. S. v. Edgar (D. C. 1905) 140 Fed. 655, 661.

3. Privilege of cutting not repealed.—The privileges conferred by this act were not affected by subsequent legislation. U. S. v. Price Trading Co. (1901) 109 Fed. 239, 48 C. C. A. 331; Same v. Edgar (D. C. 1905) 140 Fed. 655. And see Stubbs v. U. S. (1900) 104 Fed. 988, 44 C. C. A. 292; (1901) 111 Fed. 366, 49 C. C. A. 392.

4. Persons authorized to cut.—A citizen and resident may lawfully cut and remove timber from the public mineral lands for building, agricultural, mining or other domestic purposes. U. S. v. Copper Queen Consol. Min. Co. (1902) 22 Sup. Ct. 761, 762, 185 U. S. 495, 46 L. Ed. 1008; Same v. United Verde Copper Co. (1905) 25 Sup. Ct. 222, 224, 196 U. S. 207, 49 L. Ed. 449; Same v. Plowman (1910) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523; Same v. Lynde (C. C. 1891) 47 Fed. 297.

A person cutting timber on mineral lands and claiming the provisions of the statute must show he is a bona fide resident. Powers v. U. S. (1903) 119 Fed. 562, 565, 56 C. C. A. 128.

Placer mining locations cannot be

made as a blind to cover contemplated timber cutting. Anderson v. U. S. (1907) 152 Fed. 87, 81 C. C. A. 311.

Possession of a mining claim confers no right to take the timber thereon, except as it may be reasonably necessary in legitimate mining operations. McQuillan v. Tanana Electric Co. (1906) 3 Alaska, 110, 118. See Teller v. U. S. (1901) 113 Fed. 273, 51 C. C. A. 230; Powers v. U. S. (1903) 119 Fed. 562, 56 C. C. A. 128.

The language used in this act includes aliens as well as citizens, if they are bona fide residents of the states and territories and districts mentioned. U. S. v. Copper Queen Min. Co. (1900) 60 Pac. 885, 7 Ariz. 80, 86.

5. Districts in which cutting is permitted.—The provision authorizing citizens and residents of the states of Colorado and Nevada and the territories, and "all other mineral districts of the United States," to fell and remove timber on the public domain, does not apply to the state of Oregon, there being no such mineral district. U. S. v. Smith (C. C. 1882) 11 Fed. 487; Same v. Benjamin (C. C. 1884) 21 Fed. 285; Same v. English (C. C. 1901) 107 Fed. 867, judgment affirmed English v. U. S. (1902) 116 Fed. 625, 54 C. C. A. 81.

This act does not apply to California. U. S. v. Benjamin (C. C. 1884) 21 Fed. 285.

6. Lands on which cutting is permitted —Mineral character.—The authority to cut timber under this act does not extend to land adjacent to lands valuable for mineral purposes, but only includes lands known to be themselves valuable for minerals. U. S. v. Plowman (1910) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523. But it has been held this act authorizes the removal of timber not only from land on which mining claims had been located, or in which mineral has actually been discovered, but also on other lands lying in close proximity, or in the neighborhood of such mining claims, having the general character of mineral lands. U. S. v. Basic Co. (1903) 121 Fed. 504, 57 C. C. A. —; Morgan v. U. S. (1909) 169 Fed. 242, 94 C. C. A. 518. See, also, U. S. v. Richmond Min. Co. (C. C. 1889) 40 Fed. 415.

A homestead entry of mineral lands makes the land so far private property as to withdraw it from operation of this act. Bunker Hill & Sullivan Mining & Concentrating Co. v. U. S. (1913) 33 Sup. Ct. 138, 226 U. S. 548, 57 L. Ed. 345, affirming judgment (1910) 178 Fed. 914, 102 C. C. A. 292.

A person's right to cut and remove timber from the public domain is dependent on the land being mineral, and not subject to entry, except for mineral entry. Lynch v. U. S. (1905) 138 Fed. 535, 71 C. C. A. 59.

Lands, mineral in character, of little or no value except for the mineral therein, and within organized mining districts, or not far remote from known mines, were held mineral lands within the meaning of this statute. U. S. v. Richmond Min. Co. (C. C. 1889) 40 Fed. 415, writ of error dismissed (1890) 11 Sup. Ct. 1030, 140 U. S. 703, 35 L. Ed. 593.

Land returned on the government survey as mineral land, of broken and rugged surface, with every indication of mineral ground, but on which no mines have been located, though in the vicinity of valuable mines, and which is unfit for cultivation and entry as agricultural lands, is mineral land, within this act. U. S. v. Edwards (D. C. 1889) 38 Fed. 812; Same v. Mullan Fuel Co. (D. C. 1902) 118 Fed. 663, 666.

The right to cut timber from public mineral lands, subject to mineral entry only, for building, agricultural, mining, or other domestic purposes, given by this act, extends to all such lands in the state or territory, without limitation to any local subdivision. U. S. v. Edgar (D. C. 1905) 140 Fed. 655.

7. —— Extent of minerals and proof. —If land is worth more for agricultural than mining, it is not mineral land, though it may contain some gold or silver. U. S. v. Plowman (1910) 30 Sup. Ct. 299, 216 U. S. 372, 374, 54 L. Ed. 523.

Government surveys indicating the lands as mineral in character are competent evidence in favor of the person who has cut timber thereon. U. S. v. Van Winkle (1902) 113 Fed. 903, 51 C. C. A. 533; Morgan v. U. S. (1909) 169 Fed. 242, 94 C. C. A. 518.

In an action by the United States to recover for timber cut from public lands, where the defense is that the cutting was justified under this act, evidence is properly admitted to show the mineral character of other lands in the same vicinity, as well as of those from which the timber was taken, as tending to show the extent of the mineral district. U. S. v. Rossi (1904) 133 Fed. 380, 66 C. C. A. 442; Same v. Thayer (1904) 133 Fed. 1022, 66 C. C. A. 681.

The question of the character of the land is always one of fact, and the most satisfactory evidence is the actual use to which it has been placed by those who occupied it, and while it may not be conclusive evidence, testimony as to the actual use of the land tends to establish its character, and is material for that purpose. Lynch v. U. S. (1905) 138 Fed. 535, 71 C. C. A. 59.

The mere appearance of mineral is not sufficient to constitute the land mineral, but that there must be sufficient mineral to induce mining men of experience to go on the land and take and work it with the expectation of finding mineral. Anderson v. U. S. (1907) 152 Fed. 87, 81 C. C. A. 311.

The government is entitled to show by an expert miner that, in his opinion, the ground where the timber was cut was

notwithstanding the locating of mining claims thereon by third parties. Powers v. U. S. (1903) 119 Fed. 562, 56 C. C. A. 128.

Where defendant corporation purchased timber which had been wrongfully cut from the public domain, the corporation acquired no better title than the sellers, and could not defend an action by the United States to recover the value of the logs on the ground that it was acting in good faith. Anderson v. U. S. (1907) 152 Fed. 87, 81 C. C. A. 311.

The United States cannot recover for timber cut on unsurveyed land within the limits of a railroad grant, and which, when surveyed, would fall within the limits of an odd-numbered section, as the government had parted with its title to such section. U. S. v. Mullan Fuel Co. (D. C. 1902) 118 Fed. 663, citing cases establishing doctrine.

17. Liability of railroad company.—A railroad corporation, which has purchased, for use upon its locomotives and cars, wood severed from the public mineral lands, is liable to the United States for the value of the wood; such purchase and use being unlawful. U. S. v. Eureka & P. R. Co. (C. C. 1889) 40 Fed. 419, writ of error dismissed Eureka & P. R. Co. v. U. S. (1892) 13 Sup. Ct. 1046, 149 U. S. 773, 37 L. Ed. 957.

18. Plea and proof of good faith.—Defendant may prove, in order to prevent the assessment of punitive or exemplary damages, that he acted under the advice of reputable counsel. U. S. v. Homestake Min. Co. (1902) 117 Fed. 481, 488, 54 C. C. A. 303; Same v. Mullan Fuel Co. (D. C. 1902) 118 Fed. 663, 667.

Defendant may introduce evidence of innocence and good faith in mitigation of damages under the general denial or a plea of justification. Gentry v. U. S. (1900) 101 Fed. 51, 54, 41 C. C. A. 185; Same v. Van Winkle (1902) 113 Fed. 903, 905, 51 C. C. A. 533; U. S. v. Homestake Min. Co. (1902) 117 Fed. 481, 490, 54 C. C. A. 303.

Evidence is admissible for the purpose of showing whether the trespass was intentional or unintentional and in the honest belief that the defendant was lawfully exercising a right which he had or whether he was acting with the willful intention of taking property to which he knew he had no right. Gentry v. U. S. (1900) 101 Fed. 51, 53, 41 C. C. A. 185. See U. S. v. Gentry (1902) 119 Fed. 70, 55 C. C. A. 658.

The test to determine whether one is a willful or innocent trespasser is not his violation of law in the light of the maxim that every man must know the law, but his honest belief and his actual intention at the time he committed the alleged trespass; and neither a justification of the acts nor any other complete defense is essential to the proof that the person committing such acts was not a willful trespasser. U. S. v. Homestake Min. Co. (1902) 117 Fed. 481, 486, 54 C. C. A. 303; Same v. Gentry (1902) 119 Fed. 70, 55 C. C. A. 658.

19. Presumptions and burden of proof.—The burden is on the defendant to show compliance with the statute and the rules and regulations established by the interior department. U. S. v. Basic Co. (1903) 121 Fed. 504, 57 C. C. A. 624; U. S. v. Gumm (1899) 58 P. 398, 9 N. M. 611.

The right to cut timber under this act is quite narrow, and the burden of proof is on the party claiming the right. Northern Pac. R. Co. v. Lewis (1896) 16 Sup. Ct. 831, 834, 162 U. S. 366, 40 L. Ed. 1002; U. S. v. Plowman (1900) 30 Sup. Ct. 299, 300, 216 U. S. 372, 54 L. Ed. 523.

The taking of timber from the public lands raises the presumption that it was willfully and intentionally taken, but it is a disputable presumption of fact which may be overcome by proof. U. S. v. Homestake Min. Co. (1902) 117 Fed. 481, 486, 54 C. C. A. 303.

Where defendants plead a license from the secretary of the interior, the burden of proof is on them on that issue. U. S. v. Gumm (1899) 58 P. 398, 9 N. M. 611.

20. Measure of damages.—See, also, notes to § 4980, ante.

A person who has cut and removed timber in good faith, in the belief that he had a lawful right to do so under this act, if not so justified, is liable in damages for its stumpage value only, and not for the manufactured value. Gentry v. U. S. (1900) 101 Fed. 51, 41 C. C. A. 185; U. S. v. Van Winkle (1902) 113 Fed. 903, 51 C. C. A. 533; Same v. Homestake Min. Co. (1902) 117 Fed. 481, 54 C. C. A. 303; Same v. Coughanour (1904) 133 Fed. 224, 66 C. C. A. 278; Morgan v. U. S. (1909) 169 Fed. 242, 94 C. C. A. 518. See, also, Anderson v. U. S. (1907) 152 Fed. 87, 81 C. C. A. 311.

One who cut and removed timber from public mineral lands, which he converted into lumber and sold, is not liable, as a willful trespasser, for the added value of the timber due to his labor and expense, merely because of his failure to keep the record required by the rules prescribed by the general land office pursuant to this act, if he believed in good faith that he was a resident of the state in such sense as to be within the terms of the act, and where his failure to keep the record was due to his ignorance that it was required. Powers v. U. S. (1903) 119 Fed. 562, 56 C. C. A. 128.

§ 4990. (Act June 3, 1878, c. 150, § 2.) Registers and receivers to notify Commissioner of General Land Office of unlawful cutting of timber.

It shall be the duty of the register and the receiver of any local land-office in whose district any mineral land may be situated to ascertain from time to time whether any timber is being cut or used upon any such lands, except for the purposes authorized by this act, within their respective land districts; and, if so, they shall immediately notify the Commissioner of the General Land Office of that fact; and all necessary expenses incurred in making such proper examinations shall be paid and allowed such register and receiver in making up their next quarterly accounts. (20 Stat. 88.)

Notes of Decisions

Duty of registers and receivers.—This section requires registers and receivers to ascertain if any timber has been unlawfully cut, and, if so, to notify the commissioner of the general land office. U. S. v. United Verde Copper Co. (1905) 25 Sup. Ct. 222, 223, 196 U. S. 207, 49 L. Ed. 449.

§ 4991. (Act June 3, 1878, c. 150, § 3.) Violations of act punishable.

Any person or persons who shall violate the provisions of this act, or any rules and regulations in pursuance thereof made by the Secretary of the Interior, shall be deemed guilty of a misdemeanor, and, upon conviction, shall be fined in any sum not exceeding five hundred dollars, and to which may be added imprisonment for any term not exceeding six months. (20 Stat. 89.)

Notes of Decisions

Violations of regulations.—One who cuts and removes timber from mineral lands, and sells the same or the lumber manufactured therefrom, without compliance with the regulations made by the secretary of interior, is guilty of a violation of the statute. U. S. v. Reder (D. C. 1895) 69 Fed. 965.

Intent.—On the trial of an indictment for cutting timber on mineral land for an unauthorized purpose, the intent is wholly immaterial. U. S. v. Reder (D. C. 1895) 69 Fed. 965.

§ 4992. (Act March 3, 1891, c. 561, § 8, as amended, Act March 3, 1891, c. 559, Act Feb. 13, 1893, c. 103, and Act March 3, 1901, c. 855.) Timber on certain public lands may be cut for certain purposes.

In the States of Colorado, Montana, Idaho, North Dakota, and South Dakota, Wyoming, New Mexico and Arizona, and [the District of] Alaska, and the gold and silver regions of Nevada, California, Oregon, and Washington and [the Territory of] Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, Provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-

eight, providing for the cutting of timber on mineral lands. (26 Stat. 1099. 26 Stat. 1093. 27 Stat. 444. 31 Stat. 1436.)

The portion of this section set forth here, as originally enacted, was as follows:

"And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and in the District of Alaska and the gold and silver regions of Nevada, and the Territory of Utah, in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon, it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing, or domestic purposes, and has not been transported out of the same; but nothing herein contained shall apply to operate to enlarge the rights of any railway company to cut timber on the public domain: Provided, That the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this section."

It was amended to read as set forth here by Act March 3, 1891, c. 559, cited above, except that after the word "Wyoming," the words "New Mexico and Arizona," were inserted by Act Feb. 13, 1893, c. 103, and after the word "Nevada," the words "California, Oregon, and Washington" were inserted by Act March 3, 1901, c. 855, last cited above.

The section was further amended by Act July 1, 1898, c. 546, § 1, and Act March 3, 1901, c. 862, post, §§ 4993, 4994.

The portion of the section omitted here prescribed the time within which suits by the United States to annul patents should be brought, and is set forth post, § 5114.

The words "the District of," inclosed in brackets in this section, were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

The words "The Territory of," also inclosed in brackets in this section, were superseded by the admission of Utah into the Union by Act July 16, 1894, c. 138, 28 Stat. 107.

The cutting of timber on the public mineral lands in Colorado, Nevada, New Mexico, Arizona, Utah, Wyoming, Dakota, Idaho, Montana, and all other mineral districts of the United States for certain purposes was permitted by Act June 3, 1878, c. 150, ante, §§ 4989–4991.

Notes of Decisions

Construction and purpose of statute.—The section shows that congress did not intend to withdraw the privilege of cutting timber conferred by the original act of June 3, 1878. U. S. v. Price Trading Co. (1901) 109 Fed. 239, 48 C. C. A. 331. See, also, Stubbs v. U. S. (1900) 104 Fed. 988, 44 C. C. A. 292; Id. (1901) 111 Fed. 366, 49 C. C. A. 392.

Action for trespass.—In an action for timber trespass on public lands, it was a good defense that defendants, in so far as they had cut timber at the instance of settlers and residents, had exchanged therefor its value in lumber, under this statute, and the rules of the Interior Department with reference thereto. U. S. v. Hamaker (D. C. 1912) 199 Fed. 644.

§ 4993. (Act July 1, 1898, c. 546, § 1.) Removal of timber cut in Wyoming to Idaho.

That section eight of an Act entitled "An Act to repeal the timber culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be, and the same is hereby, amended as follows:

That it shall be lawful for the Secretary of the Interior to grant permits, under the provisions of the eighth section of the Act of March third, eighteen hundred and ninety-one, to citizens of Idaho and Wyoming to cut timber in the State of Wyoming west of the continental divide, on the Snake River and its tributaries to the boundary line of Idaho for agricultural, mining, or other domestic purposes, and to remove the timber so cut to the State of Idaho. (30 Stat. 618.)

This was a provision of the sundry civil appropriation act for the fiscal year 1899, cited above.

Act March 3, 1891, c. 561, § 8, mentioned as amended by this provision, is set forth ante, § 4992.

§ 4994. (Act March 3, 1901, c. 862.) Limitations of use of timber taken from public lands not to apply to certain territory.

The provisions of chapter five hundred and fifty-nine of the Re-

vised Statutes of the United States, approved March third, eighteen hundred and ninety-one, limiting the use of timber taken from public lands to residents of the State in which such timber is found, for use within said State, shall not apply to the south slope of Pryor Mountains, in the State of Montana, lying south of the Crow Reservation, west of the Big Horn River, and east of Sage Creek; but within the above-described boundaries the provisions of said chapter shall apply equally to the residents of the States of Wyoming and Montana, and to the use of timber taken from the above-described tract in either of the above-named States. (31 Stat. 1439.)

This was an act entitled "An act to amend chapter five hundred and fifty-nine of the Revised Statutes of the United States, approved March third, eighteen hundred and ninety-one."

Act March 3, 1891, c. 559, mentioned in this act, amended Act March 3, 1891, c. 561, § 8, set forth ante, § 4992.

§ 4995. (Act March 4, 1913, c. 165, § 1.) Sale of timber killed or damaged by forest fires; proceeds of sales of damaged timber upon existing claims.

The Secretary of the Interior is hereby authorized, under such rules as he may prescribe, to sell and dispose of to the highest bidder at public auction, or through sealed bids, the timber on any lands of the United States, outside the boundaries of national forests, including those embraced in unperfected claims under any of the public land laws, also upon the ceded Indian lands, that may have been killed or seriously and permanently damaged by forest fires prior to the passage of this Act, the proceeds of all such sales to be covered into the Treasury of the United States: Provided, That the damaged timber upon any lands embraced in an existing claim shall be disposed of only upon the application or with the written consent of such claimant, and the money received from the sale of damaged timber on any such lands shall be kept in a special fund to await the final determination of such claim. (37 Stat. 1015.)

This section and the section next following were an act entitled, "An act to authorize the sale of burnt timber on the public domain."

§ 4996. (Act March 4, 1913, c. 165, § 2.) Disposal of proceeds of sale of burnt timber upon existing claim where claim is patented; disposal of proceeds where claim is rejected.

Upon the certification of the Secretary of the Interior that any such claim has been finally approved and patented the Secretary of the Treasury is hereby authorized and directed to pay to such claimant, his heirs or legal representatives, the money received from the sale of the damaged timber upon his land, after deducting therefrom the expenses of the sale; and upon the certification of the Secretary of the Interior that any such claim has been finally rejected and canceled the Secretary of the Treasury is hereby authorized and directed to transfer the money derived from the sale of the damaged timber upon the lands embraced in such claim to the general fund in the Treasury derived from the sale of public lands, unless by legislation the lands from which the timber had been removed had been theretofore appropriated to the benefit of an Indian tribe or otherwise, in which event the net proceeds derived from the sale of the timber shall be transferred to the fund of such tribe or otherwise credited or distributed as by law provided. (37 Stat. 1016.)

CHAPTER TEN G

Unlawful Inclosures or Occupancy; Obstructing Settlement or Transit

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes Act Feb. 25, 1885, c. 149, as amended by Act March 10, 1908, c. 75, relating to the unlawful occupancy of the public lands.

Sec.
4997. Inclosure of or assertion of right to public lands without title.
4998. Suits for violations of preceding section.
4999. Obstruction of settlement on or transit over public lands.
5000. Violations of act punishable.
5001. Removal of unlawful inclosures.
5002. Permission from Secretary of Interior to bring suits for unlawful inclosures.

§ 4997. (Act Feb. 25, 1885, c. 149, § 1.) Inclosure of or assertion of right to public lands without title.

All inclosures of any public lands in any State or Territory of the United States, heretofore or to be hereafter made, erected, or constructed by any person, party, association, or corporation, to any of which land included within the inclosure the person, party, association, or corporation making or controlling the inclosure had no claim or color of title made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith with a view to entry thereof at the proper land-office under the general laws of the United States at the time any such inclosure was or shall be made, are hereby declared to be unlawful, and the maintenance, erection, construction, or control of any such inclosure is hereby forbidden and prohibited; and the assertion of a right to the exclusive use and occupancy of any part of the public lands of the United States in any State or any of the Territories of the United States, without claim, color of title, or asserted right as above specified as to inclosure, is likewise declared unlawful, and hereby prohibited. (23 Stat. 321.)

This was the first section of an act entitled "An act to prevent unlawful occupancy of the public lands."

Sections 2–6 of the act are set forth post, §§ 4998–5002.

Section 7 of the act related to pending suits and is omitted as temporary merely.

Notes of Decisions

1. Power of congress to protect public lands.
2. Construction and purpose of statute.
3. Public right of pasturage.
4. Possessory rights of settlers.
5. Public lands within statute.
6. Occupancy and inclosure of lands by corporation.
7. Color of title to land inclosed.
8. What constitutes unlawful inclosure.
9. —— Intent.
10. —— Fences upon private property.
11. Defense to prosecution.
12. Indictment.
13. —— Negativing exception.
14. Evidence.
15. Verdict.

1. Power of congress to protect public lands.—This act is an exercise of the constitutional right of congress to protect the public lands from nuisances erected upon adjoining property; and under it the government may compel the removal of fences inclosing such public lands, though erected on private property. Camfield v. U. S. (1897) 17 Sup. Ct. 864, 867, 167 U. S. 518, 42 L. Ed. 260; Golconda Cattle Co. v. Same (1912) 201 Fed. 281, 119 C. C. A. 519, affirming order U. S. v. Golconda Cattle Co. (D. C. 1912) 196 Fed. 240. See, also, Camfield v. U. S. (1895) 67 Fed. 17, 18, 14 C. C. A. 228; U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 126 C. C. A. 376. But see U. S. v. Douglas-Willan Sartoris Co. (1889) 3 Wyo. 287, 22 Pac. 92.

2. Construction and purpose of statute.—This act makes it a penal offense to inclose public lands of the United States or to assert the right to the exclusive occupancy of any part without claim or color of title in good faith

or an asserted right thereto with a view to entry thereof at the proper land office. Lingle v. Snyder (1908) 160 Fed. 627, 87 C. C. A. 529; Kitts v. Austin (1890) 83 Cal. 167, 23 Pac. 290; U. S. v. Bisel (1888) 8 Mont. 20, 19 Pac. 251; Same v. Flaherty (1888) 8 Mont. 31, 19 Pac. 553; Third Nat. Exch. Bank v. Smith (1912) 125 P. 632, 17 N. M. 166; Garst v. Love (1896) 55 P. 19, 6 Okl. 46, 7 Okl. 666.

This act was only intended to prevent mere trespassers from inclosing public lands, and in a proceeding thereunder it is a sufficient defense to show that the lands inclosed are not public lands, or that defendant had color of title acquired in good faith. Cameron v. U. S. (1893) 13 Sup. Ct. 595, 597, 148 U. S. 301, 37 L. Ed. 459. See, also, Cameron v. U. S. (1892) 13 Sup. Ct. 184, 185, 146 U. S. 533, 33 L. Ed. 1077; Abadie v. Same (1893) 13 Sup. Ct. 836, 149 U. S. 261, 37 L. Ed. 726.

The word "or," preceding the words "an asserted right," should be construed to mean "nor." Lillis v. U. S. (1911) 190 Fed. 530, 111 C. C. A. 362, writ of certiorari denied (1911) 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632.

This act is intended to prevent the inclosure and appropriation of tracts of public land by associations of cattle owners, who have surrounded by fences public lands and excluded intended settlers; but the application of the act is restricted to cases of wholly unauthorized appropriations and inclosures. U. S. v. Brandestein (D. C. 1887) 32 Fed. 738, 741. See, also, Carr Land & Live Stock Co. v. U. S. (1902) 118 Fed. 821, 55 C. C. A. 433; U. S. v. Pacific Life Stock Co. (D. C. 1910) 192 Fed. 443.

This act is simply intended to preserve access to the public domain, and is not intended to interfere with the use and enjoyment of private property, unless such use is a mere subterfuge for inclosing or preventing access to the public domain. U. S. v. Rindge (D. C. 1913) 208 Fed. 611. See, also, Camfield v. U. S. (1897) 17 Sup. Ct. 864, 868, 167 U. S. 518, 42 L. Ed. 260; Potts v. Same (1902) 114 Fed. 52, 51 C. C. A. 678; Homer v. Same (1911) 185 Fed. 741, 108 C. C. A. 79; Hanley v. Same (1911) 186 Fed. 711, 108 C. C. A. 581; Lillis v. Same (1911) 190 Fed. 530, 111 C. C. A. 362 (writ of certiorari denied [1911] 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632); Golconda Cattle Co. v. Same (1912) 201 Fed. 281, 119 C. C. A. 519 (affirming order U. S. v. Golconda Cattle Co. [D. C. 1912] 196 Fed. 240). And see Ridpath v. Denee (1915) 148 P. 15, 85 Wash. 322; U. S. v. Douglas-Willan Sartoris Co. (1889) 3 Wyo. 287, 22 Pac. 92; Pool v. Baker (Wyo. 1916) 154 P. 328.

A citizen inclosing a section of land of the public domain in violation of this act, being without right of possession or color of title, and without hope of acquiring title, cannot call on equity to prevent another from trespassing on the land. Clemmons v. Gillette (1905) 83 P. 879, 33 Mont. 321, 114 Am. St. Rep. 814.

3. Public right of pasturage.—In passing this act congress did not intend to prohibit altogether the pasturage of public lands or to reverse the former practice of the government in that particular. Camfield v. U. S. (1887) 17 Sup. Ct. 864, 868, 167 U. S. 518, 42 L. Ed. 260.

As there is a recognized public right of pasturage on the public domain which is left open, defendants cannot be enjoined from exercising such right by persons who own parcels of land detached and scattered through a large body of the public domain, and lying open, though thereby defendants' cattle will trespass on complainants' lands. Buford v. Houtz (1890) 10 Sup. Ct. 805, 133 U. S. 320, 33 L. Ed. 618. See, also, Stearns v. U. S. (1907) 152 Fed. 900, 82 C. C. A. 48; Clemmons v. Gillette (1905) 83 P. 879, 33 Mont. 321, 114 Am. St. Rep. 814; Hill v. Winkler (N. M. 1915) 151 P. 1014; Mathews v. Great Northern Ry. Co. (1897) 72 N. W. 1085, 7 N. D. 81.

The principle that the owner must prevent his stock from going on the uninclosed lands of his neighbor is not applicable to the regions of the public domain open to stockraisers. Richards v. Sanderson (1907) 89 P. 769, 39 Colo. 270.

The privilege of grazing stock on the public lands cannot be monopolized by any one, directly or indirectly, or under claim that he is but protecting his own lands. Id.

The fact that one has pastured the public lands of the United States without claim of title, or committing himself therewith under some of the possessory acts, will not give him a legal or equitable right to the pasture grown thereon. McGinnis v. Friedman (1888) 2 Idaho, 361, 17 Pac. 635.

Where a person inclosing a portion of the public domain has no right to maintain an action for the depasturing of the land by another, he cannot have the incidental relief by way of injunction restraining the latter from continuing to depasture the land. Clemmons v. Gillette (1905) 83 P. 879, 33 Mont. 321, 114 Am. St. Rep. 814.

Where plaintiff inclosed with its private land certain land belonging to the public domain, and defendants gained an entrance with their cattle into the inclosure, and on the public land therein, in a peaceable manner, they did not in so doing commit an unlawful act. Martin v. Platte Valley Sheep Co. (1904) 76 P. 571, 78 P. 1093, 12 Wyo. 432.

The privilege or right of pasturage

upon the public uninclosed lands of the government which are not reserved or set apart for other public uses is common to all who may wish to enjoy it, and is not peculiar to any particular persons, nor is a prior right gained by priority of use; nor is such right dependent on, or enlarged by, the ownership of neighboring lands. Anthony Wilkinson Live Stock Co. v. McIlquam (1905) 83 P. 364, 14 Wyo. 209.

The use of public uninclosed lands for pasturage of cattle confers no title on the person so using them, but the government may at any time withdraw its consent to such use. Id.

While an owner of land who permits the same to remain open and uninclosed may thereby subject it to use for grazing purposes by the cattle of an adjoining owner, yet he may at any time prevent such use by the erection of a fence on one or more sides of his premises; and it is not necessary for him, if he chooses to erect a fence on only one or two sides of his land, to completely inclose his land by erecting fences on the other sides, and thereby segregate it from the public domain. Id.

Plaintiffs, who had been accustomed to graze their cattle upon their home range, consisting largely of public lands, were not entitled to an injunction restraining defendants from driving their sheep upon such lands. Healy v. Smith (1906) 83 P. 583, 14 Wyo. 263, 116 Am. St. Rep. 1004.

By unlawfully inclosing government lands with his own, one acquires no right to the exclusive possession of such government lands; nor can he, by the inclosure, deprive others from peaceably turning cattle thereon. Hardman v. King (1906) 85 P. 382, 14 Wyo. 503.

The use of uninclosed and unoccupied government lands for pasturing live stock is merely permissive, creates no title, and may be terminated at any time. McIlquham v. Anthony Wilkinson Live Stock Co. (Wyo. 1909) 104 P. 20.

4. Possessory rights of settlers.—A settler in advance of surveys who incloses no greater area than the land laws permit him to enter is not a trespasser nor is his inclosure unlawful. U. S. v. Godwin (1888) 7 Mont. 402, 16 P. 850; Waring v. Loomis (1904) 76 P. 510, 35 Wash. 85; McAllister v. Okanogan County (1909) 100 P. 146, 51 Wash. 647.

This act does not authorize a person to enter upon a tract of less than 160 acres which had been inclosed by the original settler, as an incident to his settlement and cultivation thereof, all of which was in actual use for agricultural purposes, and was held by another under conveyances of record from such original settler and his grantees. Tidwell v. Chiricahua Cattle Co. (1898) 53 P. 192, 5 Ariz. 352. See, also, Neal v. Kayser (Ariz. 1909) 100 P. 439.

A mere trespasser on the public lands, with an inclosure erected and maintained contrary to this act, cannot by such occupancy prevent a homestead entry by a citizen who goes peaceably on a portion of the tract, and in other respects complies with the law. Whittaker v. Pendola (1889) 78 Cal. 296, 20 Pac. 680. See, also, Caldwell v. Bush (1896) 45 Pac. 488, 6 Wyo. 342.

An entry on inclosed and improved land occupied and claimed by another under a certificate from a railroad company is not authorized by this statute; but the person so entering is a naked trespasser. Laurendeau v. Fugelli (1889) 1 Wash. St. 559, 21 Pac. 29; Id. (1892) 5 Wash. 94, 31 Pac. 421; Id. (1893) 5 Wash. 632, 32 Pac. 465.

A possessor of government land, with the intent to lawfully acquire title thereto from the government, is not technically a trespasser. Waring v. Loomis (1904) 76 P. 510, 35 Wash. 85.

5. Public lands within statute.—Lands reserved from the public domain, and set apart for school purposes, form part of the public lands, within this act. U. S. v. Bisel (1888) 8 Mont. 20, 19 Pac. 251; Same v. Flaherty (1888) 8 Mont. 31, 19 Pac. 553; Barkley v. U. S. (1888) 3 Wash. T. 522, 19 Pac. 36.

The inclosure of lands by the licensee of a land grant railroad company, after such lands had, on filing of the plat of the proposed road by the company, been withdrawn from settlement, but before they had been earned by the company, was not unlawful. U. S. v. Osborn (C. C. 1890) 44 Fed. 29; Same v. Brandestein (D. C. 1887) 32 Fed. 738.

The tract book of a local land office is prima facie evidence that the lands therein shown to be public lands are such. Jesse D. Carr Land & Live Stock Co. v. U. S. (1902) 118 Fed. 821, 55 C. C. A. 433.

After Utah became a state the inclosure of lands granted for school purposes was no longer unlawful. U. S. v. Elliott (C. C. 1896) 74 Fed. 92. See, also, U. S. v. Elliot (1895) 12 Utah, 119, 41 Pac. 720, reversing (1891) 7 Utah, 389, 26 Pac. 1117.

Land which is within a railroad grant, and a school section owned by the state, cannot be classed as a part of the public domain. U. S. v. White (D. C. 1901) 110 Fed. 598.

Lands granted by a railroad, to which the grantee has been unable to get title, the township not being surveyed, are not within this act. U. S. v. Godwin (1888) 7 Mont. 402, 16 Pac. 850.

6. Occupancy and inclosure of lands by corporation.—Whether the unlawful inclosure be erected and maintained by a natural or artificial person, it is equal-

ly unlawful. U. S. v. Pacific Live Stock Co. (D. C. 1910) 192 Fed. 443.

A corporation cannot lawfully become a settler upon public land, and hence its occupancy and inclosure thereof, at least before its predecessor's selection of land in exchange for land in a forest reserve is unlawful. Pacific Live Stock Co. v. Isaacs (Or. 1908) 96 P. 460.

7. Color of title to land inclosed.—Color of title exists wherever there is a reasonable doubt regarding the validity of an apparent title, whether the doubt arises from the circumstances under which the land is held, the identity of the land conveyed, or the construction of the instrument under which the party in possession claims title. Cameron v. U. S. (1893) 13 Sup. Ct. 595, 598, 148 U. S. 301, 37 L. Ed. 459 (reversing U. S. v. Cameron [1889] 21 Pac. 177, 3 Ariz. 100); Third Nat. Exchange Bank of Sandusky, Ohio, v. Smith (1915) 148 P. 512, 20 N. M. 264.

A deed from a railroad company to defendant for unsurveyed public lands, described by section and subdivision as though surveyed, is inadmissible to show color of title, since it creates no right to any particular land. Carroll v. U. S. (1907) 154 Fed. 425, 83 C. C. A. 245.

The crime defined is limited to such persons as have no claim or color of title to the land inclosed. U. S. v. Felderward (C. C. 1888) 36 Fed. 490, 491. See Third Nat. Exchange Bank of Sandusky, Ohio, v. Smith (1915) 148 P. 512, 20 N. M. 264.

A judicial decree, followed by possession under a bona fide claim, is color of title, within the meaning of this act. Los Angeles Farming & Milling Co. v. Hoff (Cal. 1893) 34 Pac. 518.

"Good faith" is freedom from any design to defraud any person having the better title; and knowledge of an adverse claim to, or lien on, the property, does not indicate bad faith, unless accompanied by some improper means to defeat such claim or lien. Third Nat. Exchange Bank of Sandusky, Ohio, v. Smith (1915) 148 P. 512, 20 N. M. 264.

8. What constitutes unlawful inclosure.—A person does not establish that his inclosure is incomplete by showing that he took advantage of a lake to make a part of his inclosure, and that, though the fence extended into the lake, cattle could get around the ends thereof at periods of low water, and that there was a gap of three-quarters of a mile across an impassable cañon. Thomas v. U. S. (1905) 136 Fed. 159, 69 C. C. A. 157.

The maintaining of an inclosure of public lands by joining defendant's fences with lawful fences belonging to other parties, thereby intentionally effecting an inclosure of public lands, constitutes a violation of this act. Thomas v. U. S. (1905) 136 Fed. 159, 69 C. C. A. 157; Simpson v. Same (1911) 184 Fed. 817, 107 C. C. A. 89. See, also, U. S. v. Brighton Ranche Co. (C. C. 1885) 26 Fed. 218.

Any means by which public land is practically separated from the body thereof by one not making claim thereto in good faith constitutes an unlawful "inclosure" under this section. Golconda Cattle Co. v. U. S. (1912) 201 Fed. 281, 119 C. C. A. 519, affirming order U. S. v. Golconda Cattle Co. (D. C. 1912) 196 Fed. 240.

9. —— Intent.—Inclosure of any of the public land or maintaining such an inclosure except by one making claim to the land in good faith is made unlawful by this section, and the intent with which the inclosure was made or is maintained is immaterial in a suit in equity for an injunction under the following section. Golconda Cattle Co. v. U. S. (1912) 201 Fed. 281, 119 C. C. A. 519, affirming order U. S. v. Golconda Cattle Co. (D. C. 1912) 196 Fed. 240. And see Carroll v. U. S. (1907) 154 Fed. 425, 83 C. C. A. 245.

The inclosure of public lands by a private corporation is unlawful, under this act, without regard to the intent with which it is done. U. S. v. Camfield (C. C. 1894) 59 Fed. 562, decree affirmed Camfield v. U. S. (1895) 66 Fed. 101, 13 C. C. A. 359. See, also, Homer v. U. S. (1911) 185 Fed. 741, 108 C. C. A. 79; Lillis v. Same (1911) 190 Fed. 530, 111 C. C. A. 362 (writ of certiorari denied [1911] 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632); U. S. v. Bufford (1892) 8 Utah, 173, 30 Pac. 433.

10. —— Fences upon private property.—The government may compel the removal of fences inclosing public lands, though erected on private property. Camfield v. U. S. (1897) 17 Sup. Ct. 864, 867, 167 U. S. 518, 42 L. Ed. 260. See, also, U. S. v. Brighton Ranche Co. (C. C. 1885) 26 Fed. 218.

Where a landowner in good faith, for the purpose of inclosing his own land, builds a fence on the line extending around the tract, such act is not unlawful, even though such fence so connects with fenced lands of other owners as thereby to inclose unclaimed public lands. Potts v. U. S. (1902) 114 Fed. 52, 51 C. C. A. 678.

This act applies to the inclosure and appropriation to private use of such lands by fences built on other lands, and the government may maintain a suit thereunder to abate such fences. Cardwell v. U. S. (1905) 136 Fed. 593, 69 C. C. A. 367.

Where defendants maintained a fence around a large tract of land, the greater part of which they owned, but which also included smaller tracts of public land of the United States, such inclosure was not rendered lawful by again inclosing the government tracts by fences built around each by defendants on their own land, thus segregating them from the larger inclosed tract.

Homer v. U. S. (1911) 185 Fed. 741, 108 C. C. A. 79.

Under this section, a fence built upon one's own land, which in fact incloses public lands of the United States, is unlawful, regardless of the intent with which such fence is built or maintained. Homer v. U. S. (1911) 185 Fed. 741, 108 C. C. A. 79. See, also, U. S. v. Rindge (D. C. 1913) 208 Fed. 611.

The incidental inclosure of public lands by a defendant by a fence built entirely on its own lands for the bona fide purpose of protecting the same, and not for the purpose of inclosing the government lands, and in which fence were a number of openings, is not unlawful, so as to entitle the United States to an injunction to restrain the maintenance of the fence. Golconda Cattle Co. v. U. S. (C. C. A. 1914) 214 Fed. 903, reversing order on rehearing (1912) 201 Fed. 281, 119 C. C. A. 519, which affirms (D. C. 1912) U. S. v. Golconda Cattle Co., 196 Fed. 240. But see U. S. v. Buford (1892) 8 Utah, 173, 30 Pac. 433.

An inclosure by one owning odd sections is unlawful, even though the fence is so constructed as to be entirely on his own lands, if the result is to inclose therewith the even sections belonging to the government. U. S. v. Camfield (C. C. 1894) 59 Fed. 562, decree affirmed Camfield v. U. S. (1895) 66 Fed. 101, 13 C. C. A. 359, which is affirmed (1897) 17 Sup. Ct. 864, 867, 167 U. S. 518, 42 L. Ed. 260. See Stoddard v. U. S. (1914) 214 Fed. 566, 131 C. C. A. 18; Mackay v. Uinta Development Co. (1914) 219 Fed. 116, 135 C. C. A. 18; Id. (1914) 219 Fed. 121, 135 C. C. A. 23.

Where the owner of a tract of grazing land built a fence from a mountain range on the east, westward to the south of his land, and then northwestward to a mountain range on the north, inclosing between such fence and the mountains his own land and also public lands, which he used for a pasture, and there were two breaks in the fence, through which, as well as over the mountains, trails led into the pasture, but for practical purposes the fence and mountains prevented defendant's stock from straying out and other stock from coming in, such fence did not constitute an unlawful inclosure. U. S. v. Johnston (C. C. 1908) 172 Fed. 635.

This act does not prevent a property owner from constructing fences on his own land to protect the same against trespass, and useful for the proper enjoyment thereof, without intention of appropriating or inclosing public lands or preventing lawful access thereto. U. S. v. Rindge (D. C. 1913) 208 Fed. 611.

11. Defense to prosecution.—The failure of the land department to give the customary notice to the accused to remove his inclosure constitutes no defense. Simpson v. U. S. (1911) 184 Fed. 817, 107 C. C. A. 89.

12. Indictment.—An indictment charging the defendants with having, by force, threats, and intimidation, prevented and obstructed a person from peaceably entering upon and establishing a settlement upon a tract of public land, which follows the language of the statute, describes the acts of the defendants and the land, charges that it was public land subject to entry under the laws of the United States, and names the person who was prevented from entering and establishing a settlement thereon, is sufficiently specific. Haynes v. U. S. (1900) 101 Fed. 817, 42 C. C. A. 34.

Indictments for inclosing and asserting a right to the exclusive use and occupancy of public lands without claim or color of title thereto acquired in good faith under the land laws, held good. Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642.

The word "made," as used in this section, has a more comprehensive meaning than the words "constructed" or "erected," and a person "makes" an inclosure so long as he maintains it, and since the statute is violated, where a person maintained the inclosure of land to which he has no claim, an indictment charging such an inclosure is not defective for failure to allege that, at the time the inclosure was made, defendant had no claim or color of title to the land made or acquired in good faith or a right thereto asserted with a view to entry. Bircher v. U. S. (1909) 169 Fed. 589, 95 C. C. A. 87; Cardwell v. Same (1909) 169 Fed. 592, 95 C. C. A. 90, writ of certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 599, 54 L. Ed. 343.

An indictment alleging that the inclosure consisted of posts and wire fences, that defendant in maintaining and controlling the fences and inclosure had no claim or color of title to any of the lands made or acquired in good faith, or any asserted right thereto by or under claim made in good faith with a view to entry, thereon, etc., is sufficient, without a bill of particulars. Simpson v. U. S. (1911) 184 Fed. 817, 107 C. C. A. 89.

An indictment charging that defendant unlawfully, etc., maintained and controlled an inclosure of the public lands of the United States situated, etc., and that such inclosure consisted of posts and wire fences, sufficiently alleged that the lands described were surrounded by posts and wire fences. Id.

An indictment for fencing public lands need not allege that defendant had not gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith, that being a matter of defense. U. S. v. Cook (D. C. 1888) 36 Fed. 896.

An indictment charging defendant with

unlawfully and knowingly maintaining a certain inclosure of public lands, without alleging that the inclosure was made without claim or color of title to any of the land inclosed, "made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States," in the language of the statute, is fatally defective. U. S. v. Churchill (D. C. 1900) 101 Fed. 443.

13. —— **Negativing exception.**—An indictment alleging that accused so constructed, maintained, and controlled the inclosure then and there having no claim or color of title made or acquired in good faith or otherwise or at all to any of the land, "or an asserted right" thereto by or under claim made in good faith, with a view to entry thereof, etc., is good. Lillis v. U. S. (1911) 190 Fed. 530, 111 C. C. A. 362, writ of certiorari denied (1911) 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632.

An indictment for unlawfully inclosing a portion of the public lands must show that the defendant is not within any of the exceptions permitting such inclosure. U. S. v. Felderward (C. C. 1888) 36 Fed. 490.

14. **Evidence.**—On the trial of an indictment for inclosing and asserting an exclusive right to public land without claim or color of title, acts, conduct, and statements of defendants tending to show the assertion of a right to exclude the general public or others from the lands described are competent evidence. Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642.

To show defendant's knowledge that there was public land within his inclosure, and his intent, the government may prove an unlawful arrangement to procure the lands from the government, though such proof tends to show the commission of another offense. Lillis v. U. S. (1911) 190 Fed. 530, 111 C. C. A. 362, writ of certiorari denied (1911) 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632.

15. **Verdict.**—On the trial of an indictment containing three counts, the first charging the unlawful erection and construction of an inclosure, the second the unlawful maintenance and control of such inclosure, and the third the unlawful prevention and obstruction of free passage over the lands by means of fencing and inclosing the same, a verdict of not guilty on the first and third counts is not inconsistent with one of guilty on the second. Carroll v. U. S. (1907) 154 Fed. 425, 83 C. C. A. 245.

§ 4998. (Act Feb. 25, 1885, c. 149, § 2.) Suits for violations of preceding section.

It shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental sub-divisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district [or circuit] court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district [or circuit] court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed

Homer v. U. S. (1911) 185 Fed. 741, 108 C. C. A. 79.

Under this section, a fence built upon one's own land, which in fact incloses public lands of the United States, is unlawful, regardless of the intent with which such fence is built or maintained. Homer v. U. S. (1911) 185 Fed. 741, 108 C. C. A. 79. See, also, U. S. v. Rindge (D. C. 1913) 208 Fed. 611.

The incidental inclosure of public lands by a defendant by a fence built entirely on its own lands for the bona fide purpose of protecting the same, and not for the purpose of inclosing the government lands, and in which fence were a number of openings, is not unlawful, so as to entitle the United States to an injunction to restrain the maintenance of the fence. Golconda Cattle Co. v. U. S. (C. C. A. 1914) 214 Fed. 903, reversing order on rehearing (1912) 201 Fed. 281, 119 C. C. A. 519, which affirms (D. C. 1912) U. S. v. Golconda Cattle Co., 196 Fed. 240. But see U. S. v. Buford (1892) 8 Utah, 173, 30 Pac. 433.

An inclosure by one owning odd sections is unlawful, even though the fence is so constructed as to be entirely on his own lands, if the result is to inclose therewith the even sections belonging to the government. U. S. v. Camfield (C. C. 1894) 59 Fed. 562, decree affirmed Camfield v. U. S. (1895) 66 Fed. 101, 13 C. C. A. 359, which is affirmed (1897) 17 Sup. Ct. 864, 867, 167 U. S. 518, 42 L. Ed. 260. See Stoddard v. U. S. (1914) 214 Fed. 566, 131 C. C. A. 18; Mackay v. Uinta Development Co. (1914) 219 Fed. 116, 135 C. C. A. 18; Id. (1914) 219 Fed. 121, 135 C. C. A. 23.

Where the owner of a tract of grazing land built a fence from a mountain range on the east, westward to the south of his land, and then northwestward to a mountain range on the north, inclosing between such fence and the mountains his own land and also public lands, which he used for a pasture, and there were two breaks in the fence, through which, as well as over the mountains, trails led into the pasture, but for practical purposes the fence and mountains prevented defendant's stock from straying out and other stock from coming in, such fence did not constitute an unlawful inclosure. U. S. v. Johnston (C. C. 1908) 172 Fed. 635.

This act does not prevent a property owner from constructing fences on his own land to protect the same against trespass, and useful for the proper enjoyment thereof, without intention of appropriating or inclosing public lands or preventing lawful access thereto. U. S. v. Rindge (D. C. 1913) 208 Fed. 611.

11. Defense to prosecution.—The failure of the land department to give the customary notice to the accused to remove his inclosure constitutes no defense. Simpson v. U. S. (1911) 184 Fed. 817, 107 C. C. A. 89.

12. Indictment.—An indictment charging the defendants with having, by force, threats, and intimidation, prevented and obstructed a person from peaceably entering upon and establishing a settlement upon a tract of public land, which follows the language of the statute, describes the acts of the defendants and the land, charges that it was public land subject to entry under the laws of the United States, and names the person who was prevented from entering and establishing a settlement thereon, is sufficiently specific. Haynes v. U. S. (1900) 101 Fed. 817, 42 C. C. A. 34.

Indictments for inclosing and asserting a right to the exclusive use and occupancy of public lands without claim or color of title thereto acquired in good faith under the land laws, held good. Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642.

The word "made," as used in this section, has a more comprehensive meaning than the words "constructed" or "erected," and a person "makes" an inclosure so long as he maintains it, and since the statute is violated, where a person maintained the inclosure of land to which he has no claim, an indictment charging such an inclosure is not defective for failure to allege that, at the time the inclosure was made, defendant had no claim or color of title to the land made or acquired in good faith or a right thereto asserted with a view to entry. Bircher v. U. S. (1909) 169 Fed. 589, 95 C. C. A. 87; Cardwell v. Same (1909) 169 Fed. 592, 95 C. C. A. 90, writ of certiorari denied (1909) 30 Sup. Ct. 400, 215 U. S. 599, 54 L. Ed. 343.

An indictment alleging that the inclosure consisted of posts and wire fences, that defendant in maintaining and controlling the fences and inclosure had no claim or color of title to any of the lands made or acquired in good faith, or any asserted right thereto by or under claim made in good faith with a view to entry, thereon, etc., is sufficient, without a bill of particulars. Simpson v. U. S. (1911) 184 Fed. 817, 107 C. C. A. 89.

An indictment charging that defendant unlawfully, etc., maintained and controlled an inclosure of the public lands of the United States situated, etc., and that such inclosure consisted of posts and wire fences, sufficiently alleged that the lands described were surrounded by posts and wire fences. Id.

An indictment for fencing public lands need not allege that defendant had not gone upon, improved, or occupied said lands under the land laws of the United States, claiming title thereto, in good faith, that being a matter of defense. U. S. v. Cook (D. C. 1888) 36 Fed. 896.

An indictment charging defendant with

unlawfully and knowingly maintaining a certain inclosure of public lands, without alleging that the inclosure was made without claim or color of title to any of the land inclosed, "made or acquired in good faith, or an asserted right thereto by or under claim, made in good faith, with a view to entry thereof at the proper land office under the general laws of the United States," in the language of the statute, is fatally defective. U. S. v. Churchill (D. C. 1900) 101 Fed. 443.

13. —— **Negativing exception.**—An indictment alleging that accused so constructed, maintained, and controlled the inclosure then and there having no claim or color of title made or acquired in good faith or otherwise or at all to any of the land, "or an asserted right" thereto by or under claim made in good faith, with a view to entry thereof, etc., is good. Lillis v. U. S. (1911) 190 Fed. 530, 111 C. C. A. 362, writ of certiorari denied (1911) 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632.

An indictment for unlawfully inclosing a portion of the public lands must show that the defendant is not within any of the exceptions permitting such inclosure. U. S. v. Felderward (C. C. 1888) 36 Fed. 490.

14. **Evidence.**—On the trial of an indictment for inclosing and asserting an exclusive right to public land without claim or color of title, acts, conduct, and statements of defendants tending to show the assertion of a right to exclude the general public or others from the lands described are competent evidence. Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642.

To show defendant's knowledge that there was public land within his inclosure, and his intent, the government may prove an unlawful arrangement to procure the lands from the government, though such proof tends to show the commission of another offense. Lillis v. U. S. (1911) 190 Fed. 530, 111 C. C. A. 362, writ of certiorari denied (1911) 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632.

15. **Verdict.**—On the trial of an indictment containing three counts, the first charging the unlawful erection and construction of an inclosure, the second the unlawful maintenance and control of such inclosure, and the third the unlawful prevention and obstruction of free passage over the lands by means of fencing and inclosing the same, a verdict of not guilty on the first and third counts is not inconsistent with one of guilty on the second. Carroll v. U. S. (1907) 154 Fed. 425, 83 C. C. A. 245.

§ 4998. (Act Feb. 25, 1885, c. 149, § 2.) Suits for violations of preceding section.

It shall be the duty of the district attorney of the United States for the proper district, on affidavit filed with him by any citizen of the United States that section one of this act is being violated showing a description of the land inclosed with reasonable certainty, not necessarily by metes and bounds nor by Governmental sub-divisions of surveyed lands, but only so that the inclosure may be identified, and the persons guilty of the violation as nearly as may be, and by description, if the name cannot on reasonable inquiry be ascertained, to institute a civil suit in the proper United States district [or circuit] court, or territorial district court, in the name of the United States, and against the parties named or described who shall be in charge of or controlling the inclosure complained of as defendants; and jurisdiction is also hereby conferred on any United States district [or circuit] court or territorial district court having jurisdiction over the locality where the land inclosed, or any part thereof, shall be situated, to hear and determine proceedings in equity, by writ of injunction, to restrain violations of the provisions of this act; and it shall be sufficient to give the court jurisdiction if service of original process be had in any civil proceeding on any agent or employee having charge or control of the inclosure; and any suit brought under the provisions of this section shall have precedence for hearing and trial over other cases on the civil docket of the court, and shall be tried and determined at the earliest practicable day. In any case if the inclosure shall be found to be unlawful, the court shall make the proper order, judgment, or decree for the destruction of the inclosure, in a summary way, unless the inclosure shall be removed

by the defendant within five days after the order of the court. (23 Stat. 321.)

The words "or circuit," inclosed in brackets in this section, were superseded by the abolition of the circuit courts and the transfer of their powers and duties to the district courts, by Jud. Code, §§ 289-291, ante, §§ 1266-1268.

Notes of Decisions

Power of United States to protect its property.—The enforcement of a decree for the removal or destruction of an unlawful inclosure of public lands rendered under this section, is within the police power of the United States to protect its property and is not an infringement of the constitutional rights of the owner of the inclosure. Golconda Cattle Co. v. U. S. (1912) 201 Fed. 281, 119 C. C. A. 519, affirming order U. S. v. Golconda Cattle Co. (D. C. 1912) 196 Fed. 240, following Camfield v. U. S. (1897) 17 Sup. Ct. 864, 867, 167 U. S. 518, 42 L. Ed. 260.

Common-law right independent of statute.—The United States, independent of this act, has all the common-law rights of an individual with respect to depredations on the public lands, and may avail itself of all the summary remedies given by a court of equity. U. S. v. Bernard (1913) 202 Fed. 728, 121 C. C. A. 190. See, also, Camfield v. U. S. (1897) 17 Sup. Ct. 864, 867, 167 U. S. 518, 42 L. Ed. 260; U. S. v. Brighton Ranch Co. (C. C. 1885) 25 Fed. 465; Same v. Brighton Ranch Co. (C. C. 1885) 26 Fed. 218.

Nature of proceedings under statute.—A civil suit, instituted, under this act, in the name of the United States, against persons inclosing public lands, for the destruction of such inclosure, is not a common-law action, but a summary proceeding in the nature of a suit in equity. Cameron v. U. S. (1893) 13 Sup. Ct. 595, 597, 148 U. S. 301, 37 L. Ed. 459.

This statute was only intended to prevent mere trespassers from inclosing public lands, and in a proceeding thereunder it is sufficient to show that the lands inclosed are not public lands, or that defendant had color of title acquired in good faith. Cameron v. U. S. (1893) 13 Sup. Ct. 595, 597, 148 U. S. 301, 37 L. Ed. 459. See, also, Cameron v. U. S. (1892) 13 Sup. Ct. 184, 185, 146 U. S. 533, 36 L. Ed. 1077; Abadie v. Same (1893) 13 Sup. Ct. 836, 149 U. S. 261, 37 L. Ed. 726; Homer v. Same (1911) 185 Fed. 741, 108 C. C. A. 79; U. S. v. Brandestein (D. C. 1887) 32 Fed. 738; Same v. Pacific Live Stock Co. (D. C. 1910) 192 Fed. 443; Tidwell v. Chiricahua Cattle Co. (1898) 53 Pac. 192, 5 Ariz. 352.

This act gives the federal courts jurisdiction in equity to restrain the inclosure of public lands, and to award damages for the use thereof as incidental relief. U. S. v. Bernard (1913) 202 Fed. 728, 121 C. C. A. 190. See, also, U. S. v. Cleveland & C. Cattle Co. (C. C. 1888) 33 Fed. 323; U. S. v. Bisel (1888) 8 Mont. 20, 19 Pac. 251; Same v. Flaherty, 8 Mont. 31, 19 Pac. 553.

Damages.—Defendants, having wrongfully inclosed public lands, were liable for the reasonable value of their use, though such lands were not injured, and would not have been leased by the government, if not inclosed. U. S. v. Bernard (1913) 202 Fed. 728, 121 C. C. A. 190.

Complainant, by suing in equity to restrain the illegal inclosure of public lands and for damages, waived its right to exemplary damages. Id.

§ 4999. (Act Feb. 25, 1885, c. 149, § 3.) Obstruction of settlement on or transit over public lands.

No person, by force, threats, intimidation, or by any fencing or inclosing, or any other unlawful means, shall prevent or obstruct, or shall combine and confederate with others to prevent or obstruct, any person from peaceably entering upon or establishing a settlement or residence on any tract of public land subject to settlement or entry under the public land laws of the United States, or shall prevent or obstruct free passage or transit over or through the public lands: Provided, This section shall not be held to affect the right or title of persons, who have gone upon, improved or occupied said lands under the land laws of the United States, claiming title thereto, in good faith. (23 Stat. 322.)

Notes of Decisions

Scope and purpose of section.—This section is not limited to the passage of individuals, but requires that the lands also be left open to the passage of stock. Stoddard v. U. S. (1914) 214 Fed. 566, 131 C. C. A. 18; Mackay v. Uinta Development Co. (1914) 219 Fed. 116, 135 C. C. A. 18; Id. (1914) 219 Fed. 121, 135 C. C. A. 23. It is intended to prevent obstructing any person from peaceably entering on or settling on the public domain as well

as to prevent free passage or transit over or through public lands. The act of maintaining an enclosure of public lands must be reached by suit under section 1 of this act and not under this section. One may invoke this section against another who has a piece of drift fence, provided the fence is an obstruction to entry or settlement, or prevents free passage over public lands. Golconda Cattle Co. v. U. S. (1912) 201 Fed. 281, 119 C. C. A. 519. See, also, U. S. v. Rindge (D. C. 1913) 208 Fed. 611. And see Krause v. U. S. (1906) 147 Fed. 442, 78 C. C. A. 642; Hanley v. U. S. (1911) 186 Fed. 711, 108 C. C. A. 581.

Congress was not concerned with the initiation or creation of means of access to public lands, but with the matter of keeping the boundaries thereof open, so that all persons who could lawfully reach the same might enter. U. S. v. Rindge (D. C. 1913) 208 Fed. 611.

Public lands within section.—Land covered by a homestead claim after entry and before patent is not "public land" within the meaning of this section. U. S. v. Buchanan (1914) 34 Sup. Ct. 237, 232 U. S. 72, 58 L. Ed. 511.

Fence prohibited.—A fence, which in combination with natural barriers constitutes a complete obstruction to the passage of range stock into a township containing public land, is illegal, though constructed entirely on land belonging to defendant. Stoddard v. U. S. (C. C. A. 1914) 214 Fed. 566. See Camfield v. U. S. (1897) 17 Sup. Ct. 864, 167 U. S. 518, 42 L. Ed. 260; Golconda Cattle Co. v. Same (1912) 201 Fed. 281, 119 C. C. A. 519; Mackay v. Uinta Development Co. (1914) 219 Fed. 116, 135 C. C. A. 18; Id. (1914) 219 Fed. 121, 135 C. C. A. 23.

§ 5000. (Act Feb. 25, 1885, c. 149, § 4, as amended, Act March 10, 1908, c. 75.) Violations of act punishable.

Any person violating any of the provisions hereof, whether as owner, part owner, or agent, or who shall aid, abet, counsel, advise, or assist in any violation hereof, shall be deemed guilty of a misdemeanor and fined in a sum not exceeding one thousand dollars or be imprisoned not exceeding one year, or both, for each offense. (23 Stat. 322. 35 Stat. 40.)

The amendment of this section by Act March 10, 1908, c. 75, cited above, consisted in the insertion of the words "or both," after the provisions for fine or imprisonment in the section as originally enacted.

Notes of Decisions

Criminal liability of agent.—See, also, notes to § 4997, ante.

Whether a general manager of a ranch owned by a corporation, on which there was a fence which together with natural barriers, inclosed a large quantity of government land, was personally chargeable with the offense of maintaining such inclosure, is a question for the jury. Hanley v. U. S. (1911) 186 Fed. 711, 108 C. C. A. 581.

The government must show that accused had no claim or color of title to the lands, made or acquired in good faith, and did not assert right thereto by or under claim made in good faith, with a view to entry thereon in the proper land office under the general laws of the United States. Lillis v. U. S. (1911) 190 Fed. 530, 111 C. C. A. 362, certiorari denied (1911) 32 Sup. Ct. 525, 223 U. S. 726, 56 L. Ed. 632.

Inclosure of any of the public lands, or maintaining an inclosure except by one making claim to the land in good faith, is an offense within this section, and the wrongdoer may be indicted. Golconda Cattle Co. v. U. S. (1912) 201 Fed. 281, 119 C. C. A. 519.

Indictment.—See, also, notes § 4997, ante.

Under an indictment charging only the maintenance of such an inclosure, the defendant, a manager of a ranch, cannot be convicted of having aided, abetted, counseled, advised, or assisted in its maintenance. Hanley v. U. S. (1911) 186 Fed. 711, 108 C. C. A. 581.

Punishment.—A $500 fine is adequate as punishment against a corporation for unlawfully inclosing 650 acres of public land. U. S. v. Pacific Live Stock Co. (D. C. 1910) 192 Fed. 443.

—— **Corporations.**—A corporation is subject to fine for unlawfully inclosing public domain, unaffected by the amendment after the offense. U. S. v. Pacific Live Stock Co. (D. C. 1910) 192 Fed. 443.

§ 5001. (Act Feb. 25, 1885, c. 149, § 5.) Removal of unlawful inclosures.

The President is hereby authorized to take such measures as shall be necessary to remove and destroy any unlawful inclosure of any of said lands, and to employ civil or military force as may be necessary for that purpose. (23 Stat. 322.)

§ 5002. (Act Feb. 25, 1885, c. 149, § 6.) Permission from Secretary of Interior to bring suits for unlawful inclosures.

Where the alleged unlawful inclosure includes less than one hundred and sixty acres of land, no suit shall be brought under the provisions of this act without authority from the Secretary of the Interior. (23 Stat. 322.)

CHAPTER TEN H

Abandoned Military Reservations

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes Act July 5, 1884, c. 214, 23 Stat. 103, and subsequent provisions of a general and permanent nature relating to the disposal of the lands within abandoned military reservations. Provisions relating to particular reservations, being special and local in their nature are omitted.

Sec.
5003. Disposition of abandoned and useless military reservations.
5004. Survey or subdivision of abandoned or useless military reservations; appraisal and sale; rights of settlers.
5005. Appraisal and sale of buildings, etc., on reservations.
5006. Disposition of mineral lands on reservations.
5007. Abandoned military reservations in Nevada; entry on under homestead laws only.
5007a. Homestead and desert laws made applicable to military reservations in Nevada.
5008. Grants of not to exceed 20 acres of abandoned military reservations to municipal corporations.
5009. Lands within abandoned military reservations opened to settlement; preference right of entry.
5010. Operation of previous act on reservations afterward placed under control of Secretary of Interior not affected by act; mode of appraisal.
5011. Lands within abandoned military reservations opened to settlement.
5012. Selections by states in lieu of school sections in abandoned military reservations, confirmed; disposal of such school sections.

§ 5003. (Act July 5, 1884, c. 214, § 1.) Disposition of abandoned and useless military reservations.

Whenever, in the opinion of the President of the United States, the lands, or any portion of them, included within the limits of any military reservation heretofore or hereafter declared, have become or shall become useless for military purposes, he shall cause the same or so much thereof as he may designate, to be placed under the control of the Secretary of the Interior for disposition as hereinafter provided, and shall cause to be filed with the Secretary of the Interior a notice thereof. (23 Stat. 103.)

This was the first section of an act entitled "An act to provide for the disposal of abandoned and useless military reservations," cited above.

Sections 2, 3, and 5 of the act are set forth post, §§ 5004–5006.

Section 4 of the act repealed Act Aug. 18, 1856, c. 129, 11 Stat. 87, and Act June 12, 1858, c. 156, § 6, 11 Stat. 336.

Section 6 of the act provided for the extension of State, county, and territorial roads across military reservations, and is set forth, ante, § 4920.

The lands already placed in the custody of the Secretary of the Interior under the provisions of this act, the disposal of which had not been provided for by a subsequent act of Congress, which exceeded 5,000 acres in area, except such as had government improvements thereon or had been reserved for some public use, were opened for settlement under the public land laws, and a preference right of entry was given to certain bona fide settlers thereon, without interfering in any manner with the operation of this act upon lands thereafter placed under control of the Secretary of the Interior, by Act Aug. 23, 1894, c. 314, post, §§ 5009, 5010; and the provisions of said Act Aug. 23, 1894, c. 314, were extended to all lands placed under the control of the Sec-

retary of the Interior under any law in force prior to this act, by Act Feb. 15, 1895, c. 92, § 1, post, § 5011.

An appropriation for expenses of survey, appraisal, and sale of abandoned military reservations, transferred to the control of the Secretary of the Interior under the provisions of this act and any law prior thereto, is made by recent sundry civil appropriation acts. The provision for the fiscal year 1917, was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Notes of Decisions

Transfer to another department.—This act, aside from special acts for the disposition of particular military posts, is the only general act providing for the disposition of useless military reservations; but, independently of this statute, lands reserved for military purposes cannot be transferred by the President to any other department without an act of congress. (1910) 28 Op. Atty. Gen. 143.

§ 5004. (Act July 5, 1884, c. 214, § 2.) Survey or subdivision of abandoned or useless military reservations; appraisal and sale; rights of settlers.

The Secretary of the Interior may, if in his opinion the public interests so require, cause the said lands, or any part thereof, in such reservations, to be regularly surveyed, or to be subdivided into tracts of less than forty acres each, and into town lots, or either, or both. He shall cause the said lands so surveyed and subdivided, and each tract thereof, to be appraised by three competent and disinterested men to be appointed by him, and who shall, after having each been first duly sworn to impartially and faithfully execute the trust reposed in them, appraise the said lands, subdivisions, and tracts, and each of them and report their proceedings to the Secretary of the Interior for his action thereon. If such appraisement be disapproved, the Secretary of the Interior shall again cause the said lands to be appraised as before provided; and when the appraisement has been approved he shall cause the said lands, subdivisions, and lots to be sold at public sale, to the highest bidder for cash, at not less than the appraised value thereof, nor less than one dollar and twenty-five cents per acre, first having given not less than sixty days' public notice of the time, place, and terms of sale, immediately prior to such sale, by publication in at least two newspapers having a general circulation in the country or section of county where the lands to be sold are situate; and any lands, subdivisions, or lots remaining unsold may be reoffered for sale at any subsequent time in the same manner, at the discretion of the Secretary of the Interior; and if not sold at such second offering for want of bidders, then the Secretary of the Interior may sell the same at private sale, for cash, at not less than the appraised value, nor less than one dollar and twenty-five cents per acre: Provided, That any settler who was in actual occupation of any portion of any such reservations prior to the location of such reservation, or settled thereon prior to January first, eighteen hundred and eighty-four, in good faith for the purpose of securing a home and of entering the same under the general laws and has continued in such occupation to the present time, and is by law entitled to make a homestead entry shall be entitled to enter the land so occupied, not exceeding one hundred and sixty acres in a body, according to the Government surveys and subdivisions: Provided further, That said lands were subject to entry under the public land laws at the time of their withdrawal: And provided further, That all patents heretofore issued, and approved State selections, covering any lands within the old Fort Lyon Military Reservation, in the State of Colorado, declared by executive order of August eighth, eighteen hundred and sixty-three, are hereby confirmed; and the rights of all entrymen and settlers on said reservation to acquire title under the homestead, preemption, or timber culture laws are hereby recognized and affirmed

to the extent they would have attached had public lands been settled upon or entered; and such portions of said reservation as shall not have been entered or settled upon as aforesaid shall be disposed of by the Secretary of the Interior under the provisions of this act, including lands that may be abandoned by settlers or entrymen. (23 Stat. 103.)

The public sale of abandoned military reservations was excepted from the provisions of the act discontinuing the sale of public lands at public sale. Act March 3, 1891, c. 561, § 9, ante, § 4753.

Private entry on public lands, except in Missouri, was suspended by Act March 2, 1889, c. 381, § 1, ante, § 4760. Section 8 of said act, ante, § 4762, however, excepted from the operation thereof the provisions of this act.

Notes of Decisions

Property subject to sale.—Dragoon Barracks lot, in St. Augustine, Fla., and the buildings thereon, was property to be appraised and disposed of in the manner provided by this and the following section. (1887) 18 Op. Atty. Gen. 543.

Government buildings within a patented private claim belong to the government, when its right of ownership is reserved in the patent. (1893) 20 Op. Atty. Gen. 603.

Preference right of entry or purchase.—There is nothing in this act offering or granting to settlers or occupants, entering into possession subsequent to the date of the act and the executive order of withdrawal, any preference right of entry or purchase. Subsequent adverse claims to lots or lands in such tract must be determined by the law of possession. Walsh v. Ford (1901) 1 Alaska, 146. And see Johnson v. Drew (1894) 34 Fla. 130, 15 South. 780, 43 Am. St. Rep. 172; State v. Tanner (1905) 102 N. W. 235, 73 Neb. 104; Same v. McCright (1905) 102 N. W. 241, 73 Neb. 123; Same v. Bednar (1905) 102 N. W. 241, 73 Neb. 122; Same v. Brimmer (1905) 102 N. W. 242, 73 Neb. 121.

This act recognized only the right of an individual settler in the actual occupation of a portion of the military reservation, prior to the location of the reservation, or prior to January 1, 1884, in good faith, for the purpose of securing a home. State v. Tanner (1905) 102 N. W. 235, 73 Neb. 104; Same v. McCright (1905) 102 N. W. 241, 73 Neb. 123; Same v. Bednar (1905) 102 N. W. 241, 73 Neb. 122; Same v. Brimmer (1905) 102 N. W. 242, 73 Neb. 121.

§ 5005. (Act July 5, 1884, c. 214, § 3.) Appraisal and sale of buildings, etc., on reservations.

The Secretary of the Interior shall cause any improvements, buildings, building materials, and other property which may be situate upon any such lands, subdivisions or lots not heretofore sold by the United States authorities, to be appraised in the same manner as hereinbefore provided for the appraisements of such lands, subdivisions, and lots, and shall cause the same, together with the tract or lot upon which they are situate, to be sold at public sale, to the highest bidder for cash, at not less than the appraised value of such land and improvements, first giving the sixty days' notice as hereinbefore provided; or he may, in his discretion, cause the improvements to be sold separately, at public sale for cash, at not less than the appraised value, to be removed by the purchaser within such time as may be prescribed, first giving the sixty days' public notice before provided; and if in any case the lands and improvements, or the improvements separately, as the case may be, are not sold for want of bidders, then the Secretary of the Interior may, in his discretion, cause the same to be reoffered for sale, at any subsequent time, in the same manner as above provided, or may cause the same to be sold at private sale for not less than the appraised value: Provided, That where buildings or improvements have been heretofore sold by the United States authorities the land upon which such buildings or improvements are situate not exceeding the smallest subdivision or lot provided for by this act upon the reservation on which said buildings are situate shall be offered for sale to the purchaser of said improvements and buildings at the appraised value of the lands and if said purchaser shall fail for sixty days after notice to complete said purchase of lands the same shall be sold under the

provisions of this act: And provided further That the proceeds of the military reservation lands sold on Bois Blanc Island near to Fort Mackinaw military reservation shall be set apart as a separate fund for the improvement of the National Park on the Island of Mackinaw Michigan under the direction of the Secretary of War. (23 Stat. 103.)

See note to sections 1 and 2 of this act, ante, §§ 5003, 5004.

The National Park on Mackinaw Island was established by Act March 3, 1875, c. 191, 18 Stat. 517.

§ 5006. (Act July 5, 1884, c. 214, § 5.) Disposition of mineral lands on reservations.

Whenever any lands containing valuable mineral deposits shall be vacated by the reduction or abandonment of any military reservation under the provisions of this act, the same shall be disposed of exclusively under the mineral land laws of the United States. (23 Stat. 104.)

The mineral land laws are contained in chapter 6 of this Title.

See notes to section 1 of this act, ante, § 5003.

§ 5007. (Act Oct. 1, 1890, c. 1239.) Abandoned military reservations in Nevada; entry on under homestead laws only.

That all the agricultural lands embraced within the military reservations in the State of Nevada which have been placed under the control of the Secretary of the Interior for disposition be disposed of under the homestead laws, and not otherwise. (26 Stat. 561.)

This was an act entitled "An act to open abandoned military reservations in the State of Nevada to homestead entry."

Entry under the desert-land laws was authorized by Act Aug. 21, 1916, c. 361, post, § 5007a.

§ 5007a. (Act Aug. 21, 1916, c. 361.) Homestead and desert laws made applicable to military reservations in Nevada.

All the agricultural lands embraced within the military reservations in the State of Nevada which have been placed under the control of the Secretary of the Interior for disposition be disposed of under the homestead and desert-land laws, and not otherwise: Provided, That this Act is intended to make applicable to the desert-land laws only such lands as were included under the Act of March third, eighteen hundred and seventy-seven, providing for the disposition of public lands under the desert-land laws. (39 Stat.)

This was an act entitled "An act to open abandoned military reservations in the state of Nevada to homestead entry and desert-land entry, and to amend an act entitled 'An act to open abandoned military reservations in the state of Nevada to homestead entry,' approved Oct. 1, 1890," cited above.

Act March 3, 1877, mentioned in this section, is set forth, ante, §§ 4674–4680.

Entry under the homestead laws had previously been authorized by Act Oct. 1, 1890, c. 1239, ante, § 5007.

§ 5008. (Act March 3, 1893, c. 208, § 1.) Grants of not to exceed 20 acres of abandoned military reservations to municipal corporations.

The President is hereby authorized by proclamation to withhold from sale and grant for public use to the municipal corporation in which the same is situated all or any portion of any abandoned military reservation not exceeding twenty acres in one place. (27 Stat. 593.)

This was a proviso annexed to an appropriation for survey, etc., of abandoned military reservations in the sundry civil appropriation act for the fiscal year 1894, cited above.

§ 5009. (Act Aug. 23, 1894, c. 314, § 1.) Lands within abandoned military reservations opened to settlement; preference right of entry.

All lands not already disposed of included within the limits of any abandoned military reservation heretofore placed under the control of the Secretary of the Interior for disposition under the Act approved July fifth, eighteen hundred and eighty-four, the disposal of which has not been provided for by a subsequent Act of Congress, where the area exceeds five thousand acres, except such legal subdivisions as have Government improvements thereon, and except also such other parts as are now or may be reserved for some public use, are hereby opened to settlement under the public-land laws of the United States, and a preference right of entry for a period of six months from the date of this Act shall be given all bona fide settlers who are qualified to enter under the homestead law and have made improvements and are now residing upon any agricultural lands in said reservations, and for a period of six months from the date of settlement when that shall occur after the date of this Act: Provided, That persons who enter under the homestead law shall pay for such lands not less than the value heretofore or hereafter determined by appraisement, nor less than the price of the land at the time of the entry, and such payment may, at the option of the purchaser, be made in five equal installments, at times and at rates of interest to be fixed by the Secretary of the Interior. (28 Stat. 491.)

This section and the section next following were an act entitled "An act to provide for the opening of certain abandoned military reservations, and for other purposes."

Act July 5, 1884, c. 214, mentioned in this section is set forth ante, §§ 5003–5006.

This act was amended and its provisions extended by Act Feb. 15, 1895, c. 92, § 1, post, § 5011.

§ 5010. (Act Aug. 23, 1894, c. 314, § 2.) Operation of previous act on reservations afterward placed under control of Secretary of Interior not affected by act; mode of appraisal.

Nothing contained in this Act shall be construed to suspend or to interfere with the operation of the said Act approved July fifth, eighteen hundred and eighty-four, as to all lands included in abandoned military reservations hereafter placed under the control of the Secretary of the Interior for disposal, and all appraisements required by the first section of this Act shall be in accordance with the provisions of said Act of July fifth, eighteen hundred and eighty-four. (28 Stat. 491.)

See note to preceding section of this act, ante, § 5009.

§ 5011. (Act Feb. 15, 1895, c. 92, § 1.) Lands within abandoned military reservations opened to settlement.

The provisions of the Act approved August twenty-third, eighteen hundred and ninety four, entitled "An Act to provide for the opening of certain abandoned military reservations, and for other purposes," are hereby extended to all abandoned military reservations which were placed under the control of the Secretary of the Interior under any law in force prior to the Act of July fifth, eighteen hundred and eighty-four. (28 Stat. 664.)

This was the first section of an act entitled "An act to amend and extend the provisions of an act entitled 'An act to provide for the opening of certain abandoned military reservations, and for other purposes,' approved August twenty-third, eighteen hundred and ninety four."

Section 2 of the act extended the preference right of entry given to actual settlers by the act thereby amended for six months from the date of the amendatory act.

Act July 5, 1884, c. 214, and Act Aug. 23, 1894, c. 314, mentioned in this section, are set forth ante, §§ 5003–5006, 5009, 5010.

§ 5012. (Act Feb. 11, 1903, c. 543.) Selections by states in lieu of school sections in abandoned military reservations, confirmed; disposal of such school sections.

All State school indemnity selections in lieu of what are known as school sections in abandoned military reservations made pursuant to the decision of the Secretary of the Interior dated January twenty-eighth, eighteen hundred and ninety-eight, and before notice of the withdrawal of that decision was received at the local land office at which the selections were made, and which are otherwise regular and free from any prior lawful claim, shall be confirmed by the Secretary of the Interior; and the lands in such school sections in lieu of which such confirmed selections were made shall be disposed of under the laws applicable to other lands in such abandoned military reservations, a preference right being accorded to those who have made and maintained a bona fide settlement or entry pursuant to said decision of the Secretary of the Interior. (32 Stat. 822.)

This was an act entitled "An act adjusting certain conflicts respecting State school indemnity selections in lieu of school sections in abandoned military reservations."

General provisions for selections by States in lieu of school lands, supply deficiencies thereof, are contained in R. S. §§ 2275, 2276, ante, §§ 4860, 4861.

Special provisions for opening to homestead entry the lands embraced in the abandoned Fort Lyon, the Old Fort Lyon, and the Pagosa Springs Military Reservations, in Colorado, were contained in Act Oct. 1, 1890, c. 1240, 26 Stat. 561.

The undisposed of public lands in the abandoned Fort Buford Military Reservation in North Dakota and Montana were made subject to disposal under the homestead, town-site and desert-land laws by Act May 19, 1900, c. 484, 31 Stat. 180.

Each homestead entryman on lands in the abandoned Fort Fetterman Military Reservation, in Wyoming, was given the right to purchase not more than one quarter section of the public lands on that reservation for pasture or grazing land, by Act March 3, 1901, c. 833, 31 Stat. 1085.

A similar right was given to homesteaders on the abandoned Fort Bridger, Fort Sanders, or Fort Laramie Military Reservations, or the abandoned Fort Laramie Wood Reservation, by Act May 31, 1902, c. 945, 32 Stat. 283.

Provisions for the reappraisement and sale of the lands, formerly in the abandoned Walla Walla Military Reservation in Washington, then remaining undisposed of, were contained in Act April 22, 1904, c. 1415, 33 Stat. 243.

Homestead entrymen upon the lands of the abandoned Fort Abraham Lincoln Military Reservation in North Dakota were entitled to a patent therefor upon compliance with the homestead laws without paying the appraised value, by Act April 23, 1904, c. 1496, 33 Stat. 306.

Provisions for the disposal of the unsold lots in the abandoned Fort Crawford Military Reservation, in Wisconsin, giving occupants and settlers a preference right of purchase, were contained in Act April 25, 1904, c. 1600, 33 Stat. 306.

The Secretary of the Interior was authorized to dispose of the lands in the abandoned Fort Shaw Military Reservation, in Montana, under the provisions of the public land laws, by Act June 9, 1906, c. 3066, 34 Stat. 228.

The laws for the disposal of the public lands were extended to lands in the abandoned Fort Crittenden Military Reservation, in Utah, and homestead entrymen upon the abandoned Fort Rice Military Reservation, in North Dakota, were entitled to patent upon compliance with the homestead laws without paying the appraised value of the lands, by Act June 30, 1906, c. 3931, 34 Stat. 808.

Portions of the lands of the abandoned Fort Sheridan Military Reservation and the abandoned Fort McPherson Military Reservation, which had become subject to homestead entry were exempted from the payment of the appraised values, by Act May 29, 1908, c. 220, § 8, 35 Stat. 467.

The Carey Act, Act Aug. 18, 1894, c. 301, § 4, was extended to lands in the former Fort Bridger Military Reservation, in Wyoming, by Act Feb. 16, 1911, c. 90, 36 Stat. 913.

The Secretary of the Interior was authorized to sell the lands, buildings, and other appurtenances of the old Fort Spokane Military Reservation, then used for Indian school purposes, by Act March 3, 1911, c. 210, 36 Stat. 1075.

The unreserved lands within the former Fort Niobrara Military Reservation, in Nebraska, except certain portions granted to the State, the City of Valen-

tine, and certain individuals, were made subject to homestead entry by Act Jan. 27, 1913, c. 14, 37 Stat. 651.

Provisions for surveying and opening to settlement the abandoned Fort Assinniboine Military Reservation, were made by Act Feb. 11, 1915, c. 25, 38 Stat. 817, as amended by Act Sept. 7, 1916, c. 452, 39 Stat.

The Secretary of the Interior was authorized to sell certain enumerated abandoned military reservations in the state of Washington, by Act July 3, 1916, c. 217, 39 Stat.

CHAPTER TEN I

Ceded Indian Reservations

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes those acts of Congress which were of general application to ceded Indian reservations and lands. The agreements with the Indians of various tribes or nations for the purchase or cession of all or parts of their lands, the acts of Congress ratifying the agreements or treaties, making appropriations for payment to the Indians therefor, providing for the allotment to the Indians of the lands reserved from the cessions, providing for the disposition of the remainder under the public land laws, including the homestead, town-site, and desert-land laws, and authorizing new agreements looking to the cession of other lands, and the proclamations of the President opening said lands to settlers, being special and local, inasmuch as they each related to some particular tract of land belonging to some particular tribe or nation of Indians, are omitted. The general policy observed throughout in the acquisition and disposition of these lands was the same, the differences being mainly in the minor details incident to their disposition, principally under the homestead laws, such as regards the time of entry, persons who might enter, number of acres which they might enter, prices to be paid, right to commute, etc. In the case of entries under the homestead laws, where any of the provisions of the general laws have been expressly declared inapplicable to said entries that fact has been noted under the proper section in the chapter relating to homesteads—Chapter 5 of this Title.

Sec.
5013. Free homesteads to settlers on Indian lands acquired and opened to settlement; commutation rights; payments to Indians.
5014. Commutation by settlers under free homestead law.
5015. Second homestead entry by settlers on ceded Indian lands having made final entry by payment of price before passage of free homestead law.
5016. Negotiations by Secretary of Interior for cession of Indian lands.
5017. Classification and appraisement of unallotted and unreserved Indian lands authorized.
5018. Agreements with Indians not to be affected by act.
5019. Town-site laws extended to ceded Indian lands in Minnesota.

§ 5013. (Act May 17, 1900, c. 479, § 1.) Free homesteads to settlers on Indian lands acquired and opened to settlement; commutation rights; payments to Indians.

All settlers under the homestead laws of the United States upon the agricultural public lands, which have already been opened to settlement, acquired prior to the passage of this Act by treaty or agreement from the various Indian tribes, who have resided or shall hereafter reside upon the tract entered in good faith for the period required by existing law, shall be entitled to a patent for the land so entered upon the payment to the local land officers of the usual and customary fees, and no other or further charge of any kind whatsoever shall be required from such settler to entitle him to a patent for the land covered by his entry: Provided, That the right to commute any such entry and pay for said lands in the option of any such settler and in the time and at the prices now fixed by existing laws shall remain in full force and effect: Provided, however, That all sums of money so released which if not released would belong to any Indian tribe shall be paid to such Indian tribe by the United States, and that in the event that

the proceeds of the annual sales of the public lands shall not be sufficient to meet the payments heretofore provided for agricultural colleges and experimental stations by an Act of Congress, approved August thirtieth, eighteen hundred and ninety, for the more complete endowment and support of the colleges for the benefit of agricultural and mechanic arts, established under the provisions of an Act of Congress, approved July second, eighteen hundred and sixty-two, such deficiency shall be paid by the United States: And provided further, That no lands shall be herein included on which the United States Government had made valuable improvements, or lands that have been sold at public auction by said Government. (31 Stat. 179.)

This was the first section of an act entitled "An act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose."

Section 2 of the act repealed all acts and parts of acts in conflict therewith.

Prior to the passage of this act, the acts of Congress ratifying the cessions of Indian lands, and providing for the opening of the lands so ceded, or the proclamations of the President declaring said lands opened to settlement, usually contained provisions that the lands should be opened to settlement under the homestead laws of the United States except that R. S. § 2301, ante, § 4589, should not be applicable; thus denying to settlers under the acts the right to commute their entries. By the provision in this act, all settlers on Indian lands which were ceded and opened to settlement prior to May 17, 1900, were entitled to commute their entries, in the option of such settlers, in the time and at the prices now fixed by existing laws. It may be doubted whether or not this provision permitted settlers on said lands to commute their entries when the acts under which their entries were made prohibited such commutations. However, by the provisions of Act Jan. 26, 1901, c. 180, post, § 5014, the provisions of R. S. § 2301, ante, § 4589, were extended to all settlers on lands under this act, except that said settlers were required to pay the price provided in the law under which their original entries were made. This supplementary act clearly permitted settlers on said lands to commute their entries, although the laws under which said entries were made forbade such commutations.

The laws authorizing the commutation of homesteads in the Territory of Oklahoma generally were applicable to the commutation of homesteads in Greer county, Okl., by Act Jan. 18, 1897, c. 62, § 7, post, § 5043.

Homestead settlers who, prior to the passage of this act, had acquired title to the land by final entry by payment of the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the act had final entry not been made prior to its passage, were authorized to make another homestead entry, by Act May 22, 1902, c. 821, § 2, post, § 5015.

The provisions of Act May 2, 1890, c. 182, § 22, post, § 5023, for commutation for town-site purposes of homestead entries in Oklahoma, was made applicable to lands in Oklahoma ceded by certain Indian bands and tribes, by Act March 11, 1902, c. 180, 32 Stat. 63.

Settlers upon all ceded Indian reservations were granted extensions of time in which to make the payments required by law by Act June 10, 1896, c. 398, § 1, 29 Stat. 342, Act June 7, 1897, c. 3, § 1, 30 Stat. 87, and Act May 31, 1900, c. 598, § 1, 31 Stat. 241. Settlers upon all ceded Indian reservations in Minnesota were granted an extension of one year's time in which to make the required payments, by Act June 21, 1906, c. 3504. The extensions granted by all of these acts having expired, and the acts being temporary merely, they are omitted.

Cited without definite application, Bailey v. Sanders (1910) 177 Fed. 667, 101 C. C. A. 293, affirmed (1913) 33 Sup. Ct. 602, 228 U. S. 603, 57 L. Ed. 985.

§ 5014. (Act Jan. 26, 1901, c. 180.) Commutation by settlers under free homestead law.

The provisions of section twenty-three hundred and one of the Revised Statutes of the United States, as amended, allowing homestead settlers to commute their homestead entries be, and the same hereby are, extended to all homestead settlers affected by or entitled to the benefits of the provisions of the Act entitled "An Act providing for free homesteads on the public lands for actual

and bona fide settlers, and reserving the public lands for that purpose," approved the seventeenth day of May, anno Domini nineteen hundred: Provided, however, That in commuting such entries the entryman shall pay the price provided in the law under which original entry was made. (31 Stat. 740.)

R. S. § 2301, as amended by Act March 3, 1891, c. 561, § 6, 26 Stat. 1098, ante, § 4589, provided that all persons entitled to avail themselves of the provisions of R. S. § 2289, ante, § 4530, might pay the minimum price for the quantity of land entered by them at any time after the expiration of fourteen calendar months from the date of their entry, and obtain a patent therefor, upon making proof of settlement and of residence and cultivation for such period of fourteen months. This act made said section applicable to all settlers on Indian lands ceded and opened to settlement prior to May 17, 1900, although the acts under which the original entries were made forbade the commutation.

The laws authorizing the commutation of homesteads in the Territory of Oklahoma generally are applicable to the commutation of homesteads in Greer county, Okl., by Act Jan. 18, 1897, c. 62, § 7, post, § 5043.

Homestead settlers on certain ceded Indian lands in South Dakota were to be entitled to the provisions of this act, by Act May 22, 1902, c. 821, § 1, 32 Stat. 203.

§ 5015. (Act May 22, 1902, c. 821, § 2.) Second homestead entry by settlers on ceded Indian lands having made final entry by payment of price before passage of free homestead law.

Any person who, prior to the passage of an Act entitled "An Act providing for free homesteads on the public lands for actual and bona fide settlers, and reserving the public lands for that purpose," approved May seventeenth, nineteen hundred, having made a homestead entry and perfected the same and acquired title to the land by final entry by having paid the price provided in the law opening the land to settlement, and who would have been entitled to the provisions of the Act before cited had final entry not been made prior to the passage of said Act, may make another homestead entry of not exceeding one hundred and sixty acres of any of the public lands in any State or Territory subject to homestead entry: Provided, That any person desiring to make another entry under this Act will be required to make affidavit, to be transmitted with the other filing papers now required by law, giving the description of the tract formerly entered, date and number of entry, and name of the land office where made, or other sufficient data to admit of readily identifying it on the official records: And provided further, That said person has all the other proper qualifications of a homestead entryman: And provided also, That commutation under section twenty-three hundred and one of the Revised Statutes, or any amendment thereto, or any similar statute, shall not be permitted of an entry made under this Act, excepting where the final proof, submitted on the former entry hereinbefore described, shows a residence upon the land covered thereby for the full period of five years, or such term of residence thereon as added to any properly credited military or naval service shall equal such period of five years. (32 Stat. 203.)

This section was part of an act entitled "An act to allow the commutation of and second homestead entries in certain cases."

Section 1 of the act allowed commutation by homestead entrymen upon the Sioux Indian Reservation in South Dakota.

Act May 17, 1900, c. 479, § 1, mentioned in this section, is ante, § 5013.

§ 5016. (Act March 3, 1901, c. 832, § 1.) Negotiations by Secretary of Interior for cession of Indian lands.

That the Secretary of the Interior be, and he is hereby, authorized, in his discretion, to negotiate, through any United States Indian inspector, agreements with any Indians for the cession to the United States of portions of their respective reservations or surplus unallotted

lands, any agreements thus negotiated to be subject to subsequent ratification by Congress. (31 Stat. 1077.)

This was a provision of the Indian appropriation act for the fiscal year 1902, cited above.

Prior to the passage of this act the President was authorized, on each occasion when it was desired to acquire any lands from particular tribes or nations of Indians, by an act of Congress, to appoint commissioners to negotiate agreements with the Indians for the acquisition of the tracts desired, subject to ratification by Congress.

§ 5017. (Act June 6, 1912, c. 155.) Classification and appraisement of unallotted and unreserved Indian lands authorized.

That the Secretary of the Interior be, and he is hereby, authorized to cause to be classified or reclassified and appraised or reappraised, in such manner as he may deem advisable, the unallotted or otherwise unreserved lands within any Indian reservation opened to settlement and entry but not classified and appraised in the manner provided for in the Act or Acts opening such reservations to settlement and entry, or where the existing classification or appraisement is, in the opinion of the Secretary of the Interior, erroneous. (37 Stat. 125.)

This was an act entitled "An act authorizing the Secretary of the Interior to classify and appraise unallotted Indian lands."

§ 5018. (Act March 3, 1891, c. 561, § 10.) Agreements with Indians not to be affected by act.

Nothing in this act shall change, repeal, or modify any agreements or treaties made with any Indian tribes for the disposal of their lands, or of land ceded to the United States to be disposed of for the benefit of such tribes, and the proceeds thereof to be placed in the Treasury of the United States; and the disposition of such lands shall continue in accordance with the provisions of such treaties or agreements; except as provided in section 5 of this act. (26 Stat. 1099.)

This section was part of the act repealing the timber-culture laws. Other sections are set forth or referred to post, § 5116.

§ 5019. (Act Feb. 9, 1903, c. 531.) Town-site laws extended to ceded Indian lands in Minnesota.

Chapter eight, title thirty-two, of the Revised Statutes of the United States, entitled "Reservation and sale of town sites on the public lands," be, and is hereby, extended to and declared to be applicable to ceded Indian lands within the State of Minnesota. This act shall take effect and be in force from and after its passage. (32 Stat. 820.)

This was an act entitled "An act to extend the provisions of chapter eight, title thirty-two, of the Revised Statutes of the United States, entitled 'Reservation and sale of town sites on the public lands,' to the ceded Indian lands in the State of Minnesota."

Chapter 8 of this Title of the Revised Statutes, mentioned in this act, is set forth ante, §§ 4784–4801.

Homestead settlers on ceded Indian reservations in Minnesota are granted an extension of time to make payments for the lands purchased by them, by a provision of Act June 21, 1906, c. 3504, 34 Stat. 326.

Special provisions for opening to settlement relinquished lands of the Walker River Reservation in Nevada were made by Act May 27, 1902, c. 888, 32 Stat. 261.

Special provisions extending the homestead laws to lands included within the former Ute Indian Reservation in Colorado were made by Act June 13, 1902, c. 1080, 32 Stat. 384.

Provisions for opening to homestead entry agricultural lands of the Chippewa Indian Reservation in Minnesota, after the removal of the Merchantable pine timber therefrom, were made by Act June 27, 1902, c. 1157, 32 Stat. 403, and Act May 20, 1908, c. 181, § 8, 35 Stat. 171. Subsequent provisions for offering for sale and disposing of the unsold timber on lands classified as "pine lands," and for opening to homestead settlement such lands on which

there is unsold pine timber after such re-offering, were contained in Act June 25, 1910, c. 431, § 27, 36 Stat. 862.

Provisions for the sale, subject to the homestead laws, of part of the Red Lake Reservation in Minnesota, were made by Act Feb. 20, 1904, c. 161, 33 Stat. 46, and the time for payments by homestead settlers thereon was extended by Act March 26, 1910, c. 129, § 1, 36 Stat. 265. Subsequent provisions relating to homestead entries on such lands were made by Act Feb. 16, 1911, c. 91, 36 Stat. 913.

Provisions for patents to settlers under the homestead laws on agricultural public lands in the north one-half of the Colville Indian Reservation in Washington were made by Act Feb. 7, 1903, c. 514, 32 Stat. 803. And the sale and disposition of surplus or unallotted lands in the diminished Colville Reservation was provided for by Act March 22, 1906, c. 1126, 34 Stat. 80.

Provisions making all lands of the former Fort Hall Indian Reservation in Idaho, offered for sale in accordance with Act June 6, 1900, c. 813, 31 Stat. 672, and remaining unsold, subject to entry in accordance with the provisions of section 5 of that act, were made by Act March 30, 1904, c. 854, 33 Stat. 153.

The right was given to the State of South Dakota to select school indemnity or other lands granted to the State in the ceded portion of the Great Sioux Reservation in South Dakota, and the general laws for the disposal of the public lands were extended to and made applicable to said ceded portion of that reservation, by Act March 30, 1904, c. 855, 33 Stat. 154. Commutation by homestead entrymen upon such lands was allowed by Act May 22, 1902, c. 821, § 1, 32 Stat. 203.

Provisions for the survey and allotment of lands within the limits of the Flathead Indian Reservation in Montana, and the sale and disposal of all surplus lands after allotment, were made by Act April 23, 1904, c. 1495, 33 Stat. 302, amended by Act May 29, 1908, c. 216, § 15, 35 Stat. 448, and Act April 12, 1910, c. 156, 36 Stat. 296, and in Act June 25, 1910, c. 431, § 29, 36 Stat. 863.

Provisions for the sale and disposal of surplus or unallotted lands of the Yakima Indian Reservation in Washington were made by Act Dec. 21, 1904, c. 22, 33 Stat. 595, amended by Act May 6, 1910, c. 203, 36 Stat. 348, and in Res. Jan. 29, 1907, No. 9, 34 Stat. 1420.

The time within which homestead settlers may establish their residence upon certain lands formerly part of the Rosebud Indian Reservation in South Dakota or of the Devils Lake Indian Reservation in North Dakota, was extended by Act Feb. 7, 1905, c. 545, 33 Stat. 700.

Provisions for appraisement and opening to homestead settlement and entry of relinquished and undisposed-of portions of Round Valley Indian Reservation in California were made by Act Feb. 8, 1905, c. 553, 33 Stat. 706.

Provisions for the disposal, under the homestead, town-site, coal, and mineral land laws, of ceded lands of the Shoshone or Wind River Reservation in Wyoming were made by Act March 3, 1905, c. 1452, § 2, 33 Stat. 1021, Res. March 28, 1906, No. 12, 34 Stat. 825, Act Feb. 25, 1909, c. 197, 35 Stat. 650, and Act July 3, 1906, c. 213, 39 Stat.

Provisions for the sale and disposal under the homestead laws of a portion of the Lower Brule Indian Reservation in South Dakota were made by Act April 21, 1906, c. 1645, 34 Stat. 124.

Provisions for the disposal, under the homestead, mineral and town-site laws, of lands, not allotted or reserved or otherwise disposed of, of the Blackfeet Indian Reservation in Montana, were made by Act March 1, 1907, c. 2285, 34 Stat. 1035–1039.

Provisions for the sale and disposal, under the homestead and town-site laws, of a portion of the surplus or unallotted lands of the Rosebud Indian Reservation in South Dakota, were made by Act March 2, 1907, c. 2536, 34 Stat. 1230, and the time for payments by homestead settlers thereon was extended by Act March 26, 1910, c. 129, § 2, 36 Stat. 265, and Act Aug. 17, 1911, c. 22, 37 Stat. 21.

Land in any of several Indian reservations in Minnesota, not included in the National Forest created in that state, classified as agricultural land, was declared open to homestead settlement, and said land classified as timber land was to be open to homestead settlement as soon as the timber was removed therefrom, by Act May 23, 1908, c. 193, § 4, 35 Stat. 272.

Provisions for the sale of certain lands reserved for agency and school purposes in the former Cheyenne and Arapahoe Indian Reservation in Oklahoma were made by Act May 29, 1908, c. 216, § 12, 35 Stat. 447, amended by Act Jan. 31, 1910, c. 21, 36 Stat. 190. Provisions for opening to entry under the homestead laws lands so reserved were made by Act June 17, 1910, c. 299, 36 Stat. 533, and the time for payment therefor was extended by Act Aug. 22, 1911, c. 44, 37 Stat. 33, and by Act Aug. 24, 1912, c. 388, 37 Stat. 530.

Provisions for the sale and disposal of surplus unallotted agricultural lands

of the Spokane Indian Reservation in Washington, were made by Act May 29, 1908, c. 217, 35 Stat. 458.

Provisions for the sale and disposal, under the homestead and town-site laws, of a portion of the surplus and unallotted lands in the Cheyenne River and Standing Rock Indian Reservations in South Dakota and North Dakota, were made by Act May 29, 1908, c. 218, 35 Stat. 460, amended by Act Feb. 17, 1910, c. 40, 36 Stat. 196, and Act March 26, 1910, c. 129, § 4, 36 Stat. 266.

Provisions for the survey and allotment of lands within the limits of the Fort Peck Indian Reservation in Montana and the sale and disposal of the surplus lands after allotment, were made by Act May 30, 1908, c. 237, 35 Stat. 558.

The time fixed for opening to public entry unallotted lands in the Uintah Reservation in Utah, previously extended by several preceding acts, was further extended by a provision of Act March 3, 1905, c. 1479, 33 Stat. 1069. Provisions for commutation of homestead entries on said lands were made by Act March 3, 1911, c. 210, 36 Stat. 1074.

The public-land laws were extended to certain territory ten miles square ceded by the Shoshone and Arapahoe Indians, by Act March 19, 1906, c. 961, 34 Stat. 78.

The establishment of town-sites and the sale of lots within the common lands of the Kiowa, Comanche, and Apache Indians in Oklahoma, were authorized by Act March 20, 1906, c. 1125, 34 Stat. 80. And the opening to settlement and disposal of certain lands, previously set apart as grazing land and as a wood reservation, in the Kiowa, Comanche, and Apache Indian reservations in Oklahoma, was provided for by Act June 5, 1906, c. 2580, 34 Stat. 213, and Act June 28, 1906, c. 3581, 34 Stat. 550.

The time within which payments were required by those acts was extended one year by Act March 11, 1908, c. 79, 35 Stat. 41, and further extended by Act March 26, 1910, c. 129, § 3, 36 Stat. 266. And the sale of tracts of land remaining unsold under said Act June 5, 1906, and also under Act June 6, 1900, c. 813, § 6, 31 Stat. 676, is provided for by Act May 29, 1908, c. 216, § 24, 35 Stat. 456.

Provisions for the sale of lands in the Siletz Reservation in Oregon were made by Act May 13, 1910, c. 233, 36 Stat. 367. And provisions for the issue of patents on certain pending homestead entries within said Reservation were made by Act March 4, 1911, c. 272, 36 Stat. 1356.

Provisions for the sale and disposal of surplus and unallotted lands in that portion of the Pine Ridge Indian Reservation in Bennett county, South Dakota, were made by Act May 27, 1910, c. 257, 36 Stat. 440.

Provisions for the sale and disposal of surplus and unallotted lands in that portion of the Rosebud Indian Reservation in Mellette and Washabaugh Counties, South Dakota, were made by Act May 30, 1910, c. 260, 36 Stat. 448.

Provisions for the survey and allotment of lands within the limits of the Fort Berthold Indian Reservation in North Dakota, and the sale and disposal of the surplus lands after allotment, were made by Act June 1, 1910, c. 264, 36 Stat. 455.

The sale for town-site purposes of certain portions of the surplus and unallotted lands in the Cheyenne River Indian Reservation in South Dakota was authorized by Act June 23, 1910, c. 369, 36 Stat. 602.

Section 3 of Act May 1, 1888, c. 213, 25 Stat. 133, providing that certain lands of the Gros Ventre, Piegan, Blood, Blackfoot, and River Crow Reservation, in Montana, to which the Indian title was extinguished, should be restored to the public domain, and be open to entry under the homestead laws except R. S. § 2301, ante, § 4589, authorizing commutation, and under other laws specified, was amended, to provide that said lands should be open to the operation of laws regulating the entry, sale, or disposal of the public lands, and previous entries under any of such laws were confirmed, by Act March 3, 1911, c. 218, 36 Stat. 1080.

The lease, for the production of oil and gas, of ceded lands of the Shoshone or Wind River Indian Reservation, in Wyoming, was authorized by Act Aug. 21, 1916, c. 363, 39 Stat.

Provisions for the survey and allotment of lands within the diminished Colville Indian Reservation, in Washington, and the sale and disposal of the surplus after allotment, were made by Act March 22, 1906, c. 1126, 34 Stat. 80, as amended by Act Aug. 31, 1916, c. 424, 39 Stat.

CHAPTER TEN J

Public Lands in Oklahoma

This chapter, inserted here as additional to the original chapters of Title XXXII of the Revised Statutes, includes the general and permanent provisions relating to the public lands in Oklahoma generally, and to those in Greer County, Oklahoma. Provisions relating to lands ceded by particular Indian tribes are set forth or referred to ante, under chapter 10 I, of this Title, "Ceded Indian Reservations."

Since the Territory of Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267, the words "Territory of," and "Territory," wherever they occur in the acts in this chapter, were superseded thereby, when they have reference to Oklahoma.

Sec.
5020. Homestead entries on Indian lands; soldiers' and sailors' homesteads; reservation of school and missionary lands; rights of railroad corporations.
5021. Procedure in applications, entries, etc., in Oklahoma; selections to be in square form; limitation of amount of holding; soldiers' and sailors' homesteads.
5022. Patents upon homestead entries on payment at expiration of twelve months after location.
5023. Town-site laws made applicable; lands open to entry; reservations for parks, etc.; rights of homestead settlers.
5024. Reservations between sections of land in Oklahoma for highway purposes.
5025. Fraudulent settlement on lands in Oklahoma; punishment.
5026. Rights of occupants not impaired by provisions of act.
5027. Non-mineral character of lands in Oklahoma.
5028. Division of Oklahoma into counties before opening lands to settlement; reservation of lands for county seats.
5029. Entry by trustees.
5030. Certificate or other evidence of occupancy.
5031. Church lots.
5032. Sale or reservation of lots.
5033. Town-site law of Kansas to govern trustees.
5034. Preference of pending entries; appeals.
5035. Authority, duties, and compensation of trustees.
5036. Town-site laws extended to Cherokee Outlet.
5037. Boards of town-site trustees abolished.
5038. Vacation of town-sites; homestead entries; sale.
5039. Vacated town-sites to be sold by towns or as isolated tracts.
5040. Homestead settlers on lands in Greer county; preference right; purchase of additional lands, rights of settlers' families; effect of death of settler; removal of crops and improvements.
5041. Unoccupied lands subject to entry under homestead laws only.
5042. Town-site entries.
5043. Application of act to Greer county only; repeal; commutation of homesteads.
5044. Right of purchasers from Texas to perfect title under homestead laws notwithstanding previous entries thereunder.

§ 5020. (Act May 2, 1890, c. 182, § 18.) Homestead entries on Indian lands; soldiers' and sailors' homesteads; reservation of school and missionary lands; rights of railroad corporations.

Whenever any of the other lands within the Territory of Oklahoma, now occupied by any Indian tribe, shall by operation of law or proclamation of the President of the United States, be open to settlement, they shall be disposed of to actual settlers only, under the provisions of the homestead law, except section twenty-three hundred and one of the Revised Statutes of the United States, which shall not apply: Provided, however, That each settler, under and in accordance with the provisions of said homestead laws, shall before receiving a patent for his homestead pay to the United States for the land so taken by him, in addition to the fees provided by law, a sum per acre equal to the amount which has been or may be paid by the United States to obtain a relinquishment of the Indian title or inter-

est therein, but in no case shall such payment be less than one dollar and twenty-five cents per acre. The rights of honorably discharged soldiers and sailors in the late civil war, as defined and described in sections twenty-three hundred and four and twenty-three hundred and five of the Revised Statutes of the United States, shall not be abridged except as to such payment. All tracts of land in Oklahoma Territory which have been set apart for school purposes, to educational societies, or missionary boards at work among the Indians, shall not be open for settlement, but are hereby granted to the respective educational societies or missionary boards for whose use the same has been set apart. No part of the land embraced within the Territory hereby created shall inure to the use or benefit of any railroad corporation, except the rights of way and land for stations heretofore granted to certain railroad corporations. Nor shall any provision of this act or any act of any officer of the United States, done or performed under the provisions of this act or otherwise, invest any corporation owning or operating any railroad in the Indian Territory, or Territory created by this act, with any land or right to any land in either of said Territories, and this act shall not apply to or affect any land which, upon any condition on becoming a part of the public domain, would inure to the benefit of, or become the property of, any railroad corporation. (26 Stat. 90.)

These provisions were part of section 18 of an act providing a temporary government for Oklahoma, cited above.

The portion of the section, at the beginning thereof, preceding the part set forth here, provided for reservation of school lands, and for entries under the homestead laws on the "Public Land Strip," and on lands ceded by the Muskogee (or Creek) and Seminole Indians.

Sections 20–24 and 27 of this act are set forth post, §§ 5021–5026. Section 25 excepted Greer county from the provisions of the act. Special provisions applicable only to lands in Greer county are set forth post, §§ 5040–5044.

R. S. § 2301, ante, § 4589, mentioned in this section, provided for the commutation of homestead entries.

All settlers on Indian lands, acquired and opened to settlement prior to May 17, 1901, who reside on their lands the required length of time, are entitled, upon proper proof, to patents therefor upon payment of the land-office fees only, and the right to commute such entries in the time and at the prices fixed by existing laws remains in full force and effect, by Act May 17, 1900, c. 479, § 1, ante, § 5013. The provisions of R. S. § 2301, as amended were extended to all settlers on said lands, by Act Jan. 26, 1901, c. 180, ante, § 5014.

Homestead entries by soldiers and sailors were provided for by R. S. §§ 2304, 2305, ante, §§ 4592, 4593.

Notes of Decisions

School lands.—The territory of Oklahoma received no title to sections 16 and 36 in each township in said territory by this act. Territory v. Choctaw, O. & W. Ry. Co. (Okl. 1908) 95 P. 420.

§ 5021. (Act May 2, 1890, c. 182, § 20.) Procedure in applications, entries, etc., in Oklahoma; selections to be in square form; limitation of amount of holding; soldiers' and sailors' homesteads.

The procedure in applications, entries, contests, and adjudications in the Territory of Oklahoma shall be in form and manner prescribed under the homestead laws of the United States, and the general principles and provisions of the homestead laws, except as modified by the provisions of this act and the acts of Congress approved March first and second, eighteen hundred and eighty-nine, heretofore mentioned, shall be applicable to all entries made in said Territory, but no patent shall be issued to any person who is not a citizen of the United States at the time of making final proof. All persons who shall settle on land in said Territory, under the provisions of the homestead laws of the United States, and of this act,

shall be required to select the same in square form as nearly as may be; and no person who shall at the time be seized in fee simple of a hundred and sixty acres of land in any State or Territory, shall hereafter be entitled to enter land in said Territory of Oklahoma. The provisions of sections twenty-three hundred and four and twenty three hundred and five of the Revised Statutes of the United States shall, except so far as modified by this act, apply to all homestead settlements in said Territory. (26 Stat. 91.)

See note to section 18 of this act, ante, § 5020.

The acts referred to in this section are Act March 1, 1889, c. 317, 25 Stat. 757, which ratified and confirmed an agreement with the Muskogee (or Creek) Indians for the cession of certain of their lands, and provided for homestead entries thereon, and Act March 2, 1889, c. 412, 25 Stat. 1004, which appropriated money for payment to the Seminole Indians for lands ceded by them, and provided for entry thereon under the homestead laws, authorized negotiations for the cession of lands from the Cherokee Indians, and provided for the opening of said lands, if ceded, for settlement.

The other modifications of the homestead laws mentioned in this section are those which related to entries of special cessions of land. A synopsis of them is given in the note to Act May 17, 1900, c. 479, § 1, ante, § 5013.

Soldiers' and sailors' homestead entries were provided for by R. S. §§ 2304, 2305, ante, §§ 4592, 4593.

Notes of Decisions

Qualifications of entrymen.—See, also, notes to § 4530, ante.

One holding land by virtue of a receiver's final certificate prior to issue of patent is not seised in fee simple of the land described, and is not on account thereof prohibited from entering public lands. Gourley v. Countryman (1907) 90 P. 427, 18 Okl. 220.

Contests.—This section authorizes witnesses in contest cases to be sworn by the register or receiver. Peters v. U. S. (1894) 2 Okl. 116, 33 Pac. 1031.

§ 5022. (Act May 2, 1890, c. 182, § 21.) Patents upon homestead entries on payment at expiration of twelve months after location.

Any person, entitled by law to take a homestead in said Territory of Oklahoma, who has already located and filed upon, or shall hereafter locate and file upon, a homestead within the limits described in the President's proclamation of April first, eighteen hundred and eighty nine, and under and in pursuance of the laws applicable to the settlement of the lands opened for settlement by such proclamation, and who has complied with all the laws relating to such homestead settlement, may receive a patent therefor at the expiration of twelve months from date of locating upon said homestead upon payment to the United States of one dollar and twenty-five cents per acre for land embraced in such homestead. (26 Stat. 91.)

See notes to section 18 of this act, ante, § 5020.

Subsequent special provisions for commutation of homestead entries on lands in Oklahoma within the lands acquired from particular tribes of Indians, or the Public Land Strip, or the Cherokee Outlet, were made by Act March 3, 1891, c. 543, § 16, 26 Stat. 1026, Act March 3, 1893, c. 209, § 10, 27 Stat. 643, Act Oct. 20, 1893, c. 5, § 2, 28 Stat. 3, Act May 17, 1900, c. 479, 31 Stat. 179, and Act Jan. 26, 1901, c. 180, 31 Stat. 740.

General provisions for commutation of homestead entries on lands acquired from Indian tribes were made by Act May 17, 1900, c. 479, § 1, ante, § 5013.

§ 5023. (Act May 2, 1890, c. 182, § 22.) Town-site laws made applicable; lands open to entry; reservations for parks, etc.; rights of homestead settlers.

The provisions of title thirty-two, chapter eight of the Revised Statutes of the United States relating to "reservation and sale of town sites on the public lands" shall apply to the lands open, or to be opened to settlement in the Territory of Oklahoma, except those opened to settlement by the proclamation of the President on the twenty-second day of April, eighteen hundred and eighty-nine: Pro-

vided, That hereafter all surveys for town sites in said Territory shall contain reservations for parks (of substantially equal area if more than one park) and for schools and other public purposes, embracing in the aggregate not less than ten nor more than twenty acres; and patents for such reservations, to be maintained for such purposes, shall be issued to the towns respectively when organized as municipalities: Provided further, That in case any lands in said Territory of Oklahoma, which may be occupied and filed upon as a homestead, under the provisions of law applicable to said Territory, by a person who is entitled to perfect his title thereto under such laws, are required for town site purposes, it shall be lawful for such person to apply to the Secretary of the Interior to purchase the lands embraced in said homestead or any part thereof for town-site purposes. He shall file with the application a plat of such proposed town-site, and if such plat shall be approved by the Secretary of the Interior, he shall issue a patent to such person for land embraced in said town site, upon the payment of the sum of ten dollars per acre for all the lands embraced in such town site, except the lands to be donated and maintained for public purposes as provided in this section. And the sums so received by the Secretary of the Interior shall be paid over to the proper authorities of the municipalities when organized, to be used by them for school purposes only. (26 Stat. 91.)

See notes to section 18 of this act, ante, § 5020.

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267.

The entry of town-sites in Greer county, Oklahoma, under the provisions of R. S. §§ 2387-2389, was provided for by Act Jan. 18, 1897, c. 62, § 3, post, § 5042.

The provisions of this section for commutation for town-site purposes of homestead entries was made applicable to certain ceded Indian lands in Oklahoma, by Act March 11, 1902, c. 180, 32 Stat. 63.

Notes of Decisions

Patent.—The city acquires an absolute alienable title under the patent. Sharp v. City of Guthrie (Okl. 1915) 152 P. 403.

Cancellation of patent.—Where a patent has been issued to a homestead entryman for town-site purposes, and the land was duly platted, and the town site is actually occupied, and a number of the lots have been sold to innocent purchasers, though the patentee obtained title through fraud, the patent cannot be canceled without materially affecting the interest of innocent holders, and the government is without remedy. Lynch v. U. S. (1903) 73 P. 1095, 13 Okl. 142.

§ 5024. (Act May 2, 1890, c. 182, § 23.) Reservations between sections of land in Oklahoma for highway purposes.

That there shall be reserved public highways four rods wide between each section of land in said Territory, the section lines being the center of said highways; but no deduction shall be made, where cash payments are provided for, in the amount to be paid for each quarter section of land by reason of such reservation. But if the said highway shall be vacated by any competent authority, the title to the respective strips shall inure to the then owner of the tract of which it formed a part by the original survey. (26 Stat. 92.)

See notes to section 18 of this act, ante, § 5020.

§ 5025. (Act May 2, 1890, c. 182, § 24.) Fraudulent settlement on lands in Oklahoma; punishment.

It shall be unlawful for any person, for himself or any company, association, or corporation, to directly or indirectly procure any person to settle upon any lands open to settlement in the Territory of Oklahoma, with intent thereafter of acquiring title thereto; and any title thus acquired shall be void; and the parties to such fraudulent settlement shall severally be guilty of a misde-

meanor, and shall be punished upon indictment, by imprisonment not exceeding twelve months, or by a fine not exceeding one thousand dollars, or by both such fine and imprisonment, in the discretion of the court. (26 Stat. 92.)

See notes to section 18 of this act, ante, § 5020.

Notes of Decisions

Illegality of contract.—No action either at law or in equity can be maintained on a contract entered into in violation of this provision. Bass v. Smith (1903) 71 P. 628, 12 Okl. 485.

§ 5026. (Act May 2, 1890, c. 182, § 27.) Rights of occupants not impaired by provisions of act.

The provisions of this act shall not be so construed as to invalidate or impair any legal claims or rights of persons occupying any portion of said Territory, under the laws of the United States, but such claims shall be adjudicated by the Land Department, or the courts, in accordance with their respective jurisdictions. (26 Stat. 93.)

See notes to section 18 of this act, ante, § 5020.

§ 5027. (Act March 3, 1891, c. 543, § 16.) Non-mineral character of lands in Oklahoma.

All the lands in Oklahoma are hereby declared to be agricultural lands, and proof of their non-mineral character shall not be required as a condition precedent to final entry. (26 Stat. 1026.)

This was the concluding provision of section 16 of the Indian appropriation act for the fiscal year 1892, cited above.

Said section 16 was one of numerous sections of that act making provisions for carrying into effect certain agreements with particular Indian tribes for cessions of lands, etc.

The preceding portion of this section, omitted here, provided for the opening of certain lands of the Pottawatomie, Shawnee, and Cheyenne and Arapahoe Indians.

The laws relating to mineral lands were extended over certain ceded Indian lands by provisions of Act March 2, 1895, c. 188, 28 Stat. 899, and Act June 6, 1900, c. 813, § 6, 31 Stat. 680. Said provisions are omitted as special and local only.

Notes of Decisions

Construction of statute.—This law has governed the settlement of all lands in Oklahoma, except lands allotted to the Comanche, Kiowa, and Apache tribes of Indians. Bay v. Oklahoma Southern Gas, etc., Min. Co. (1903) 73 P. 936, 13 Okl. 425, 431.

§ 5028. (Act March 3, 1891, c. 543, § 37.) Division of Oklahoma into counties before opening lands to settlement; reservation of lands for county seats.

Before any lands in Oklahoma are open to settlement it shall be the duty of the Secretary of the Interior to divide the same into counties which shall contain as near as possible not less than seven hundred square miles in each county. * * Provided further, That as soon as the county lines are designated by the Secretary he shall reserve not to exceed one-half section of land in each county, to be located near the center of said county, for county seat purposes, to be entered under sections twenty-three hundred and eighty-seven and twenty-three hundred and eighty-eight of the Revised Statutes. (26 Stat. 1043.)

These provisions were part of section 37 of the Indian appropriation act for the fiscal year 1892, cited above.

See notes to provisions of section 16 of the act, ante, § 5027.

Provisions similar to those of this section were made also by section 17 of the act, 26 Stat. 1026.

R. S. §§ 2387, 2388, mentioned in this section, making provisions for townsite entries by trustees, are set forth ante, §§ 4791, 4792.

Notes of Decisions

Reservations for county seats.—Devolution of title to lots on town sites in the Cheyenne and Arapaho country reserved for county seats by the Secre-

tary of the Interior is governed by the federal town act and the town-site laws of Kansas, as modified by Act Cong. March 3, 1891. League v. Town of Taloga (1913) 129 P. 702, 35 Okl. 277; Foote v. Town of Watonga (Okl. 1913) 130 P. 597.

§ 5029. (Act May 14, 1890, c. 207, § 1.) Entry by trustees.

So much of the public lands situate in the Territory of Oklahoma, now open to settlement, as may be necessary to embrace all the legal subdivisions covered by actual occupancy for purposes of trade and business, not exceeding twelve hundred and eighty acres in each case, may be entered as town-sites, for the several use and benefit of the occupants thereof, by three trustees to be appointed by the Secretary of the Interior for that purpose, such entry to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entry shall have been made, the Secretary of the Interior shall provide regulations for the proper execution of the trust, by such trustees including the survey of the land into streets, alleys, squares, blocks, and lots when necessary, or the approval of such survey as may already have been made by the inhabitants thereof, the assessment upon the lots of such sum as may be necessary to pay for the lands embraced in such town-site, costs of survey, conveyance of lots, and other necessary expenses, including compensation of trustees: Provided, That the Secretary of the Interior may when practicable cause more than one town site to be entered and the trust thereby created executed in the manner herein provided by a single board of trustees, but not more than seven boards of trustees in all shall be appointed for said Territory, and no more than two members of any of said boards shall be appointed from one political party. (26 Stat. 109.)

This section and the six sections next following were part of an act entitled "An act to provide for town site entries of lands in what is known as Oklahoma, and for other purposes."

Section 8 of the act made an appropriation for carrying out the provisions of the act. It is omitted as temporary merely.

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267.

The provisions of this act were extended to the Cherokee Outlet by Joint Res. Sept. 1, 1893, No. 4, post, § 5036.

The board of town-site trustees created by this act was abolished, and so much of the trust vested in the board and initiated as remains unexecuted was vested in the Commissioner of the General Land-Office, by Act July 7, 1898, c. 571, § 1, post, § 5037.

Special provisions relating to town-sites upon lands ceded by particular Indian bands or tribes were made by Act May 2, 1890, c. 182, § 22, 26 Stat. 91, and Act March 11, 1902, c. 180, 32 Stat. 63. They are omitted as special and local only.

Notes of Decisions

Occupants of town sites—Meaning.—See, also, notes to § 4791, ante.

The selection of a lot in a projected town site in Oklahoma, in accordance with a plat agreed upon by a portion of the occupants at or near the date of the opening to settlement, did not vest such an unconditional title in the selector as will prevail against the right of Oklahoma City to the use and occupation of the lot as a public street under a subsequent survey by trustees appointed under this act to make town-site entries for the several use and benefit of the occupants, the selector not being an occupant thereof when the trustees made entry of the land, nor when the conveyance to them was made by the government. Oklahoma City v. McMaster (1905) 25 Sup. Ct. 324, 325, 196 U. S. 529, 49 L. Ed. 587. See, also, City of Guthrie v. Beamer (1895) 3 Okl. 652, 41 Pac. 647.

One who erects a building on a town-site lot for business purposes is an "occupant," and is entitled to a conveyance from the trustees, though he is a non-resident. Hagar v. Wikoff (1895) 2 Okl. 580, 39 Pac. 281.

Interior department's supervision of execution of trust.—The trust upon which the title is held by the town-site trustees is subject to the supervision of the interior department. McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S. 209, 37 L. Ed. 1055; Paine v. Foster (1896) 53 P. 109, 9 Okl. 213

(affirmed [1899] 59 P. 252, 9 Okl. 257); Bockfinger v. Foster (1900) 62 P. 799, 10 Okl. 488 (affirmed [1903] 23 Sup. Ct. 836, 190 U. S. 116, 47 L. Ed. 975); Fitzgerald v. Foster (1902) 69 P. 878, 11 Okl. 558.

The supervisory power of the secretary of interior extends to decisions of the trustees upon adverse claims. McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S. 209, 37 L. Ed. 1055.

—— **Regulations.**—The rule of the secretary of the interior, requiring a contestant before town-site trustees to deposit $32 with the treasurer of the board before a cause will be heard, is reasonable. Twine v. Carey (1894) 2 Okl. 249, 37 Pac. 1096.

§ 5030. (Act May 14, 1890, c. 207, § 2.) Certificate or other evidence of occupancy.

In the execution of such trust, and for the purpose of the conveyance of title by said trustees, any certificate or other paper evidence of claim duly issued by the authority recognized for such purpose by the people residing upon any town site the subject of entry hereunder, shall be, taken as evidence of the occupancy by the holder thereof of the lot or lots therein described, except that where there is an adverse claim to said property such certificate shall only be prima facie evidence of the claim of occupancy of the holder: Provided, That nothing in this act contained shall be so construed as to make valid any claim now invalid of those who entered upon and occupied said lands in violation of the laws of the United States or the proclamation of the President thereunder: Provided further, That the certificates hereinbefore mentioned shall not be taken as evidence in favor of any person claiming lots who entered upon said lots in violation of law or the proclamation of the President thereunder. (26 Stat. 109.)

Notes of Decisions

Execution of trust.—The trustees appointed under this act were the agents of the government for the purpose of carrying out the trust thereby created to the extent and as specified, and this included the ascertainment of the beneficiaries in the first instance, and the transmission of title to them. McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S. 209, 37 L. Ed. 1055; Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 837, 190 U. S. 116, 47 L. Ed. 975.

§ 5031. (Act May 14, 1890, c. 207, § 3.) Church lots.

Lots of land occupied by any religious organization, incorporated or otherwise, conforming to the approved survey within the limits of such town-site, shall be conveyed to or in trust for the same. (26 Stat. 109.)

Notes of Decisions

Title acquired by town-site trustees.—The United States retained its hold on the land until the title by proper conveyances should pass from it or from its agents, the town-site trustees, to occupants. Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 838, 190 U. S. 116, 47 L. Ed. 975. See, also, McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S. 209, 37 L. Ed. 1055.

§ 5032. (Act May 14, 1890, c. 207, § 4.) Sale or reservation of lots.

All lots not disposed of as hereinbefore provided for shall be sold under the direction of the Secretary of the Interior for the benefit of the municipal government of any such town, or the same or any part thereof may be reserved for public use as sites for public buildings, or for the purpose of parks, if in the judgment of the Secretary such reservation would be for the public interest, and the Secretary shall execute proper conveyances to carry out the provisions of this section. (26 Stat. 109.)

Notes of Decisions

Disposal of surplus lands.—As a matter of convenience, the trustees were the instrumentality for the transmission of title in respect of lands disposed of to actual holders, while the secretary of the interior was the medium as to surplus lands. McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S.

209, 37 L. Ed. 1055. See, also, Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 837, 190 U. S. 116, 47 L. Ed. 975; City of Oklahoma City v. Hill (1897) 50 P. 242, 6 Okl. 114.

Town-site trustees appointed under this act had no power to execute a deed to undisposed-of lots in a town site to the city, for public use as a site for public buildings, while applications of persons for deeds by virtue of occupancy were pending; and, while an appeal was pending from a decision of the town-site trustees adverse to the applicants, and before the final decision in the case was made by the secretary of the interior, and prior to an order of the secretary of the interior, or any action tantamount thereto, setting aside the lots for public use as a site for public buildings, a deed to the lots made by the trustees to the city for such purpose is void. City of Oklahoma City v. Hill (1897) 50 P. 242, 6 Okl. 114.

§ 5033. (Act May 14, 1890, c. 207, § 5.) Town-site law of Kansas to govern trustees.

The provisions of sections four, five, six and seven, of an act of the legislature of the State of Kansas, entitled "An act relating to town-sites," approved March second, eighteen hundred and sixty-eight, shall, so far as applicable, govern the trustees in the performance of their duties hereunder. (26 Stat. 109.)

Notes of Decisions

Title of trustees.—The trustees did not hold an indefeasible title as of private right. Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 837, 190 U. S. 116, 47 L. Ed. 975.

§ 5034. (Act May 14, 1890, c. 207, § 6.) Preference of pending entries; appeals.

All entries of town-sites now pending on application hereafter made under this act, shall have preference at the local land office of the ordinary business of the office and shall be determined as speedily as possible, and if an appeal shall be taken from the decision of the local office in any such case to the Commissioner of the General Land Office, the same shall be made special, and disposed of by him as expeditiously as the duties of his office will permit, and so if an appeal should be taken to the Secretary of the Interior. And all applications heretofore filed in the proper land office shall have the same force and effect as if made under the provisions of this act, and upon the application of the trustees herein provided for, such entries shall be prosecuted to final issue in the names of such trustees, without other formality and when final entry is made the title of the United States to the land covered by such entry shall be conveyed to said trustees for the uses and purposes herein provided. (26 Stat. 110.)

Notes of Decisions

Interior department's control of land patented to town-site trustees.—The issuance of a patent to the town-site trustees appointed by the secretary of the interior is not a final disposition of the government's title and control, but is a conveyance in trust, to be carried out by the trustees under the control of the secretary; and, although this act devolved upon the trustees the duty of determining adverse claims to lots, the secretary had power to provide for appeals therefrom to the commissioner of the general land office, and finally to himself; and the pendency of such appeals deprives the trustees of power to make conveyances. McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 63, 150 U. S. 209, 37 L. Ed. 1055, reversing (1892) 1 Okl. 92, 30 Pac. 438. See, also, Paine v. Foster (1896) 53 Pac. 109, 9 Okl. 213, affirmed (1899) 59 Pac. 252, 9 Okl. 257.

—— **Jurisdiction of courts.**—One claiming under the homestead laws of the United States cannot maintain a suit against town-site trustees to devest them of the title held by them, under this act, in trust for town-site occupants, since, until conveyed to an occupant as provided in such act, the title remains, in every essential sense, in the United States. Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 838, 190 U. S. 116, 47 L. Ed. 975, affirming judgment (1900) 62 Pac. 799, 10 Okl. 488.

Town-site trustees appointed under this act were officers of the government, and the issuance of a patent to them for a town site did not devest the department of the control of the land

embraced therein; and the courts could not, during the existence of such trust, intercept the legal title and adjudge such trustees to be trustees for the use and benefit of one claiming adversely to the trust created by the act under which the patent was issued to them. Hammer v. Hermann (1901) 65 P. 943, 11 Okl. 127; Fitzgerald v. Foster (1902) 69 P. 878, 11 Okl. 558.

§ 5035. (Act May 14, 1890, c. 207, § 7.) Authority, duties, and compensation of trustees.

The trustees appointed under this act shall have the power to administer oaths, to hear and determine all controversies arising in the execution of this act shall keep a record of their proceedings, which shall, with all papers filed with them and all evidence of their official acts, except conveyances, be filed in the General Land Office and become part of the records of the same, and all conveyances executed by them shall be acknowledged before an officer duly authorized for that purpose. They shall be allowed such compensation as the Secretary of the Interior may prescribe, not exceeding ten dollars per day while actually employed; and such traveling and other necessary expenses as the Secretary may authorize and the Secretary of the Interior shall also provide them with necessary clerical force by detail or otherwise. (26 Stat. 110.)

See note to section 1 of this act, ante, § 5029, as to abolition of board of trustees by Act July 7, 1898, c. 571, post, § 5037.

. A general limitation on subsistence allowances, or money in lieu thereof, is made by §§ 3236a, 3236b, ante.

Notes of Decisions

Conclusiveness of decisions of town-site trustees.—Town-site trustees appointed under this act bear the same relation to the disposition of town lots that registers and receivers do to the disposal of public lands, and their decisions on questions of fact are conclusive and will not be inquired into, except on appeal to the proper departmental officers. Twine v. Carey (1894) 37 P. 1096, 2 Okl. 249; King v. Thompson (1895) 3 Okl. 644, 39 Pac. 466; Myers v. Berry (1895) 41 P. 580, 3 Okl. 612. See, also, Bassett v. Mitchell (1895) 3 Okl. 177, 41 Pac. 601.

Conveyance by trustees.—The issuance and delivery of a deed to a lot by a board of town-site trustees renders the same at once liable for taxes, as other real property, notwithstanding a contest may be pending between adverse claimants therefor. Brooks v. Garner (Okl. 1908) 94 P. 694, rehearing denied (1908) 97 P. 995.

—— Jurisdiction of land department after conveyance.—Neither the Commissioner of the General Land Office nor the Secretary of the Interior can entertain an appeal from a decision of a board of town-site trustees appointed in pursuance of this act, after a deed to a town lot has been made and delivered, notwithstanding an appeal was pending at the time of such issuance and delivery. The functions and jurisdiction of that department necessarily close when the title has passed from the government. Brooks v. Garner (Okl. 1908) 94 P. 694. Rehearing denied (1908) 97 P. 995. See, also, McDaid v. Oklahoma (1893) 14 Sup. Ct. 59, 62, 150 U. S. 209, 37 L. Ed. 1055; Bockfinger v. Foster (1903) 23 Sup. Ct. 836, 837, 190 U. S. 116, 47 L. Ed. 975.

§ 5036. (Res. Sept. 1, 1893, No. 4.) Town-site laws extended to Cherokee Outlet.

That all the provisions of an act of Congress, approved May Fourteenth, One Thousand Eight Hundred and Ninety, which provides for townsite entries of lands in a portion of what is known as "Oklahoma," be, and the same are hereby, made applicable to the territory known as the "Cherokee Outlet," and now a part of the Territory of Oklahoma; and that all acts or parts of acts inconsistent with this joint resolution be and the same are hereby repealed. (28 Stat. 11.)

Act May 14, 1890, c. 207, mentioned in this resolution, is set forth ante, §§ 5029-5035.

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267.

§ 5037. (Act July 7, 1898, c. 571.) Boards of town-site trustees abolished.

Payment to boards on town-site entries in Oklahoma: * * On January first, eighteen hundred and ninety-nine, the boards of trustees for town sites, and each of them in said Territory, shall cease and be abolished, and no compensation shall be allowed or paid to anyone, member, or trustee, or disbursing agent on or after January first, eighteen hundred and ninety-nine. And so much of the trust vested in said boards and heretofore initiated as shall remain unexecuted on said date shall be vested in the Commissioner of the General Land Office, who is hereby authorized and empowered to complete the same. (30 Stat. 674.)

This was a proviso annexed to an appropriation for the boards on town-site entries in the deficiency appropriation act for the fiscal year 1898, cited above.

The boards of town-site trustees abolished by this provision were created by Act May 14, 1890, c. 207, ante, §§ 5029–5035.

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267.

Notes of Decisions

Execution of trust by the commissioner of the general land office.—This act simply charges the commissioner of the general land office with the execution and completion of the trust formerly conferred on the town-site boards; and hence the commissioner cannot be sued as a trustee of such lands, for the benefit of another, in any case where formerly the town-site trustees could not be sued. Hammer v. Hermann (1901) 65 P. 943, 11 Okl. 127.

§ 5038. (Act May 11, 1896, c. 168, § 1.) Vacation of town-sites; homestead entries; sale.

In all cases where a town site, or an addition to a town site, entered under the provisions of section twenty-two of an Act entitled "An Act to provide a temporary government for the Territory of Oklahoma, to enlarge the jurisdiction of the United States court in the Indian Territory, and for other purposes," approved May second, eighteen hundred and ninety, shall be vacated in accordance with the laws of the Territory of Oklahoma, and patents for the public reservations in such vacated town site, or addition thereto, have not been issued, it shall be lawful for the Commissioner of the General Land Office, upon an official showing that such town site, or addition thereto, has been vacated, and upon payment of the homestead price for such reservations, to issue a patent for such reservations to the original entryman. If the original entryman shall fail or neglect to make application for the reservations within six months from the vacation of such town site, or from the passage of this Act, the reservations shall be subject to disposal under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the Act approved February twenty-sixth, eighteen hundred and ninety-five. (29 Stat. 116.)

This section and the section next following were part of an act entitled "An act providing for the disposal of public reservations in vacated town sites or additions to town sites in the Territory of Oklahoma."

Section 3 of the act repealed all laws in so far as they conflicted with this act.

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267.

R. S. § 2455, mentioned in this section, is set forth post, § 5110.

Act May 2, 1890, c. 182, § 22, mentioned in this section, is set forth ante, § 5023.

The sale to the county of Tillman and the town of Grandfield, Oklahoma, of vacant, undisposed-of lands within the town-site reserves in Oklahoma, was authorized by Act Aug. 9, 1916, c. 304, 39 Stat.

§ 5039. (Act May 11, 1896, c. 168, § 2.) Vacated town-sites to be sold by towns or as isolated tracts.

If a patent has already issued, or shall hereafter issue, for any such reservation, to any town or municipality, such town or munic-

ipality, upon the vacation of the town site or addition thereto, as aforesaid, may sell the same at public or private sale to the highest bidder after thirty days' public notice of such sale, and convey said lands to the purchaser by proper deed of conveyance, and cover the proceeds of such sale into the school fund of such town or municipality: Provided, That where, by reason of the vacation of an entire town site and all its additions, the municipal organization has ceased to exist, the reservations in such vacated town site which may have been patented to the town may be disposed of as isolated tracts under the provisions of section twenty-four hundred and fifty-five of the Revised Statutes of the United States, as amended by the Act approved February twenty-sixth, eighteen hundred and ninety-five. (29 Stat. 117.)

See notes to section 1 of this act, ante, § 5038.

§ 5040. (Act Jan. 18, 1897, c. 62, § 1.) Homestead settlers on lands in Greer county; preference right; purchase of additional lands; rights of settlers' families; effect of death of settler; removal of crops and improvements.

Every person qualified under the homestead laws of the United States, who, on March sixteenth, eighteen hundred and ninety-six, was a bona fide occupant of land within the territory established as Greer County, Oklahoma, shall be entitled to continue his occupation of such land with improvements thereon, not exceeding one hundred and sixty acres, and shall be allowed six months preference right from the passage of this Act within which to initiate his claim thereto, and shall be entitled to perfect title thereto under the provisions of the homestead law, upon payment of land office fees only, at the expiration of five years from the date of entry, except that such person shall receive credit for all time during which he or those under whom he claims shall have continuously occupied the same prior to March sixteenth, eighteen hundred and ninety-six. Every such person shall also have the right, for six months prior to all other persons, to purchase at one dollar an acre, in five equal annual payments, any additional land of which he was in actual possession on March sixteenth, eighteen hundred and ninety-six, not exceeding one hundred and sixty acres, which, prior to said date, shall have been cultivated, purchased, or improved by him. When any person entitled to a homestead or additional land, as above provided, is the head of a family, and though still living, shall not take such homestead or additional land, within six months from the passage of this Act, any member of such family over the age of twenty-one years, other than husband or wife, shall succeed to the right to take such homestead or additional land for three months longer, and any such member of the family shall also have the right to take, as before provided, any excess of additional land actually cultivated or improved prior to March sixteenth, eighteen hundred and ninety-six above the amount to which such head of the family is entitled, not to exceed one hundred and sixty acres to any one person thus taking as a member of such family.

In case of the death of any settler who actually established residence and made improvement on land in said Greer County prior to March sixteenth, eighteen hundred and ninety-six, the entry shall be treated as having accrued at the time the residence was established, and sections twenty-two hundred and ninety-one and twenty-two hundred and ninety-two of the Revised Statutes shall be applicable thereto.

Any person entitled to such homestead or additional land shall have the right prior to January first, eighteen hundred and ninety-seven, from the passage of this Act to remove all crops and improvements he may have on land not taken by him. (29 Stat. 490.)

This section and the three sections next following were part of an act entitled "An act to provide for the entry of lands in Greer County, Oklahoma, to give preference rights to settlers, and for other purposes."

The act providing a temporary government for the Territory of Oklahoma excepted from its provisions Greer county, until the decision by the Supreme Court of the United States on the title to said county as between the United States and the State of Texas, Act May 2, 1890, c. 182, § 25, 26 Stat. 92. The action brought in the Supreme Court under that act was decided March 16, 1896, and the title to said county adjudicated to be in the United States. United States v. Texas, 162 U. S. 1, 16 S. Ct. 725, 40 L. Ed. 867. This act was passed for the purpose of relieving settlers on lands in said county. The government of the county was provided for by Act May 4, 1896, c. 155, 29 Stat. 113.

Section 4 of the act reserved sections 16 and 36 for school purposes and provided for the selection of lieu lands when those sections were occupied under the homestead or town-site laws. Section 5 provided for the issuance of patents for lands occupied on March 16, 1896, for church, cemetery, school, or other charitable or voluntary purposes. Section 6 established a land office at Mangum. Section 8 provided that the act should take effect from its passage and approval. These sections, being temporary in their nature, are omitted.

Provisions relating to settlements on ceded Indian lands generally are set forth ante, under chapter 10I of this Title, "Ceded Indian Reservations."

R. S. § 2291, ante, § 4532, mentioned in this section, provided when certificates and patents, under the homestead laws, should be given, and also provided for the affidavit and other proofs required as a prerequisite to the certificates and patents. Rev. St. § 2292, ante, § 4543, also mentioned therein, prescribed cases in which the rights of homestead entrymen should inure to the benefit of infant children.

The time within which the preference right was to be exercised was extended to Jan. 1, 1898, by Act June 23, 1897, c. 8, 30 Stat. 105.

The right to perfect entries given by this section was extended to purchasers of lands in Greer county from Texas, notwithstanding the fact that they had already acquired lands under the homestead laws, by Act March 1, 1899, c. 328, post, § 5044.

Notes of Decisions

Purpose of act.—This act was passed after an adjudication that Greer county constituted no part of Texas, but was under the exclusive jurisdiction of the United States. Bogard v. Sweet (1908) 28 Sup. Ct. 595, 209 U. S. 464, 52 L. Ed. 892, affirming judgment (1906) 87 P. 669, 17 Okl. 40. See U. S. v. Texas (1896) 16 Sup. Ct. 725, 162 U. S. 1, 40 L. Ed. 867.

§ 5041. (Act Jan. 18, 1897, c. 62, § 2.) Unoccupied lands subject to entry under homestead laws only.

All land in said county not occupied, cultivated, or improved, as provided in the first section hereof, or not included within the limits of any town site or reserve shall be subject to entry to actual settlers only, under the provisions of the homestead law. (29 Stat. 490.)

§ 5042. (Act Jan. 18, 1897, c. 62, § 3.) Town-site entries.

The inhabitants of any town located in said county shall be entitled to enter the same as a town site under the provisions of sections twenty-three hundred and eighty-seven, twenty-three hundred and eighty-eight, and twenty-three hundred and eighty-nine of the Revised Statutes of the United States: Provided, That all persons who have made or own improvements on any town lots in said county made prior to March sixteenth, eighteen hundred and ninety-six, shall have the preference right to enter said lots under the provisions of this Act and of the general town site laws. (29 Stat. 490.)

R. S. §§ 2387–2389, mentioned in this section, providing for the entry of town sites by trustees, are set forth ante, §§ 4791–4793.

§ 5043. (Act Jan. 18, 1897, c. 62, § 7.) Application of act to Greer county only; repeal; commutation of homesteads.

The provisions of this Act shall apply only to Greer County, Oklahoma, and that all laws inconsistent with the provisions of this Act, applying to said territory in said county, are hereby repealed; and all laws authorizing commutations of homesteads in Oklahoma shall apply to Greer County. (29 Stat. 491.)

Provisions relating to the commutation of homestead entries upon lands acquired from Indians generally, and upon such lands in Oklahoma, are set forth ante, §§ 5013, 5020–5026.

§ 5044. (Act March 1, 1899, c. 328.) Right of purchasers from Texas to perfect title under homestead laws notwithstanding previous entries thereunder.

Section one of an Act to give preference right to settlers in Greer County, Oklahoma Territory, is hereby so amended as to allow parties who have had the benefit of the homestead laws of the United States, and who had purchased land in Greer County from the State of Texas prior to March sixteenth, eighteen hundred and ninety-six, to perfect titles to said lands according to the provisions of section one hereinbefore mentioned, under such regulations as the Commissioner of the General Land Office may prescribe, and according to the legal subdivisions of the public surveys, if no adverse rights have attached: Provided, That no settler shall be permitted to acquire to exceed three hundred and twenty acres under this provision. (30 Stat. 966.)

This was an act entitled "An act to amend section one of an act to provide for the entry of lands in Greer County, Oklahoma Territory, to give preference rights to settlers, and for other purposes."

Act Jan. 18, 1897, c. 62, § 1, amended by this section, is set forth ante, § 5040.

Oklahoma was admitted into the Union as a State by Act June 16, 1906, c. 3335, 34 Stat. 267.

Actual settlers on lands in Greer county were entitled to perfect their entries by Act Jan. 18, 1897, c. 62, ante, §§ 5040–5043.

CHAPTER TEN K

Public Lands in Alaska

This chapter, inserted here as additional to the original chapters of the Revised Statutes, includes Act March 3, 1891, c. 561, §§ 11–14, Act May 14, 1898, c. 299, Act April 28, 1904, c. 1772, and other provisions of a general and permanent nature relating to public lands in Alaska.

Sec.
5045. Surveys in Alaska.
5045a. Reservation of school lands and lands for support of agricultural college and school of mines; lieu lands; leases; disposition of proceeds of mineral lands.
5045b. Grant for site for agricultural college and school of mines; use of land for agricultural experiment station.
5046. Homestead laws extended to Alaska; limitation of amount to be entered; locations on unsurveyed lands; restriction of transfers.
5046a. Entry on unappropriated public lands in Alaska; persons entitled.
5046b. Entry on unappropriated public lands in Alaska; lands excepted.
5047. Mining laws extended to Alaska; gold, etc., mining on Bering Sea; miners' regulations; not to conflict with laws of United States; exclusive permits to mine below low tide forbidden; gold, etc., mining below low tide; regulations; reservation of roadway not to apply to mineral lands or town sites.
Sec.
5048. Mining rights in Alaska of native-born citizens of Canada.
5049. Recording notices of location; when and where filed for record.
5050. Miners' regulations for recording; election of recorder; certain records legalized.
5051. Annual labor or improvements on mining claims in Alaska; affidavits, and making and filing thereof; forfeiture of claim for failure to comply with provisions of act.
5052. Fees for filing, etc., proofs of work and improvements.
5053. Time for filing adverse claims, and for instituting adverse suits, in Alaska.
5054. Association placer-mining claims limited to 40 acres; annual assessment work to be not less than $100 for each 20 acres, or fraction.
5055. Requisites of power of attorney to locate placer-mining claim; restrictions upon locations by attorneys.
5056. Restrictions upon locations by owners.
5057. Area and shape of placer-mining claims.

Sec.
5058. Placer-mining claims located in violation of this act void.
5059. Miner's labor lien upon output; priority of lien.
5060. Claim of lien filed within 90 days: form.
5061. Recording claim of lien; fees of recorder.
5062. Limitation of lien if no action is commenced.
5063. Action to foreclose lien; jurisdiction of justices of the peace.
5064. Errors of form not ground for dismissal; amendment of notice and pleadings; opportunity to defendant to meet an omitted or misstated material averment.
5065. Lien notice filed as statement of the case; issuance and service of summons; posting notice on dump, etc.; effect; adverse claims.
5066. Joinder of lien claimants; consolidation of actions; costs; attorneys' fees; waiver of lien void.
5067. Judgment; order for sale of dump, etc.; extraction of gold by marshal or by defendant; disposition of proceeds; apportionment among preferred claims.
5068. Appeal from justice of the peace; extraction and deposit of gold pending appeal; excess paid to owner after 90 days if no liens filed against it; deposit of cash in lieu of gold.
5069. Persons buying, washing up, removing, etc., gold or gold dust with notice of lien, liable for full amount of judgment and costs; persons removing dump, etc., from possession of officer guilty of larceny.
5070. Coal-land laws extended to Alaska.
5071. Location of lands on which coal mine has been opened or improved; filing notice of location.
5072. Patents for coal lands, how obtained; notice of application therefor; title to shore of navigable waters not to be acquired.
5073. Adverse claims, and proceedings thereon.
5074. Existing provisions not in conflict with this act continued in force.
5075. Consolidation of claims or locations of coal land in Alaska; formation of associations or corporations to perfect entry and acquire title.
5076. Reservation to United States of preference right to purchase product of mine for use of Army and Navy.
5077. Forfeiture of lands or deposits purchased under act, if owned, etc., as part of combination, or controlled by combination, in form of unlawful trust, or subject of contract or conspiracy in restraint of trade, or held in excess of amount limited.
5078. Patents under act to recite terms and conditions prescribed.
5078a. Surveys of lands known to be valuable for deposits of coal.
5078b. Reservation of certain limited areas of coal lands; mining of coal deposits in reserved areas, under direction of President, when necessary by reason of insufficient supply of coal.
5078c. Division of unreserved coal lands into leasing blocks or tracts; leasing thereof; restriction on amount of coal or coal lands to be acquired through lease, etc., by railroad or common carrier; relinquishment of pending claims to coal lands; adjudication of pending claims.
5078d. Further or new lease of additional lands to lessees.
5078e. Consolidation of leases or holdings of small blocks or areas.
5078f. Limitation of lease as to area of block or tract leased; no person, etc., to take or hold any interest in more than one such lease; exception of interest acquired by descent, will, etc.
5078g. Purchase, etc., of interest in two or more such leases, or of stock in corporation having such interest, a felony; punishment thereof; exception of ownership and interest acquired by descent, will, etc.
5078h. Director, trustee, officer, etc., of corporation holding interest in such lease, who acts, on behalf of corporation, in purchase of interest in another lease, or in sale, etc., of such interest to corporation or individual holding like interest, guilty of felony; punishment thereof.
5078i. Subleasing, etc., or control of lands or deposits leased, to be part of or controlled by unlawful trust combination, etc., or of any holding in excess of area limited, to be ground for forfeiture of lease.
5078j. Royalties and rentals to be paid by lessees; term of leases, and renewals; disposition of profits from operation of government mines and of royalties and rentals under leases.
5078k. Licenses or permits to prospect for, mine, and dispose of coal, for supply of local and domestic needs for fuel.

Sec.
5078l. Reservation required, in lease, entry, etc., of right to grant easements in land leased, etc., for working same or other coal lands and other purposes; reservation authorized, in lease, of right to lease, sell, etc., surface of lands; permits for such easements and for use of other public lands, for coal washeries, etc.
5078m. Leases not to be assigned or sublet without consent of Secretary of the Interior; provisions required to be contained in leases.
5078n. Possession of lessee to be deemed possession of United States.
5078o. Forfeiture and cancellation of lease, and other remedies for breach of conditions thereof.
5078p. Lands containing deposits of coal, withdrawn from entry or sale, not to be disposed of or acquired except as provided in this act; pending proceedings not affected; lease of land as to which claim is pending not to be made until final disposition of claim.
5078q. Statements, etc., and reports required under act, to be upon oath; form, etc.; false oath, etc., punishable as for perjury.
5078r. Regulations, etc., to carry out purposes of act.
5079. Entries by trustees under townsite laws; surveys; limitation of entry.
5080. Purchases for trade or manufacture; adverse claimants.
5081. Surveys; deposits; making and approval.
5082. Lands and rights reserved.
Sec.
5083. Right of way on lands in Alaska; materials, grounds for stations, etc., for railroads; reservation of minerals; title to tide lands, etc.; transportation charges to be posted.
5084. Rights of several roads through canyons, etc.; grade crossings; effect on wagon roads, etc.; right to regulate transportation charges.
5085. Condemnation of land; preliminary surveys.
5086. Map of location; forfeiture of rights granted.
5087. Right of way through lands in Alaska for wagon roads, wire rope, aerial or other tramways; reservation of minerals; preliminary survey and map of location; tolls; priority of applicants for right of way; forfeiture of rights granted; mortgages; liens.
5088. Act not to apply to military, park, Indian, or other reservations.
5089. Right to repeal or amend act; assignment of right of way.
5090. Map of location; requisites.
5091. Purchases for trade or manufacture; lands reserved; adverse claimants; applications; proof; patents.
5092. Sale of timber on public lands in Alaska.
5093. Export of pulp wood or wood pulp from Alaska.
5094. Missionary stations.
5095. Land for schools or missions; patents; general land laws not put in force in Alaska.
5096. Allotment of land to native Indians or Eskimo as homesteads.
5096a. Annette Islands reserved for Meltakahtla Indians.

§ 5045. (Act March 3, 1899, c. 424, § 1.) Surveys in Alaska.

The system of public land surveys is hereby extended to the district of Alaska. (30 Stat. 1098.)

This was a provision of the sundry civil appropriation act for the fiscal year 1900, cited above.

The survey of coal lands was specifically provided for by Act Oct. 20, 1914, c. 330, § 1, post, § 5078a.

§ 5045a. (Act March 4, 1915, c. 181, § 1.) Reservation of school lands and lands for support of agricultural college and school of mines; lieu lands; leases; disposition of proceeds of mineral lands.

When the public lands of the Territory of Alaska are surveyed, under direction of the Government of the United States, sections numbered sixteen and thirty-six in each township in said Territory shall be, and the same are hereby, reserved from sale or settlement for the support of common schools in the Territory of Alaska; and section thirty-three in each township in the Tanana Valley between parallels sixty-four and sixty-five north latitude and between the one hundred and forty-fifth and the one hundred and fifty-second degrees of west longitude (meridian of Greenwich) shall be, and the same is hereby, reserved from sale or settlement

for the support of a Territorial agricultural college and school of mines when established by the Legislature of Alaska upon the tract granted in section two of this Act: Provided, That where settlement with a view to homestead entry has been made upon any part of the sections reserved hereby before the survey thereof in the field, or where the same may have been sold or otherwise appropriated by or under the authority of any Act of Congress, or are wanting or fractional in quantity, other lands may be designated and reserved in lieu thereof in the manner provided by the Act of Congress of February twenty-eighth, eighteen hundred and ninety-one (Twenty-sixth Statutes, page seven hundred and ninety-one): Provided further, That the Territory may, by general law, provide for leasing said land in area not to exceed one section to any one person, association, or corporation for not longer than ten years at any one time: And provided further, That if any of said sections, or any part thereof, shall be of known mineral character at the date of acceptance of survey thereof, the reservation herein made shall not be effective or applicable, but the entire proceeds or income derived by the United States from such sections sixteen and thirty-six and such section thirty-three in each township in the Tanana Valley area hereinbefore described, and the minerals therein, together with the entire proceeds or income derived from said reserved lands, are hereby appropriated and set apart as separate and permanent funds in the Territorial treasury, to be invested and the income from which shall be expended only for the exclusive use and benefit of the public schools of Alaska or of the agricultural college and school of mines, respectively, in such manner as the Legislature of Alaska may by law direct. (38 Stat. 1214, 1215.)

This section and the section next following were an act entitled "An act to reserve lands to the territory of Alaska for educational uses and for other purposes."

Existing schools and missions were allowed to retain land held by them by Act June 6, 1900, c. 786, § 27, post, § 5095.

§ 5045b. (Act March 4, 1915, c. 181, § 2.) Grant for site for agricultural college and school of mines; use of land for agricultural experiment station.

Section numbered six, in township numbered one south of the Fairbanks base line and range numbered one west of the Fairbanks meridian; section numbered thirty-one, in township numbered one north of the Fairbanks base line and range numbered one west of the Fairbanks meridian; section numbered one, in township numbered one south of the Fairbanks base line and range numbered two west of the Fairbanks meridian; and section numbered thirty-six, in township numbered one north of the Fairbanks base line and range numbered two west of the Fairbanks meridian, be, and the same are hereby, granted to the Territory of Alaska, but with the express condition that they shall be forever reserved and dedicated to use as a site for an agricultural college and school of mines: Provided, That nothing in this Act shall be held to interfere with or destroy any legal claim of any person or corporation to any part of said lands under the homestead or other law for the disposal of the public lands acquired prior to the approval of this Act: Provided further, That so much of the said land as is now used by the Government of the United States as an agricultural experiment station may continue to be used for such purpose until abandoned for that use by an order of the President of the United States or by Act of Congress. (38 Stat. 1215.)

See note to preceding section.

§ 5046. (Act March 3, 1903, c. 1002.) Homestead laws extended to Alaska; limitation of amount to be entered; locations on unsurveyed lands; restriction of transfers.

All the provisions of the homestead laws of the United States not in conflict with the provisions of this Act, and all rights incident thereto, are hereby extended to the district of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu land selections pertaining to any land grant outside of the district of Alaska shall be made, and no land scrip or land warrant of any kind whatsoever shall be located within or exercised upon any lands in said district except as now provided by law; and provided further that no more than one hundred and sixty acres shall be entered in any single body by such scrip, lieu selection, or soldier's additional homestead right; and provided further that no location of scrip, selection, or right along any navigable or other waters shall be made within the distance of eighty rods of any lands, along such waters, theretofore located by means of any such scrip or otherwise; and provided further that no commutation privileges shall be allowed in excess of one hundred and sixty acres included in any homestead entry under the provisions hereof: Provided, That no entry shall be allowed extending more than one hundred and sixty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims; and that nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district; and no patent shall issue hereunder until all the requirements of sections twenty-two hundred and ninety-one, twenty-two hundred and ninety-two, and twenty-three hundred and five of the Revised Statutes of the United States have been fully complied with as to residence, improvements, cultivation, and proof except as to commuted lands as herein provided: And it is further provided, That every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the district of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations hereof, be entitled to enter three hundred and twenty acres or a less quantity of unappropriated public land in said district of Alaska. If any of the land so settled upon, or to be settled upon, is unsurveyed, then the land settled upon, or to be settled upon, must be located in a rectangular form, not more than one mile in length, and located by north and south lines run according to the true meridian; that the location so made shall be marked upon the ground by permanent monuments at each of the four corners of the said location, so that the boundaries of the same may be readily and easily traced; that the record of said location shall, within ninety days from the date of settlement, be filed for record in the recording district in which the land is situated. Said record shall contain the name of the settler, the date of the settlement, and such a description of the land settled upon, by reference to some natural object or permanent monument, as will identify the same; and, if after the expiration of the said period of five years or at such date as the settler may desire to commute the public surveys of the United States have not been extended over the land located, a patent shall nevertheless issue for the land included within the boundaries of said location as thus recorded, upon proof to be submitted to the register and receiver of the proper land office, upon proof that he is a citizen of the United States, and upon the further proof required by section twenty-two hundred and ninety-

one of the Revised Statutes of the United States as heretofore and herein amended, and under the procedure in the obtaining of patents to the unsurveyed lands of the United States, as provided for by section ten of the Act hereby amended, and under such rules and regulations as shall be prescribed by the Secretary of the Interior as hereinbefore provided, without the payment of any purchase price or other charges, except the ordinary office fees and commissions of the register and receiver except one dollar and twenty-five cents per acre on land commuted: And provided always, That no title shall be obtained hereunder to any of the mineral or coal lands of the district of Alaska: And it is further provided, That the right of any homestead settler to transfer any portion of the land so settled upon, as provided by section twenty-two hundred and eighty-eight of the Revised Statutes of the United States, shall be restricted and limited within the district of Alaska as follows: For church, cemetery, or school purposes to five acres, and for the right of railroads across such homestead to one hundred feet in width on either side of the center line of said railroad; and all contracts by the settler made before his receipt of patent from the Government, for the conveyance of the land homesteaded by him or her, except as herein provided, shall be held null and void. (32 Stat. 1028.)

This was an act entitled "An act to amend section one of the act of Congress approved May fourteenth, eighteen hundred and ninety-eight, entitled 'An act extending the homestead laws and providing for a right of way for railroads in the District of Alaska.' "

Act May 14, 1898, c. 299, § 1, 30 Stat. 409, mentioned in said title of this act, as amended thereby, was as follows:

"The homestead laws of the United States and the rights incident thereto, including the right to enter surveyed or unsurveyed lands under provisions of law relating to the acquisition of title through soldiers' additional homestead rights, are hereby extended to the District of Alaska, subject to such regulations as may be made by the Secretary of the Interior; and no indemnity, deficiency, or lieu lands pertaining to any land grant whatsoever originating outside of said District of Alaska shall be located within or taken from lands in said District: Provided, That no entry shall be allowed extending more than eighty rods along the shore of any navigable water, and along such shore a space of at least eighty rods shall be reserved from entry between all such claims, and that nothing herein contained shall be so construed as to authorize entries to be made, or title to be acquired, to the shore of any navigable waters within said District: And it is further provided, That no homestead shall exceed eighty acres in extent."

R. S. § 2291, mentioned in this act, and Act March 3, 1877, c. 172, with subsequent provisions relating to the same subject, are set forth ante, §§ 4532–4534.

R. S. § 2292, mentioned in this act, is set forth ante, § 4543; and R. S. § 2305, also mentioned therein, is set forth ante, § 4593.

Section 10 of the act amended by this act, Act May 14, 1898, c. 299, also mentioned in this act, is set forth post, § 5091.

R. S. § 2288, also mentioned in this act, was amended, subsequently to this act, by Act March 3, 1905, c. 1424. It is set forth, as so amended, ante, § 4535.

The Secretary of the Interior was authorized to allot homesteads to Indians or Eskimos by Act May 17, 1906, c. 2649, post, § 5096.

See, also, §§ 5046a, 5046b, post, for amendatory and supplementary legislation.

Notes of Decisions

1. Effect of act on jurisdiction of land office.
2. Lands constituting public domain in Alaska.
3. Lands within military reservation not subject to entry.
4. Entry and settlement.
5. —— Soldier's additional homestead rights.
6. Actions to quiet title—Homestead and mineral claimants.
7. Shores or tide lands not subject to entry or sale.
8. Shore defined.
9. Riparian and littoral rights.
10. Roadway reservation.

1. Effect of act on jurisdiction of land office.—This act does not change the jurisdiction of the land department to determine the mineral character of the land in a contest between a mineral claimant and a homesteader. Nelson v. Brownell (1912) 193 Fed. 641, 113

C. C. A. 509; Lassley v. Same (1912) 199 Fed. 772, 118 C. C. A. 362.

2. Lands constituting public domain in Alaska.—All the vacant and unappropriated lands in Alaska at the date of the cession of 1867 by Russia became a part of the public domain and public lands of the United States. U. S. v. Berrigan (1905) 2 Alaska, 442. See Kinkead v. U. S. (1893) 14 Sup. Ct. 172, 150 U. S. 483, 37 L. Ed. 1152; Carroll v. Price (D. C. 1896) 81 Fed. 137.

3. Lands within military reservation not subject to entry.—Public lands lying within the limits of a reservation for military purposes are not subject to entry under the soldier's additional homestead laws. Gavigan v. Crary (1905) 2 Alaska, 370.

4. Entry and settlement.—A homestead entry, though informal, constitutes a segregation of the tract from the public domain and its reservation for sale under the homestead laws. Heine v. Roth (1905) 2 Alaska, 416.

Before a homestead entryman in Alaska can obtain a vested and exclusive right to his homestead on the public domain, his entry must be completed in the United States land office. The filing of a notice with the recorder, and occupation and improvement, do not convey vested rights therein. Bergstrom v. Alaska Cent. Ry. Co. (1907) 3 Alaska, 428.

A possessory right to enable the settler to segregate and hold a portion of the public land can only be acquired by actual possession. Hinchman v. Ripinsky (1908) 3 Alaska, 543.

Settlement upon the public lands of Alaska vests in the settler a property right against every one but the government, and where two persons claim adversely to each other the possession of government land, the one having the prior possession has the prior right; no abandonment having been shown. Possessory rights so acquired may be conveyed from one person to another, and written conveyances are admissible as tending to show a right in the last grantee. Burr v. House (1909) 3 Alaska, 641.

5. —— Soldier's additional homestead rights.—See, also, notes to § 4594, ante.

A soldier's additional homestead certificate may be sold and assigned by the soldier, and the assignee may enter land with it in Alaska. Gavigan v. Crary (1905) 2 Alaska, 370.

6. Actions to quiet title—Homestead and mineral claimants.—This amendment, like the original act, does not require a suit to quiet title in a contest between a homestead settler and the locator of a mineral claim concerning the mineral character of land claimed by both, as the jurisdiction of the land office to determine such contest remains unchanged. Nelson v. Brownell (1912) 193 Fed. 641, 113 C. C. A. 509; Lassley v. Same (1912) 199 Fed. 772, 118 C. C. A. 362. And see Ripinsky v. Hinchman (1911) 186 Fed. 151, 108 C. C. A. 263; Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

7. Shores or tide lands not subject to entry or sale.—See, also, notes to §§ 5047, 5083, 5091, post.

A location of land on a shore under the soldiers' additional homestead script act does not give the proprietor any right in the land lying below the line of ordinary high tide. Columbia Canning Co. v. Hampton (1908) 161 Fed. 60, 88 C. C. A. 224.

Navigable streams in Alaska are public highways, and no portion of the bed or land lying between high and low water mark is subject to entry or sale under the public land laws. U. S. v. Roth (1904) 2 Alaska, 257; Heim v. Roth (1905) 2 Alaska, 416.

No one can acquire title to tidelands in Alaska, as they are held in trust by the United States for the future state. Young v. Town of Juneau (1911) 4 Alaska, 372; Barron v. Alexander (1912) 4 Alaska, 591.

8. Shore defined.—The "shore" is the ground between ordinary high-water and low-water mark. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

9. Riparian and littoral rights.—An owner or claimant of lands in Alaska which border on navigable waters, having no right to the shore lands, has no exclusive right of fishery in such waters nor to erect and maintain a fish trap either on the shore between high and low water mark, or in the adjacent deep waters to the exclusion of others. Columbia Canning Co. v. Hampton (1908) 161 Fed. 60, 88 C. C. A. 224.

Where a homestead entry in Alaska was bordered on one side by the meanders of the tide waters of Orca Inlet, the entryman, as the owner of the upland, though acquiring no title to the shore or soil below high-water mark, was entitled to free and unobstructed access to the navigable water, and for that purpose to construct a wharf over such lands without interference by third persons claiming the right to use the shore. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

Citizens of the United States claiming, in good faith, uplands in Alaska, and in actual possession thereof, take the same littoral rights as are incident to ownership in fee. Lewis v. Johnson (D. C. 1896) 76 Fed. 476.

The possession of a homestead entryman under the public land laws held to be coextensive with the boundaries of his land, and to extend over shore lands of navigable waters abutting thereon. U. S. v. Roth (1904) 2 Alaska, 257.

A homestead entry perfected under the United States land laws, where the land abuts upon the waters of a navigable stream, gives to the qualified entryman the exclusive right to the use and occupation of the shore land between high and low water mark as against a mere trespasser. Id.

One who owns the littoral or riparian right in front of upland abutting on the seashore in Alaska is thereby authorized to build wharves from the upland to deep water navigation for the purpose of rendering his means of access more serviceable. Young v. Town of Juneau (1911) 4 Alaska, 372.

The owner or locator of lands in Alaska, which border upon navigable or tidal waters, has, under the general law, the right of access to such waters for the purpose of navigation. Thompson v. Pelton (1912) 4 Alaska, 510.

10. Roadway reservation. — Where shore land was acquired under this act, there was no reservation of a roadway above high-water mark. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

§ 5046a. (Act July 8, 1916, c. 228, § 1.) Entry on unappropriated public lands in Alaska; persons entitled.

Every person who is qualified under existing laws to make homestead entry of the public lands of the United States who has settled upon or who shall hereafter settle upon any of the public lands of the United States situated in the District of Alaska, whether surveyed or unsurveyed, with the intention of claiming the same under the homestead laws, shall, subject to the provisions and limitations of the Act approved March third, nineteen hundred and three, chapter one thousand and two, United States Statutes at Large, page one thousand and twenty-eight, be entitled to enter one hundred and sixty acres or a less quantity of unappropriated public land in said District of Alaska, and no more, and a former homestead entry in any other State or Territory shall not be a bar to a homestead entry in Alaska: Provided, That nothing herein contained shall be construed to limit or curtail the area of any homestead claim heretofore lawfully initiated.

This section, and the section next following, were an act entitled "An act to amend the United States homestead law in its application to Alaska, and for other purposes," cited above.

Act March 3, 1903, mentioned in this section, is set forth ante, § 5046.

§ 5046b. (Act July 8, 1916, c. 228, § 2.) Entry on unappropriated public lands in Alaska; lands excepted.

There shall be excepted from homestead settlement and entry under this Act the lands in Annette and Pribilof Islands, the islands leased or occupied for the propagation of foxes, and such other lands as have been or may be reserved or withdrawn from settlement or entry.

See note to preceding section.

§ 5047. (Act June 6, 1900, c. 786, § 26.) Mining laws extended to Alaska; gold, etc., mining on Bering Sea; miners' regulations; not to conflict with laws of United States; exclusive permits to mine below low tide forbidden; gold, etc., mining below low tide; regulations; reservation of roadway not to apply to mineral lands or town sites.

The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to [the District of] Alaska: Provided, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary

possession thereof for exploration and mining purposes until otherwise provided by law: Provided further, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of War authorizing any person or persons, corporation or company to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of War may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide, under the tenth section of the Act of May fourteenth, eighteen hundred and ninety-eight, entitled "An Act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," shall not apply to mineral lands or town sites. (31 Stat. 329.)

This section was part of an act entitled "An act making further provision for a civil government for Alaska, and for other purposes," cited above.

Act May 14, 1898, c. 299, § 10, mentioned in this section, is set forth post, § 5091.

Notes of Decisions

Mineral laws extended to Alaska.—See, also, notes to §§ 5070, 5075, post.

The mining laws were extended to Alaska by the act of May 17, 1884. Bennett v. Harkrader (1895) 15 Sup. Ct. 863, 158 U. S. 441, 39 L. Ed. 1046; Meydenbauer v. Stevens (D. C. 1897) 78 Fed. 787; Price v. McIntosh (1901) 1 Alaska, 286; U. S. v. Berrigan (1905) 2 Alaska, 442. And subsequently by this act. Thompson v. Pelton (1912) 4 Alaska, 510.

Water right laws extended to Alaska.—See, also, notes to § 4647, ante.

So much of the water act of July 26, 1866, c. 262, 14 Stat. 253 (R. S. § 2339) as relates to the appropriation of water on the public domain for mining purposes, is in force in Alaska. Revenue Min. Co. v. Balderston (1905) 2 Alaska, 363; McFarland v. Alaska Perservance Mining Co. (1907) 3 Alaska, 308, overruling Ketchikan Co. v. Citizens Co. (1903) 2 Alaska, 120. See, also, Miocene Ditch Co. v. Moore (1907) 150 Fed. 483, 80 C. C. A. 301; Noland v. Coon (1890) 1 Alaska, 36; Miocene Ditch Co. v. Jacobson (1905) 2 Alaska, 567. And see Van Dyke v. Midnight Sun Mining & Ditch Co. (1910) 177 Fed. 85, 100 C. C. A. 503.

Tide lands not open to location.—Lands lying below ordinary high tide on the shore of the ocean and arms of the sea in the district of Alaska are not subject to location under the mining laws of the United States. Alaska Gold Min. Co. v. Barbridge (1901) 1 Alaska, 311; Heine v. Roth (1905) 2 Alaska, 416; Pacific Coast Co. v. McCloskey (1906) 3 Alaska, 77; Thompson v. Pelton (1912) 4 Alaska, 510.

A location notice, by one who claims the upland and the tide lands fronting thereon, is void so far as it attempts to initiate title in the tide lands. Pacific Coast Co. v. McCloskey (1906) 3 Alaska, 77. And see McCloskey v. Pacific Coast Co. (1908) 160 Fed. 794, 87 C. C. A. 568, 22 L. R. A. (N. S.) 673.

Location over homestead entry.—A placer mining claim cannot be located over a valid homestead entry in Alaska until the homestead entry has been contested and canceled by the land office. Heine v. Roth (1905) 2 Alaska, 416; Steele v. Tanana Mines Ry. Co., Id. 451.

Annual assessment work on mining claims.—See, also, notes to § 5051, post.

The provisions of the mining laws governing assessment work made applicable to Alaska by this act were superseded as to Alaska by the act governing labor on mining claims in Alaska. Thatcher v. Brown (1911) 190 Fed. 708, 111 C. C. A. 436.

§ 5048. (Act May 14, 1898, c. 299, § 13.) Mining rights in Alaska of native-born citizens of Canada.

That native-born citizens of the Dominion of Canada shall be ac-

corded in said [District of] Alaska the same mining rights and privileges accorded to citizens of the United States in British Columbia and the Northwest Territory by the laws of the Dominion of Canada or the local laws, rules, and regulations; but no greater rights shall be thus accorded than citizens of the United States or persons who have declared their intention to become such may enjoy in said [District of] Alaska; and the Secretary of the Interior shall from time to time promulgate and enforce rules and regulations to carry this provision into effect. (30 Stat. 415.)

This section was part of an act extending the homestead laws and providing for right of way for railroads in the District of Alaska, other sections of which are post, §§ 5083–5092.

The words "District of," inclosed in brackets in this section, were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

§ 5049. (Act June 6, 1900, c. 786, § 15.) Recording notices of location; when and where filed for record.

Notices of location of mining claims shall be filed for record within ninety days from the date of the discovery of the claim described in the notice, and all instruments shall be recorded in the recording district in which the property or subject-matter affected by the instrument is situated, and where the property or subject-matter is not situated in any established recording district the instrument affecting the same shall be recorded in the office of the clerk of the division of the court having supervision over the recording division in which such property or subject-matter is situated. (31 Stat. 327.)

This was a proviso annexed to section 15 of the act making further provision for a civil government for Alaska, cited above.

The preceding provisions of the section to which this proviso was annexed are set forth ante, § 3577.

See note to section 26 of this act, ante, § 5047.

Notes of Decisions

Recording of location notice.—A notice of the location describing the claim with reasonable certainty filed and recorded in the precinct where the claim lies within 90 days from the date of discovery is essential to the validity of a mining claim. Cook v. Klonos (1908) 164 Fed. 529, 90 C. C. A. 403 (modified on rehearing [1909] 168 Fed. 700, 94 C. C. A. 144); Butler v. Good Enough Min. Co. (1901) 1 Alaska, 246; Redden v. Harlan (1905) 2 Alaska, 402; Bulette v. Dodge, Id. 427; Charlton v. Kelly (1906) 2 Alaska, 532; Overgaard v. Westerberg (1906) 3 Alaska, 168; Cascaden v. Bortolis (1906) Id. 200.

Time for recording.—The provision of this section giving 90 days within which to record the location notices is reasonable, and under it a miners' rule, regulation, or custom cannot limit the time within which a miner may file his notice of location to less than 90 days. Butler v. Good Enough Min. Co. (1901) 1 Alaska, 246.

Under this section a miner has 90 days within which to record his notice of location, and may safely record at any time not beyond 90 days from discovery and staking. Butler v. Good Enough Min. Co. (1901) 1 Alaska, 246. And see Charlton v. Kelly (1906) 2 Alaska, 532.

Failure to record notice.—This section does not require, but merely permits, the recording of location notices, nor does it provide that the failure to record shall work a forfeiture of rights, and such forfeiture does not follow in the absence of a well-established rule or custom of the miners of the district to that effect. Sturtevant v. Vogel (1909) 167 Fed. 448, 93 C. C. A. 84; Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207.

Sufficiency of location notice.—Error in the location notice in its reference to a permanent monument is not material between the locators and a subsequent locator, where the claim was properly marked by stakes, and especially where the subsequent locator never saw the notice and could not have been misled thereby. Sturtevant v. Vogel (1909) 167 Fed. 448, 93 C. C. A. 84. See, also, Smith v. Cascaden (1906) 148 Fed. 793, 78 C. C. A. 459.

The location notice must contain the name or names of the locators, the date of the location, and such a description of the claim, by reference to some natural object or permanent monument,

as will identify the claim. Charlton v. Kelly (1906) 2 Alaska, 532. See Jualpa Co. v. Thorndyke (1910) 4 Alaska, 207.

Conflict between courses and distances called for in notice and visible boundaries.—A placer claim is not void because there is a discrepancy between the courses and distances mentioned and called for in the location notice and the stakes and monuments set by the locator to mark the boundaries of his claim. Steen v. Wild Goose Min. Co. (1901) 1 Alaska, 255; Price v. McIntosh, Id. 286.

§ 5050. (Act June 6, 1900, c. 786, § 16.) Miners' regulations for recording; election of recorder; certain records legalized.

* * Miners in any organized mining district may make rules and regulations governing the recording of notices of location of mining claims, water rights, flumes and ditches, mill sites and affidavits of labor, not in conflict with this Act or the general laws of the United States; and nothing in this Act shall be construed so as to prevent the miners in any regularly organized mining district not within any recording district established by the court from electing their own mining recorder to act as such until a recorder therefor is appointed by the court: Provided further, All records heretofore regularly made by the United States commissioner at Dyea, Skagway, and the recorder at Douglas City, not in conflict with any records regularly made with the United States commissioner at Juneau, are hereby legalized. And all records heretofore made in good faith in any regularly organized mining district are hereby made public records, and the same shall be delivered to the recorder for the recording district including such mining district within six months from the passage of this act. (31 Stat. 328.)

These were provisos annexed to section 16 of the act making further provision for a civil government for Alaska, cited above.

The preceding provisions of the section to which these provisos were annexed are set forth ante, § 3578.

See note to section 26 of this act, ante, § 5047.

Notes of Decisions

Miners' regulations — Validity.—This section prohibits miners in any district from enacting and enforcing rules in conflict with the mining laws, and it repeals existing rules of miners in conflict with such laws. Butler v. Good Enough Min. Co. (1901) 1 Alaska, 246.

This section supplementing the general mining laws authorizes miners in any district to make rules and regulations governing the location of notices. McFarland v. Alaska Perseverance Co. (1907) 3 Alaska, 308.

§ 5051. (Act March 2, 1907, c. 2559, § 1.) Annual labor or improvements on mining claims in Alaska; affidavits, and making and filing thereof; forfeiture of claim for failure to comply with provisions of act.

During each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter located. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the

owner. Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed. (34 Stat. 1243.)

This section and the section next following were an act entitled "An act to amend the laws governing labor or improvements upon mining claims in Alaska."

The provision of this act requiring the annual assessment work to be performed each year was suspended during the year 1913 as to all mining claims on Seward Peninsula in Alaska, west of longitude one hundred fifty-eight west, and north of latitude sixty-four, so that no claim could be forfeited for nonperformance of the assessment work for that year, provided the claimant recorded in the office where the location notice and certificate was filed, on or before December 31, 1913, a notice that he intended in good faith to hold or work the claim, by Act Dec. 1, 1913, c. 39, 38 Stat. 235.

Notes of Decisions

Annual assessment work.—This act by implication repealed and superseded, as to mining claims in Alaska, the provision of the prior mining law that on a failure to do the annual assessment work a claim shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators have not resumed work upon the claim after failure and before such location. Thatcher v. Brown (1911) 190 Fed. 708, 111 C. C. A. 436.

—— **Forfeiture for nonperformance.**—Where the locator of a mining claim in Alaska has failed to do the annual assessment work required by this act, he cannot save his rights by a resumption of work before the intervention of other parties. Thatcher v. Brown (1911) 190 Fed. 709, 111 C. C. A. 436; Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (1914) 210 Fed. 599, 127 C. C. A. 235.

§ 5052. (Act March 2, 1907, c. 2559, § 2.) Fees for filing, etc., proofs of work and improvements.

The recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. (34 Stat. 1243.)

§ 5053. (Act June 7, 1910, c. 265.) Time for filing adverse claims, and for instituting adverse suits, in Alaska.

In the [district] of Alaska adverse claims authorized and provided for in sections twenty-three hundred and twenty-five and twenty-three hundred and twenty-six, United States Revised Statutes, may be filed at any time during the sixty days period of publication or within eight months thereafter, and the adverse suits authorized and provided for in section twenty-three hundred and twenty-six, United States Revised Statutes, may be instituted at any time within sixty days after the filing of said claims in the local land office. (36 Stat. 459.)

This was an act entitled "An act extending the time in which to file adverse claims and institute adverse suits against mineral entries in the District of Alaska."

The word "district," inclosed in brackets in this section, was superseded by the organization of Alaska as a Territory, by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

R. S. §§ 2325, 2326, mentioned in this act, are set forth ante, §§ 4622, 4623.

Previous provisions prescribing the times for filing adverse claims to coal lands in Alaska and for bringing actions thereon, were made by Act April 28, 1904, c. 1772, § 3, post, § 5073.

§ 5054. (Act Aug. 1, 1912, c. 269, § 1.) Association placer-mining claims limited to 40 acres; annual assessment work to be not less than $100 for each 20 acres, or fraction.

No association placer-mining claim shall hereafter be located in Alaska in excess of forty acres, and on every placer-mining claim hereafter located in Alaska, and until a patent has been issued therefor, not less than one hundred dollars' worth of labor shall be performed or improvements made during each year, including the year of location, for each and every twenty acres or excess fraction thereof. (37 Stat. 242.)

This section and the four sections next following were an act entitled "An act to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes."

§ 5055. (Act Aug. 1, 1912, c. 269, § 2.) Requisites of power of attorney to locate placer-mining claim; restrictions upon locations by attorneys.

No person shall hereafter locate any placer-mining claim in Alaska as attorney for another unless he is duly authorized thereto by a power of attorney in writing, duly acknowledged and recorded in any recorder's office in the judicial division where the location is made. Any person so authorized may locate placer-mining claims for not more than two individuals or one association under such power of attorney, but no such agent or attorney shall be authorized or permitted to locate more than two placer-mining claims for any one principal or association during any calendar month, and no placer-mining claim shall hereafter be located in Alaska except under the limitations of this Act. (37 Stat. 243.)

§ 5056. (Act Aug. 1, 1912, c. 269, § 3.) Restrictions upon locations by owners.

No person shall hereafter locate, cause or procure to be located, for himself more than two placer-mining claims in any calendar month: Provided, That one or both of such locations may be included in an association claim. (37 Stat. 243.)

§ 5057. (Act Aug. 1, 1912, c. 269, § 4.) Area and shape of placer-mining claims.

No placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width. (37 Stat. 243.)

§ 5058. (Act Aug. 1, 1912, c. 269, § 5.) Placer-mining claims located in violation of this act void.

Any placer-mining claim attempted to be located in violation of this Act shall be null and void, and the whole area thereof may be located by any qualified locator as if no such prior attempt had been made. (37 Stat. 243.)

§ 5059. (Act June 25, 1910, c. 422, § 1.) Miner's labor lien upon output; priority of lien.

Every miner or other laborer who shall labor in or upon any mine or mining ground for another in the Territory of Alaska in digging, thawing, conveying, hoisting, piling, cleaning up, or any other kind of work in producing any mineral-bearing sands, gravels, earth, or rock, gold or gold dust, or other minerals, or shall aid or assist therein by his labor as cook, engineer, fireman, or in cutting and delivering wood used in said work, or in work in any like capacity in producing the dump, shall, where his labor directly aided in such production, have a lien upon the dump or mass of

mineral-bearing sands, gravels, earth, or rocks, and all gold and gold dust, or other minerals therein, and all gold and gold dust extracted therefrom, for the full amount of wages for all the time which he was so employed as such laborer in producing the said dump, within one year next preceding his ceasing to labor thereon; and to the extent of the labor of the said miner or other laborer actually employed or expended thereon, within one year next prior to ceasing to labor thereon, the said lien shall be prior to and preferred over any deed, mortgage, bill of sale, attachment, conveyance, or other claim, whether the same was made or given prior to such labor or not: Provided, That this preference shall not apply to any such deed, mortgage, bill of sale, attachment, conveyance, or other claim given in good faith and for value prior to the approval of this Act. (36 Stat. 848.)

This section and the ten sections next following constituted an act entitled "An act to create, establish, and enforce a miner's labor lien in the Territory of Alaska, and for other purposes."

Notes of Decisions

Lienable items.—The statute gives a lien for labor alone, and no lien can be had for the use of a boiler or for the price of a cable. Donaldson v. Henning (1913) 4 Alaska, 642.

Amount and extent of lien.—Where the work and labor in developing the mine prior to the time a dump was actually piled on the surface contributed towards producing the dump, the claim of the lienor will be allowed in full as against the dump. Donaldson v. Henning (1913) 4 Alaska, 642.

Preferences.—The preference did not apply to the right of mine owners to a royalty fixed by a contract of lease made prior to the act. Donaldson v. Henning (1913) 4 Alaska, 642.

§ 5060. (Act June 25, 1910, c. 422, § 2.) Claim of lien filed within 90 days; form.

Every laborer, within ninety days after the completion of the performance of the work or labor mentioned in the foregoing section who shall claim the benefit thereof, must, personally or by some other person for him, file for record in the recording precinct where the labor was performed a claim of lien containing a statement of his demand under oath, substantially in the following form:

Notice of Laborer's Lien.

Territory of Alaska, ——— precinct, ss:

——— ———, claimant, against ——— ———, defendant.

Notice is hereby given that ——— ———, claimant, claims a lien upon (describing the dump or mass of mineral-bearing sands, gravels, earth, or rock, and its location with reasonable certainty) in the ——— precinct, in the Territory of Alaska, for labor performed in (digging, and so forth; describe the work). That the name of the owner or reputed owner of said property is ——— ———, and that ——— ——— is the owner or reputed owner of the mine or mining ground from which the dump or mass of mineral-bearing sands, gravels, earth or rock and the minerals therein were extracted, and that ——— ——— employed claimant to perform such work and labor upon the following terms and conditions (state substance of contract, if any, or reasonable value); that said contract has been faithfully performed and fully complied with on the part of the claimant, who performed labor thereunder aforesaid for the period of ——— days; that said labor was performed between the ——— day of ——— and the ——— day of ———, and the rendition of said service was closed on the ——— day of ———, and ninety days have not elapsed since that time; that the amount of claimant's demand for said service is ———; that no part thereof has been paid (except the sum of ——— dollars), and there is now due and remaining unpaid there-

on, after deducting all just credits and offsets, the sum of ——— dollars, in which amount he claims a lien upon said property.

———, ———,
Claimant.

Territory of Alaska, ——— precinct, ss:

——— ———, being first duly sworn, on oath deposes and says, that I am the claimant (or if by some other person state the fact) named in the foregoing claim; that I have heard the same read, know the contents thereof, and believe the same to be true.

Subscribed and sworn to before me this ——— day of ———.

——— ———
[Officer's title.]

(36 Stat. 848.)

Notes of Decisions

Notice of claim.—The notice must be such as to inform any one interested of the extent of the lien claim and of the property upon which it is claimed. Donaldson v. Henning (1913) 4 Alaska, 642.

§ 5061. (Act June 25, 1910, c. 422, § 3.) Recording claim of lien; fees of recorder.

The recorder must record every claim filed under the provisions of this Act in books kept by him for that purpose, which record must be indexed as deeds and other conveyances are required by law to be indexed and for which he may receive the following fees and none other: For filing, ten cents; for recording, one dollar; for indexing, fifteen cents for each name. (36 Stat. 849.)

§ 5062. (Act June 25, 1910, c. 422, § 4.) Limitation of lien if no action is commenced.

No lien provided for in this Act shall bind any property for a longer period than ninety days after the claim has been filed, unless an action be commenced within that time to enforce the same. (36 Stat. 849.)

§ 5063. (Act June 25, 1910, c. 422, § 5.) Action to foreclose lien; jurisdiction of justices of the peace.

The action for the foreclosure of the lien provided for in this Act shall be begun either in the district court or in the justice's court in the precinct where the lien was filed and the justices of the peace in Alaska are hereby given full jurisdiction in the foreclosure of such liens under the provisions of this Act, and shall also have such other jurisdiction and power as is now conferred on them by law in aid of the enforcement of this Act, and the provisions of section seven hundred and twenty-three of chapter seventy-one of the Code of Civil Procedure now in force in Alaska shall be applicable to the jurisdiction intended to be conferred by this Act. (36 Stat. 849.)

Code of Civil Procedure, c. 71, § 723, mentioned in this section is Act June 6, 1900, c. 786, Title II, c. 71, § 723, 31 Stat. 446.

§ 5064. (Act June 25, 1910, c. 422, § 6.) Errors of form not ground for dismissal; amendment of notice and pleadings; opportunity to defendant to meet an omitted or misstated material averment.

No mistake, informality, or mere matter of form or lack of statement, either in the lien notice or pleadings, shall be ground for dismissal or unnecessary delay in the action to foreclose the lien, but the lien notice and pleadings may be amended at any time before judgment, and section ninety-two of chapter eleven of the Code of Civil Procedure now in force in Alaska shall apply to such amendments: Provided, That if it be shown that a material statement or averment has been omitted or misstated, it shall be ground for a

reasonable delay or continuance to give the defendant a reasonable opportunity to meet it upon amendment. (36 Stat. 849.)

Code of Civil Procedure, c. 11, § 92, mentioned in this section is Act June 6, 1900, c. 786, Title II, c. 11, § 92, 31 Stat. 346.

Notes of Decisions

Amendments.—Amendments to notices and pleadings cannot be allowed which will cut out intervening rights or defeat the rights of those who have incurred expense or who have pursued a course of action relying reasonably and in good faith upon such information as was imparted by the notices. Donaldson v. Henning (1913) 4 Alaska, 642.

§ 5065. (Act June 25, 1910, c. 422, § 7.) Lien notice filed as statement of the case; issuance and service of summons; posting notice on dump, etc.; effect; adverse claims.

The claimant may file the original or a certified copy of the notice of lien in the district or justice's court as the statement of his case, and thereupon the court or justice shall issue the usual summons directed to the defendant or defendants, which summons, together with a copy of the lien notice, shall, by any officer authorized to serve process, be served upon the defendant or defendants, as provided in sections nine hundred and fifty and nine hundred and fifty-one of chapter ninety-two of the Code of Civil Procedure now in force in Alaska. The summons shall require the defendant or defendants to appear before such court or justice at a time and a place to be named therein, not less than six nor more than twenty days from the date thereof, to answer the demand of the claimant in the said lien notice, or judgment for want of an answer will be taken against them. Service by publication may be had pursuant to sections forty-seven and forty-eight of chapter four of said Code of Civil Procedure. The officer serving the summons shall also immediately post a copy of said lien notice in a conspicuous place on the dump or mass of mineral-bearing sands, gravels, earth, or rock, and gold and gold dust, and other minerals therein upon which the lien is filed, and from the moment of posting the lien notice the dump or mass of mineral-bearing sands, gravels, earth, and rock, and gold and gold dust, and other minerals therein shall be in the custody and under the control of the officer. All persons who claim any interest therein in opposition to the lien claimant may come in and answer and set up and defend their said claims, but no claim or claims of any owner, lessee, or other adverse defendant shall bar the lien claimant from recovering the sum due him for actual labor in producing the said dump or mass of mineral-bearing sands, gravels, earth, or rock, or gold and gold dust, or other minerals. (36 Stat. 850.)

Code of Civil Procedure, c. 92, §§ 950, 951, mentioned in this section, are Act June 6, 1900, c. 786, Title II, c. 92, §§ 950, 951, 31 Stat. 481, 482; and Code of Civil Procedure, c. 4, §§ 47, 48, also mentioned in this section, are Act June 6, 1900, c. 786, Title II, c. 4, §§ 47, 48, 31 Stat. 340.

§ 5066. (Act June 25, 1910, c. 422, § 8.) Joinder of lien claimants; consolidation of actions; costs; attorneys' fees; waiver of lien void.

Any number of persons claiming liens under this Act may join in the same action, and when separate actions are commenced the court may consolidate them. The court shall also allow, as a part of the costs, the moneys paid for filing, recording, and indexing the notice of lien, the sum of five dollars for drawing the same, and a reasonable attorney's fee for each person claiming a lien, not to exceed ten per centum of the amount of the lien established on judgment. Any contract or agreement or any waiver of any kind made or signed by any minor or laborer whereby it is sought to

waive or abandon his right to file a lien under this Act, or any agreement for an extended time of payment whereby the same end is sought, shall to that extent be null and void as against public policy. (36 Stat. 850.)

§ 5067. (Act June 25, 1910, c. 422, § 9.) Judgment; order for sale of dump, etc.; extraction of gold by marshal or by defendant; disposition of proceeds; apportionment among preferred claims.

In such action judgment must be rendered in favor of each person having a laborer's lien for the amount due him, and the court shall order the dump or mass of mineral-bearing sands, gravels, earth, or rock, and the gold and gold dust, and other minerals therein subject to the lien to be sold by the marshal in the same manner that personal property is sold on execution; or the court may, upon a showing that it is necessary to do so to preserve the property from loss or waste, by order require the marshal to wash up or extract the gold and gold dust or other mineral from the said mineral-bearing sands, gravels, earth, or rock; or the court may, by order, allow the defendant or defendants or any party interested to wash up and extract the said mineral, in the presence of the marshal or deputy marshal or special officer, who shall take the gold or gold dust or other minerals as it is washed up and extracted and return the same into court, and it shall be immediately paid out as follows: First, the cost of cleaning up or extracting the gold or gold dust or other minerals shall be paid; second, the court costs shall be paid; and, third, the judgment or judgments so rendered in favor of the lien claimants shall be paid; and if there is not sufficient gold or gold dust, or other minerals, or sufficient moneys obtained from the sale of the property to pay all claims in full, the court shall apportion the proceeds to the payment of such judgments pro rata: Provided, That no part of any such proceeds shall be paid upon any claim or judgment to any person who did not actually perform labor in producing the dump or the proceeds thereof until all such preferred claims are paid in full. (36 Stat. 850.)

§ 5068. (Act June 25, 1910, c. 422, § 10.) Appeal from justice of the peace; extraction and deposit of gold pending appeal; excess paid to owner after 90 days if no liens filed against it; deposit of cash in lieu of gold.

An appeal may be taken from a final judgment of a justice of the peace in actions instituted under this Act to the district court, in the manner provided in chapter ninety-seven of the Code of Civil Procedure now in force in Alaska, and upon such appeal being perfected the dump or mass of mineral-bearing sands, gravels, earth and rock, gold and gold dust, or other minerals shall be washed up by the marshal or any party mentioned in section nine of this Act as the district court may direct, and all the gold or gold dust or other mineral so washed up shall be paid into the registry of the district court there to await the final judgment on appeal: Provided, That the gold or gold dust or other mineral in excess of the amount of the judgment, including an additional amount equal to the probable accruing costs on appeal and two years' interest at the legal rate, shall after the expiration of ninety days from the time it was paid into the registry of the district court, be released to the owners upon a showing that no liens have been filed against it. The defendant or defendants, or any one or more of them, may deposit cash in lieu of the gold or gold dust on the dump, which shall remain in the custody of the law until the final

judgment, and shall then be applied in payment of the judgment or judgments rendered on each lien claims, and costs, and interest. (36 Stat. 851.)

Code of Civil Procedure, c. 97, mentioned in this section, is Act June 6, 1900, c. 786, Title II, c. 97, 31 Stat. 487, 488.

§ 5069. (Act June 25, 1910, c. 422, § 11.) Persons buying, washing up, removing, etc., gold or gold dust with notice of lien, liable for full amount of judgment and costs; persons removing dump, etc., from possession of officer guilty of larceny.

Any person or persons who shall, after the copy of the notice of lien is posted upon any dump or mass of mineral-bearing sands, gravels, earth or rock, gold and gold dust, or other mineral, as provided in this Act, and with knowledge of such notice of lien, buy, purchase, wash up, remove, destroy, or carry away all or any part or portion of the same, or the gold or gold dust therein, or who shall render it difficult, uncertain, or impossible to identify the gold or gold dust or other mineral obtained therefrom, shall be liable to the lien holder for the full amount of his judgment and costs; and any person who shall take and carry away all or any part or portion of said dump of mineral-bearing sands, gravels, earth or rock, or the gold or gold dust or other minerals therefrom, after the same shall come into the custody of the officer, shall be guilty of a crime and shall be punished as for the larceny of a like amount; and any district attorney in Alaska is specially required to immediately cause a warrant to be issued for the arrest of any such person or persons and to prosecute them according to law. (36 Stat. 851.)

§ 5070. (Act June 6, 1900, c. 796.) Coal-land laws extended to Alaska.

So much of the public land laws of the United States are hereby extended to [the district of] Alaska as relate to coal lands, namely, sections twenty-three hundred and forty-seven to twenty-three hundred and fifty-two, inclusive, of the Revised Statutes. (31 Stat. 658.)

This was an act entitled "An act to extend the coal land laws to the District of Alaska."

The words "the district of," inclosed in brackets in this section, were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

R. S. §§ 2347–2352, mentioned in this section, are set forth ante, §§ 4658–4664.

This act was amended by further provisions relating to coal lands in Alaska, and all provisions of the coal land laws not in conflict therewith were continued in force, by Act April 28, 1904, c. 1772, post, §§ 5071–5074.

No title to any mineral or coal lands in Alaska can be obtained under the amendment of Act May 14, 1898, c. 299, § 1, which extended the homestead laws to Alaska, by a provision of Act March 3, 1903, c. 1002, ante, § 5046.

Provisions permitting consolidation of claims or locations of coal land in Alaska, and the formation of associations or corporations to perfect entry of and acquire title to such lands, under conditions and restrictions prescribed, were made by Act May 28, 1908, c. 211, post, §§ 5075–5078.

This section may be regarded as substantially superseded by provisions for leasing the coal lands made by Act Oct. 20, 1914, c. 330, post, §§ 5078a–5078r.

Notes of Decisions

Construction and application of act.— This act was inoperative for a time because the lands of Alaska were unsurveyed, and under existing laws could be entered only "by legal subdivisions." U. S. v. Munday (1911) 32 Sup. Ct. 53 55, 222 U. S. 175, 56 L. Ed. 149; (1909) 27 Op. Atty. Gen. 412.

This act must be construed in pari materia with the other coal-mining acts, and they are all susceptible of a construction which will make all their provisions harmonious, and they are meant to operate consistently with the evident intent of congress. U. S. v. Doughten (C. C. 1911) 186 Fed. 226. See, also, U. S. v. Munday (1911) 32 Sup. Ct. 53, 55, 222 U. S. 175, 56 L. Ed. 149.

§ 5071. (Act April 28, 1904, c. 1772, § 1.) Location of lands on which coal mine has been opened or improved; filing notice of location.

Any person or association of persons qualified to make entry under the coal-land laws of the United States, who shall have opened or improved a coal mine or coal mines on any of the unsurveyed public lands of the United States in the district of Alaska, may locate the lands upon which such mine or mines are situated, in rectangular tracts containing forty, eighty, or one hundred and sixty acres, with north and south boundary lines run according to the true meridian, by marking the four corners thereof with permanent monuments, so that the boundaries thereof may be readily and easily traced. And all such locators shall, within one year from the passage of this Act, or within one year from making such location, file for record in the recording district, and with the register and receiver of the land district in which the lands are located or situated, a notice containing the name or names of the locator or locators, the date of the location, the description of the lands located, and a reference to such natural objects or permanent monuments as will readily identify the same. (33 Stat. 525.)

This section and the three sections next following were an act entitled "An act to amend an act entitled 'An act to extend the coal land laws to the district of Alaska,' approved June sixth, nineteen hundred."

Alaska was organized as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

This section and the three sections next following, may be regarded as substantially superseded by provisions for leasing the Alaskan coal fields made by Act Oct. 20, 1914, c. 330, post, §§ 5078a–5078r.

Notes of Decisions

Purpose of act.—The sole purpose of this act was to remedy a defect in the existing laws, so as to enable locators to acquire title to coal claims on unsurveyed public lands. U. S. v. Munday (1911) 32 Sup. Ct. 53, 57, 222 U. S. 175, 56 L. Ed. 149; Same v. Doughten (C. C. 1911) 186 Fed. 226, 232. See, also (1909) 27 Op. Atty. Gen. 412.

The conditions in Alaska covered by this act were but temporary, and when the coal lands there shall be brought under the system of public surveys this act will cease to be operative. U. S. v. Munday (1911) 32 Sup. Ct. 53, 57, 222 U. S. 175, 56 L. Ed. 149.

Number of entries by one entryman.—The restriction to one entry by the same person, made by the general coal land laws, which relate solely to surveyed lands, and which were extended to Alaska by Act June 6, 1900, was made applicable to entries on unsurveyed coal lands in Alaska by this act. U. S. v. Munday (1911) 32 Sup. Ct. 53, 54, 222 U. S. 175, 56 L. Ed. 149, reversing judgment (C. C. 1911) 186 Fed. 375. And see U. S. v. Doughten (C. C. 1911) 186 Fed. 226; (1909) 27 Op. Atty. Gen. 412.

§ 5072. (Act April 28, 1904, c. 1772, § 2.) Patents for coal lands, how obtained; notice of application therefor; title to shore of navigable waters not to be acquired.

Such locator or locators, or their assigns, who are citizens of the United States, shall receive a patent to the lands located by presenting, at any time within three years from the date of such notice, to the register and receiver of the land district in which the lands so located are situated an application therefor, accompanied by a certified copy of a plat of survey and field notes thereof, made by a United States deputy surveyor or a United States mineral surveyor duly approved by the surveyor-general for the district of Alaska, and a payment of the sum of ten dollars per acre for the lands applied for; but no such application shall be allowed until after the applicant has caused a notice of the presentation thereof, embracing a description of the lands, to have been published in a newspaper in the district of Alaska published nearest the location of the premises for a period of sixty days, and shall have caused copies of such notice, together with a certified copy of the official plat or survey, to have been kept posted

in a conspicuous place upon the land applied for and in the land office for the district in which the lands are located for a like period, and until after he shall have furnished proof of such publication and posting, and such other proof as is required by the coal-land laws: Provided, That nothing herein contained shall be so construed as to authorize entries to be made or title to be acquired to the shore of any navigable waters within said district.

Act April 28, 1904, c. 1772, § 2, 33 Stat. 525.
See note to section 1 of this act, ante, § 5071.

Notes of Decisions

Number of entries by one entryman.—It was not the purpose of congress to depart from its policy which imposed a restriction upon the number of locations, which had always been limited to one. U. S. v. Munday (1911) 32 Sup. Ct. 53, 57, 222 U. S. 175, 56 L. Ed. 149.

Payment of purchase price.—The payment required to be made by locators of Alaska coal lands, as a condition precedent to patent therefor, need not be made, in cases where protest is filed, until after the termination of the protest. (1910) 28 Op. Atty. Gen. 448. And see U. S. v. Doughten (C. C. 1911) 186 Fed. 226.

§ 5073. (Act April 28, 1904, c. 1772, § 3.) Adverse claims, and proceedings thereon.

During such period of posting and publication, or within six months thereafter, any person or association of persons having or asserting any adverse interest or claim to the tract of land or any part thereof sought to be purchased shall file in the land office where such application is pending, under oath, an adverse claim, setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin an action to quiet title in a court of competent jurisdiction within the district of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of such court therein. (33 Stat. 525.)

Subsequent provisions extending the times for filing adverse claims, as authorized in Rev. St. §§ 2325, 2326, ante, §§ 4622, 4623, and for instituting suits thereon, were made by Act June 7, 1910, c. 265, ante, § 5053.
See note to section 1 of this act, ante, § 5071.

§ 5074. (Act April 28, 1904, c. 1772, § 4.) Existing provisions not in conflict with this act continued in force.

All the provisions of the coal-land laws of the United States not in conflict with the provisions of this Act shall continue and be in full force in the district of Alaska. (33 Stat. 526.)

See note to section 1 of this act, ante, § 5071.

Notes of Decisions

Number of entries by one entryman.—This section did not limit the continuation of the coal land laws of the United States made applicable to the district of Alaska to such laws as applied to surveyed lands only, but included the provisions of the Revised Statutes limiting the quantity subject to entry by individuals or associations, though this act did not in itself limit the number of entries or locations a person or association might make. U. S. v. Doughten (C. C. 1911) 186 Fed. 226.

See, also, U. S. v. Munday (1911) 32 Sup. Ct. 53, 57, 222 U. S. 175, 56 L. Ed. 149.

§ 5075. (Act May 28, 1908, c. 211, § 1.) Consolidation of claims or locations of coal land in Alaska; formation of associations or corporations to perfect entry and acquire title.

All persons, their heirs or assigns, who have in good faith personally or by an attorney in fact made locations of coal land in the Territory of Alaska in their own interest, prior to November twelfth, nineteen hundred and six, or in accordance with circular of instructions issued by the Secretary of the Interior May sixteenth, nineteen hundred and seven, may consolidate their said claims or loca-

tions by including in a single claim, location, or purchase not to exceed two thousand five hundred and sixty acres of contiguous lands, not exceeding in length twice the width of the tract thus consolidated and for this purpose such persons, their heirs or assigns, may form associations or corporations who may perfect entry of and acquire title to such lands in accordance with the other provisions of law under which said locations were originally made: Provided, That no corporation shall be permitted to consolidate its claims under this Act unless seventy-five per centum of its stock shall be held by persons qualified to enter coal lands in Alaska. (35 Stat. 424.)

This section and the three sections next following were an act entitled "An act to encourage the development of coal deposits in the Territory of Alaska."

Certain consolidations of coal leases are permitted by Act Oct. 20, 1914, c. 330, §§ 5, 6, post, §§ 5078e, 5078f.

Notes of Decisions

Construction of act.—While this act cannot render criminal acts which were innocent at the time of their commission, yet it may nevertheless be looked to for the purpose of ascertaining the legislative intent. U. S. v. Doughten (C. C. 1911) 186 Fed. 226.

This act is remedial and curative in its nature and should be construed liberally so as to afford all the relief which the language of the act indicates that congress intended to grant. (1909) 27 Op. Atty. Gen. 412.

Consolidation of coal land claims.—The benefits of this act can be shared only by persons who made coal land locations in good faith and in their own interest individually, without fraud, collusion, or deceit, or any purpose to violate any provision of the law. (1909) 27 Op. Atty. Gen. 412.

Coal locations in Alaska, made in good faith and in the interest of the locators alone, may lawfully pass to entry and patent, where the locators have, after making their locations, entered into an agreement to consolidate their claims. Id.

§ 5076. (Act May 28, 1908, c. 211, § 2.) Reservation to United States of preference right to purchase product of mine for use of Army and Navy.

The United States shall, at all times, have the preference right to purchase so much of the product of any mine or mines opened upon the lands sold under the provisions of this Act as may be necessary for the use of the Army and Navy, and at such reasonable and remunerative price as may be fixed by the President; but the producers of any coal so purchased who may be dissatisfied with the price thus fixed shall have the right to prosecute suits against the United States in the Court of Claims for the recovery of any additional sum or sums they may claim as justly due upon such purchase. (35 Stat. 424.)

A reservation of coal lands is also made in Act Oct. 20, 1914, c. 330, § 2, post, § 5078b, providing for leasing certain Alaskan coal fields.

§ 5077. (Act May 28, 1908, c. 211, § 3.) Forfeiture of lands or deposits purchased under act, if owned, etc., as part of combination, or controlled by combination, in form of unlawful trust, or subject of contract or conspiracy in restraint of trade, or held in excess of amount limited.

If any of the lands or deposits purchased under the provisions of this Act shall be owned, leased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever so that they form part of, or in any way effect any combination, or are in anywise controlled by any combination in the form of an unlawful trust, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, or of any holding of such lands by any individual, partnership, association, corporation, mortgage, stock ownership, or control, in excess of two thousand five hundred and sixty acres in the district of Alaska, the title thereto shall be forfeited to the United States by pro-

ceedings instituted by the Attorney-General of the United States in the courts for that purpose. (35 Stat. 424.)

A similar provision is made where coal lands are leased by Act Oct. 20, 1914, c. 330, § 8a, post, § 5078i.

The general anti-trust acts, whose operation is not confined to Alaska, are set forth post, Title LVI C, §§ 8820–8836.

§ 5078. (Act May 28, 1908, c. 211, § 4.) Patents under act to recite terms and conditions prescribed.

Every patent issued under this Act shall expressly recite the terms and conditions prescribed in sections two and three hereof. (35 Stat. 424.)

Sections 2 and 3 of this act, mentioned in this section, are set forth ante, §§ 5076, 5077.

§ 5078a. (Act Oct. 20, 1914, c. 330, § 1.) Surveys of lands known to be valuable for deposits of coal.

That the Secretary of the Interior be, and hereby is, authorized and directed to survey the lands of the United States in the Territory of Alaska known to be valuable for their deposits of coal, preference to be given first in favor of surveying lands within those areas commonly known as the Bering River, Matanuska, and Nenana coal fields, and thereafter to such areas or coal fields as lie tributary to established settlements or existing or proposed rail or water transportation lines: Provided, That such surveys shall be executed in accordance with existing laws and rules and regulations governing the survey of public lands. There is hereby appropriated, out of any money in the Treasury not otherwise appropriated, the sum of $100,000 for the purpose of making the surveys herein provided for, to continue available until expended: Provided, That any surveys heretofore made under the authority or by the approval of the Department of the Interior may be adopted and used for the purposes of this Act. (38 Stat. 741.)

This section, and the sixteen sections next following were an act entitled "An act to provide for the leasing of coal lands in the territory of Alaska, and for other purposes," cited above.

Previous provisions allowing entry, etc., upon Alaskan coal fields, and largely superseded by this act, are contained in Act June 6, 1900, c. 796, ante, § 5070, Act April 28, 1904, c. 1772, ante, §§ 5071–5074, and Act May 28, 1908, c. 211, ante, §§ 5075–5078.

§ 5078b. (Act Oct. 20, 1914, c. 330, § 2.) Reservation of certain limited areas of coal lands; mining of coal deposits in reserved areas, under direction of President, when necessary by reason of insufficient supply of coal.

The President of the United States shall designate and reserve from use, location, sale, lease, or disposition not exceeding five thousand one hundred and twenty acres of coal-bearing land in the Bering River field and not exceeding seven thousand six hundred and eighty acres of coal-bearing land in the Matanuska field, and not to exceed one-half of the other coal lands in Alaska: Provided, That the coal deposits in such reserved areas may be mined under the direction of the President when, in his opinion, the mining of such coal in such reserved areas, under the direction of the President, becomes necessary, by reason of an insufficient supply of coal at a reasonable price for the requirements of Government works, construction and operation of Government railroads, for the Navy, for national protection, or for relief from monopoly or oppressive conditions. (38 Stat. 742.)

§ 5078c. (Act Oct. 20, 1914, c. 330, § 3.) Division of unreserved coal lands into leasing blocks or tracts; leasing thereof; restriction on amount of coal or coal lands to be acquired through lease, etc., by railroad or common carrier; relinquishment of pending claims to coal lands; adjudication of pending claims.

The unreserved coal lands and coal deposits shall be divided by the Secretary of the Interior into leasing blocks or tracts of forty acres each, or multiples thereof, and in such form as in the opinion of the Secretary will permit the most economical mining of the coal in such blocks, but in no case exceeding two thousand five hundred and sixty acres in any one leasing block or tract; and thereafter, the Secretary shall offer such blocks or tracts and the coal, lignite, and associated minerals therein for leasing, and may award leases thereof through advertisement, competitive bidding, or such other methods as he may by general regulations adopt, to any person above the age of twenty-one years who is a citizen of the United States, or to any association of such persons, or to any corporation or municipality organized under the laws of the United States or of any State or Territory thereof: Provided, That a majority of the stock of such corporation shall at all times be owned and held by citizens of the United States: And provided further, That no railroad or common carrier shall be permitted to take or acquire through lease or permit under this Act any coal or coal lands in excess of such area or quantity as may be required and used solely for its own use, and such limitation of use shall be expressed in all leases or permits issued to railroads or common carriers hereunder: And provided further, That any person, association, or corporation qualified to become a lessee under this Act and owning any pending claim under the public-land laws to any coal lands in Alaska may, within one year from the passage of this Act, enter into an arrangement with the Secretary of the Interior by which such claim shall be fully relinquished to the United States; and if in the judgment of the Secretary of the Interior, the circumstances connected with such claim justify so doing, the moneys paid by the claimant or claimants to the United States on account of such claim shall, by direction of the Secretary of the Interior, be returned and paid over to such person, association, or corporation as a consideration for such relinquishment.

All claims of existing rights to any of such lands in which final proof has been submitted and which are now pending before the Commissioner of the General Land Office or the Secretary of the Interior for decision shall be adjudicated within one year from the passage of this Act. (38 Stat. 742.)

§ 5078d. (Act Oct. 20, 1914, c. 330, § 4.) Further or new lease of additional lands to lessees.

A person, association, or corporation holding a lease of coal lands under this act may, with the approval of the Secretary of the Interior and through the same procedure and upon the same terms and conditions as in the case of an original lease under this Act, secure a further or new lease covering additional lands contiguous to those embraced in the original lease, but in no event shall the total area embraced in such original and new leases exceed in the aggregate two thousand five hundred and sixty acres.

Upon satisfactory showing by any lessee to the Secretary of the Interior that all of the workable deposits of coal within a tract covered by his or its lease will be exhausted, worked out, or removed within three years thereafter, the Secretary of the Interior may, within his discretion, lease to such lessee an additional tract of land or coal deposits, which, including the coal area remaining

in the original lease, shall not exceed two thousand five hundred and sixty acres, through the same procedure and under the same competitive conditions as in case of an original lease. (38 Stat. 742.)

§ 5078e. (Act Oct. 20, 1914, c. 330, § 5.) Consolidation of leases or holdings of small blocks or areas.

Subject to the approval of the Secretary of the Interior, lessees holding under leases small blocks or areas may consolidate their said leases or holdings so as to include in a single holding not to exceed two thousand five hundred and sixty acres of contiguous lands. (38 Stat. 743.)

§ 5078f. (Act Oct. 20, 1914, c. 330, § 6.) Limitation of lease as to area of block or tract leased; no person, etc., to take or hold any interest in more than one such lease; exception of interest acquired by descent, will, etc.

Each lease shall be for such leasing block or tract of land as may be offered or applied for, not exceeding in area two thousand five hundred and sixty acres of land, to be described by the subdivisions of the survey, and no person, association, or corporation, except as hereinafter provided, shall be permitted to take or hold any interest as a stockholder or otherwise in more than one such lease under this Act, and any interest held in violation of this proviso shall be forfeited to the United States by appropriate proceedings instituted by the Attorney General for that purpose in any court of competent jurisdiction, except that any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held for two years, and not longer, after its acquisition. (38 Stat. 743.)

§ 5078g. (Act Oct. 20, 1914, c. 330, § 7.) Purchase, etc., of interest in two or more such leases, or of stock in corporation having such interest, a felony; punishment thereof; exception of ownership and interest acquired by descent, will, etc.

Any person who shall purchase, acquire, or hold any interest in two or more such leases, except as herein provided, or who shall knowingly purchase, acquire, or hold any stock in a corporation having an interest in two or more such leases, or who shall knowingly sell or transfer to one disqualified to purchase, or except as in this Act specifically provided, disqualified to acquire, any such interest, shall be deemed guilty of a felony, and upon conviction shall be punished by imprisonment for not more than three years and by a fine not exceeding $1,000: Provided, That any such ownership and interest hereby forbidden which may be acquired by descent, will, judgment, or decree may be held two years after its acquisition and not longer, and in case of minority or other disability such time as the court may decree. (38 Stat. 743.)

§ 5078h. (Act Oct. 20, 1914, c. 330, § 8.) Director, trustee, officer, etc., of corporation holding interest in such lease, who acts, on behalf of corporation, in purchase of interest in another lease, or in sale, etc., of such interest to corporation or individual holding like interest, guilty of felony; punishment thereof.

Any director, trustee, officer, or agent of any corporation holding any interest in such a lease who shall, on behalf of such corporation, act in the purchase of any interest in another lease, or who shall knowingly act on behalf of such corporation in the sale or transfer of any such interest in any lease held by such corporation to any corporation or individual holding any interest in any such a lease, except as herein provided, shall be guilty of a felony and

shall be subject to imprisonment for a term of not exceeding three years and a fine of not exceeding $1,000. (38 Stat. 743.)

§ 5078i. (Act Oct. 20, 1914, c. 330, § 8a.) Subleasing, etc., or control of lands or deposits leased, to be part of or controlled by unlawful trust combination, etc., or of any holding in excess of area limited, to be ground for forfeiture of lease.

If any of the lands or deposits leased under the provisions of this Act shall be subleased, trusteed, possessed, or controlled by any device permanently, temporarily, directly, indirectly, tacitly, or in any manner whatsoever, so that they form part of or are in anywise controlled by any combination in the form of an unlawful trust, with consent of lessee, or form the subject of any contract or conspiracy in restraint of trade in the mining or selling of coal, entered into by the lessee, or of any holding of such lands by any individual, partnership, association, corporation, or control, in excess of two thousand five hundred and sixty acres in the Territory of Alaska, the lease thereof shall be forfeited by appropriate court proceedings. (38 Stat. 743.)

The general anti-trust acts, whose operation is not confined to Alaska, are set forth post, Title LVI C, §§ 8820–8836.

§ 5078j. (Act Oct. 20, 1914, c. 330, § 9.) Royalties and rentals to be paid by lessees; term of leases, and renewals; disposition of profits from operation of government mines and of royalties and rentals under leases.

For the privilege of mining and extracting and disposing of the coal in the lands covered by his lease the lessee shall pay to the United States such royalties as may be specified in the lease, which shall not be less than two cents per ton, due and payable at the end of each month succeeding that of the shipment of the coal from the mine, and an annual rental, payable at the beginning of each year, on the lands covered by such lease, at the rate of twenty-five cents per acre for the first year thereafter, fifty cents per acre for the second, third, fourth, and fifth years, and $1 per acre for each and every year thereafter during the continuance of the lease, except that such rental for any year shall be credited against the royalties as they accrue for that year. Leases may be for periods of not more than fifty years each, subject to renewal, on such terms and conditions as may be authorized by law at the time of such renewal. All net profits from operation of Government mines, and all royalties and rentals under leases as herein provided, shall be deposited in the Treasury of the United States in a separate and distinct fund to be applied to the reimbursement of the Government of the United States on account of any expenditures made in the construction of railroads in Alaska, and the excess shall be deposited in the fund known as The Alaska Fund, established by the Act of Congress of January twenty-seventh, nineteen hundred and five, to be expended as provided in said last-mentioned Act. (38 Stat. 744.)

§ 5078k. (Act Oct. 20, 1914, c. 330, § 10.) Licenses or permits to prospect for, mine, and dispose of coal, for supply of local and domestic needs for fuel.

In order to provide for the supply of strictly local and domestic needs for fuel the Secretary of the Interior may, under such rules and regulations as he may prescribe in advance, issue to any applicant qualified under section three of this Act a limited license or permit granting the right to prospect for, mine, and dispose of coal belonging to the United States on specified tracts not to exceed ten acres to any one person or association of persons in any one coal field for a period of not exceeding ten years, on such con-

ditions not inconsistent with this Act as in his opinion will safeguard the public interest, without payment of royalty for the coal mined or for the land occupied: Provided, That the acquisition of holding of a lease under the preceding sections of this Act shall be no bar to the acquisition, holding, or operating under the limited license in this section permitted. And the holding of such a license shall be no bar to the acquisition or holding of such a lease or interest therein. (38 Stat. 744.)

§ 5078*l*. (Act Oct. 20, 1914, c. 330, § 11.) Reservation required, in lease, entry, etc., of right to grant easements in land leased, etc., for working same or other coal lands and other purposes; reservation authorized, in lease, of right to lease, sell, etc., surface of lands; permits for such easements and for use of other public lands, for coal washeries, etc.

Any lease, entry, location, occupation, or use permitted under this Act shall reserve to the Government of the United States the right to grant or use such easements in, over, through, or upon the land leased, entered, located, occupied, or used as may be necessary or appropriate to the working of the same or other coal lands by or under authority of the Government and for other purposes: Provided, That said Secretary, in his discretion, in making any lease under this Act, may reserve to the United States the right to lease, sell, or otherwise dispose of the surface of the lands embraced within such lease under existing law or laws hereafter enacted in so far as said surface is not necessary for use by the lessee in extracting and removing the deposits of coal therein. If such reservation is made, it shall be so determined before the offering of such lease.

The said Secretary during the life of the lease is authorized to issue such permits for easements herein provided to be reserved, and to permit the use of such other public lands in the Territory of Alaska as may be necessary for the construction and maintenance of coal washeries or other works incident to the mining or treatment of coal, which lands may be occupied and used jointly or severally by lessees or permittees, as may be determined by said Secretary. (38 Stat. 744.)

§ 5078m. (Act Oct. 20, 1914, c. 330, § 12.) Leases not to be assigned or sublet without consent of Secretary of the Interior; provisions required to be contained in leases.

No lease issued under authority of this Act shall be assigned or sublet except with the consent of the Secretary of the Interior. Each lease shall contain provisions for the purpose of insuring the exercise of reasonable diligence, skill, and care in the operation of said property, and for the safety and welfare of the miners and for the prevention of undue waste, including a restriction of the workday to not exceeding eight hours in any one day for underground workers except in cases of emergency; provisions securing the workers complete freedom of purchase, requiring the payment of wages at least twice a month in lawful money of the United States, and providing proper rules and regulations to secure fair and just weighing or measurement of the coal mined by each miner, and such other provisions as are needed for the protection of the interests of the United States, for the prevention of monopoly, and for the safeguarding of the public welfare. (38 Stat. 744.)

§ 5078n. (Act Oct. 20, 1914, c. 330, § 13.) Possession of lessee to be deemed possession of United States.

The possession of any lessee of the land or coal deposits leased under this act for all purposes involving adverse claims to the leased property shall be deemed the possession of the United

States, and for such purposes the lessee shall occupy the same relation to the property leased as if operated directly by the United States. (38 Stat. 745.)

§ 5078o. (Act Oct. 20, 1914, c. 330, § 14.) Forfeiture and cancellation of lease, and other remedies for breach of conditions thereof.

Any such lease may be forfeited and canceled by appropriate proceeding in a court of competent jurisdiction whenever the lessee fails to comply with any provision of the lease or of general regulations promulgated under this Act; and the lease may provide for the enforcement of other appropriate remedies for breach of specified conditions thereof. (38 Stat. 745.)

§ 5078p. (Act Oct. 20, 1914, c. 330, § 15.) Lands containing deposits of coal, withdrawn from entry or sale, not to be disposed of or acquired except as provided in this act; pending proceedings not affected; lease of land as to which claim is pending not to be made until final disposition of claim.

On and after the approval of this Act no lands in Alaska containing deposits of coal withdrawn from entry or sale shall be disposed of or acquired in any manner except as provided in this Act: Provided, That the passage of this Act shall not affect any proceeding now pending in the Department of the Interior, and any such proceeding may be carried to a final determination in said department notwithstanding the passage hereof: Provided further, That no lease shall be made, under the provisions hereof, of any land, a claim for which is pending in the Department of the Interior at the date of the passage of this Act, until and unless such claim is finally disposed of by the department adversely to the claimant. (38 Stat. 745.)

§ 5078q. (Act Oct. 20, 1914, c. 330, § 16.) Statements, etc., and reports required under act, to be upon oath; form, etc.; false oath, etc., punishable as for perjury.

All statements, representations, or reports required, unless otherwise specified, by the Secretary of the Interior under this Act shall be upon oath and in such form and upon such blanks as the Secretary of the Interior may require, and any person making false oath, representation, or report shall be subject to punishment as for perjury. (38 Stat. 745.)

§ 5078r. (Act Oct. 20, 1914, c. 330, § 17.) Regulations, etc., to carry out purposes of act.

The Secretary of the Interior is authorized to prescribe the necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act. (38 Stat. 745.)

§ 5079. (Act March 3, 1891, c. 561, § 11.) Entries by trustees under town-site laws; surveys; limitation of entry.

Until otherwise ordered by Congress lands in Alaska may be entered for town-site purposes, for the several use and benefit of the occupants of such town sites, by such trustee or trustees as may be named by the Secretary of the Interior for that purpose, such entries to be made under the provisions of section twenty-three hundred and eighty-seven of the Revised Statutes as near as may be; and when such entries shall have been made the Secretary of the Interior shall provide by regulation for the proper execution of the trust in favor of the inhabitants of the town site, including the survey of the land into lots, according to the spirit and intent of said section twenty-three hundred and eighty-seven of the Revised Stat-

utes, whereby the same results would be reached as though the entry had been made by a county judge and the disposal of the lots in such town site and the proceeds of the sale thereof had been prescribed by the legislative authority of a State or Territory: Provided, That no more than six hundred and forty acres shall be embraced in one townsite entry. (26 Stat. 1099.)

This section and the three sections next following were part of the act to repeal timber-culture laws, etc., cited above.

Other sections of the act are set forth or referred to post, § 5116.

R. S. § 2387, mentioned in this section, is set forth ante, § 4791.

The President was authorized to withdraw, locate, and dispose of town sites along the line of the railroad to be located and constructed by him in Alaska, by Act March 12, 1914, c. 37, § 1, ante, § 3593a.

Notes of Decisions

Who may acquire title to lots.—The provisions of the town-site law do not contemplate that title to town lots should vest in aliens. Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224.

—— **Indians.**—Indians, natives of Alaska, though living in villages, are not entitled to claim village sites, under this section. Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224.

Occupancy and settlement.—See, also, notes, § 4791, ante.

A person who uses a lot in Alaska, and occupies it in good faith with buildings or other improvements, which show his intention to possess and claim it under the town-site law, although he may not reside on it, can acquire title thereto. Sawyer v. Van Hook (1900) 1 Alaska, 108. And see Gordon v. Ross-Higgins Co. (1908) 162 Fed. 637, 89 C. C. A. 429.

The initiatory steps to be taken by citizens in establishing a town site are to settle upon and occupy the land for town-site purposes, and when so occupied, they may have the same entered in the land office for such purposes, through a trustee or trustees named by the Secretary of the Interior, by whom it is entered in trust for the settlers and occupants. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

As to land within the town site of Juneau the terms under which persons could acquire title were prescribed by this act. McGrath v. Valentine (1909) 167 Fed. 473, 93 C. C. A. 109.

Appointment and authority of trustees.—Legal title to lots in a town site can only be acquired from the town-site trustee, and his decision on questions of fact is conclusive, in absence of fraud, unless reversed on appeal to the land department. Miller v. Margerie (1907) 149 Fed. 694, 79 C. C. A. 382; McGrath v. Valentine (1909) 167 Fed. 473, 93 C. C. A. 109. And see Miller v. Margerie (1909) 170 Fed. 710, 96 C. C. A. 30; Valentine v. McGrath (1910) 4 Alaska, 102.

It is proper for settlers and occupants to petition the secretary of the interior to name a trustee or trustees to enter lands occupied for townsite purposes who, when so named, become the trustee or trustees for all. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

Survey of town site.—The official survey and plat of any town site located on government lands, and the lots and blocks thereof, are permanent landmarks, which may be considered in establishing the location of adjoining lands outside the town site. Carroll v. Price (D. C. 1896) 81 Fed. 137.

§ 5080. (Act March 3, 1891, c. 561, § 12.) Purchases for trade or manufacture; adverse claimants.

Any citizen of the United States twenty-one years of age, and any association of such citizens, and any corporation incorporated under the laws of the United States, or of any State or Territory of the United States now authorized by law to hold lands in the Territories now or hereafter in possession of and occupying public lands in Alaska for the purpose of trade or manufactures, may purchase not exceeding one hundred and sixty acres to be taken as near as practicable in a square form, of such land at two dollars and fifty cents per acre: Provided, That in case more than one person, association or corporation shall claim the same tract of land the person, association or corporation having the prior claim by reason of possession and continued occupation shall be entitled to purchase the same; but the entry of no person, association, or corporation

shall include improvements made by or in possession of another prior to the passage of this act. (26 Stat. 1100.)

See notes to section 11 of this act, ante, § 5079.

This section and the two sections immediately following may be regarded as superseded to a great extent, except as to claims initiated prior to January 1, 1898, by Act May 14, 1898, c. 299, § 10, post, § 5091.

Notes of Decisions

Possessory right or title to land.—See, also, notes to § 5091, post.

Where two persons claim adversely to each other the possession of government land, the one having the prior possession has the prior right. Carroll v. Price (D. C. 1896) 81 Fed. 137. And see Malony v. Adsit (1899) 20 Sup. Ct. 115, 118, 175 U. S. 281, 44 L. Ed. 163.

The only estate that could be held was that of possession. Malony v. Adsit (1900) 20 Sup. Ct. 115, 118, 175 U. S. 281, 44 L. Ed. 163.

The right of locators within an alleged town site, not shown to have been entered for that purpose, is at most a mere possessory right, with the privilege of regularly entering the town site in the future, if the citizens so desire, and is insufficient on which to base a suit to remove a cloud on title. Ripinsky v. Hinchman (1910) 181 Fed. 786, 105 C. C. A. 462, decree modified on rehearing (1911) 186 Fed. 151, 108 C. C. A. 263.

Possessory rights in government lands are forfeited by removing therefrom and abandoning one's claim, and the land is then restored to the public domain; but, if the occupant resumes possession before occupation by another, his right is restored. Carroll v. Price (D. C. 1896) 81 Fed. 137.

Possessory rights in government lands may be conveyed from one person to another, and written conveyances are admissible as tending to establish a right in the last grantee. Id.

A location notice made on nonmineral lands may be received as evidence tending to show possession by the locator, together with any other acts indicating possession. Id.

Citizens of the United States have the right to go upon the public lands in Alaska, and possess, occupy, use, and improve them. Id.

No citizen may question the occupation or possession of one residing on the lands or lots belonging to the United States, except he shows a better right or title in himself. The actual prior possession of the first occupant would be better than the subsequent possession of the last. Walsh v. Ford (1901) 1 Alaska, 146.

A right to the possession of government lands cannot be initiated by a forcible entry and trespass on the peaceable possession of another person. Id.

One who lays out a town site into lots, blocks, streets, and alleys acquires no rights thereby. Such lots can be held only by one in the actual use, occupation, or possession thereof, and such use, occupation, and possession may be evidenced by stakes, fencing, buildings, residence, and other improvements showing the fact. Price v. Brockway (1901) 1 Alaska, 233.

One who is in possession of a lot on the public lands and using the same for purposes of trade or residence may maintain a suit to quiet his title thereto. Foss v. Dam (1901) 1 Alaska, 346.

A mere occupancy for a brief time by camping on the ground in a tent is not a sufficient evidence of the occupation of public land for the purpose of trade and manufacture on which to base title under the land laws. Osgood v. Donnelly (1901) 1 Alaska, 385.

One who abandons a portion of his possessory rights on the public domain of Alaska, including one entire boundary line, thus leaving the limits of his claim open, indefinite, and undetermined, is limited in his possessory claim in the direction of his abandoned boundaries to lands actually occupied and used. Haines Wharf Co. v. Dalton (1902) 1 Alaska, 555.

A citizen who claims, uses, and actually occupies a small tract of public land for purposes of manufacturing and sawing lumber is entitled to the exclusive possession of the whole tract as against another, who subsequently enters upon a portion thereof not covered by structures, marks it with stakes, and begins the erection of a warehouse. Copper River Lumber Co. v. Humphreys (1903) 2 Alaska, 39.

—— **Littoral or riparian rights.**—See, also, notes to § 5091, post.

Citizens of the United States, claiming in good faith uplands in Alaska, and in actual occupation and possession thereof, take the same littoral rights as are incident to ownership in fee. Lewis v. Johnson (D. C. 1896) 76 Fed. 476, 479.

Quantity of land which may be purchased.—Persons occupying a reasonable quantity of public land in Alaska for manufacturing, business, houses, or for a wharf may obtain title to such land under the acts of Congress providing therefor. Such applicants are not necessarily restricted to a single lot, the size of which may be fixed by an arbitrary rule of the trustee. Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224.

Withdrawal of land from sale after settlement.—This act did not create a contract whereby the government was

bound to convey land to persons in possession, or to reimburse them for improvements if the lands should be withdrawn from sale. Russian-American Packing Co. v. U. S. (1905) 26 Sup. Ct. 157, 159, 199 U. S. 570, 50 L. Ed. 314, affirming judgment (1904) 39 Ct. Cl. 460.

This and the following section did not impair the right of the government to withdraw the land from entry and sale. Id.

§ 5081. (Act March 3, 1891, c. 561, § 13.) Surveys; deposits; making and approval.

It shall be the duty of any person, association or corporation entitled to purchase land under this act to make an application to the [United States marshal, ex officio] surveyor-general of Alaska, for an estimate of the cost of making a survey of the lands occupied by such person, association, or corporation, and the cost of the clerical work necessary to be done in the office of the said [United States marshal, ex officio] surveyor-general; and on the receipt of such estimate from the [United States marshal, ex officio] surveyor general, the said person, association, or corporation shall deposit the amount in a United States depository, as is required by section numbered twenty-four hundred and one, Revised Statutes, relating to deposits for surveys.

That on the receipt by the [United States marshal, ex-officio] surveyor-general, of the said certificates of deposit, he shall employ a competent person to make such survey, under such rules and regulations as may be adopted by the Secretary of the Interior, who shall make his return of his field notes and maps to the office of the said [United States marshal, ex officio] surveyor-general; and the said [United States marshal, ex officio] surveyor-general, shall cause the said field notes and plats of such survey to be examined, and, if correct, approve the same, and shall transmit certified copies of such maps and plats to the office of the Commissioner of the General Land Office.

That when the said field notes and plats of said survey shall have been approved by the said Commissioner of the General Land Office, he shall notify such person, association, or corporation, who shall then, within six months after such notice, pay to the said [United States marshal, ex officio] surveyor-general, for such land, and patent shall issue for the same. (26 Stat. 1100.)

See notes to sections 11 and 12 of this act, ante, §§ 5079, 5080.

The words "United States marshal, ex officio," inclosed in brackets in this section, were superseded by the striking out of the provision of Act May 17, 1884, c. 53, § 8, 23 Stat. 26, that the United States marshal of Alaska should be the surveyor-general of that land-district, and by the provision for the appointment of a surveyor-general for Alaska, by Act July 24, 1897, c. 14, § 2, set forth ante, § 4438.

Notes of Decisions

Government's power to reserve land not impaired by survey.—Any rights previously acquired under this and the preceding section by settlement and survey of public lands in Alaska were terminated by the proclamation of the President that the land was reserved for the purpose of establishing a fish culture station in accordance with the following section. Russian-American Packing Co. v. U. S. (1905) 26 Sup. Ct. 157, 159, 199 U. S. 570, 50 L. Ed. 314.

§ 5082. (Act March 3, 1891, c. 561, § 14.) Lands and rights reserved.

None of the provisions of the last two preceding sections of this act shall be so construed as to warrant the sale of any lands belonging to the United States which shall contain coal or the precious metals, or any town site, or which shall be occupied by the United States for public purposes, or which shall be reserved for such purposes, or to which the natives of Alaska have prior rights by virtue of actual occupation, or which shall be selected by the United States Commissioner of Fish and Fisheries on the island of Kadiak and Afognak for the purpose of establishing fish-culture

stations. And all tracts of land not exceeding six hundred and forty acres in any one tract now occupied as missionary stations in said [district of] Alaska are hereby excepted from the operation of the last three preceding sections of this act. No portion of the islands of the Pribylov Group or the Seal Islands of Alaska shall be subject to sale under this act; and the United States reserves, and there shall be reserved in all patents issued under the provisions of the last two preceding sections the right of the United States to regulate the taking of salmon and to do all things necessary to protect and prevent the destruction of salmon in all the waters of the lands granted frequented by salmon. (26 Stat. 1100.)

See note to sections 11 and 12 of this act, ante, §§ 5079, 5080.

The words "district of," inclosed in brackets in this section, were superseded by the organization of Alaska as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

Notes of Decisions

Military reservations.—Settlement and entry of a public military reservation cannot be made under the land laws of the United States. Crawford v. Burr (1903) 2 Alaska, 33; Gavigan v. Crary (1905) 2 Alaska, 370.

The town-site laws have never been held to permit settlement upon military reservations. Crawford v. Burr (1903) 2 Alaska, 33.

Lands occupied by native tribes.—Lands actually used and occupied by the native tribes of Alaska are reserved from sale or other disposal by the laws of the United States. These laws constitute a direct and mandatory prohibition against an entry of any such lands. U. S. v. Berrigan (1905) 2 Alaska, 442. And see McGrath v. Valentine (1909) 167 Fed. 473, 93 C. C. A. 109; Sutter v. Heckman (1901) 1 Alaska, 188; Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224.

Reservation for fish culture.—Any rights previously acquired under the two preceding sections of this act by settlement upon and survey of public lands in Alaska were terminated by the proclamation of the President that the land in question was reserved for the purpose of establishing a fish-culture station, in accordance with this section. Russian-American Packing Co. v. U. S. (1905) 26 Sup. Ct. 157, 158, 199 U. S. 570, 50 L. Ed. 314, affirming judgment (1904) 39 Ct. Cl. 460; Royal Packing Co. v. Same (1905) 26 Sup. Ct. 159, 199 U. S. 579, 50 L. Ed. 316, affirming judgment (1904) 39 Ct. Cl. 566.

—— Compensation for improvements.—The value of improvements made on public lands in Alaska by a mere trespasser, occupying the land without a shadow of title, canot be recovered from the United States upon the selection of the land for a fish-culture station. Russian-American Packing Co. v. United States (1905) 26 Sup. Ct. 157, 159, 199 U. S. 570, 50 L. Ed. 314, affirming judgment (1904) 39 Ct. Cl. 460; Royal Packing Co. v. Same (1905) 26 Sup. Ct. 159, 199 U. S. 579, 50 L. Ed. 316, affirming judgment (1904) 39 Ct. Cl. 566.

§ 5083. (Act May 14, 1898, c. 299, § 2.) Right of way on lands in Alaska; materials, grounds for stations, etc., for railroads; reservation of minerals; title to tide lands, etc.; transportation charges to be posted.

The right of way through the lands of the United States in the District of Alaska is hereby granted to any railroad company, duly organized under the laws of any State or Territory or by the Congress of the United States, which may hereafter file for record with the Secretary of the Interior a copy of its articles of incorporation, and due proofs of its organization under the same, to the extent of one hundred feet on each side of the center line of said road; also the right to take from the lands of the United States adjacent to the line of said road, material, earth, stone, and timber necessary for the construction of said railroad; also the right to take for railroad uses, subject to the reservation of all minerals and coal therein, public lands adjacent to said right of way for station buildings, depots, machine shops, side tracks, turn-outs, water stations, and terminals, and other legitimate railroad purposes, not to exceed in amount twenty acres for each station, to the extent of one station for each ten miles of its road, excepting at terminals and

junction points, which may include additional forty acres, to be limited on navigable waters to eighty rods on the shore line, and with the right to use such additional ground as may in the opinion of the Secretary of the Interior be necessary where there are heavy cuts or fills: Provided, That nothing herein contained shall be so construed as to give to such railroad company, its lessees, grantees, or assigns the ownership or use of minerals, including coal, within the limits of its right of way, or of the lands hereby granted: Provided further, That all mining operations prosecuted or undertaken within the limits of such right of way or of the lands hereby granted shall, under rules and regulations to be prescribed by the Secretary of the Interior, be so conducted as not to injure or interfere with the property or operations of the road over its said lands or right of way. And when such railway shall connect with any navigable stream or tide water such company shall have power to construct and maintain necessary piers and wharves for connection with water transportation, subject to the supervision of the Secretary of the Treasury: Provided, That nothing in this Act contained shall be construed as impairing in any degree the title of any State that may hereafter be erected out of said District, or any part thereof, to tide lands and beds of any of its navigable waters, or the right of such State to regulate the use thereof, nor the right of the United States to resume possession of such lands, it being declared that all such rights shall continue to be held by the United States in trust for the people of any State or States which may hereafter be erected out of said District. The term "navigable waters," as herein used, shall be held to include all tidal waters up to the line of ordinary high tide and all nontidal waters navigable in fact up to the line of ordinary high-water mark. All charges for the transportation of freight and passengers on railroads in the District of Alaska shall be printed and posted as required by section six of an Act to regulate commerce as amended on March second, eighteen hundred and eighty-nine, and such rates shall be subject to revision and modification by the Secretary of the Interior. (30 Stat. 409.)

This was section 2 of an act entitled "An act extending the homestead laws and providing for right of way for railroads in the District of Alaska, and for other purposes," cited above.

Section 1 of this act, which extended the homestead laws to Alaska, was amended by Act March 3, 1903, c. 1002, ante, § 5046.

Sections 3–11 of the act are set forth post, §§ 5084–5092.

Section 12 of the act authorizing the President to establish, discontinue, etc., land districts in Alaska, is set forth ante, § 4517. Section 13, granting mining rights to native-born citizens of the Dominion of Canada, is set forth ante, § 5049. Section 14 granting the privileges of the bonded warehouses to the government and citizens of the Dominion of Canada, is set forth, post, § 5694.

The District of Alaska was organized as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

Section 6 of Interstate Commerce Act of Feb. 4, 1887, c. 104, mentioned in the last provision of this section, is set forth, as amended by Act March 2, 1889, c. 382, § 1, also mentioned therein, and by subsequent acts, post, § 8569.

The President was authorized to locate, purchase, or construct and operate or lease a railroad to connect one or more Pacific harbors in Alaska with the navigable waters in the interior and with a coal field or fields, and terminal and station grounds and rights of way through the public lands in Alaska were granted, by Act March 12, 1914, c. 37, ante, §§ 3593a–3593d.

Notes of Decisions

Nature of grant.—The terms of the grant contained in this section are in præsenti. Washington Trust Co. of City of New York v. Dunway (1909) 169 Fed. 37, 94 C. C. A. 405.

A railroad has a grant of easement over tidelands in Alaska for the erection of necessary approaches, piers, and wharves in forming a connection with navigable waters. Dalton v. Katalla Co. (1911) 4 Alaska, 410.

Right of way over mineral location.—Where, prior to a survey, certain oil claims had been located on the public land in controversy in Alaska, such claims, if valid, withdrew the land from

entry, so that a railroad company could not obtain a right of way over the same under this section. Alaska Pac. Ry. & Terminal Co. v. Copper River & N. W. Ry. Co. (1908) 160 Fed. 862, 87 C. C. A. 666, affirming Alaska Pacific Ry. & Terminal Co. v. Copper River & N. E. Ry. Co. (1907) 3 Alaska, 343.

Taking timber from adjacent lands.—On compliance with the statute, public lands adjacent to the line of the road become charged with the company's right to take timber therefrom, and this right extends to lands included in a subsequent homestead entry. Bergstrom v. Alaska Cent. Ry. Co. (1907) 3 Alaska, 428.

Regulation of rates.—Authority of the Secretary of the Interior to prescribe rates was superseded by Act June 29, 1906 (post, § 8583). Interstate Commerce Commission v. U. S. ex rel. Humbolt S. S. Co. (1912) 32 Sup. Ct. 556, 224 U. S. 474, 56 L. Ed. 849, affirming U. S. v. Interstate Commerce Commission (1911) 37 App. D. C. 266.

Shores of navigable waters—Public policy.—See, also, notes to § 5046, ante, and § 5091, post.

The policy of the United States in regard to the ownership and disposition of shores of navigable streams in Alaska was declared in this act. Heine v. Roth (1905) 2 Alaska, 416. See, also, Alaska Gold Min. Co. v. Barbridge (1901) 1 Alaska, 311.

—— Lands not open to mining location.—Navigable streams in Alaska are public highways, and no portion of the bed or land lying between high and low water mark is subject to location under the mineral land laws. Alaska Gold Min. Co. v. Barbridge (1901) 1 Alaska, 311; Heine v. Roth (1905) 2 Alaska, 416.

—— Riparian or littoral rights.—See, also, notes to § 5046, ante.

The right of access to navigable waters by means of a wharf or other structure is subject to the proviso of this section as title to lands and beds of navigable waters. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

§ 5084. (Act May 14, 1898, c. 299, § 3.) Rights of several roads through canyons, etc.; grade crossings; effect on wagon roads, etc.; right to regulate transportation charges.

Any railroad company whose right of way, or whose track or roadbed upon such right of way, passes through any canyon, pass, or defile shall not prevent any other railroad company from the use and occupancy of said canyon, pass, or defile for the purposes of its road, in common with the road first located, or the crossing of other railroads at grade; and the location of such right of way through any canyon, pass, or defile shall not cause the disuse of any tramway, wagon road, or other public highway now located therein, nor prevent the location through the same of any such tramway, wagon road, or highway where such tramway, wagon road, or highway may be necessary for the public accommodation; and where any change in the location of such tramway, wagon road, or highway is necessary to permit the passage of such railroad through any canyon, pass, or defile, said railroad company shall, before entering upon the ground occupied by such tramway, wagon road, or highway, cause the same to be reconstructed at its own expense in the most favorable location, and in as perfect a manner as the original road or tramway: Provided, That such expenses shall be equitably divided between any number of railroad companies occupying and using the same canyon, pass, or defile, and that where the space is limited the United States district court shall require the road first constructed to allow any other railroad or tramway to pass over its track or tracks through such canyon, pass, or defile on such equitable basis as the said court may prescribe; and all shippers shall be entitled to equal accommodations as to the movement of their freight and without discrimination in favor of any person or corporation: Provided, That nothing herein shall be construed as depriving Congress of the right to regulate the charges for freight, passengers, and wharfage. (30 Stat. 410.)

See notes to section 2 of this act, ante, § 5083.

Notes of Decisions

Canyons—Peaceable entry.—Whether a railroad company's employés entered a canyon peacefully and lawfully as authorized by this section is a question of fact. Copper River & N. W. Ry. Co. v. Phillips (1912) 196 Fed. 328, 116 C. C. A. 148.

§ 5085. (Act May 14, 1898, c. 299, § 4.) Condemnation of land; preliminary surveys.

Where any company, the right of way to which is hereby granted, shall in the course of construction find it necessary to pass over private lands or possessory claims on lands of the United States, condemnation of a right of way across the same may be made in accordance with section three of the Act entitled "An Act to amend an Act entitled 'An Act to aid in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the use of the same for postal, military, and other purposes, approved July first, eighteen hundred and sixty-two,'" approved July second, eighteen hundred and sixty-four: Provided further, That any such company, by filing with the Secretary of the Interior a preliminary actual survey and plat of its proposed route, shall have the right at any time within one year thereafter, to file the map and profile of definite location provided for in this Act, and such preliminary survey and plat shall, during the said period of one year from the time of filing the same, have the effect to render all the lands on which said preliminary survey and plat shall pass subject to such right of way. (30 Stat. 410.)

See notes to section 2 of this act, ante, § 5083.

Act July 2, 1864, c. 216, § 3, 13 Stat. 357, mentioned in this section, was not incorporated in the Revised Statutes.

The time of the Western Alaska Construction Company to comply with the provisions of this section and section 5 of this act, next following, relating to rights of way over public lands in Alaska for railroads, in acquiring and completing its railroad, was extended by Act April 9, 1904, c. 1165, 33 Stat. 165.

§ 5086. (Act May 14, 1898, c. 299, § 5.) Map of location; forfeiture of rights granted.

Any company desiring to secure the benefits of this Act shall, within twelve months after filing the preliminary map of location of its road as hereinbefore prescribed, whether upon surveyed or unsurveyed lands, file with the register of the land office for the district where such land is located a map and profile of at least a twenty-mile section of its road or a profile of its entire road if less than twenty miles, as definitely fixed; and shall thereafter each year definitely locate and file a map of such location as aforesaid of not less than twenty miles additional of its line of road until the entire road has been thus definitely located, and upon approval thereof by the Secretary of the Interior the same shall be noted upon the records of said office, and thereafter all such lands over which such right of way shall pass shall be disposed of subject to such right of way: Provided, That if any section of said road shall not be completed within one year after the definite location of said section so approved, or if the map of definite location be not filed within one year as herein required, or if the entire road shall not be completed within four years from the filing of the map of definite location, the rights herein granted shall be forfeited as to any such uncompleted section of said road, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way, stations, and terminals shall cease and become null and void without further action. (30 Stat. 410.)

See notes to section 2 of this act, ante, § 5083.

Notes of Decisions

Survey and map essential.—A railroad acquires no right of way over the public lands in Alaska until the preliminary survey and plat thereof shall have been made. Such survey and plat reserves the rights of the company for one year. Steele v. Tanana Mines Ry. Co. (1905) 2 Alaska, 451.

Effect of filing maps.—The grant of right of way to railroads across the

public lands in Alaska takes effect only after the lines have been located on the ground; the preliminary lines reserve for one year, the definite lines reserve permanently. Steele v. Tanana Mines Ry. Co. (1905) 2 Alaska, 451. See, also, Washington Trust Co. of City of New York v. Dunaway (1909) 169 Fed. 37, 94 C. C. A. 405.

Upon making the final survey and filing the definite maps of location for a railroad across the public lands in Alaska, the right of way fixed thereby excludes any further disposition of the lands except subject to such right of way. Steele v. Tanana Mines Ry. Co. (1905) 2 Alaska, 451.

Change of location—Homestead entry and mining claim.—Where it is attempted to change the preliminary lines of a railroad right of way in Alaska, so that the same shall for the first time be located upon a homestead entry or placer mine location, it can only be done with the consent of the homesteader or locator, or upon condemnation proceedings. Steele v. Tanana Mines Ry. Co. (1905) 2 Alaska, 451.

§ 5087. (Act May 14, 1898, c. 299, § 6.) Right of way through lands in Alaska for wagon roads, wire rope, aerial or other tramways; reservation of minerals; preliminary survey and map of location; tolls; priority of applicants for right of way; forfeiture of rights granted; mortgages; liens.

The Secretary of the Interior is hereby authorized to issue a permit, by instrument in writing, in conformity with and subject to the restrictions herein contained, unto any responsible person, company, or corporation, for a right of way over the public domain in said District, not to exceed one hundred feet in width, and ground for station and other necessary purposes, not to exceed five acres for each station for each five miles of road, to construct wagon roads and wire rope, aerial, or other tramways, and the privilege of taking all necessary material from the public domain in said District for the construction of such wagon roads or tramways, together with the right, subject to supervision and at rates to be approved by said Secretary, to levy and collect toll or freight and passenger charges on passengers, animals, freight, or vehicles passing over the same for a period not exceeding twenty years, and said Secretary is also authorized to sell to the owner or owners of any such wagon road or tramway, upon the completion thereof, not to exceed twenty acres of public land at each terminus at one dollar and twenty-five cents per acre, such lands when located at or near tide water not to extend more than forty rods in width along the shore line and the title thereto to be upon such expressed conditions as in his judgment may be necessary to protect the public interest, and all minerals, including coal, in such right of way or station grounds shall be reserved to the United States: Provided, That such lands may be located concurrently with the line of such road or tramway, and the plat of preliminary survey and the map of definite location shall be filed as in the case of railroads and subject to the same conditions and limitations: Provided further, That such rights of way and privileges shall only be enjoyed by or granted to citizens of the United States or companies or corporations organized under the laws of a State or Territory; and such rights and privileges shall be held subject to the right of Congress to alter, amend, repeal, or grant equal rights to others on contiguous or parallel routes. And no right to construct a wagon road on which toll may be collected shall be granted unless it shall first be made to appear to the satisfaction of the Secretary of the Interior that the public convenience requires the construction of such proposed road, and that the expense of making the same available and convenient for public travel will not be less on an average than five hundred dollars per mile: Provided, That if the proposed line of road in any case shall be located over any road or trail in common use for public travel, the Secretary of the Interior shall decline to grant such right of way, if, in his opinion, the interests of the public would be injuriously affected thereby. Nor shall any right to collect toll upon any wagon road in said Dis-

trict be granted or inure to any person, corporation, or company until it shall be made to appear to the satisfaction of said Secretary that at least an average of five hundred dollars per mile has been actually expended in constructing such road; and all persons are prohibited from collecting or attempting to collect toll over any wagon road in said District, unless such person or the company or person for whom he acts shall at the time and place the collection is made or attempted to be made possess written authority, signed by the Secretary of the Interior, authorizing the collection and specifying the rates of toll: Provided, That accurate printed copies of said written authority from the Secretary of the Interior, including toll, freight, and passenger charges thereby approved, shall be kept constantly and conspicuously posted at each station where toll is demanded or collected. And any person, corporation, or company collecting or attempting to collect toll without such written authority from the Secretary of the Interior, or failing to keep the same posted as herein required, shall be deemed guilty of a misdemeanor, and on conviction thereof shall be fined for each offense not less than fifty dollars nor more than five hundred dollars, and in default of payment of such fine and costs of prosecution shall be imprisoned in jail not exceeding ninety days, or until such fine and costs of prosecution shall have been paid.

Any person, corporation, or company qualified to construct a wagon road or tramway under the provisions of this Act that may heretofore have constructed not less than one mile of road, at a cost of not less than five hundred dollars per mile, or one-half mile of tramway at a cost of not less than five hundred dollars; shall have the prior right to apply for such right of way and for lands at stations and terminals and to obtain the same pursuant to the provisions of this Act over and along the line hitherto constructed or actually being improved by the applicant, including wharves connected therewith. That if any party to whom license has been granted to construct such wagon road or tramway shall, for the period of one year, fail, neglect, or refuse to complete the same, the rights herein granted shall be forfeited as to any such uncompleted section of said wagon road or tramway, and thereupon shall revert to the United States without further action or declaration, the notation of such uncompleted section upon the records of the land office shall be canceled, and the reservations of such lands for the purposes of said right of way shall cease and become null and void without further action. And if such road or tramway shall not be kept in good condition for use, the Secretary of the Interior may prohibit the collection of toll thereon pending the making of necessary repairs. All mortgages executed by any company acquiring a right of way under this Act, upon any portion of its road that may be constructed in said District of Alaska, shall be recorded with the Secretary of the Interior, and the record thereof shall be notice of their execution, and shall be a lien upon all the rights and property of said company as therein expressed, and such mortgage shall also be recorded in the office of the secretary of the District of Alaska and in the office of the secretary of the State or Territory wherein such company is organized: Provided, That all lawful claims of laborers, contractors, subcontractors, or material men, for labor performed or material furnished in the construction of the railroad, tramway, or wagon road shall be a first lien thereon and take precedence of any mortgage or other lien. (30 Stat. 411.)

See note to section 2 of this act, ante, § 5083.

Notes of Decisions

Validity of railroad mortgage.—A railroad company, which had filed its preliminary map and commenced actual construction, executed a mortgage on

all its property then owned or to be thereafter acquired to secure bonds to be used for construction. It had not at that time complied with the provision requiring filing of map and profile of definite survey, but time for doing so and for completion of its road was afterward extended by a special act with which it complied. Held, that the mortgage was a valid lien. Washington Trust Co. of City of New York v. Dunaway (1909) 169 Fed. 37, 94 C. C. A. 405.

Recording mortgage.—The provisions for recording contemplate a mortgage on the road as an entirety, including right of way, roadbed, track, rolling stock, and appurtenant property, and the general provisions of the subsequent Alaska Code, requiring chattel mortgages to be recorded in the precinct where mortgagor resides and where the property is, and renewed each year, do not apply to such a railroad mortgage nor repeal special provisions for its recording. Washington Trust Co. of City of New York v. Dunaway (1909) 169 Fed. 37, 94 C. C. A. 405.

§ 5088. (Act May 14, 1898, c. 299, § 7.) Act not to apply to military, park, Indian, or other reservations.

This act shall not apply to any lands within the limits of any military, park, Indian, or other reservation unless such right of way shall be provided for by Act of Congress. (30 Stat. 412.)

See notes to section 2 of this act, ante, § 5083.

Notes of Decisions

Military reservations.—Entry of a public military reservation cannot be made under the land laws of the United States. Crawford v. Burr (1903) 2 Alaska, 33; Gavigan v. Crary (1905) 2 Alaska, 370.

Indian reservations—Entry.—Lands actually used and occupied by native tribes of Alaska are reserved from sale or other disposal by the laws of the United States. These laws constitute a direct and mandatory prohibition against an entry of such lands. U. S. v. Berrigan (1905) 2 Alaska, 442. And see Sutter v. Heckman (1901) 1 Alaska, 188; Johnson v. Pacific Coast S. S. Co. (1904) 2 Alaska, 224.

§ 5089. (Act May 14, 1898, c. 299, § 8.) Right to repeal or amend act; assignment of right of way.

Congress hereby reserves the right at any time to alter, amend, or repeal this Act or any part thereof; and the right of way herein and hereby authorized shall not be assigned or transferred in any form whatever prior to the construction and completion of at least one-fourth of the proposed mileage of such railroad, wagon road, or tramway, as indicated by the map of definite location, except by mortgages or other liens that may be given or secured thereon to aid in the construction thereof: Provided, That where within ninety days after the approval of this Act, proof is made to the satisfaction of the Secretary of the Interior that actual surveys, evidenced by designated monuments, were made, and the line of a railroad, wagon road or tramway located thereby, or that actual construction was commenced on the line of any railroad, wagon road or tramway, prior to January twenty-first, eighteen hundred and ninety-eight, the rights to inure hereunder shall, if the terms of this Act are complied with as to such railroad, wagon road or tramway, relate back to the date when such survey or construction was commenced; and in all conflicts relative to the right of way or other privilege of this Act the person, company or corporation having been first in time in actual survey or construction, as the case may be, shall be deemed first in right. (30 Stat. 412.)

See notes to section 2 of this act, ante, § 5083.

Notes of Decisions

Mortgage.—This section authorizes mortgaging in aid of the construction of a railroad partly constructed. Washington Trust Co. of City of New York v. Dunaway (1909) 169 Fed. 37, 94 C. C. A. 405.

Lien for license tax.—This section permits a mortgage or other lien in aid of construction, but a license tax due the United States is not made a lien on the property of the railroad company. U. S. v. Seward Peninsula R. Co. (1913) 203 Fed. 963, 122 C. C. A. 265.

§ 5090. (Act May 14, 1898, c. 299, § 9.) Map of location; requisites.

The map and profile of definite location of such railroad, wagon road, or tramway, to be filed as hereinbefore provided, shall, when the line passes over surveyed lands, indicate the location of the road by reference to section or other established survey corners, and where such line passes over unsurveyed lands the location thereon shall be indicated by courses and distances and by references to natural objects and permanent monuments in such manner that the location of the road may be readily determined by reference to descriptions given in connection with said profile map. (30 Stat. 413.)

See notes to section 2 of this act, ante, § 5083.

§ 5091. (Act May 14, 1898, c. 299, § 10.) Purchases for trade or manufacture; lands reserved; adverse claimants; applications; proof; patents.

Any citizen of the United States twenty-one years of age, or any association of such citizens, or any corporation incorporated under the laws of the United States or of any State or Territory now authorized by law to hold lands in the Territories, hereafter in the possession of and occupying public lands in the District of Alaska in good faith for the purposes of trade, manufacture, or other productive industry, may each purchase one claim only not exceeding eighty acres of such land for any one person, association, or corporation, at two dollars and fifty cents per acre, upon submission of proof that said area embraces improvements of the claimant and is needed in the prosecution of such trade, manufacture, or other productive industry, such tract of land not to include mineral or coal lands, and ingress and egress shall be reserved to the public on the waters of all streams, whether navigable or otherwise: Provided, That no entry shall be allowed under this Act on lands abutting on navigable water of more than eighty rods: Provided further, That there shall be reserved by the United States a space of eighty rods in width between tracts sold or entered under the provisions of this Act on lands abutting on any navigable stream, inlet, gulf, bay, or seashore, and that the Secretary of the Interior may grant the use of such reserved lands abutting on the water front to any citizen or association of citizens, or to any corporation incorporated under the laws of the United States or under the laws of any State or Territory, for landings, and wharves, with the provision that the public shall have access to and proper use of such wharves, and landings, at reasonable rates of toll to be prescribed by said Secretary, and a roadway sixty feet in width, parallel to the shore line as near as may be practicable, shall be reserved for the use of the public as a highway: Provided further, That in case more than one person, association, or corporation shall claim the same tract of land, the person, association, or corporation having the prior claim, by reason of actual possession and continued occupation in good faith, shall be entitled to purchase the same, but where several persons are or may be so possessed of parts of the tract applied for the same shall be awarded to them according to their respective interests: Provided further, That all claims substantially square in form and lawfully initiated, prior to January twenty-first eighteen hundred and ninety-eight, by survey or otherwise, under sections twelve and thirteen of the Act approved March third, eighteen hundred and ninety-one (Twenty-sixth Statutes at Large, Chapter five hundred and sixty-one), may be perfected and patented upon compliance with the provisions of said Act, but subject to the requirements and provisions of this Act, except as to area, but in no case shall such entry extend along the water front for more than one hundred and sixty rods: And provided further, That the Secretary of the Interior shall reserve for the

use of the natives of Alaska suitable tracts of land along the water front of any stream, inlet, bay, or sea shore for landing places for canoes and other craft used by such natives: Provided, That the Annette, Pribilof Islands, and the islands leased or occupied for the propagation of foxes be excepted from the operation of this Act. That all affidavits, testimony, proofs and other papers provided for by this Act and by said Act of March third, eighteen hundred and ninety-one, or by any departmental or Executive regulation thereunder, by depositions or otherwise, under commission from the register and receiver of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States, before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register and receiver of the proper local land office. And thereafter such proof, together with a certified copy of the field notes and plat of the survey of the claim, shall be filed in the office of the surveyor-general of the District of Alaska, and if such survey and plat shall be approved by him, certified copies thereof, together with the claimant's application to purchase, shall be filed in the United States land office in the land district in which the claim is situated, whereupon, at the expense of the claimant, the register of such land office shall cause notice of such application to be published for at least sixty days in a newspaper of general circulation published nearest the claim within the District of Alaska, and the applicant shall at the time of filing such field notes, plat, and application to purchase in the land office, as aforesaid, cause a copy of such plat, together with the application to purchase, to be posted upon the claim, and such plat and application shall be kept posted in a conspicuous place on such claim continuously for at least sixty days, and during such period of posting and publication or within thirty days thereafter any person, corporation, or association, having or asserting any adverse interest in, or claim to, the tract of land or any part thereof sought to be purchased, may file in the land office where such application is pending, under oath, an adverse claim setting forth the nature and extent thereof, and such adverse claimant shall, within sixty days after the filing of such adverse claim, begin action to quiet title in a court of competent jurisdiction within the District of Alaska, and thereafter no patent shall issue for such claim until the final adjudication of the rights of the parties, and such patent shall then be issued in conformity with the final decree of the court. (30 Stat. 413.)

The District of Alaska was organized as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

This section probably superseded the provisions of Act March 3, 1891, c. 561, §§ 12–14, ante, §§ 5080–5082, except as to claims initiated prior to January 1, 1898.

The Karluk Packing Company was authorized to purchase certain lands in Alaska, claimed by it, with certain reservations and exceptions, by Act May 21, 1900, c. 486, 31 Stat. 180.

The reservation, by this section, of a roadway along the shore was not to apply to mineral lands or town sites, by Act June 6, 1900, c. 786, § 27, post, § 5095.

See notes to section 2 of this act, ante, § 5083.

Notes of Decisions

Town-site entries—Occupancy or possession.—See, also, notes to § 5079, ante.

Under this statute a citizen may use and occupy a tract of public domain, not to exceed 80 acres in area, for the purpose of trade or manufacture, and whenever he shall have marked out said tract and shall have erected his mill or other machinery upon any part he may hold the entire tract. Copper River Lumber Co. v. Humphreys (1903) 2 Alaska, 39.

Disposal of shore lands—Tide lands.—In Alaska, title in fee to tide lands is held by the United States for the future state, and cannot be obtained either by priority of possession, by the ownership of the uplands, or by settlement and occupancy of the tide

lands themselves. Carroll v. Price (D. C. 1896) 81 Fed. 137; Sutter v. Heckman (1900) 1 Alaska, 81; Alaska Gold Min. Co. v. Barbridge (1901) 1 Alaska, 311; Juneau Ferry Co. v. Alaska S. S. Co. (1902) 1 Alaska, 533; Pacific Coast Co. v. McCloskey (1906) 3 Alaska, 77.

Where the town-site trustee of Juneau caused a survey to be extended over tide lands abutting thereon, and the tide lands to be platted into town lots and sold by the trustee, the trustee acted without authority, and the deed to the tide land conveyed no title. Pacific Coast Co. v. McCloskey (1906) 3 Alaska, 77.

—— **Riparian and littoral rights.**—See, also, notes to § 5046, ante.

An owner of lands in Alaska which border on tidal waters has no title to the soil below high-water mark, and cannot enjoin the maintenance of a wharf or other structure in aid of navigation thereon, unless it prevents his own free access to the navigable waters. Decker v. Pacific Coast S. S. Co. (C. C. A. 1908) 164 Fed. 974.

An equitable owner or claimant of government lands in Alaska on the seashore may convey his littoral rights to an individual or corporation, to enable such grantee to erect and maintain a wharf for the benefit of commerce and navigation. Id.

Citizens of the United States claiming, in good faith, uplands in Alaska, and in actual occupation and possession thereof, take the same littoral rights as are incident to ownership in fee, and among these is the right of access over and across abutting tide lands to deep water. Lewis v. Johnson (D. C. 1896) 76 Fed. 476.

A temporary and uncertain structure on tide lands in Alaska is not sufficient to acquire a right of possession or occupancy. Juneau Ferry Co. v. Alaska S. S. Co. (1902) 1 Alaska, 533.

Where the surveyor employed by a town-site trustee so located a street along the dividing line between ordinary high tide line and the upland as to include a portion of each, with the intention of separating the tide lands from the upland owner's property, and thus preventing the latter from claiming littoral rights in the tide lands, the map so made by the surveyor, approved by the trustee and the Secretary of the Interior, was without authority of law, and in no way divested the then owner of the possessory title from any interest which he had then acquired. Pacific Coast Co. v. McCloskey (1906) 3 Alaska, 77.

A trespasser has no right to go upon tide land in front of the upland owner and erect structures which interrupt or interfere with the right of the upland owner's access to deep water in front of his upland property. Id.

The only littoral right which is recognized on tide lands in Alaska is the right of an upland owner to ingress and egress over the same. Id.

—— **Roadway reservation.**—The provision for a roadway reservation 60 feet wide parallel to the shore line as near as may be practicable for uses of public highway, refers to a roadway through the reserved land previously described, and not other lands granted in fee under the homestead laws. Dalton v. Hazelet (1910) 182 Fed. 561, 105 C. C. A. 99.

The proviso for the reservation of a roadway has no reference to patents for homesteads in Alaska. Alaska Cent. Ry. Co. v. Dooley (1910) 4 Alaska, 184.

—— **Jurisdiction of interior department.**—The department of the interior has sole jurisdiction over tide lands, and its action thereon is final. Lewis v. Johnson (1902) 1 Alaska, 529.

Actions to quiet title—Nature and form.—The reference to the courts of the controversy under the statute is in aid of the land department, and such form of action may be adopted as would be most appropriate to meet the exigencies of the case. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35. See, also, Ripinsky v. Hinchman (1911) 186 Fed. 151, 108 C. C. A. 263, modifying decree on rehearing (1910) 181 Fed. 786, 105 C. C. A. 462.

The statute has in purview adverse claimants who are seeking title from the government to the same parcel of government land, and it is incumbent upon the contestants to show by what right they respectively claim superiority. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35. And see Heckman v. Sutter (1902) 119 Fed. 83, 84, 55 C. C. A. 635.

This statute has its prototype in the general mining laws. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

—— **Homestead and mineral claimants.**—The requirement of this section as to suits to quiet title does not apply to a contest between a homestead settler and a locator of a mineral claim concerning the mineral character of the land claimed by both. Nelson v. Brownell (1912) 193 Fed. 641, 113 C. C. A. 509; Lassley v. Brownell (1912) 199 Fed. 772, 118 C. C. A. 362.

—— **Practice.** — An adverse suit brought to determine the respective rights of a claimant under the law permitting soldiers' additional homestead certificates to be located on the public land in Alaska, and those who deny his right by adverse proceedings may be maintained in the district courts of Alaska; the practice and parties being controlled and regulated solely by the Code of Alaska. Gavigan v. Crary (1905) 2 Alaska, 370.

—— **Parties.**—Occupants of lots in an Alaska unincorporated town claimed as

a town site, prior to the appointment of a town-site trustee, may join in a suit brought in aid of an adverse claim filed against a homestead entry which conflicts with their claims. Hinchman v. Ripinsky (1913) 202 Fed. 625, 121 C. C. A. 35.

Settlers upon public lands claimed under the laws permitting soldier's additional homestead certificates to be located in Alaska may intervene in an adverse suit brought to quiet title thereto, though they have not filed an adverse in the land office proceedings. Gavigan v. Crary (1905) 2 Alaska, 370.

§ 5092. (Act May 14, 1898, c. 299, § 11.) Sale of timber on public lands in Alaska.

The Secretary of the Interior, under such rules and regulations as he may prescribe, may cause to be appraised the timber or any part thereof upon public lands in the District of Alaska, and may from time to time sell so much thereof as he may deem proper for not less than the appraised value thereof, in such quantities to each purchaser as he shall prescribe, to be used in the District of Alaska, but not for export therefrom. And such sales shall at all times be limited to actual necessities for consumption in the District from year to year, and payments for such timber shall be made to the receiver of public moneys of the local land office of the land district in which said timber may be sold, under such rules and regulations as the Secretary of the Interior may prescribe, and the moneys arising therefrom shall be accounted for by the receiver of such land office to the Commissioner of the General Land Office in a separate account, and shall be covered into the Treasury. The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber found upon the public lands in said District of Alaska by actual settlers, residents, individual miners, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and for domestic purposes, as may actually be needed by such persons for such purposes. (30 Stat. 414.)

The District of Alaska was organized as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

In addition to the provisions of this section relating to the sale and use for certain purposes of timber on public lands in Alaska, pulp wood or wood pulp manufactured from timber in Alaska may be exported therefrom, by Act Feb. 1, 1905, c. 288, § 2, post, § 5093.

§ 5093. (Act Feb. 1, 1905, c. 288, § 2.) Export of pulp wood or wood pulp from Alaska.

Pulp wood or wood pulp manufactured from timber in [the district of] Alaska may be exported therefrom. (33 Stat. 628.)

This section was part of an act which transferred the execution of the laws relating to forest reserves from the Secretary of the Interior to the Secretary of Agriculture, other sections of which are set forth post, §§ 5142, 5152.

The District of Alaska was organized as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

§ 5094. (Act May 17, 1884, c. 53, § 8.) Missionary stations.

The land not exceeding six hundred and forty acres at any station now occupied as missionary stations among the Indian tribes in said section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which said missionary stations respectively belong until action by Congress. (23 Stat. 26.)

This section was part of an act entitled "An act providing a civil government for Alaska," cited above.

Tracts occupied as missionary stations were excepted from the operation of the town-site and trade-purchase laws by a proviso of Act March 3, 1891, c. 561, § 14, ante, § 5082.

§ 5095. (Act June 6, 1900, c. 786, § 27.) Land for schools or missions; patents; general land laws not put in force in Alaska.

The Indians or persons conducting schools or missions in the district shall not be disturbed in the possession of any lands now

actually in their use or occupation, and the land, at any station not exceeding six hundred and forty acres, now occupied as missionary stations among the Indian tribes in the section, with the improvements thereon erected by or for such societies, shall be continued in the occupancy of the several religious societies to which the missionary stations respectively belong, and the Secretary of the Interior is hereby directed to have such lands surveyed in compact form as nearly as practicable and patents issued for the same to the several societies to which they belong; but nothing contained in this Act shall be construed to put in force in the district the general land laws of the United States. (31 Stat. 330.)

This section was part of an act entitled "An act making further provision for a civil government for Alaska, and for other purposes," cited above.

The District of Alaska was organized as a Territory by Act Aug. 24, 1912, c. 387, ante, §§ 3528–3544.

Reservation of public lands for the support of educational institutions was made by Act March 4, 1915, c. 181, ante, §§ 5045a, 5045b.

§ 5096. (Act May 17, 1906, c. 2469.) Allotment of land to native Indians or Eskimo as homesteads.

The Secretary of the Interior is hereby authorized and empowered, in his discretion and under such rules as he may prescribe, to allot not to exceed one hundred and sixty acres of nonmineral land in the district of Alaska to any Indian or Eskimo of full or mixed blood who resides in and is a native of said district, and who is the head of a family, or is twenty-one years of age; and the land so allotted shall be deemed the homestead of the allottee and his heirs in perpetuity, and shall be inalienable and nontaxable until otherwise provided by Congress. Any person qualified for an allotment as aforesaid shall have the preference right to secure by allotment the nonmineral land occupied by him not exceeding one hundred and sixty acres. (34 Stat. 197.)

This was an act entitled "An act authorizing the Secretary of the Interior to allot homesteads to the natives of Alaska."

The general homestead provisions are contained in Act March 3, 1903, c. 1002, ante, § 5046, and Act July 8, 1916, c. 228, ante, §§ 5046a, 5046b.

§ 5096a. (Act March 3, 1891, c. 561, § 15.) Annette islands reserved for Metlakahtla Indians.

That until otherwise provided by law the body of lands known as Annette Islands, situated in Alexander Archipelago in Southeastern Alaska, on the north side of Dixon's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtlans who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to time by the Secretary of the Interior. (26 Stat. 1101.)

This was section 15 of an act entitled "An act to repeal timber-culture laws, and for other purposes," cited above.

CHAPTER ELEVEN

Miscellaneous Provisions Relating to the Public Lands

Sec.

PATENTS FOR PRIVATE LAND CLAIMS

5097. Patents to issue for claims heretofore confirmed.
5098. Patents issued to persons who had died before issue, effect of.
5099. Title to lands in Missouri confirmed.
5100. Existing rights not affected.
5101. Certificates of location of private land claims in Florida, Louisiana, and Missouri; issue and location.
5102. Certificates receivable in payment of pre-emption claims or in commutation of homestead entries.
5103. Location of certificates; entries; patents.
5104. Application of act to certificates issued under Act June 2, 1858, c. 81.
5105. Patents for locations under certificates made prior to Act Jan. 28, 1879, c. 30.

DISPOSITION OF SUSPENDED ENTRIES AND CLAIMS; INVALID AND DEFECTIVE CLAIMS AND PATENTS THEREFOR

5106. Cases of "suspended entries of public lands" and "suspended pre-emption land claims."
5107. Adjudications under above, how approved.
5108. Decisions to be arranged into classes.
5109. Patents to issue for lands in the first class, and lands in second class to revert to the United States.
5110. Commissioner to order into market and sell at auction isolated or disconnected tracts not exceeding one quarter section; sale of mountainous or rough tracts, not isolated or disconnected, upon application of adjoining landowner.
5111. Patents surrendered and new ones issued in certain cases.
5112. Extent of foregoing provisions.
5113. Suspension of entries for correction of clerical errors; patents.
5114. Limitations of suits to annul patents.
5115. Entries and final proofs, made out of proper land district by error of officers, confirmed.

TIMBER-CULTURE

5116. Repeal of timber-culture laws.

EVIDENCES OF TITLE

5117. The false making, altering, etc., of any instrument in writing, etc., concerning lands, etc., in California; penalty.
5118. Falsely dating any evidence of title under Mexican authority, etc., to lands in California; penalty.
5119. Presenting false or counterfeited evidences of title, etc., to lands in California, and prosecuting suits thereon; penalty.

ENFORCEMENT OF PROVISIONS

5120. Power of Commissioner of Land-Office to enforce this Title.

PATENTS FOR PRIVATE LAND CLAIMS

§ 5097. (R. S. § 2447.) Patents to issue for claims heretofore confirmed.

In case of any claim to land in any State or Territory which has heretofore been confirmed by law, and in which no provision is made by the confirmatory statute for the issue of a patent, it may be lawful, where surveys for the land have been or may hereafter be made, to issue patents for the claims so confirmed, upon the presentation to the Commissioner of the General Land-Office of plats of survey thereof, duly approved by the surveyor-general of any State or Territory, if the same be found correct by the Commissioner. But such patents shall only operate as a relinquishment of title on the part of the United States, and shall in no manner interfere with any valid adverse right to the same land, nor be construed to preclude a legal investigation and decision by the proper judicial tribunal between adverse claimants to the same land.

Act Dec. 22, 1854, c. 10, 10 Stat. 599.

All the right, title, and interest of the United States to lands in Missouri confirmed to claimants by Acts of Congress, or officers or boards acting un-

der any act of Congress, were granted to such persons, to the same effect as if patents had been issued therefor, by Act June 6, 1874, c. 223, post, §§ 5099, 5100.

The issuance of certificates of location or scrip to claimants of land in Florida, Louisiana, and Missouri whose claims had been allowed, and the location of land thereunder, were provided for by Act Jan. 28, 1879, c. 30, and Act May 30, 1894, c. 87, post, §§ 5101–5104.

See § 699, ante, and notes thereunder.

Notes of Decisions

Construction and application of section.—The words "confirmed by law" mean confirmation by the act of that power which, under our system, enacts law, and not confirmation by mere construction of law; and this act authorizes the issue of a patent in every case where, by valid enactment, the law-making power had before its date declared the title to be in the person named. (1863) 10 Op. Atty. Gen. 508. See, also, Shaw v. Kellogg (1898) 18 Sup. Ct. 632, 645, 170 U. S. 312, 42 L. Ed. 1050.

Effect of confirmatory statute.—A confirmatory statute passes title as effectually as if it contained in terms a grant de novo. Ryan v. Carter (1876) 93 U. S. 78, 82, 23 L. Ed. 807; Tameling v. United States Freehold & Emigration Co. (1876) 93 U. S. 644, 23 L. Ed. 998. And see U. S. v. Maxwell Land Grant Co. (C. C. 1884) 21 Fed. 19, 22.

Operation of patent as relinquishment.—A patent issued under this section conveys no title if the United States at the time thereof had no title to the land described therein. Missionary Society of M. E. Church v. Dalles City (1883) 2 Sup. Ct. 672, 674, 107 U. S. 336, 27 L. Ed. 545.

A patent granted under this section, on confirmation of a claim under a confirmatory act not providing for a patent, is allowed to operate only as a quitclaim or relinquishment of the claim of the United States to the land, and without prejudice to adverse claimants. Louis v. Giroir (1888) 40 La. Ann. 710, 4 South. 878.

§ 5098. (R. S. § 2448.) Patents issued to persons who had died before issue, effect of.

Where patents for public lands have been or may be issued, in pursuance of any law of the United States, to a person who had died, or who hereafter dies, before the date of such patent, the title to the land designated therein shall inure to and become vested in the heirs, devisees, or assignees of such deceased patentee as if the patent had issued to the deceased person during life.

Act May 20, 1836, c. 76, 5 Stat. 31.

Notes of Decisions

Construction and purpose of statute.—After final proof, it has been the uniform practice to alienate homesteads the same as if the homesteader had title in fee, and this section clearly countenances such conveyances. In re Parmeter's Estate (D. C. 1914) 211 Fed. 757, 758, 759.

The design of this act was not to set up void entries or surveys, but merely to give effect to patents that, but for the act, would be void because issued to a deceased person. Stubblefield v. Boggs (1853) 2 Ohio St. 216.

Indian lands.—Where a treaty reserves land to be selected by the president, and patented to an individual of a tribe, such reservation creates an equitable estate in that individual which he may sell, and upon the selection and patenting of the land title will vest in his grantee, and this rule is operative where the individual conveyed his interest and died before the issuing of the patent. Crews v. Burcham (1861) 1 Black, 352, 355, 17 L. Ed. 91.

Lands in an Indian reservation are not "public lands," within this section, nor are patents issued to Indian allottees of reservation lands issued pursuant to a law of the United States within such section. Meeker v. Kaelin (C. C. 1909) 173 Fed. 216.

Validity and effect of patent.—Patents for land issued to persons deceased inure to their heirs as fully as if made in the lifetime of the deceased. Galloway v. Finley (1838) 12 Pet. 264, 296, 9 L. Ed. 1079; Schedda v. Sawyer (C. C. 1846) Fed. Cas. No. 12,443; Lamb v. Starr (C. C. 1868) Fed. Cas. No. 8,022; Phillips v. Sherman (1860) 36 Ala. 189; Tarver v. Smith (1861) 38 Ala. 135; Waterman v. Smith (1859) 13 Cal. 373; Trimble's Lessee v. Boothby (1846) 14 Ohio, 109, 45 Am. Dec. 526. And see Davenport v. Lamb (1871) 13 Wall. 418, 427, 20 L. Ed. 655; Hershberger v. Blewett (C. C. 1892) 55 Fed. 170, 176.

A patent issued after the death of the patentee is void. Galloway v. Finley (1838) 37 U. S. (12 Pet.) 264, 9 L. Ed. 1079; Wood v. Ferguson's Lessee (1857) 7 Ohio St. 288.

Where the right of a decedent in public lands is sold under a judgment, and a sheriff's deed is made to the purchaser, the deed conveys a valid title in prefer-

ence to the title of decedent's heir or devisee, and the patent when issued will convey the title to the person holding the equitable title. Landes v. Brant (1850) 10 How. 348, 373, 13 L. Ed. 449.

A patent for land issued to A. and B. after A.'s death vested the entire estate in B., one half for himself, the other half in trust for A.'s heirs. Reynolds v. Clark (Ohio, 1834) Wright, 56.

—— **Taking by inheritance or purchase.**—Heirs of homestead entryman who made final proof before death could take as heirs where a patent issued in his name only, and not as beneficiaries under the statute. Doran v. Kennedy (1915) 35 Sup. Ct. 615, 237 U. S. 362, 59 L. Ed. 996, affirming decree (1913) 141 N. W. 851, 122 Minn. 1.

Where homesteader died after final proof, and patent was issued to her husband, he took as her heir, and not directly as a purchaser from the government. Parmeter v. Butler (C. C. A. 1915) 228 Fed. 668.

Under a patent issued under the desert land laws to heirs of a deceased entryman, the heirs take by purchase and not by inheritance. Powell v. Powell (1912) 126 Pac. 1058, 22 Idaho, 531.

Who are heirs.—The heirs intended by a patent are those heirs who would have inherited the separate property of the deceased under the state laws. Powell v. Powell (1912) 126 Pac. 1058, 22 Idaho, 531. And see Hutchinson Investment Co. v. Caldwell (1894) 14 Sup. Ct. 504, 506, 152 U. S. 65, 38 L. Ed. 356; In re Parmeter's Estate (D. C. 1914) 211 Fed. 757.

§ 5099. (Act June 6, 1874, c. 223, § 1.) Title to lands in Missouri confirmed.

All of the right, title, and interest of the United States in and to all of the lands in the State of Missouri which have at any time heretofore been confirmed to any person or persons by any act of Congress, or by any officer or officers, or board or boards of commissioners, acting under and by authority of any act of Congress, shall be, and the same are hereby, granted, released, and relinquished by the United States, in fee-simple, to the respective owners of the equitable titles thereto, and to their respective heirs and assigns forever, as fully and as completely, in every respect whatever, as could be done by patents issued therefor according to law. (18 Stat. 62.)

This section and the section next following were part of an act entitled "An act obviating the necessity of issuing patents for certain private land-claims in the State of Missouri, and other purposes."

Section 3 of this act provided for the discontinuance of the office of recorder of land titles in Missouri, the disposition of the records, etc., of the office, and the exercise of the powers and performance of the duties of recorder. It is set forth ante, § 4514.

Notes of Decisions

Scope of act.—This act refers to those cases in which no patents had been given. Sweringen v. St. Louis (1902) 22 Sup. Ct. 569, 572, 185 U. S. 38, 46 L. Ed. 795.

§ 5100. (Act June 6, 1874, c. 223, § 2.) Existing rights not affected.

Nothing contained in the first section of this act shall, in any manner, abridge, divest, impair, injure, or prejudice any valid right, title or interest of any person or persons in or to any portion or part of the lands mentioned in said first section; and this act shall in nowise affect any lands or lots heretofore relinquished to the United States. (18 Stat. 62.)

§ 5101. (Act Jan. 28, 1879, c. 30, § 1.) Certificates of location of private land claims in Florida, Louisiana, and Missouri; issue and location.

Whenever, in cases prosecuted under the acts of Congress of June twenty-second, eighteen hundred and sixty, March second, eighteen hundred and sixty-seven, and the first section of the act of June tenth, eighteen hundred and seventy-two, providing for the adjustment of private land-claims in the States of Florida, Louisiana and Missouri, the validity of the claim has been, or shall be hereafter, recognized by the Supreme Court of the United

States, and the court has decreed that the plaintiff or plaintiffs is or are entitled to enter a certain number of acres upon the public lands of the United States, subject to private entry at one dollar and twenty-five cents per acre, or to receive certificate of location for as much of the land the title to which has been established as has been disposed of by the United States, certificate of location shall be issued by the Commissioner of the General Land Office attested by the seal of said office, to be located as provided for in the sixth section of the aforesaid act of Congress of June twenty-second, eighteen hundred and sixty, or applied according to the provisions of the second section of this act; and said certificate of location or scrip shall be subdivided according to the request of the confirmee or confirmees, and, as nearly as practicable, in conformity with the legal divisions and subdivisions of the public lands of the United States, and shall be, and are hereby declared to be, assignable by deed or instrument of writing, according to the form and pursuant to regulations prescribed by the Commissioner of the General Land Office, so as to vest the assignee with all the rights of the original owners of the scrip, including the right to locate the scrip in his own name. (20 Stat. 274.)

This section and the three sections next following were an act entitled "An act defining the manner in which certain land-scrip may be assigned and located, or applied by actual settlers, and providing for the issue of patents in the name of the locator or his legal representatives."

Act June 22, 1860, c. 188, 12 Stat. 85, mentioned in this section, provided a method of final adjustment of private land claims in Florida, Louisiana, and Missouri. Act March 2, 1867, c. 184, 14 Stat. 544, and Act June 10, 1872, c. 421, § 1, 17 Stat. 378, also mentioned, continued Act June 22, 1860, c. 188, in force.

§ 5102. (Act Jan. 28, 1879, c. 30, § 2.) Certificates receivable in payment of pre-emption claims or in commutation of homestead entries.

Such scrip shall be received from actual settlers only in payment of pre-emption claims or in commutation of homestead claims, in the same manner and to the same extent as is now authorized by law in the case of military bounty-land warrants. (20 Stat. 275.)

The pre-emption laws were repealed by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097.

The homestead laws are contained in chapter 5 of this Title.

Provisions relating to military bounty-land warrants are contained in chapter 10 of this Title.

§ 5103. (Act Jan. 28, 1879, c. 30, § 3.) Location of certificates; entries; patents.

The register of the proper land-office, upon any such certificate being located, shall issue, in the name of the party making the location, a certificate of entry, upon which, if it shall appear to the satisfaction of the Commissioner of the General Land Office that such certificate has been fairly obtained, according to the true intent and meaning of this act, a patent shall issue, as in other cases, in the name of the locator or his legal representative. (20 Stat. 275.)

The provisions of this section were extended to scrip issued prior to the passage of this act, by Act May 30, 1894, c. 87, post, § 5105.

§ 5104. (Act Jan. 28, 1879, c. 30, § 4.) Application of act to certificates issued under Act June 2, 1858, c. 81.

The provisions of this act respecting the assignment and patenting of scrip and its application to pre-emption and homestead claims shall apply to the indemnity-certificates of location provided for by the act of the second of June, eighteen hundred and fifty-eight, entitled "An act to provide for the location of certain confirmed private land-claims in the State of Missouri, and for other purposes." (20 Stat. 275.)

Act June 2, 1858, mentioned in this section, was chapter 81 of the acts of that session, 11 Stat. 294.

§ 5105. (Act May 30, 1894, c. 87.) Patents for locations under certificates made prior to Act Jan. 28, 1879, c. 30.

It shall be lawful for the Commissioner of the General Land Office to cause patents to be issued, as evidence of title, for all valid locations made with land scrip issued pursuant to decrees of the Supreme Court of the United States, which valid locations were made prior to the approval of the aforesaid Act in the same manner that patents are now issued under the provisions of section three of said Act of January twenty-eighth, eighteen hundred and seventy-nine. (28 Stat. 84.)

This was an act entitled "An act supplementary to the act of Congress approved January twenty-eighth, eighteen hundred and seventy-nine, entitled 'An act defining the manner in which certain land scrip may be assigned and located or applied by actual settlers, and providing for the issue of patents in the name of the locator or his legal representatives.' "

Act Jan. 28, 1879, c. 30, mentioned in this section, is set forth ante, §§ 5101–5104.

(R. S. § 2449. Transferred to Chapter 10A.)

This section provided for the passing of fee-simple title by grants of lands to the several States and Territories. It is placed, with other provisions relating to such grants, under chapter 10 A of this Title, "Reservations and Grants to States for Public Purposes," § 4870.

DISPOSITION OF SUSPENDED ENTRIES AND CLAIMS; INVALID AND DEFECTIVE CLAIMS AND PATENTS THEREFOR

§ 5106. (R. S. § 2450, as amended, Act Feb. 27, 1877, c. 69, § 1.) Cases of "suspended entries of public lands" and "suspended pre-emption land claims."

The Commissioner of the General Land-Office is authorized to decide upon principles of equity and justice, as recognized in courts of equity, and in accordance with regulations to be settled by the Secretary of the Interior, the Attorney-General, and the Commissioner, conjointly, consistently with such principles, all cases of suspended entries of public lands and of suspended pre-emption land-claims, and to adjudge in what cases patents shall issue upon the same.

Act Aug. 3, 1846, c. 78, § 1, 9 Stat. 51. Act March 3, 1853, c. 152, § 1, 10 Stat. 258. Act June 26, 1856, c. 47, 11 Stat. 22. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 244.

This section was amended by Act Feb. 27, 1877, c. 69, § 1, cited above, by striking out the words "Secretary of the Treasury," and inserting in place thereof the words "Secretary of the Interior."

The issuance of patents to settlers on donation lands in Washington and Oregon afterwards included within military reservations, upon their abandonment, was provided for by Act Feb. 28, 1877, c. 74, 19 Stat. 264.

The suspension of entries on public lands for correction of clerical errors was provided for by Act March 3, 1891, c. 561, §§ 7, 8, post, §§ 5113, 5114.

The time for proving claims to donation lands in Oregon, Washington, and Idaho, was extended by Act July 26, 1894, c. 163, 28 Stat. 122.

Certain cash entries on public lands were confirmed by Act Jan. 30, 1897, c. 111, 29 Stat. 507.

Notes of Decisions

Application and purpose of statute.—The purpose of this legislation was not to limit or restrict the general jurisdiction of the land officers, but it was rather to supplement that jurisdiction by authorizing them to apply the principles of equity for the purpose of saving irregular entries from rejection when otherwise meritorious. Hawley v. Diller (1900) 20 Sup. Ct. 986. 992, 178 U. S. 476, 44 L. Ed. 1157, affirming Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514, reversing Hawley v. Diller (C. C. 1896) 75 Fed. 946.

Requirements of statute.—This section requires that cases of suspended entries shall be tried according to the principles of equity, and under regulations to be prescribed by the secretary of the interior, the attorney general, and the commissioner of the land office. Foley v. Harrison (1853) 15 How. 433, 14 L. Ed. 761; Neff v. U. S. (1908) 165 Fed. 273, 91 C. C. A. 241; Stimson Land Co. v. Hollister (C. C. 1896) 75 Fed. 941. See, also, U. S. v. Burkett (D. C. 1907) 150 Fed. 208; Gage v. Gunther (1902) 68 Pac. 710, 136 Cal. 338, 89 Am. St. Rep. 141.

§ 5107. (R. S. § 2451, as amended, Act Feb. 27, 1877, c. 69, § 1.) Adjudications under above, how approved.

Every such adjudication shall be approved by the Secretary of the Interior and the Attorney-General, acting as a board; and shall operate only to divest the United States of the title of the lands embraced thereby, without prejudice to the rights of conflicting claimants.

Act Aug. 3, 1846, c. 78, § 1, 9 Stat. 51. Act Feb. 27, 1877, c. 69, § 1, 19 Stat. 244.

This section was amended by Act Feb. 27, 1877, c. 69, § 1, cited above, by striking out the words "Secretary of the Treasury," and inserting in place thereof the words "Secretary of the Interior."

Notes of Decisions

Requirement of statute.—This section requires that every adjudication shall be approved by the secretary of the interior and the attorney general acting as a board. Stimson Land Co. v. Rawson (C. C. 1894) 62 Fed. 426, 429.

Decision rejecting or canceling entry.—A decision by the secretary of the interior, reversing a decision of the commissioner of the general land office, and rejecting and canceling an entry for fraud, is not in excess of the jurisdiction conferred upon him by law, because the attorney general did not join in the consideration of the matter, since the requirement of the approval of a commissioner's decision by the secretary and the attorney general, acting as a board, applies only to decisions sustaining irregular entries, and thereby devesting the United States of its title, and does not extend to decisions rejecting or canceling entries. Hawley v. Diller (1900) 20 Sup. Ct. 986, 993, 178 U. S. 476, 44 L. Ed. 1157, affirming decree Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514, reversing decree Hawley v. Diller (C. C. 1896) 75 Fed. 946.

The fact that a ruling of the commissioner of the general land office canceling an entry of public land for fraud has not been approved by the secretary of the interior, as this section provides, gives no right to the holder of the certificate based on such entry to assert title as against the holder of a patent to the land issued upon another title. California Redwood Co. v. Litle (C. C. 1897) 79 Fed. 854.

Conclusiveness of decision.—A decision of the board is final, there being no provision for an appeal to any other jurisdiction. Foley v. Harrison (1853) 15 How. 433, 447, 14 L. Ed. 761.

A decision by an officer of the executive branch of the government, canceling an entry after it has been allowed and the land paid for and before the legal title has passed from the government, is not binding on the courts if supported only by a general conclusion that fraud has been committed, and that the entry was not made in good faith, with intent on the part of the entryman to take the land for his exclusive use and benefit. Stimson Land Co. v. Rawson (C. C. 1894) 62 Fed. 426.

(R. S. § 2452. Repealed.)

This section directed the Commissioner of the General Land-Office to report to Congress a list of adjudications, etc., under the preceding sections. It was expressly repealed by Act March 2, 1895, c. 177, § 3, ante, § 707.

§ 5108. (R. S. § 2453.) Decisions to be arranged into classes.

The Commissioner shall arrange his decisions into two classes; the first class to embrace all such cases of equity as may be finally confirmed by the board, and the second class to embrace all such cases as the board reject and decide to be invalid.

Act Aug. 3, 1846, c. 78, § 3, 9 Stat. 51.

Notes of Decisions

Purpose of statute.—The purpose of this legislation was to supplement the general jurisdiction of the land officers. Hawley v. Diller (1900) 20 Sup. Ct. 986, 992, 178 U. S. 476, 44 L. Ed. 1157.

§ 5109. (R. S. § 2454.) Patents to issue for lands in the first class, and lands in second class to revert to the United States.

For all lands covered by claims which are placed in the first class, patents shall issue to the claimants; and all lands embraced by

claims placed in the second class shall ipso facto revert to, and become part of, the public domain.

Act Aug. 3, 1846, c. 78, § 4, 9 Stat. 51.

Notes of Decisions

Necessity and object of statute.—This legislation was necessary to save irregular entries from rejection when otherwise meritorious. Hawley v. Diller (1900) 20 Sup. Ct. 986, 992, 178 U. S. 476, 44 L. Ed. 1157.

§ 5110. (R. S. § 2455, as amended, Act Feb. 26, 1895, c. 133, Act June 27, 1906, c. 3554, and Act March 28, 1912, c. 67.) Commissioner to order into market and sell at auction isolated or disconnected tracts not exceeding one quarter section; sale of mountainous or rough tracts, not isolated or disconnected, upon application of adjoining landowner.

It shall be lawful for the Commissioner of the General Land Office to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than one dollar and twenty-five cents an acre, any isolated or disconnected tract or parcel of the public domain not exceeding one quarter section which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land officers of the district in which such land may be situated: Provided, That any legal subdivisions of the public land, not exceeding one quarter section, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of said commissioner, be ordered into the market and sold pursuant to this Act upon the application of any person who owns lands or holds a valid entry of, lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this Act: Provided further, That this Act shall not defeat any vested right which has already attached under any pending entry or location.

Act Aug. 3, 1846, c. 78, § 5, 9 Stat. 51. Act Feb. 26, 1895, c. 133, 28 Stat. 687. Act June 27, 1906, c. 3554, 34 Stat. 517. Act March 28, 1912, c. 67, 37 Stat. 77.

This section, as originally enacted, was as follows:

"It may be lawful for the Commissioner of the General Land-Office to order into market, after due notice, without the formality and expense of a proclamation of the President, all lands of the second class, though heretofore unproclaimed and unoffered, and such other isolated or disconnected tracts or parcels of unoffered lands which, in his judgment, it would be proper to expose to sale in like manner. But public notice of at least thirty days shall be given by the land-officers of the district in which such lands may be situated, pursuant to the directions of the Commissioner."

It was amended by Act Feb. 26, 1895, c. 133, cited above, to read as follows:

"It shall be lawful for the Commissioner of the General Land Office to order into market and sell for not less than one dollar and twenty-five cents per acre any isolated or disconnected tract or parcel of the public domain less than one quarter section which in his judgment it would be proper to expose to sale after at least thirty days' notice by the land officers of the district in which such lands may be situated: Provided, That lands shall not become so isolated or disconnected until the same have been subject to homestead entry for a period of three years after the surrounding land has been entered, filed upon, or sold by the Government: Provided, That not more than one hundred and sixty acres shall be sold to any one person."

It was further amended by the amendment of said amendatory act by Act June 27, 1906, c. 3554, cited above, to read substantially as set forth here, except for the first proviso, which was added by the amendment by Act March 28, 1912, c. 67, last cited above.

The law providing for the sale of any isolated or disconnected tract or parcel of the public domain was extended to any isolated and unappropriated public lands within the Nez Percés Indian reservation, with a limitation as to the prices to be paid therefor, by Act Feb. 6, 1909, c. 76, 35 Stat. 597.

Notes of Decisions

Sale of isolated tracts of land.—It may be lawful for the commissioner of the general land office to order into the market, after due notice, without the

formality of a proclamation of the President, and sell isolated or disconnected tracts of public land. Hawley v. Diller (1900) 20 Sup. Ct. 986, 992, 178 U. S. 476, 44 L. Ed. 1157. And see U. S. v. Casterlin (C. C. 1908) 164 Fed. 437.

§ 5111. (R. S. § 2456.) Patents surrendered and new ones issued in certain cases.

Where patents have been already issued on entries which are confirmed by the officers who are constituted the board of adjudication, the Commissioner of the General Land-Office, upon the canceling of the outstanding patent, is authorized to issue a new patent, on such confirmation, to the person who made the entry, his heirs or assigns.

Act March 3, 1853, c. 152, § 2, 10 Stat. 258.

Notes of Decisions

Issuance of new patent.—In the case of a voidable entry upon which a patent has already issued, where the action of the board is applied for with a view to obtaining the issue of a new patent under this section, a surrender of the outstanding patent should accompany the application or be made before the entry is acted upon by the board. The outstanding patent, when surrendered, need not be canceled until after confirmation of the entry; it is sufficient if the cancellation take place previously to the issue of a new patent. (1888) 19 Op. Atty. Gen. 188. And see Hawley v. Diller (1900) 20 Sup. Ct. 986, 992, 178 U. S. 476, 44 L. Ed. 1157.

§ 5112. (R. S. § 2457.) Extent of foregoing provisions.

The preceding provisions from section twenty-four hundred and fifty to section twenty-four hundred and fifty-six, inclusive, shall be applicable to all cases of suspended entries and locations, which have arisen in the General Land-Office since the twenty-sixth day of June, eighteen hundred and fifty-six, as well as to all cases of a similar kind which may hereafter occur, embracing as well locations under bounty-land warrants as ordinary entries or sales, including homestead entries and pre-emption locations or cases; where the law has been substantially complied with, and the error or informality arose from ignorance, accident, or mistake which is satisfactorily explained; and where the rights of no other claimant or pre-emptor are prejudiced, or where there is no adverse claim.

Act June 26, 1856, c. 47, 11 Stat. 22.

R. S. § 2452, mentioned in this section, was repealed by Act March 2, 1895, c. 177, § 3, ante, § 707. The other sections of the Revised Statutes mentioned, are set forth ante, §§ 5106–5111.

R. S. § 2455, mentioned in this section, was amended, so as no longer to apply to suspended entries or locations, by Act Feb. 26, 1895, c. 133, and subsequent amendments, as set forth ante, § 5110.

Notes of Decisions

Purpose of statute.—This legislation was necessary to save irregular entries from rejection when otherwise meritorious. Hawley v. Diller (1900) 20 Sup. Ct. 986, 992, 178 U. S. 476, 44 L. Ed. 1157, affirming Diller v. Hawley (1897) 81 Fed. 651, 654, 26 C. C. A. 514.

Adverse claims.—The secretary of the interior is not precluded from referring a contest to the board on the ground of adverse claims to the land, where the adverse claims are based on a contest of the entryman's compliance with the desert land act, under which he entered, and on an attempted entry under the homestead and timber-culture acts. Gage v. Gunther (1902) 68 P. 710, 136 Cal. 338, 89 Am. St. Rep. 141.

§ 5113. (Act March 3, 1891, c. 561, § 7.) Suspension of entries for correction of clerical errors; patents.

Whenever it shall appear to the Commissioner of the General Land Office that a clerical error has been committed in the entry of any of the public lands such entry may be suspended, upon proper notification to the claimant, through the local land office, until the error has been corrected; and all entries made under the preemption, homestead, desert-land, or timber-culture laws, in which

final proof and payment may have been made and certificates issued, and to which there are no adverse claims originating prior to final entry and which have been sold or incumbered prior to the first day of March, eighteen hundred and eighty-eight, and after final entry, to bona-fide purchasers, or incumbrancers, for a valuable consideration, shall unless upon an investigation by a Government Agent, fraud on the part of the purchaser has been found, be confirmed and patented upon presentation of satisfactory proof to the Land Department of such sale or incumbrance: Provided, That after the lapse of two years from the date of the issuance of the receiver's receipt upon the final entry of any tract of land under the homestead, timber-culture, desert-land, or pre-emption laws, or under this act, and when there shall be no pending contest or protest against the validity of such entry, the entryman shall be entitled to a patent conveying the land by him entered, and the same shall be issued to him; but this proviso shall not be construed to require the delay of two years from the date of said entry before the issuing of a patent therefor. (26 Stat. 1098.)

This section was part of the act to repeal the timber-culture laws, cited above.

Other sections of the act are set forth or referred to post, § 5116.

See notes to section 8 of the act, post, § 5114.

The pre-emption laws were repealed by Act March 3, 1891, c. 561, § 4, 26 Stat. 1097.

The homestead laws are set forth under chapter 5 of this Title.

The desert-land laws are set forth under chapter 6B of this Title.

The timber-culture laws were repealed by section 1 of this act, post, § 5116.

Notes of Decisions

Bona fide purchasers protected.—The provisions of this section as to bona fide purchasers or incumbrancers did not apply to an entry which had been canceled before its enactment. Parsons v. Venzke (1896) 17 Sup. Ct. 27, 28, 164 U. S. 89, 41 L. Ed. 360 (affirming Parsons v. Venzke [1894] 4 N. D. 452, 61 N. W. 1036, 50 Am. St. Rep. 669); Guaranty Savings Bank v. Bladow (1900) 20 Sup. Ct. 425, 428, 176 U. S. 448, 44 L. Ed. 540 (affirming and modifying judgment [1896] 69 N. W. 41, 6 N. D. 108); Pfund v. Valley Loan & Trust Co. (1897) 72 N. W. 480, 52 Neb. 473; Caldwell v. Bush (1895) 6 Wyo. 342, 45 Pac. 488.

This section recognizes that there may be a bona fide purchaser before a patent issues. U. S. v. Clark (1906) 26 Sup. Ct. 340, 200 U. S. 601, 50 L. Ed. 613.

An innocent purchaser from an entryman stands in no better position than the latter so long as the government has not parted with the legal title. U. S. v. Fisher (1912) 39 App. D. C. 176.

Congress, by the passage of this act, cut off the successful contestant's preferential right to enter on notice of cancellation of a contested entry. Graham v. Great Falls Water Power & Town Site Co. (1904) 76 P. 808, 30 Mont. 393.

Contest or protest and issuance of patent.—The directing of an investigation by a special agent of the land department within two years from the time of issuance of final receipt on a homestead entry is sufficient to bar the operation of the proviso that after the lapse of two years, there being no pending contest or protest, the entryman shall be entitled to a patent. Moses v. Long-Bell Lumber Co. (1913) 206 Fed. 51, 124 C. C. A. 185.

A protest must allege issuable facts which, if true, would defeat the entry. Gildner v. Hall (D. C. 1915) 227 Fed. 704.

—— Jurisdiction of land department.—What constitutes a "pending contest or protest" is a question within the jurisdiction of the Secretary of the Interior to determine, on application for a patent after the expiration of the period of two years; and on the Secretary's refusal to issue a patent to the applicant mandamus will not lie to compel its issuance. U. S. v. Fisher (1912) 39 App. D. C. 158, petition for writ of error denied (1913) 33 Sup. Ct. 329, 227 U. S. 445, 57 L. Ed. 591.

—— Coal land entry.—The words "pre-emption laws," in the two-year limitation, do not include coal land entries. U. S. v. Yankee Fuel Co. (D. C. 1912) 195 Fed. 850.

—— Timber and stone entry.—An entry under the timber and stone act is not covered by the proviso of this section, and mandamus will not lie to compel the issuance of a patent, although the entry was regular, and no contest of or protest against it was filed within two years thereafter. U. S. v. Ballinger (1909) 33 App. D. C. 211.

§ 5114. (Act March 3, 1891, c. 561, § 8.) Limitations of suits to annul patents.

Suits by the United States to vacate and annul any patent heretofore issued shall only be brought within five years from the passage of this act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. (26 Stat. 1099.)

This provision was part of section 8 of the act to repeal the timber-culture laws, cited above.

See notes to section 7 of the act, ante, § 5113.

This section was amended by Act March 3, 1891, c. 559, but the amending act made no change in that part of the section set forth here. The remaining portion of this section is set forth ante, § 4992.

Notes of Decisions

Application and construction of statute of limitation.—The general government is not bound by any statute of limitations, unless congress has clearly manifested its intention that it shall be so bound. U. S. v. Nashville, C. & St. L. Ry. Co. (1886) 6 Sup. Ct. 1006, 1008, 118 U. S. 120, 30 L. Ed. 81; Same v. Insley (1889) 9 Sup. Ct. 485, 486, 130 U. S. 263, 32 L. Ed. 968; Same v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552; Same v. Koleno (1915) 226 Fed. 180, 141 C. C. A. 178; Same v. Jones (D. C. 1914) 218 Fed 973; Same v. Pitan (D. C. 1915) 224 Fed. 604.

The object of the statute is to extinguish any right the government may have in the land and vest a perfect title in the adverse holder, after six years from date of the patent, regardless of any mistake or error in the land department or fraud or imposition of the patentee. U. S. v. Winona & St. P. R. Co. (1897) 17 Sup. Ct. 368, 371, 165 U. S. 463, 41 L. Ed. 789; Same v. Chandler-Dunbar Water Power Co. (1908) 28 Sup. Ct. 579, 580, 209 U. S. 447, 52 L. Ed. 881; Same v. Smith (C. C. 1910) 181 Fed. 545 (affirmed Linn & Lane Timber Co. v. U. S. [1912] 196 Fed. 593, 116 C. C. A. 267); Bodcaw Lumber Co. v. Bonnette (1914) 65 So. 493, 135 La. 369. See, also, Louisiana v. Garfield (1908) 29 Sup. Ct. 31, 33, 211 U. S. 70, 53 L. Ed. 92; Peabody Gold Min. Co. v. Gold Hill Min. Co. (C. C. 1900) 106 Fed. 241; U. S. v. Exploration Co. (C. C. 1911) 190 Fed. 405, decree reversed (C. C. A. 1913) 203 Fed. 387; Same v. Jones (D. C. 1914) 218 Fed. 973; Same v. Pitan (D. C. 1915) 224 Fed. 604.

The statute limits the time for suing to annul patents to public lands under any law of the United States. U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552.

The statute is strictly one of limitation, and it did not create the right in the United States to maintain an action to set aside a patent. U. S. v. Koleno (C. C. A. 1915) 226 Fed. 180.

The statute does not apply to a suit to quiet title to land as public land of the United States, on the ground that no patent thereto has ever been issued and that the title has not passed out of the government. U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630.

Damages for fraud.—The statute is intended to give stability to titles, and does not apply to actions for damages for fraud in obtaining patents to land. U. S. v. Jones (D. C. 1914) 218 Fed. 973; Same v. Pitan (D. C. 1915) 224 Fed. 604.

—— **Forfeiture of railroad grant.**—The limitations do not apply to a suit to enforce a forfeiture of an entire railroad grant, so far as the land is still held by the grantee, for breach of a condition requiring the grantee to sell only to actual settlers, which may have occurred after the patents were issued. U. S. v. Oregon & C. R. Co. (C. C. 1911) 186 Fed. 861. And see U. S. v. Southern Pac. R. Co. (1899) 98 Fed. 27, 42, 38 C. C. A. 619, reversed (1902) 22 Sup. Ct. 154, 183 U. S. 519, 46 L. Ed. 307.

—— **Indian land patent.**—This section does not govern suit on so-called trust patent for allotment in an Indian reservation. La Roque v. United States (1915) 36 Sup. Ct. 22, overruling U. S. v. La Roque (1912) 198 Fed. 645, 117 C. C. A. 349. And, see La Clair v. U. S. (C. C. 1910) 184 Fed. 128.

The limitation does not apply to suits brought on behalf of Indian tribes to cancel patents issued by mistake for lands within a reservation which were never a part of the public domain subject to disposal by the government. Northern Pac. Ry. Co. v. United States (1911) 191 Fed. 947, 112 C. C. A. 359, decree affirmed (1913) 33 Sup. Ct. 368, 227 U. S. 355, 57 L. Ed. 544.

—— **Partition.**—This section has no application to a partition suit by heirs of an entryman. Holloman v. Bullock (1903) 34 So. 355, 82 Miss. 405.

Computation of period of limitation—Fraud.—This section is subject to the equitable rule that, where the basis of the suit is fraud which has been concealed, the statute does not begin to run until its discovery. U. S. v. Exploration Co. (1913) 203 Fed. 387, 121 C. C. A. 491 (reversing decree [C. C. 1911] 190 Fed. 405); Same v. American Smelting & Refining Co. (1913)

203 Fed. 393, 121 C. C. A. 497; Linn & Lane Timber Co. v. U. S. (1913) 203 Fed. 394, 121 C. C. A. 498 (amending decree on rehearing [1912] 196 Fed. 593, 116 C. C. A. 267); U. S. v. Lee Wilson & Co. (D. C. 1914) 214 Fed. 630. But see Same v. Smith (C. C. 1910) 181 Fed. 545, decree affirmed Linn & Lane Timber Co. v. U. S. (1912) 196 Fed. 593, 116 C. C. A. 267, amended on rehearing (1913) 203 Fed. 394, 121 C. C. A. 498.

The United States can only avoid the limitation by alleging specific facts showing that its failure to discover the fraud alleged within the statutory period was due to concealment by the adverse party or that the fraud is of a self-concealing nature, and the failure to discover it was not due to negligence or want of diligence. U. S. v. Puget Sound Traction, Light & Power Co. (D. C. 1914) 215 Fed. 436.

—— **Commencement of suit.**—Suit by United States to cancel patents to public lands for fraudulent entries is not barred because the statutory period elapsed after date of the patent before steps were taken to implead a corporation, the real owner of the land to which defendant secretly transferred the property. Linn & Lane Timber Co. v. U. S. (1915) 35 Sup. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees (1912) 196 Fed. 593, 116 C. C. A. 267, and (1913) 203 Fed. 394, 121 C. C. A. 498; Linn & Lane Timber Co. v. U. S. (1912) 196 Fed. 593, 116 C. C. A. 267 (affirming decree U. S. v. Smith [C. C. 1910] 181 Fed. 545, and decree amended on rehearing [C. C. A. 1913] 203 Fed. 394). See, also, U. S. v. American Lumber Co. (C. C. 1897) 80 Fed. 309, affirmed (1898) 85 Fed. 827, 29 C. C. A. 431.

The running of limitations is interrupted by filing of bill and delivery of subpœnas to the marshal before the statute had run. Linn & Lane Timber Co. v. U. S. (1915) 35 Sup. Ct. 440, 236 U. S. 574, 59 L. Ed. 725, affirming decrees (1912) 196 Fed. 593, 116 C. C. A. 267, and (1913) 203 Fed. 394, 121 C. C. A. 498.

The same rules are to be applied in determining when the suit is commenced as in suits between private parties. U. S. v. American Lumber Co. (1898) 85 Fed. 827, 29 C. C. A. 431, affirming (C. C. 1897) 80 Fed. 309.

Such suit is not commenced as against grantee until filing of amended bill naming him as a defendant and the issuance of a warning order to him. U. S. v. Norris (1915) 222 Fed. 14, 137 C. C. A. 552.

A suit to cancel patent, commenced within six years from the date of the patent, is barred as to grantee, made a party after the expiration of the six years. Id.

But the suit is not barred as against the patentee. Id.

The bringing of a suit for the cancellation of a patent to land does not suspend the running of limitations in favor of a grantee, who purchased prior to the suit, until he is made a party. U. S. v. Cooper (D. C. 1914) 217 Fed. 846, decree affirmed Cooper v. U. S. (1915) 220 Fed. 871.

Laches as defense.—The United States, if not the real party in interest in an action by it to cancel a land patent, is affected by the laches. U. S. v. Beebe (1888) 8 Sup. Ct. 1083, 1086, 127 U. S. 338, 32 L. Ed. 121 (affirming decree [C. C. 1883] 17 Fed. 36); U. S. v. San Jacinto Tin Co. (C. C. 1885) 23 Fed. 279; Same v. Wenz (C. C. 1888) 34 Fed. 154; Same v. Southern Pac. R. Co. (C. C. 1889) 39 Fed. 132; La Clair v. U. S. (C. C. 1910) 184 Fed. 128; U. S. v. Wesely (C. C. 1911) 189 Fed. 276. See, also, Same v. Stinson (1903) 125 Fed. 907, 60 C. C. A. 615, decree affirmed (1905) 25 Sup. Ct. 426, 197 U. S. 200, 49 L. Ed. 724.

§ 5115. (Act March 9, 1904, c. 503, § 1.) Entries and final proofs, made out of proper land district by error of officers, confirmed.

Whenever it shall appear to the Commissioner of the General Land Office that an error has heretofore been made by the officers of any local land office in receiving any application, declaratory statement, entry, or final proof under the homestead or other land laws, and that there was no fraud practiced by the entryman, and that there are no prior adverse claimants to the land described in the entry, and that no other reason why the title should not vest in the entryman exists, except that said application, declaratory statement, entry, or proof was not made within the land district in which the lands applied for are situated, as provided by the Act of March eleventh, nineteen hundred and two, such entry or proof shall be confirmed. (33 Stat. 64.)

This section was part of an act entitled "An act relating to applications, declaratory statements, entries, and final proofs under the homestead and other land laws, and to confirm the same when made outside of the land district within which the land is situated."

Section 2 of the act provided that it should be in force from and after its passage and approval.

Act March 11, 1902, c. 182, mentioned in this section, amended R. S. § 2294, relating to the affidavits, proofs, etc., required to be made by applicants and entrymen under the homestead and various other laws, and is incorporated in that section as set forth ante, § 4546.

Entries or filings for lands in certain specified townships in Colorado are not to be canceled or held invalid because not allowed, made, or perfected in the proper land district, by Act March 26, 1908, c. 101, 35 Stat. 48.

Patents issued on certain applications were declared valid, and locations on similar applications on which no patents had issued are declared legal, by Act May 29, 1908, c. 220, § 12, 35 Stat. 468.

Provisions for change of entry where an entry, selection, or location was made of a tract of land not intended to be entered, by mistake as to the numbers of the tract, were made by R. S. § 2372, as amended by Act Feb. 24, 1909, c. 161, ante, § 4780.

TIMBER-CULTURE

(R. S. §§ 2458–2463. Transferred to Chapter 10F.)

These sections provided for the protection of live-oak and red-cedar timber on public lands. They are placed, with subsequent provisions for the protection of timber generally on such lands, ante, under chapter 10F of this Title, "Protection of Timber and Depredations," §§ 4977–4982.

(R. S. §§ 2464–2468. Repealed.)

These sections incorporated the then existing provisions of the timber-culture laws from Act March 3, 1873, c. 277, 17 Stat. 605. They were amended by Act March 13, 1874, c. 55, 18 Stat. 21, Act May 20, 1876, c. 102, 19 Stat. 54, Act Jan. 19, 1876, c. 134, 19 Stat. 59, and Act June 14, 1878, c. 190, 20 Stat. 113. This last act superseded all previous legislation on the subject, and was repealed by Act March 3, 1891, c. 561, § 1, post, § 5116, with a saving of all vested rights.

The provisions of said Act June 14, 1878, c. 190, were substantially as follows:

Section 1 provided that any person, the head of a family, or of the age of 21 years, a citizen of the United States, or who had filed his declaration of intention to become a citizen, who should plant, protect, and keep in a healthy, growing condition, for 8 years, 10 acres of timber on a quarter-section of the public lands, or 5 acres on any 80 acres, or 2½ acres on 40 acres or less, should be entitled to a patent for the whole of said 160, 80, or 40 or less acres, at the expiration of the 8 years, on making proof of such fact by not less than two credible witnesses; that no more than one quarter-section should be thus granted, and no person should be entitled to more than one entry. Section 2 prescribed the affidavit on application for entry, the fees to be paid prior to entry, and designated the amount of work and cultivation to be done on the land during the first, second, third, and fourth years of occupation; provided for the extension of time for the cultivation of the land in case of the destruction of the crops or trees planted; and provided that no final certificate should be given or patent issued until the expiration of eight years from the date of entry. Section 3 provided that, in cases of failure to comply with the other sections of the act, the lands entered should be subject to entry under the homestead laws. Section 4 provided that lands acquired under the act should not become liable to the satisfaction of any debts contracted prior to the issuing of the final certificate therefor. Section 5 required the Commissioner of the General Land-Office to prepare rules and regulations to carry into effect the provisions of the act, and fixed the fees of the registers and receivers of the land-offices. Section 6 provided that R. S. § 5392, should apply to oaths, affirmations, and affidavits required by the act. Section 7 provided that parties who had made entries under former acts might complete their title by complying with the provisions of the act. Section 8 repealed all acts and parts of acts inconsistent with the act.

Claimants under the timber-culture laws were not required, in making final proof, to appear at the land-office, but might have the proof taken by a United States court commissioner, or a clerk of any court of record, under such rules and regulations as the Secretary of the Interior might prescribe, by Act March 4, 1896, c. 40, 29 Stat. 43.

Notes of Decisions

Repealed timber-culture laws construed and applied.—See Prosser v. Finn (1908) 28 Sup. Ct. 225, 226, 208 U. S. 67, 52 L. Ed. 392; U. S. v. Keitel (1908) 29 Sup. Ct. 123, 129, 211 U. S. 370, 53 L. Ed. 230; Hartman v. Warren (1896) 76 Fed. 157, 161, 22 C. C. A. 30; Neff v. U. S. (1908) 165 Fed. 273, 91 C. C. A. 241; U. S. v. Shinn (C. C. 1882) 14 Fed. 447; Same v. Stores (C. C.

1882) 14 Fed. 824, 825; Same v. Madison (D. C. 1884) 21 Fed. 628; Same v. Burkett (D. C. 1907) 150 Fed. 208; Cooper v. Wilder (1895) 41 Pac. 26; Cooper v. Wilder (1896) 111 Cal. 191, 43 Pac. 591, 52 Am. St. Rep. 163; McElhaney v. McElhaney (1904) 101 N. W. 90, 125 Iowa, 279; Braun v. Mathieson (Iowa, 1908) 116 N. W. 789; Watkins Land Co. v. Creps (1905) 83 Pac. 969, 72 Kan. 333; Thompson v. Hanson (1881) 28 Minn. 484, 11 N. W. 86; Carner v. Chicago, St. P., M. & O. Ry. Co. (1890) 43 Minn. 375, 45 N. W. 713; Lee v. Watson (1895) 15 Mont. 228, 38 Pac. 1077; Brooks v. Hiatt (1882) 13 Neb. 503, 14 N. W. 480; Hastings & G. I. R. Co. v. Ingalls (1883) 15 Neb. 123, 16 N. W. 762; Hill v. Pitt (1901) 96 N. W. 339, 2 Neb. (Unof.) 151; Walker v. Ehresman (Neb. 1907) 113 N. W. 218; Fleischer v. Same (1902) 91 N. W. 51, 11 N. D. 221; Church v. Adams (1900) 61 Pac. 639, 37 Or. 355; Kelsay v. Eaton (1904) 76 Pac. 770, 45 Or. 70, 106 Am. St. Rep. 662; Aspey v. Barry (1900) 83 N. W. 91, 13 S. D. 220; Gould v. Tucker (1904) 100 N. W. 427, 18 S. D. 281; Yakima County v. Tullar (1888) 3 Wash. T. 393, 17 Pac. 885; Galliher v. Cadwell (1888) 3 Wash. T. 501, 18 Pac. 68.

§ 5116. (Act March 3, 1891, c. 561, § 1, as amended, Act March 3, 1893, c. 208.) Repeal of timber-culture laws.

That an act entitled "An act to amend an act entitled 'An act to encourage the growth of timber on the Western prairies,'" approved June fourteenth, eighteen hundred and seventy eight, and all laws supplementary thereto or amendatory thereof, be, and the same are hereby, repealed: Provided, That this repeal shall not affect any valid rights heretofore accrued or accruing under said laws, but all bona fide claims lawfully initiated before the passage of this act may be perfected upon due compliance with law, in the same manner, upon the same terms and conditions, and subject to the same limitations, forfeitures, and contests as if this act had not been passed: And provided further, That the following words of the last clause of section two of said act, namely, "That not less than twenty-seven hundred trees were planted on each acre," are hereby repealed: And provided further, That in computing the period of cultivation the time shall run from the date of the entry, if the necessary acts of cultivation were performed within the proper time: And provided further, That the preparation of the land and the planting of trees shall be construed as acts of cultivation, and the time authorized to be so employed and actually employed shall be computed as a part of the eight years of cultivation required by statute: And provided further, That if trees, seeds, or cuttings were in good faith planted as provided by law and the same and the land upon which so planted were thereafter in good faith cultivated as provided by law for at least eight years by a person qualified to make entry and who has a subsisting entry under the timber culture laws, final proof may be made without regard to the number of trees that may have been then growing on the land. Provided, That any person who has made entry of any public lands of the United States under the timber-culture laws, and who has for a period of four years in good faith complied with the provisions of said laws and who is an actual bona fide resident of the State or Territory in which said land is located shall be entitled to make final proof thereto, and acquire title to the same, by the payment of one dollar and twenty five cents per acre for such tract, under such rules and regulations as shall be prescribed by the Secretary of the Interior, and registers and receivers shall be allowed the same fees and compensation for final proofs in timber-culture entries as is now allowed by law in homestead entries: And provided further, That no land acquired under the provisions of this act shall in any event become liable to the satisfaction of any debt or debts contracted prior to the issuing of the final certificate therefor. (26 Stat. 1095. 27 Stat. 593.)

This section was the first section of an act entitled "An act to repeal timber-culture laws, and for other purposes," cited above.

The section was amended by Act March 3, 1893, c. 208, cited above, by

adding to the fourth proviso thereof the further proviso following it, as set forth here.

Section 2 of the original act amended Act March 3, 1877, c. 107, by adding to that act §§ 4–8 thereof, ante, §§ 4677–4680.

Section 3 amended R. S. § 2288, and is incorporated in that section as set forth ante, § 4535.

Section 4 repealed the pre-emption laws. See note to chapter 4 of this Title.

Section 5 amended R. S. §§ 2289, 2290, and is incorporated in those sections as set forth ante, §§ 4530, 4531.

Section 6 amended R. S. § 2301, and is incorporated in that section as set forth ante, § 4589.

Section 7 provided for suspension of entries of public lands for correction of clerical errors, and for issue of patents in cases where there was no adverse claim and no pending contest. It is set forth ante, § 5113.

The first portion of section 8, limiting the time for bringing suits to annul patents, is set forth ante, § 5114. The remaining portion, relating to timber depredations, is set forth, as amended by Act March 3, 1891, and subsequent acts, ante, § 4992.

Section 9 provided that public lands, with some exceptions, should not be sold at public sale. It is set forth ante, § 4753.

Section 10 prescribed the effect of the act on agreements, etc., with Indian tribes for the disposal of their lands, etc. It is set forth ante, § 5018.

Sections 11–14 related to town-sites, and purchases for trade purposes, in Alaska. They are set forth ante, §§ 5079–5082.

Section 15 reserved certain islands in Alaska for the Indians. It is set forth ante, § 5096a.

Section 16 related to town-site entries on mineral lands, and is set forth ante, § 4799.

Section 17 restricted locations of reservoir sites on the public lands. It is set forth ante, § 4698.

Sections 18–21 granted rights of way through the public lands for canals, ditches, etc. They are set forth ante, §§ 4934–4937.

Sections 22 and 23 were local in their nature, and are omitted.

Section 24 authorized the President to set apart forest reservations. It is set forth post, § 5121.

Notes of Decisions

Repeal of laws.—The repealing act declared that it should not affect any valid existing rights. Bucklin v. U. S. (1895) 16 Sup. Ct. 182, 183, 159 U. S. 682, 40 L. Ed. 305.

Land not subject to debts.—A judgment against a surety on a supersedeas bond is a "debt" contracted at the date of the approval of such bond. Leman v. Chipman (Neb. 1908) 117 N. W. 885.

The provision that no land acquired under this act shall become liable to the satisfaction of debts is a substantial reenactment of a provision of the homestead law, and will be enforced in the state as well as the federal courts. Gould v. Tucker (1904) 100 N. W. 427, 18 S. D. 281.

The only interest in government land that the United States can convey by patent under the timber culture act is an estate free from all involuntary liens and debts of the patentee contracted prior to the issuance of the final certificate. Gould v. Tucker (1905) 105 N. W. 624, 20 S. D. 226.

Exemption law valid.—The provision exempting land from debts is within the power of Congress. Adams v. Church (1902) 70 Pac. 1037, 42 Or. 270, 59 L. R. A. 782, 95 Am. St. Rep. 740.

EVIDENCES OF TITLE

(R. S. §§ 2469, 2470. Transferred to Title XI, Chapter 3.)

R. S. § 2469, required the Commissioner of the General Land-Office to certify copies of records, books, and papers on file in his office, to be used in evidence, and R. S. § 2470, provided that literal exemplifications of such records granted in virtue of said preceding section should be deemed of the same validity in all proceedings at law or in equity as if the names of the officers signing and countersigning the same had been fully inserted in such record. Both sections are placed, with subsequent provisions for the authentication and certification of such copies by the Recorder, as well as by the Commissioner of the General Land Office, under Title XI, "The Department of the Interior," chapter 3, "The General Land Office," ante, §§ 709, 710.

§ 5117. (R. S. § 2471.) The false making, altering, etc., of any instrument in writing, etc., concerning lands, etc., in California; penalty.

Every person who falsely makes, alters, forges, or counterfeits, or causes or procures to be falsely made, altered, forged, or counter-

feited; or willingly aids and assists in the false making, altering, forging, or counterfeiting any petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, or any title-paper, or evidence of right, title, or claim to lands, mines, or minerals in California, or any instrument of writing whatever in relation to lands or mines or minerals in the State of California, for the purpose of setting up or establishing against the United States any claim, right, or title to lands, mines, or minerals within the State of California, or for the purpose of enabling any person to set up or establish any such claim; and every person, who, for such purpose, utters or publishes as true and genuine any such false, forged, altered, or counterfeited petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, title-paper, evidence of right, title, or claim to lands or mines or minerals in the State of California, or any instrument of writing whatever in relation to lands or mines or minerals in the State of California, shall be punishable by imprisonment at hard labor not less than three years and not more than ten years, and by a fine of not more than ten thousand dollars.

Act May 18, 1858, c. 40, § 1, 11 Stat. 290.

Removing without authority, or altering, etc., records in the surveyor-general's office in California, and depositing fraudulent papers among the archives of the office, were made punishable by R. S. §§ 5411, 5412. Those sections were not incorporated into the Criminal Code, with other penal provisions apparently because regarded as obsolete.

§ 5118. (R. S. § 2472.) Falsely dating any evidence of title under Mexican authority, etc., to lands in California; penalty.

Every person who makes, or causes or procures to be made, or willingly aids and assists in making any falsely dated petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, or any title-paper, or written evidence of right, title, or claim, under Mexican authority, to any lands, mines, or minerals in the State of California, or any instrument of writing in relation to lands or mines or minerals in the State of California, having a false date, or falsely purporting to be made by any Mexican officer or authority prior to the seventh day of July, eighteen hundred and forty-six, for the purpose of setting up or establishing any claim against the United States to lands or mines or minerals within the State of California, or of enabling any person to set up or establish any such claim; and every person who signs his name as governor, secretary, or other public officer acting under Mexican authority, to any instrument of writing falsely purporting to be a grant, concession, or denouncement under Mexican authority, and during its existence in California, of lands, mines, or minerals, or falsely purporting to be an informe, report, record, confirmation, or other proceeding on an application for a grant, concession, or denouncement under Mexican authority, during its existence in California, of lands, mines, or minerals, shall be punishable as prescribed in the preceding section.

Act May 18, 1858, c. 40, § 2, 11 Stat. 291.

See note to R. S. § 2471, ante, § 5117.

§ 5119. (R. S. § 2473.) Presenting false or counterfeited evidences of title, etc., to lands in California, and prosecuting suits thereon; penalty.

Every person who, for the purpose of setting up or establishing any claim against the United States to lands, mines, or minerals within the State of California, presents, or causes or procures to be presented, before any court, judge, commission, or commissioner, or other officer of the United States, any false, forged, altered, or counterfeited petition, certificate, order, report, decree, concession, denouncement, deed, patent, diseño, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim to lands, minerals, or mines in the State of California, knowing the same to be false, forged, altered, or counterfeited, or any falsely dated petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim to lands, mines, or minerals in California, knowing the same to be falsely dated; and every person who prosecutes in any court of the United States, by appeal or otherwise, any claim against the United States for lands, mines, or minerals in California, which claim is founded upon, or evidenced by, any petition, certificate, order, report, decree, concession, denouncement, deed, patent, confirmation, diseño, map, expediente or part of an expediente, title-paper, or written evidence of right, title, or claim, which has been forged, altered, counterfeited, or falsely dated, knowing the same to be forged, altered, counterfeited, or falsely dated, shall be punishable as prescribed in section twenty-four hundred and seventy-one.

Act May 18, 1858, c. 40, § 3, 11 Stat. 291.
See note to R. S. § 2471, ante, § 5117.

ENFORCEMENT OF PROVISIONS

(R. S. §§ 2474, 2475. Transferred to Title XXXII B.)

R. S. § 2474, established and defined the boundaries of the Yellowstone Park, and R. S. § 2475, placed the park under exclusive control of the Secretary of the Interior, and authorized regulations by him for its protection, removal of trespassers, etc. Both these sections are placed with subsequent provisions relating to said park, and provisions relating to other parks, etc., under Title XXXII B, "The National Parks, Reservations, and Monuments," §§ 5188, 5189.

(R. S. §§ 2476, 2477. Transferred to Chapter 10C.)

R. S. § 2476, provided that navigable rivers, within the territory occupied by the public lands, should be public highways. R. S. § 2477, granted rights of way for highways over public lands. Both these sections were placed, with subsequent provisions relating to such rights of way, ante, under chapter 10C of this Title, "Rights of Way and Other Easements in Public Lands," §§ 4918, 4919.

§ 5120. (R. S. § 2478.) Power of Commissioner of Land-Office to enforce this Title.

The Commissioner of the General Land-Office, under the direction of the Secretary of the Interior, is authorized to enforce and carry into execution, by appropriate regulations, every part of the provisions of this Title not otherwise specially provided for.

Notes of Decisions

Power to make regulations.—See, also, notes to § 699, ante.

The Commissioner of the General Land office and the Secretary of the Interior can enforce by appropriate regulations every part of the public land laws as to which it is not otherwise specially provided. Leonard v. Lennox (1910) 181 Fed. 760, 104 C. C. A. 296. And see Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415; Burke v. Southern Pac. R. Co. (1914) 34 Sup. Ct. 907, 234 U. S. 669, 58 L. Ed. 1527; James v. Germania Iron Co. (1901) 107 Fed. 597, 609, 46 C. C. A. 476 (appeal dismissed [1904] 25 Sup. Ct. 786, 195 U. S. 638, 49 L. Ed. 356); U. S. v. Chaplin (C. C.

1887) 31 Fed. 890, 894; Same v. Murphy (C. C. 1887) 32 Fed. 376, 381; Van Lear v. Eisele (C. C. 1903) 126 Fed. 823; U. S. v. Bedgood (D. C. 1891) 49 Fed. 54, 58.

The phrase "under the direction of the secretary of the interior," as used in the statutes, was intended as an expression, in general terms, of the power of the secretary to supervise and control the extensive operations of the land department. Knight v. United Land Ass'n (1891) 12 Sup. Ct. 258, 142 U. S. 161, 35 L. Ed. 974; Orchard v. Alexander (1895) 15 Sup. Ct. 635, 638, 157 U. S. 372, 39 L. Ed. 737; Warner Valley Stock Co. v. Smith (1897) 17 Sup. Ct. 225, 227, 165 U. S. 28, 41 L. Ed. 621. And see Hawley v. Diller (1900) 20 Sup. Ct. 986, 993, 178 U. S. 476, 44 L. Ed. 1157; U. S. v. Barnhart (D. C. 1887) 33 Fed. 459; Alschul v. Clark (1901) 65 Pac. 991, 39 Or. 315.

Under this section the Land Department has power to adopt rules and regulations for the administration of the forest reserve act. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 23 Sup. Ct. 692, 697, 190 U. S. 301, 47 L. Ed. 1064, affirming decree (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230; Pacific Land & Improvement Co. v. Elwood Oil Co. (1903) 23 Sup. Ct. 698, 190 U. S. 316, 47 L. Ed. 1073, affirming decree (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230. See, also, Roughton v. Knight (1911) 31 Sup. Ct. 297, 219 U. S. 537, 55 L. Ed. 326; Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20, 43.

The officers of the General Land Office may make such reasonable rules relating to the disposition of the public lands as they think fit; and the courts have no authority to interfere. Eastern Banking Co. v. Lovejoy (Neb. 1908) 115 N. W. 857. See, also, Shultz v. Jones (1895) 41 P. 400, 3 Okl. 504; Meyers v. U. S. (1897) 48 Pac. 186, 5 Okl. 173.

This section authorizes such department regulations only as are appropriate, reasonable, and within the limitations of the law for the enforcement of which they are provided. Anchor v. Howe (C. C. 1892) 50 Fed. 366. See, also, U. S. v. George (1913) 33 Sup. Ct. 412, 228 U. S. 14, 57 L. Ed. 712.

The Commissioner, in the exercise of his superintendence over surveyors general, and of all subordinate officers of his bureau, is clothed with large powers of control to prevent the consequences of inadvertence, mistakes, irregularity, and fraud in their operations. Cragin v. Powell (1888) 9 Sup. Ct. 203, 206, 128 U. S. 691, 32 L. Ed. 566.

Congress may delegate power.—See, also, notes to Const. U. S. art. 4, § 3, cl. 2.

Congress can lawfully delegate power to make regulations concerning the public domain. Van Lear v. Eisele (C. C. 1903) 126 Fed. 823; U. S. v. Grimaud (1911) 31 Sup. Ct. 480, 220 U. S. 506, 55 L. Ed. 563; Light v. U. S. (1911) 31 Sup. Ct. 485, 220 U. S. 523, 55 L. Ed. 570; U. S. v. Dastervignes (C. C. 1902) 118 Fed. 199, order affirmed Dastervignes v. U. S. (1903) 122 Fed. 30, 58 C. C. A. 346; U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675. CONTRA, U. S. v. Blasingame (D. C. 1900) 116 Fed. 654.

Validity and effect of regulations.—Departmental regulations respecting the disposal of public lands, when not repugnant to the acts of Congress, have the force and effect of laws. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1901) 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230 (affirmed in Cosmos Exploration Co. v. Gray Eagle Oil Co. [1903] 23 S. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064); U. S. v. Maid (D. C. 1902) 116 Fed. 650; North v. Jones (Ind. App. 1912) 100 N. E. 84; Round Mountain Mining Co. v. Round Mountain Sphinx Mining Co. (1914) 138 Pac. 71, 36 Nev. 543 (reversing judgment on rehearing [1913] 129 Pac. 308, 35 Nev. 392, and rehearing denied [1914] 141 Pac. 849). See, also, Germania Iron Co. v. James (1898) 89 Fed. 811, 32 C. C. A. 348; Anchor v. Howe (C. C. 1892) 50 Fed. 366; Hoover v. Salling (C. C. 1900) 102 Fed. 716; Poppe v. Athearn (1872) 42 Cal. 606, 609; Chapman v. Quinn (1880) 56 Cal. 266, 273; Johnson v. Lincoln County (1915) 146 Pac. 471, 50 Mont. 253.

A regulation requiring an affidavit stating whether the homestead entryman has made other entries is suitably addressed to enforcement of the homestead law as to the amount of land which one person may secure. U. S. v. Smull (1914) 35 Sup. Ct. 349, 350, 236 U. S. 405, 59 L. Ed. 641.

But the Land Department has no power to add to the requirements of the law that cultivation and residence be proved by two credible witnesses. U. S. v. George (1913) 33 S. Ct. 412, 228 U. S. 14, 57 L. Ed. 712.

Rules for the regulation of the business of land offices, which are not illegal, and do not authorize advantage to one person over another, may be adopted. McDowell v. Morgan (1862) 28 Ill. (18 Peck) 528. See, also, Baty v. Sale (1867) 43 Ill. 351, 92 Am. Dec. 128.

Instructions given by the commissioners of the general land office to registers and receivers are not judgments, binding upon any one. Foley v. Harrison (1850) 5 La. Ann. 75.

The effect of a legal entry will not be affected by unauthorized rules of the land office. Morrow v. Warner Valley Stock Co. (Or. 1909) 101 Pac. 171; Dixon v. Same (Or. 1909) 101 Pac.

189; Foskett v. Same (Or. 1909) 101 Pac. 190.

Judicial notice of regulations.—The Land Department of the United States has the power to make reasonable rules and regulations not inconsistent with any valid law, for the purpose of giving effect to the provisions of the acts of Congress providing for the disposition of the public lands, which have the force and effect of law, and of which the courts take judicial notice. Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 23 Sup. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064; Meldrum v. U. S. (1907) 151 Fed. 177, 80 C. C. A. 545, 10 Ann. Cas. 324; Van Gesner v. Same (1907) 153 Fed. 46, 82 C. C. A. 180; Nurnberger v. Same (1907) 156 Fed. 721, 84 C. C. A. 377; Johnson v. Lincoln County (1915) 146 Pac. 471, 50 Mont. 253. And see Caha v. U. S. (1894) 14 Sup. Ct. 513, 515, 152 U. S. 211, 38 L. Ed. 415; Germania Iron Co. v. James (1898) 89 Fed. 811, 814, 32 C. C. A. 348; U. S. v. Nelson (D. C. 1912) 199 Fed. 464; Sawyer v. Gray (D. C. 1913) 205 Fed. 160.

(R. S. §§ 2479–2484. Transferred to Chapter 10D.)

R. S. § 2479, granted to the several States, with some exceptions, the swamp and overflowed lands therein; and R. S. §§ 2480–2484, provided for the selection, location, etc., of such lands, and the issue of patents therefor. All these sections are placed with subsequent provisions relating to the lands so granted, ante, under chapter 10D of this Title, "Swamp and Overflowed Lands," §§ 4958–4963.

(R. S. §§ 2485–2487. Transferred to Chapter 10A.)

R. S. §§ 2485–2487, confirmed to the State of California all selections of lands by that State made prior to July 23, 1866, and theretofore sold by the State to bona fide purchasers. These sections are placed, with other provisions relating to grants to States, etc., ante, under chapter 10A of this Title, "Reservations and Grants to States for Public Purposes," §§ 4878–4880.

(R. S. § 2488. Transferred to Chapter 10D.)

R. S. § 2488, made special provisions for certifying to the State of California swamp and overflowed lands in certain cases. It is placed, with R. S. §§ 2479–2484, relating to grants of such lands, ante, under chapter 10D of this Title, "Swamp and Overflowed Lands," § 4964.

(R. S. § 2489. Temporary.)

R. S. § 2489, incorporated the provisions of Act July 23, 1866, c. 219, § 5, 14 Stat. 220, requiring the local land offices in California immediately to forward lists of selections made by the State under swamp land and other grants, to the General Land Office for final disposition and determination, which final disposition should be made by the Commissioner of the General Land Office without delay. The section is omitted as temporary merely, and executed.

(R. S. § 2490. Transferred to Chapter 10D.)

R. S. § 2490, extended the provisions of the Swamp Land Act of Sept. 28, 1850, c. 84, 9 Stat. 520, to the States of Minnesota and Oregon. It is placed, with R. S. §§ 2479–2484, in which said Swamp Land Act was incorporated, ante, under Chapter 10D of this Title, "Swamp and Overflowed Lands," § 4965.

TITLE XXXII A

THE NATIONAL FORESTS

This title, inserted here as additional to the original titles of the Revised Statutes, includes Act March 3, 1891, c. 561, § 24, Act June 4, 1897, c. 2, § 1, and subsequent acts amendatory thereof or supplemental thereto, relating to the reservation of public lands to protect the forests, secure favorable conditions of water flows, and furnish a continuous supply of timber, and to the management and administration of the lands so reserved. These reservations were originally termed Forest Reserves, or Forest Reservations, but by Act March 4, 1907, c. 2907, 34 Stat. 1269, thereafter forest reserves were to be known as National Forests.

This title also includes Act March 1, 1911, c. 186, authorizing co-operation between the States, or between the several States and the United States, for the protection of the watersheds of navigable streams, and providing for a National Forest Reservation Commission to recommend the purchase of lands needed as National Forests for the protection of such watersheds.

Sec.

5121. Establishment of forest reserves.
5122. Forest reserves to be known as national forests.
5123. (1) Revocation of orders or proclamations establishing forest reserves.
5124. (2) Surveys; plats and field notes; maps.
5125. (3) Purposes for which forest reserves may be established and administered.
5126. (4) Protection of forest reserves; rules and regulations therefor.
5127. (5) Sale of timber.
5128. (6) Use of timber and stone by settlers.
5129. (7) Egress or ingress of actual settlers; prospecting.
5130. (9) Sites for schools and churches.
5131. (10) Civil and criminal jurisdiction.
5132. (11) Use of waters.
5133. (12) Mineral lands; restoration to public domain; location and entry.
5134. (13) Modification or vacation of executive orders; reduction of area; change of boundaries.
5135. No forest reserves to be created, and no additions thereto to be made hereafter, within certain states, except by act of Congress.
5136. Establishment of exterior boundaries of forest reserves.
5137. Sale of mature, dead, and down timber to settlers for domestic use.
5137a. Deposits from timber purchasers to defray cost of disposing of débris.
5138. Export of timber and other forest products.
5138a. Taking earth, stone, and timber for use of Navy, and for Government railways, etc., in Alaska; reports.

Sec.

5139. Calaveras Bigtree National Forest; purposes for which to be held and administered; acquisition of title to lands; reimbursement of owners.
5140. Leases of lands in forests for sanitariums or hotels.
5141. Disposition of funds from leases.
5141a. Use and occupation of lands for summer homes, hotels, stores, etc.
5142. Disposition of money received from sale of products or use of land, etc.
5143. Special fund from money received from sale of products, etc., continued; estimates of expenditures to be submitted in annual Book of Estimates.
5144. Sales of timber on forest reserves in California to conform to law governing such sales in other states.
5145. Disposal of moneys received as contributions toward forest investigations, etc.; refund to contributors of excess paid by them; report of moneys so received.
5146. Disposal of money received by or on account of Forest Service; refund to depositors of excess deposited.
5147. Amendment of Act March 4, 1907, c. 2907; refund of moneys erroneously collected for use, etc., of lands within but not part of national forests; report of amounts.
5148. Reimbursement to owners of horses, etc., damaged or destroyed while fire-fighting, trail building, etc.
5149. Payment of part of money received from each forest reserve to State or Territory for public schools and public roads.

Sec.
5150. Additional expenditures from receipts for construction and maintenance of roads and trails; co-operation with State authorities.
5150a. Appropriation for construction, etc., of roads and trails within or partly within national forests; co-operation of states; limitation on aggregate of expenditure.
5151. Free use of timber for telephone lines needed for fire protection.
5152. Forest supervisors and rangers; selection.
5153. Arrests for violations of laws and regulations relating to forest reserves and national parks, and proceedings thereon.
5154. Officials of Forest Service to aid in enforcement of local laws for certain purposes, and to aid other federal bureaus and departments in the performance of their duties.
5155. Leaves of absence to employés of the Forest Service in Alaska.
5156. Areas in Wichita Forest Reserve to be set aside for protection as breeding place for game animals and birds.
5157. Hunting, trapping, killing, or capturing game animals or birds, within areas set aside, unlawful; penalty.
5158. Operation of local game laws as to private, State, or Territorial lands, not affected by this act.
5159. Areas in Grand Canyon Forest Reserve to be set aside for protection of game animals as breeding place therefor.
5160. Hunting, trapping, killing, or capturing game animals, within areas set aside, unlawful; penalty.
5161. Operation of local game laws as to private, State, or Territorial lands, not affected by this act.
5162. Agricultural lands within forest reserves to be opened to homestead entry; preference rights of former settlers and of applicants; plats and field notes to be filed and posted; surveys; commutation provisions not to apply; credit for actual residence.
5163. Amendment of Act June 11, 1906, c. 3074, § 1; exception from provisions of certain counties of California stricken out.
5164. Land not to pass from forest until patent issues.
5165. Additional homestead right of entry to former settlers; payment of price of lands required.
5166. Entries in Black Hills Forest Reserve subject to mining laws and to appropriation of waters; limitation of title acquired as to riparian rights.
5167–5169. (Repealed.)
5169a. Act June 11, 1906, c. 3074, § 4, Act Feb. 8, 1907, c. 896, and Act July 3, 1912, c. 195, repealed; lands covered by said acts subject to existing laws.
5170. Act not to be construed to authorize future settlements on lands within forest reserves, or to impair rights of former bona fide settlers.
5171. Reinstatement of entries canceled or relinquished because of erroneous allowance after withdrawal of land for national forest purposes.
5172. Contestants prior to withdrawal of land for national forest purposes authorized to exercise preference right to enter.
5173. Segregation of lands for homestead entry; surveys, plats and field notes of agricultural lands to be made by employees of the Forest Service.
5174. Consent to agreement by States for conservation of forests and water supply.
5175. Appropriation for co-operation with States for protection from fire of forested watersheds of navigable streams; agreements with States for system of fire protection; State law required; limitation of expenditure.
5176. Appropriations for examination, survey, and acquirement of lands on headwaters of navigable streams.
5177. National Forest Reservation Commission; creation and composition; authority as to purchase of lands under act; service of members; vacancies.
5178. Annual reports of Commission.
5179. Examination, etc., of lands for purchase and report by Secretary of Agriculture; examination and report by Geological Survey.
5180. Purchase of lands approved by Commission; consent of State.
5181. Title to lands to be acquired.
5182. Acquisition of lands not defeated by rights of way, easements and reservations which will not interfere with purposes of this act; rights of way, etc., to be subject to rules and regulations.
5183. Agricultural lands included in tracts acquired; sale as homesteads; jurisdiction of lands sold to revert to state; no rights, etc., to lands acquired, waters thereon, etc., except as provided in this section.
5184. Lands acquired to be reserved, etc., as national forest lands; division into and designation, as specific national forests.
5185. State jurisdiction over persons on lands acquired not affected,

Sec.
except as to punishment of offenses against United States.
5186. Payment of 25 per cent. of receipts from each national forest to State for benefit of county public schools and roads; limitation of payment for any one county.
5187. Appropriation for expenses of Commission; payments.
5187a. Development, etc., of mineral resources of lands acquired.
5187b. Areas set aside for protection of game and fish; unlawfully taking game or fish; punishment.

§ 5121. (Act March 3, 1891, c. 561, § 24.) Establishment of forest reserves.

The President of the United States may, from time to time, set apart and reserve, in any State or Territory having public land bearing forests, in any part of the public lands wholly or in part covered with timber or undergrowth, whether of commercial value or not, as public reservations, and the President shall, by public proclamation, declare the establishment of such reservations and the limits thereof. (26 Stat. 1103.)

This section was part of the act to repeal the timber-culture laws, cited above. Other sections of the act are set forth or referred to ante, § 5116.

This section was expressly excepted from repeal by Act Aug. 4, 1892, c. 375, § 3, ante, § 4634. Section 1 of said act, ante, § 4633, provided for the entry of building-stone lands in accordance with the provisions of the placer-mining laws. Section 2, ante, § 4671, provided for the sale of timber and stone lands.

The President was authorized to revoke, modify, or suspend executive orders and proclamations designating forest reserves, by provisions of Act June 4, 1897, c. 2, § 1 (1), post, § 5123.

Before the passage of this section certain tracts of land in the State of California had been set apart as reserved forest lands, by Act Oct. 1, 1890, c. 1263, post, §§ 5209–5211. And certain lands were segregated from Yosemite National Park, and were also set apart as reserved forest lands, by Act Feb. 7, 1905, c. 547, post, §§ 5212, 5213, and by Res. June 11, 1906, No. 27, post, §§ 5214–5216, accepting the recession by the State of California of the Yosemite Valley and the Mariposa Big Tree Grove, and setting apart said tracts and other lands as reserved forest lands.

Numerous special provisions for the disposition of Indian reservation lands either set apart a portion of such lands as a national forest, as though set apart by proclamation of the President under this section, and subsequent laws amending and supplementing the same, or authorized the President to set apart a portion thereof, as he might deem proper, to constitute a national forest or to be added to such a forest already existing.

A national forest in the state of Minnesota was created by Act May 23, 1908, c. 193, 35 Stat. 268.

By provision of Act March 4, 1907, c. 2907, post, § 5122, no national forest is to be created thereafter, nor are any additions to be made to one theretofore created, in the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by act of Congress.

The Secretary of Agriculture is to execute, or cause to be executed, all laws affecting public lands reserved under this section, and acts supplemental to and amendatory thereof, after such lands have been so reserved, except such laws as affect the surveying, etc., entering, etc., or patenting of any of such lands, by Act Feb. 1, 1905, c. 288, § 1, ante, § 823. The supervision of the national forests was thereby transferred from the Secretary of the Interior to the Secretary of Agriculture.

Agricultural lands within national forests may be opened to homestead entry, by Act June 11, 1906, c. 3074, § 1, post, § 5162.

Provisions for protection of wild animals and birds in certain national forests were made by Act Jan. 24, 1905, c. 137, and Act June 29, 1906, c. 3593, post, §§ 5154–5161. And provisions for protection of birds and their eggs on lands set apart or reserved as breeding grounds for birds were made by Act June 28, 1906, c. 3565, and were incorporated into the Criminal Code, in section 84 thereof, post, § 10252.

See post, § 5135, and notes thereunder.

Notes of Decisions

Scope and purpose of statute.—This section authorizes the temporary withdrawal from sale of lands the reservation of which is contemplated. U. S. v. Grimaud (1911) 31 Sup. Ct. 480, 220 U. S. 506, 55 L. Ed. 563; Same v. Homestake Min. Co. (1902) 117 Fed. 481, 54 C. C. A. 303; Shannon v. U. S. (1908) 160 Fed. 870, 88 C. C. A. 52; U. S. v. Chicago, M. & St. P. R.

Co. (D. C. 1913) 207 Fed. 164, 169; (1911) 28 Op. Atty. Gen. 587.

The purpose of this act is to preserve the remaining forests on the public lands of the United States from depredation and destruction, and to accomplish this object all lands within forest reservations should belong to the United States for complete administration and control. Ex parte Hyde (C. C. 1904) 194 Fed. 207.

Constitutionality.—Congress, in the exercise of its control of the property of the United States, could constitutionally enact this section. Light v. U. S. (1911) 31 Sup. Ct. 485, 487, 220 U. S. 523, 55 L. Ed. 570.

Public lands—Meaning.—The words "public lands" are not always used in the same sense, and should be given such meaning in any act as comports with its purpose and intent. U. S. v. Blendaur (1904) 128 Fed. 910, 63 C. C. A. 636, reversing judgment Same v. Blendauer (D. C. 1903) 122 Fed. 703. And see (1911) 28 Op. Atty. Gen. 587.

License to use public lands.—Any implied license under which public land has been used for private purposes may be recalled by the government. Light v. U. S. (1911) 31 Sup. Ct. 485, 487, 220 U. S. 523, 55 L. Ed. 570.

Withdrawal of lands by departmental officer.—An order of the Commissioner of the General Land Office temporarily withdrawing public lands from sale pending the creation of a forest reservation thereon is the legal equivalent of one by the President, and effective to prevent the subsequent acquisition of right of way by a railroad company over such lands. Chicago, M. & St. P. Ry. Co. of Idaho v. U. S. (1914) 218 Fed. 288, 134 C. C. A. 84, affirming decree U. S. v. Chicago, M. & St. P. Ry. Co. of Idaho (D. C. 1913) 207 Fed. 164.

And a proclamation need not be signed by the President, but, if made by the Secretary of the Interior, will be presumed to have been by direction of the President. U. S. v. Blendauer (D. C. 1903) 122 Fed. 703, judgment reversed Same v. Blendaur (1904) 128 Fed. 910, 63 C. C. A. 636.

Effect of withdrawal.—The creation of a forest reserve severs the reserved land from the public domain, and appropriates it to public use so that it is no longer subject to the implied license to pasture on public lands. Shannon v. U. S. (1908) 160 Fed. 870, 88 C. C. A. 52.

§ 5122. (Act March 4, 1907, c. 2907.) Forest reserves to be known as national forests.

General Expenses, Forest Service: To enable the Secretary of Agriculture to experiment and to make and continue investigations and report on forestry, forest reserves, which shall be known hereafter as national forests, * * (34 Stat. 1269.)

This was a provision of the agricultural appropriation act for "General Expenses, Forest Service," for the fiscal year 1908, cited above.

§ 5123. (Act June 4, 1897, c. 2, § 1.) (1) Revocation of orders or proclamations establishing forest reserves.

For the survey of the public lands that have been or may hereafter be designated as forest reserves by Executive proclamation, under section twenty-four of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to repeal timber-culture laws, and for other purposes," and including public lands adjacent thereto, which may be designated for survey by the Secretary of the Interior, one hundred and fifty thousand dollars, to be immediately available: Provided, That, to remove any doubt which may exist pertaining to the authority of the President thereunto, the President of the United States is hereby authorized and empowered to revoke, modify, or suspend any and all such Executive orders and proclamations, or any part thereof, from time to time as he shall deem best for the public interests: Provided, That the Executive orders and proclamations dated February twenty-second, eighteen hundred and ninety-seven, setting apart and reserving certain lands in the States of Wyoming, Utah, Montana, Washington, Idaho, and South Dakota as forest reservations, be, and they are hereby, suspended, and the lands embraced therein restored to the public domain the same as though said orders and proclamations had not been issued: Provided further, That lands embraced in such reservations not otherwise disposed of before March first, eighteen hundred and ninety-eight, shall again become subject to the operations of said orders and

proclamations as now existing or hereafter modified by the President. (30 Stat. 34.)

The proclamations referred to were those of Feb. 22, 1897, Nos. 19–31, 29 Stat. 893–912. They were issued under the authority conferred by Act March 3, 1891, c. 561, § 24.

These provisions and those of the eleven paragraphs next following were part of section 1 of the sundry civil appropriation act for the fiscal year 1898, cited above.

The Secretary of the Interior was authorized to file and approve surveys and plats of any right of way for a wagon road, railroad, or other highway over and across any national forests when, in his judgment, the public interests would not be injuriously affected thereby, by Act March 3, 1899, c. 427, § 1, ante, § 4945. He may also grant rights of way through the national forests for electrical plants, poles, and lines for the generation and distribution of electrical power, for telephone and telegraph purposes, for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses, by Act Feb. 15, 1901, c. 372, ante, § 4946.

All laws, rules, and regulations affecting national forests, including the right to change the boundaries thereof by executive proclamation, are in force within the territory excluded from the Yosemite National Park and included in the Sierra National Forest by Act Feb. 7, 1905, c. 547, by a provision of section 2 of that act, post, § 5213.

Notes of Decisions

Purpose of statute.—The purpose of this act is to preserve the forests on public lands of the United States, and it is necessary that all lands within forest reservations should belong to the United States, and ownership means possession of full and complete title. Ex parte Hyde (C. C. 1904) 194 Fed. 207. And see U. S. v. Homestake Min. Co. (1902) 117 Fed. 481, 54 C. C. A. 303.

The whole policy of forest reservation rests on legislation having regard for the future welfare, and is intended to foster and protect growing timber. U. S. v. Shannon (C. C. 1907) 151 Fed. 863, affirmed (1908) 160 Fed. 870, 88 C. C. A. 52.

§ 5124. (Act June 4, 1897, c. 2, § 1.) (2) Surveys; plats and field notes; maps.

The surveys herein provided for shall be made, under the supervision of the Director of the Geological Survey, by such person or persons as may be employed by or under him for that purpose, and shall be executed under instructions issued by the Secretary of the Interior; and if subdivision surveys shall be found to be necessary, they shall be executed under the rectangular system, as now provided by law. The plats and field notes prepared shall be approved and certified to by the Director of the Geological Survey, and two copies of the field notes shall be returned, one for the files in the United States surveyor-general's office of the State in which the reserve is situated, the other in the General Land Office; and twenty photolithographic copies of the plats shall be returned, one copy for the files in the United States surveyor-general's office of the State in which the reserve is situated; the original plat and the other copies shall be filed in the General Land Office, and shall have the facsimile signature of the Director of the Survey attached. Such surveys, field notes, and plats thus returned shall have the same legal force and effect as heretofore given the surveys, field notes, and plats returned through the surveyors-general; and such surveys, which include subdivision surveys under the rectangular system, shall be approved by the Commissioner of the General Land Office as in other cases, and properly certified copies thereof shall be filed in the respective land offices of the districts in which such lands are situated, as in other cases. All laws inconsistent with the provisions hereof are hereby declared inoperative as respects such survey: Provided, however, That a copy of every topographic map and other maps showing the distribution of the forests, together with such field notes as may be taken relating thereto, shall be certified thereto by

the Director of the Survey and filed in the General Land Office. (30 Stat. 34.)

See notes to the preceding paragraph of this section, ante, § 5123.

§ 5125. (Act June 4, 1897, c. 2, § 1.) (3) Purposes for which forest reserves may be established and administered.

All public lands heretofore designated and reserved by the President of the United States under the provisions of the Act approved March third, eighteen hundred and ninety-one, the orders for which shall be and remain in full force and effect, unsuspended and unrevoked, and all public lands that may hereafter be set aside and reserved as public forest reserves under said Act, shall be as far as practicable controlled and administered in accordance with the following provisions: no public forest reservation shall be established, except to improve and protect the forest within the reservation, or for the purpose of securing favorable conditions of water flows, and to furnish a continuous supply of timber for the use and necessities of citizens of the United States; but it is not the purpose or intent of these provisions, or of the Act providing for such reservations, to authorize the inclusion therein of lands more valuable for the mineral therein, or for agricultural purposes, than for forest purposes. (30 Stat. 34.)

See note to the first paragraph of this section, ante, § 5213.

Act March 3, 1891, c. 561, § 24, mentioned in this section, is set forth ante, § 5121.

Notes of Decisions

Agricultural entry.—The homestead land is the only one under which land is open to settlement for agricultural purposes. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20.

Character of lands.—The character of lands is a question of fact for the land department by applying the rule that they are to be considered mineral or nonmineral according to the use for which they are the more valuable. Cosmos Exploration Co. v. Gray Eagle Oil Co. (C. C. 1900) 104 Fed. 20. See, also, U. S. v. Lavenson (D. C. 1913) 206 Fed. 755.

Nothing short of a probably commercially valuable mine will suffice in a forest reserve. U. S. v. Lavenson (D. C. 1913) 206 Fed. 755.

§ 5126. (Act June 4, 1897, c. 2, § 1.) (4) Protection of forest reserves; rules and regulations therefor.

The [Secretary of the Interior] shall make provisions for the protection against destruction by fire and depredations upon the public forests and forest reservations which may have been set aside or which may be hereafter set aside under the said Act of March third, eighteen hundred and ninety-one, and which may be continued; and he may make such rules and regulations and establish such service as will insure the objects of such reservations, namely, to regulate their occupancy and use and to preserve the forests thereon from destruction; and any violation of the provisions of this Act or such rules and regulation shall be punished as is provided for in the Act of June fourth, eighteen hundred and eighty-eight, amending section fifty-three hundred and eighty-eight of the Revised Statutes of the United States. (30 Stat. 35.)

See note to the first paragraph of this section, ante, § 5123.

Act March 3, 1891, c. 561, § 24, mentioned in this section, is set forth ante, § 5121.

Act June 4, 1888, c. 340, amending R. S. § 5388, also mentioned in this section, was incorporated in Crim. Code, § 50, post, § 10217, and was repealed by section 341, of said Code, post, § 10515.

Instead of the Secretary of the Interior, who was authorized by various provisions of this section to protect, preserve, and regulate the use of national forests set aside under Act March 3, 1891, c. 561, § 24, ante, § 5121, the Secretary of Agriculture is to execute, or cause to be executed, all laws affecting lands reserved under said Act March 3, 1891, and acts supplemental to and amendatory thereof, by Act Feb. 1, 1905, c. 288, § 1, ante, § 823.

The following general provisions relating to the management of the na-

tional forests were contained in the agricultural appropriation act for the fiscal year 1917, Act Aug. 11, 1916, c. 313, 39 Stat.

"General expenses, Forest service: To enable the Secretary of Agriculture to experiment and to make and continue investigations and report on forestry, forest fires, national forests, and lumbering, but no part of this appropriation shall be used for any experiment or test made outside the jurisdiction of the United States; to advise the owners of woodlands as to the proper care of the same; to investigate and test American timber and timber trees and their uses, and methods for the preservative treatment of timber; to seek, through investigations and the planting of native and foreign species, suitable trees for the treeless regions; to erect necessary buildings: Provided that the cost of any building erected shall not exceed $650: to pay all expenses necessary to protect, administer, and improve the national forests; to ascertain the natural conditions upon and utilize the national forests; * * * to transport and care for fish and game supplied to stock the national forests or the waters therein; to employ agents, clerks, assistants, and other labor required in practical forestry and in the administration of national forests, in the city of Washington and elsewhere; to collate, digest, report, and illustrate the results of experiments and investigations made by the Forest Service; to purchase necessary supplies, apparatus, and office fixtures, and technical books and technical journals for officers of the Forest Service stationed outside of Washington, and for medical supplies and services and other assistance necessary for immediate relief of artisans, laborers, and other employés engaged in any hazardous work under the Forest Service; to pay freight, express, telephone, and telegraph charges; for electric light and power, fuel, gas, ice, washing towels, and official traveling and other necessary expenses, including traveling expenses for legal and fiscal officers while performing Forest Service work; and for rent outside of the District of Columbia; * *"

Provisions somewhat similar were contained in previous agricultural appropriation acts.

The Secretary of Agriculture was authorized to furnish young trees to residents of that part of Nebraska covered by the Kinkaid Enlarged Homestead Act, by the agricultural appropriation act for the fiscal year 1917, Act Aug. 11, 1916, c. 313, 39 Stat., and by similar provisions in previous agricultural appropriation acts.

Notes of Decisions

Validity of statute and departmental regulations.—Legislative power is not unconstitutionally delegated by provisions making criminal the violation of the rules and regulations covering forest reservations. U. S. v. Grimaud (1911) 31 Sup. Ct. 480, 220 U. S. 506, 55 L. Ed. 563; Light v. U. S. (1911) 31 Sup. Ct. 485, 487, 220 U. S. 523, 55 L. Ed. 570. See U. S. v. 11,150 Pounds of Butter (D. C. 1911) 188 Fed. 157 (affirmed [1912] 195 Fed. 657, 115 C. C. A. 463); (1898) 22 Op. Atty. Gen. 266. Such delegation and rules were held valid for civil purposes in Dastervignes v. U. S. (1903) 122 Fed. 30, 58 C. C. A. 346 (affirming U. S. v. Dastervignes [C. C. 1902] 118 Fed. 199); Shannon v. U. S. (1908) 160 Fed. 870, 88 C. C. A. 52 (affirming U. S. v. Shannon [C. C. 1907] 151 Fed. 863). And were sustained in criminal prosecutions in U. S. v. Deguirro (D. C. 1906) 152 Fed. 568; Same v. Domingo (D. C. 1907) 152 Fed. 566; Same v. Bale (D. C. 1907) 156 Fed. 687; Same v. Rizzinelli (D. C. 1910) 182 Fed. 675. But were held invalid in U. S. v. Blasingame (D. C. 1900) 116 Fed. 654; Same v. Maid (D. C. 1902) 116 Fed. 650, 653; Same v. Mathews (D. C. 1906) 146 Fed. 306; Dent v. U. S. (1903) 71 Pac. 920, 8 Ariz. 138.

—— **Grazing.**—Regulations relating to grazing were held valid in U. S. v. Grimaud (1911) 31 Sup. Ct. 480, 220 U. S. 506, 55 L. Ed. 563 (reversing judgment [D. C. 1909] 170 Fed. 205); Dastervignes v. U. S. (1903) 122 Fed. 30, 58 C. C. A. 346 (affirming order U. S. v. Dastervignes [C. C. 1902] 118 Fed. 199); Shannon v. U. S. (1908) 160 Fed. 870, 88 C. C. A. 52 (affirming order U. S. v. Shannon [C. C. 1907] 151 Fed. 863); U. S. v. Domingo (D. C. 1907) 152 Fed. 566.

—— **Hunting.**—Regulations by which the national forest reserves may be made refuges for game, or by which the hunting, killing, or capture of game thereon may be forbidden, are not authorized by this act. (1901) 23 Op. Atty. Gen. 589.

But see subsequent acts, § 5157, et seq., post.

Approval of railroad right of way.—See, also, notes to § 4945, ante.

The Secretary of the Interior has power to make his approval of the survey and plat of a railroad right of way over a forest reservation conditional on the execution by the company of stipulations for the protection of the public interests and to prescribe general rules and regulations governing such approval. Chicago, M. & St. P. Ry. Co. of Idaho v. U. S. (1914) 218 Fed. 288, 134 C. C. A. 84, affirming decree U. S. v. Chicago, M. & St. P. Ry. Co. of Idaho (D. C. 1913) 207 Fed. 164.

Permit for use of land.—The granting of a permit for the use and occupancy of land within a forest reserve

for the purpose of conducting a fish saltery, oil, and fertilizer plant is authorized, and such permit may be conditioned upon the payment of a reasonable charge. (1905) 25 Op. Atty. Gen. 470. See, also (1907) 26 Op. Atty. Gen. 421.

Offenses.—Grazing stock upon a forest reservation without the permit required by a rule made and promulgated under the authority conferred by this act is made an offense against the United States by the provisions that violation of such rules and regulations shall be criminally punishable. U. S. v. Grimaud (1911) 31 Sup. Ct. 480, 220 U. S. 506, 55 L. Ed. 563 (reversing judgment [D. C. 1909] 170 Fed. 205); Shannon v. U. S. (1908) 160 Fed. 870. 88 C. C. A. 52 (affirming order U. S. v. Shannon [C. C. 1907] 151 Fed. 863); U. S. v. De Guirro (D. C. 1906) 152 Fed. 568; Same v. Bale (D. C. 1907) 156 Fed. 687. See, also (1898) 22 Op. Atty. Gen. 266. And so is the unlawful use of a mining claim by the locator. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675.

The fact that the statute defines the penalty for its violation as the same prescribed by another statute does not require that the offenses should be the same to render the penalty applicable. U. S. v. Domingo (D. C. 1907) 152 Fed. 566.

Unlawful use of mining claim.—The location of a mining claim within a forest reservation does not operate to withdraw the land embraced therein from the jurisdiction of the Forestry Service, and while it does not take from him the right to take and utilize the entire claim, including the surface, for all purposes and to the same extent to which he could have possessed and used it if no forest reservation existed, it confers no right to use the surface of such claim for other than mining purposes, such as the maintenance of a saloon without a permit. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675.

Injunctive relief.—The United States is entitled to injunctive relief to restrain a cattle owner from grazing his cattle on a forest reserve without the requisite stock-grazing permit. Light v. U. S. (1911) 31 Sup. Ct. 485, 220 U. S. 523, 55 L. Ed. 570; Dastervignes v. Same (1903) 122 Fed. 30, 58 C. C. A. 346, affirming order U. S. v. Dastervignes (C. C. 1902) 118 Fed. 199.

§ 5127. (Act June 4, 1897, c. 2, § 1, as amended, Act June 6, 1900, c. 804.) (5) Sale of timber.

For the purpose of preserving the living and growing timber and promoting the younger growth on forest reservations, the [Secretary of the Interior], under such rules and regulations as he shall prescribe, may cause to be designated and appraised so much of the dead, matured, or large growth of trees found upon such forest reservations as may be compatible with the utilization of the forests thereon, and may sell the same for not less than the appraised value in such quantities to each purchaser as he shall prescribe, to be used in the State or Territory in which such timber reservation may be situated, respectively, but not for export therefrom. Before such sale shall take place notice thereof shall be given by the [Commissioner of the General Land Office], for not less than thirty days, by publication in one or more newspapers of general circulation, as he may deem necessary, in the State or Territory where such reservation exists: Provided, however, That in cases of unusual emergency the [Secretary of the Interior] may, in the exercise of his discretion, permit the purchase of timber and cord wood in advance of advertisement of sale at rates of value approved by him and subject to payment of the full amount of the highest bid resulting from the usual advertisement of sale: Provided further, That he may, in his discretion, sell without advertisement, in quantities to suit applicants, at a fair appraisement, timber and cord wood not exceeding in value one hundred dollars stumpage: And provided further, That in cases in which advertisement is had and no satisfactory bid is received, or in cases in which the bidder fails to complete the purchase, the timber may be sold, without further advertisement, at private sale, in the discretion of the Secretary of the Interior, at not less than the appraised valuation, in quantities to suit purchasers: And provided further, That the provisions of this Act shall not apply to existing forest reservations in the State of California, or to reservations that may be hereafter created within said State; payments for such timber to be made to the receiver of the local land office of the district wherein said timber may be sold, under such rules and regulations as the Secretary

of the Interior may prescribe; and the moneys arising therefrom shall be accounted for by the receiver of such land office to the [Commissioner of the General Land Office], in a separate account, and shall be covered into the Treasury. Such timber, before being sold, shall be marked and designated, and shall be cut and removed under the supervision of some person appointed for that purpose by the [Secretary of the Interior], not interested in the purchase or removal of such timber nor in the employment of the purchaser thereof. Such supervisor shall make report in writing to the [Commissioner of the General Land Office] and to the receiver in the land office in which such reservation shall be located of his doings in the premises. (30 Stat. 35. 31 Stat. 661.)

This paragraph was amended by Act June 6, 1900, c. 804, cited above by striking out the following paragraph: "Before such sale shall take place, notice thereof shall be given by the Commissioner of the General Land Office, for not less than sixty days, by publication in a newspaper of general circulation, published in the county in which the timber is situated, if any is therein published, and if not, then in a newspaper of general circulation published nearest to the reservation, and also in a newspaper of general circulation published at the capitol of the State or Territory where such reservation exists," and inserting in lieu thereof the paragraph beginning with the words "Before such sale shall take place," and ending with the words "or to reservations that may be hereafter created within said State."

See notes to the first paragraph of this section, ante, § 5123.

See, also, note to preceding paragraph, ante, § 5126, as to the transfer of authority over the national forests from the Secretary of the Interior to the Secretary of Agriculture.

Notes of Decisions

Purpose of act.—This act is intended to foster and protect growing timber on forest reservations. U. S. v. Shannon (C. C. 1907) 151 Fed. 863, affirmed (1908) 160 Fed. 870, 88 C. C. A. 52.

It authorizes the grant of a permit to use land for a fish saltery and fertilizer plant for which a reasonable charge may be collected. (1905) 25 Op. Atty. Gen. 470.

Sale of timber on mining claims.—When unpatented mining claims are in a national forest, timber thereon which is dead, matured, and infested with insects so as to be a menace to the young and growing trees, may be sold by the Forest Service under regulations promulgated. Lewis v. Garlock (C. C. 1909) 168 Fed. 153.

§ 5128. (Act June 4, 1897, c. 2, § 1.) (6) Use of timber and stone by settlers.

The Secretary of the Interior may permit, under regulations to be prescribed by him, the use of timber and stone found upon such reservations, free of charge, by bona fide settlers, miners, residents, and prospectors for minerals, for firewood, fencing, buildings, mining, prospecting, and other domestic purposes, as may be needed by such persons for such purposes; such timber to be used within the State or Territory, respectively, where such reservations may be located. (30 Stat. 35.)

See notes to the first paragraph of this section, ante, § 5123.

See, also, note to the fourth paragraph, ante, § 5126, as to the transfer of authority over the national forests from the Secretary of the Interior to the Secretary of Agriculture.

The use of earth, stone, and timber from the national forests in the construction of irrigation works under the National Reclamation Act of June 17, 1902, c. 1093, ante, §§ 4700–4708, was authorized by Act Feb. 8, 1905, c. 552, ante, § 4741.

§ 5129. (Act June 4, 1897, c. 2, § 1.) (7) Egress or ingress of actual settlers; prospecting.

Nothing herein shall be construed as prohibiting the egress or ingress of actual settlers residing within the boundaries of such reservations, or from crossing the same to and from their property or homes; and such wagon roads and other improvements may be constructed thereon as may be necessary to reach their homes and to utilize their property under such rules and regulations as may be pre-

scribed by the Secretary of the Interior. Nor shall anything herein prohibit any person from entering upon such forest reservations for all proper and lawful purposes, including that of prospecting, locating, and developing the mineral resources thereof: Provided, That such persons comply with the rules and regulations covering such forest reservations. (30 Stat. 36.)

See notes to the first paragraph of this section, ante, § 5123.

See, also, note to the fourth paragraph, ante, § 5126, as to the transfer of authority over the national forests from the Secretary of the Interior to the Secretary of Agriculture.

In Act June 4, 1897, c. 2, § 1, the provisions set forth in this section were followed by provisions that in cases in which a tract of land covered by an unperfected bona fide claim, or by a patent, was included within the limits of a national forest, the settler or owner might relinquish the tract to the Government and select in lieu thereof a tract of vacant land open to settlement. Such selections were confined to vacant surveyed non-mineral public lands which were subject to homestead entry, not exceeding in area the tract covered by the claim or patent, by Act June 6, 1900, c. 791, § 1, 31 Stat. 614, and Act March 3, 1901, c. 831, § 1, 31 Stat. 1037. All of these provisions for the relinquishment, selection, and patenting of such lieu lands were repealed, with a saving of selections theretofore made, by Act March 3, 1905, c. 1495, 33 Stat. 1264.

Provisions for the relief of bona fide settlers in national forests created under Act March 3, 1891, c. 561, § 24, ante, § 5121, who had failed to place their claims of record within the statutory time, whereby the filing of such claims was permitted within a period of two years from the passage of the act, were contained in Act April 15, 1902, c. 507, 32 Stat. 106; the time limited thereby expiring April 15, 1904.

Private lands in the area included in the Sierra National Forest by Act Feb. 7, 1905, c. 547, have not the privileges of the lieu-land scrip provisions of the land laws, by section 2 of that act, post, § 5213. And the same provision as to lands included in said forest by Res. June 11, 1906, No. 27, was made by section 2 of said resolution, post, § 5215.

On the opening to homestead entry of agricultural lands within national forests settlers actually occupying and in good faith claiming such lands for agricultural purposes prior to Jan. 1, 1906, have a preference right of settlement and entry, by Act June 11, 1906, c. 3074, § 1, post, § 5162.

Settlers and owners of tracts within the Wind Cave National Park established by Act Jan. 9, 1903, c. 63, may relinquish them and secure other land, in accordance with the provisions for relinquishment of lands in national forests by section 5 of that act, post, § 5235.

Homestead entries canceled or relinquished or invalid solely because of erroneous allowance after withdrawal of the lands for national forest purposes may be reinstated, by provisions of Act March 3, 1911, c. 225, post, §§ 5171, 5172.

Notes of Decisions

Hunting.—The Secretary of the Interior cannot, without express authority of law, prescribe rules and regulations by which the national forest reserves may be made refuges for game, or by which the hunting, killing, or capture of game thereon may be forbidden. Such power was not conferred by this act. (1901) 23 Op. Atty. Gen. 589.

Unlawful use of mining claim.—It is unlawful for a locator to erect on his mining claim a saloon or other buildings or structures without permit that are in no way connected with the mining or development of the claim as such. U. S. v. Rizzinelli (D. C. 1910) 182 Fed. 675.

Selection of lieu lands authorized by repealed provisions.—As to selection of lieu lands, see Cosmos Exploration Co. v. Gray Eagle Oil Co. (1903) 23 Sup. Ct. 692, 696, 190 U. S. 301, 47 L. Ed. 1064 (affirming [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which affirms [C. C. 1900] 104 Fed. 20); Roughton v. Knight (1911) 31 Sup. Ct. 297, 219 U. S. 537, 55 L. Ed. 326 (affirming [1909] 103 Pac. 844, 156 Cal. 123); Daniels v. Wagner (1915) 35 Sup. Ct. 740, 237 U. S. 547, 59 L. Ed. 1102 (reversing decree [1913] 205 Fed. 235, 125 C. C. A. 93, which affirms [D. C. 1912] 194 Fed. 973); Same v. Merrithew (1915) 35 Sup. Ct. 747, 237 U. S. 570, 59 L. Ed. 1113 (reversing decree Same v. Wagner [1913] 205 Fed. 235, 125 C. C. A. 93); Same v. Craddock (1915) 35 Sup. Ct. 749, 237 U. S. 574, 59 L. Ed. 1118 (reversing decree Same v. Wagner [1913] 205 Fed. 235, 125 C. C. A. 93); Sawyer v. Gray (1915) 35 Sup. Ct. 842, 237 U. S. 674, 59 L. Ed. 1170; Western Lumber Co. v. Willis (1908) 160 Fed. 27, 87 C. C. A. 183; McClure v. U. S. (1911) 187 Fed. 265, 111 C. C. A. 1 (affirming decree U. S. v. McClure [C. C. 1909] 174 Fed. 510); Olive Land & Development Co. v. Olmstead (C. C. 1900) 103 Fed.

568; Pacific Land & Improvement Co. v. Elwood Oil Co. (C. C. 1900) 104 Fed. 20 (judgment affirmed [1901] 112 Fed. 4, 50 C. C. A. 79, 61 L. R. A. 230, which is affirmed [1903] 23 Sup. Ct. 698, 24 Sup. Ct. 861, 190 U. S. 316, 47 L. Ed. 1073); Ex parte Hyde (C. C. 1904) 194 Fed. 207; Clearwater Timber Co. v. Shoshone County, Idaho (C. C. 1907) 155 Fed. 612; U. S. v. Conklin (C. C. 1909) 169 Fed. 177 (decree affirmed [1910] 177 Fed. 55, 100 C. C. A. 473); U. S. v. Hyde (C. C. 1909) 174 Fed. 175; Sawyer v. Gray (D. C. 1913) 205 Fed. 160; Territory v. Perrin (1905) 83 Pac. 361, 9 Ariz. 316; McLemore v. Express Oil Co. (1910) 112 Pac. 59, 158 Cal. 559, 564, 139 Am. St. Rep. 147; Johnson v. Lincoln County (1915) 146 Pac. 471, 50 Mont. 253; Tonopah & G. R. Co. v. Fellanbaum (1910) 107 Pac. 882, 32 Nev. 278; Pacific Live Stock Co. v. Isaacs (Or. 1908) 96 Pac. 460; Peters v. Van Horn (1905) 79 Pac. 1110, 37 Wash. 550.

([8] Repealed.)

See notes to § 5129, ante.

§ 5130. (Act June 4, 1897, c. 2, § 1.) (9) Sites for schools and churches.

The settlers residing within the exterior boundaries of such forest reservations, or in the vicinity thereof, may maintain schools and churches within such reservation, and for that purpose may occupy any part of the said forest reservation, not exceeding two acres for each schoolhouse and one acre for a church. (30 Stat. 36.)

See notes to the first paragraph of this section, ante, § 5123.

§ 5131. (Act June 4, 1897, c. 2, § 1.) (10) Civil and criminal jurisdiction.

The jurisdiction, both civil and criminal, over persons within such reservations shall not be affected or changed by reason of the existence of such reservations, except so far as the punishment of offenses against the United States therein is concerned; the intent and meaning of this provision being that the State wherein any such reservation is situated shall not, by reason of the establishment thereof, lose its jurisdiction, nor the inhabitants thereof their rights and privileges as citizens, or be absolved from their duties as citizens of the State. (30 Stat. 36.)

See notes to the first paragraph of this section, ante, § 5123.

§ 5132. (Act June 4, 1897, c. 2, § 1.) (11) Use of waters.

All waters on such reservations may be used for domestic, mining, milling, or irrigation purposes, under the laws of the State wherein such forest reservations are situated, or under the laws of the United States and the rules and regulations established thereunder. (30 Stat. 36.)

See notes to the first paragraph of this section, ante, § 5123.

Notes of Decisions

Permit to use water.—It seems that the right to use water on the forest reserves can be secured only under the provisions of this act and of other legislation specifically referring to the reserves, unless such rights existed before the particular reserve in question was created. (1907) 26 Op. Atty. Gen. 421.

§ 5133. (Act June 4, 1897, c. 2, § 1.) (12) Mineral lands; restoration to public domain; location and entry.

Upon the recommendation of the Secretary of the Interior, with the approval of the President, after sixty days' notice thereof, published in two papers of general circulation in the State or Territory wherein any forest reservation is situated, and near the said reservation, any public lands embraced within the limits of any forest reservation which, after due examination by personal inspection of a competent person appointed for that purpose by the Secretary of the Interior, shall be found better adapted for mining or for agricultural purposes than for forest usage, may be restored to the public domain. And any mineral lands in any forest reservation which have been or which may be

shown to be such, and subject to entry under the existing mining laws of the United States and the rules and regulations applying thereto, shall continue to be subject to such location and entry, notwithstanding any provisions herein contained. (30 Stat. 36.)

See notes to the first paragraph of this section, ante, § 5123.

See, also, note to the fourth paragraph, ante, § 5126, as to the transfer of authority over the national forests from the Secretary of the Interior to the Secretary of Agriculture.

The Pikes Peak National Forest, the Plum Creek National Forest and the South Platte National Forest, in the State of Colorado, were opened to the location of mining claims thereon for gold, silver and cinnabar, by Act Feb. 20, 1896, c. 28, 29 Stat. 11.

Notes of Decisions

Mineral lands.—Nothing short of a probably commercially valuable mine will suffice in a forest reserve; discovery alone is not sufficient. U. S. v. Lavenson (D. C. 1913) 206 Fed. 755.

§ 5134. (Act June 4, 1897, c. 2, § 1.) (13) Modification or vacation of executive orders; reduction of area; change of boundaries.

The President is hereby authorized at any time to modify any Executive order that has been or may hereafter be made establishing any forest reserve, and by such modification may reduce the area or change the boundary lines of such reserve, or may vacate altogether any order creating such reserve. (30 Stat. 36.)

See notes to the first paragraph of this section, ante, § 5123.

The right to change the boundaries of national forests by executive proclamation is in force within the territory excluded from the Yosemite National Park and included in the Sierra National Forest by Act Feb. 7, 1905, c. 547, by a provision of section 2 of that act, post, § 5213. And a similar provision as to the lands included in said reserve by Res. June 11, 1906, No. 27, was made by section 2 of said resolution, post, § 5215.

§ 5135. (Act March 4, 1907, c. 2907.) No forest reserves to be created, and no additions thereto to be made hereafter, within certain states, except by act of Congress.

Hereafter no forest reserve shall be created, nor shall any additions be made to one heretofore created within the limits of the States of Oregon, Washington, Idaho, Montana, Colorado, or Wyoming, except by Act of Congress. (34 Stat. 1271.)

This was a proviso annexed to an appropriation for the administration, etc., of the national forests, in the agricultural appropriation act for the fiscal year 1908, cited above.

This provision was re-enacted as a proviso to Act June 25, 1910, c. 421, § 2, ante, § 4525.

The President had been given the power to establish forest reserves by Act March 3, 1891, c. 561, § 24, ante, § 5121.

A national forest in the State of California, to be known as the Calaveras Bigtree National Forest, was created by Act Feb. 18, 1909, c. 143, 35 Stat. 626, as amended by Act May 7, 1912, c. 105, 37 Stat. 108.

Certain lands in Bannock and Oneida counties, Idaho, were withdrawn from entry and included in the Pocatello National Forest by Act Feb. 18, 1911, c. 115, 36 Stat. 919.

The exchange of lands within the Kansas National Forest for privately owned lands lying within the exterior limits of that forest was authorized by Act Feb. 28, 1911, c. 181, 36 Stat. 960.

The State of Oregon was authorized to relinquish its selection, under the Carey Act, of certain lands in that State in exchange for certain other lands within national forests, the lands so relinquished to become parts of the forests in which they were situated, by Act March 4, 1911, c. 273, 36 Stat. 1357.

The Secretary of the Interior was authorized to accept from the State of Michigan a conveyance of lands to be included in or to become a national forest, and the State of Michigan was authorized to select other lands of approximately equal value from any unappropriated public lands in the State, by Act July 31, 1912, c. 264, 37 Stat. 241.

An exchange of lands within the Paulina, Oregon, National Forest for privately owned lands lying within the exterior limits of that forest was authorized by Act July 25, 1912, c. 252, 37 Stat. 200.

The exchange of a certain placer mineral survey in Lawrence County, South

Dakota, for certain other lands to become part of the Harney National Forest was authorized by Act July 15, 1912, c. 234, 37 Stat. 192.

The military reservation of Fort Wingate, New Mexico, was made a part of the Zuni National Forest by Act Aug. 10, 1912, c. 284, 37 Stat. 286, and the Secretary of Agriculture was authorized to exchange timber within the Pecos National Forest, in New Mexico, for certain privately owned timber-lands within the exterior limits of the Zuni National Forest, by Act Aug. 22, 1912, c. 327, 37 Stat. 323.

An appropriation to enable the Secretary of Agriculture to effect an exchange of lands and indemnity rights with the State of Montana was contained in the agricultural appropriation act for the fiscal year 1914, Act March 4, 1913, c. 145, 37 Stat. 854.

The exchange of lands within the Florida National Forest for privately owned lands lying within the exterior limits of that forest was authorized by Act July 3, 1916, c. 218, 39 Stat.

Provisions for the adjustment of the boundaries of the Whitman National Forest, Oregon, were made by Act Sept. 8, 1916, c. 476, 39 Stat.

The consolidation and exchange of lands belonging to the United States in the Oregon National Forest for privately owned lands lying within the exterior limits of said forest was authorized by Act Sept. 8, 1916, c. 471, 39 Stat.

Provisions for the addition of certain described lands to the Colorado and Pike National Forests, in Colorado, were made by Act Sept. 8, 1916, c. 282, 39 Stat.

Certain described lands in Colorado are reserved and made a part of and included in the Pike National Forest, subject to all prior valid adverse rights, by Act Sept. 8, 1916, c. 469, 39 Stat.

Certain lands were added to the Teton National Forest, Wyoming, by Act Aug. 16, 1916, c. 211, 39 Stat.

Any land within certain described areas, found to be chiefly valuable for the production of timber or the protection of stream flow, may be included within and made a part of the Colorado or Pike National Forests by proclamation of the President, by Act Sept. 8, 1916, c. 474, 39 Stat.

Similar provisions as to the Whitman National Forest, in Oregon, are contained in Act Sept. 8, 1916, c. 476, 39 Stat.

§ 5136. (Act March 3, 1899, c. 424, § 1.) Establishment of exterior boundaries of forest reserves.

Hereafter all standard, meander, township, and section lines of the public land surveys shall, as heretofore, be established under the direction and supervision of the Commissioner of the General Land Office, whether the lands to be surveyed are within or without reservations, except that where the exterior boundaries of public forest reservations are required to be coincident with standard, township, or section lines such boundaries may, if not previously established in the ordinary course of the public land surveys, be established and marked under the supervision of the Director of the United States Geological Survey whenever necessary to complete the survey of such exterior boundaries. (30 Stat. 1097.)

This was a provision of the sundry civil appropriation act for the fiscal year 1900, cited above.

The surveys of the forest reserves were to be made under the supervision of the Director of the Geological Survey, by Act June 4, 1897, c. 2, § 1 (2), ante, § 5124.

§ 5137. (Act Aug. 10, 1912, c. 284.) Sale of mature, dead, and down timber to settlers for domestic use.

The Secretary of Agriculture, under such rules and regulations as he shall establish, is hereby authorized and directed to sell at actual cost, to homestead settlers and farmers, for their domestic use, the mature, dead, and down timber in national forests, but it is not the intent of this provision to restrict the authority of the Secretary of Agriculture to permit the free use of timber as provided in the Act of June fourth, eighteen hundred and ninety-seven. (37 Stat. 287.)

This was a provision of the agricultural appropriation act for the fiscal year 1913, cited above.

The provisions for use of timber by settlers, of Act June 4, 1897, c. 2, § 1 (6), are set forth ante, § 5128.

The Secretary of Agriculture was authorized, from the nurseries on the Nebraska National Forest, to furnish young trees free, so far as they may be spared, to residents of the territory covered by the Kinkaid Act of April 28, 1904, c. 1801, ante, §§ 4576–4578, by a provision of Act March 4, 1913, c. 145, 37 Stat. 840.

§ 5137a. (Act Aug. 11, 1916, c. 313.) Deposits from timber purchasers to defray cost of disposing of débris.

Hereafter deposits may be received from timber purchasers in such sums as the Secretary of Agriculture may require to cover the cost to the United States of disposing of brush and other débris resulting from cutting operations in sales of national forest timber; such deposits shall be covered into the Treasury and shall constitute a special fund, which is hereby appropriated and made available until expended, as the Secretary of Agriculture may direct, to pay the cost of such work and to make refunds to the depositors of amounts deposited by them in excess of such cost. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

§ 5138. (Act Aug. 11, 1916, c. 313.) Export of timber and other forest products.

The Secretary of Agriculture may, in his discretion, permit timber and other forest products cut or removed from the national forests to be exported from the State or Territory in which said forests are respectively situated. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

The agricultural appropriation act for the fiscal year 1914, Act March 4, 1913, c. 145, 37 Stat. 839, contained a similar provision.

§ 5138a. (Act March 4, 1915, c. 144.) Taking earth, stone, and timber for use of Navy, and for Government railways, etc., in Alaska; reports.

Hereafter the Secretary of Agriculture, under regulations to be prescribed by him, is hereby authorized to permit the Navy Department to take from the national forests such earth, stone, and timber for the use of the Navy as may be compatible with the administration of the national forests for the purposes for which they are established, and also in the same manner to permit the taking of earth, stone, and timber from the national forests for the construction of Government railways and other Government works in Alaska: Provided, That the Secretary of Agriculture shall submit with his annual estimates a report of the quantity and market value of earth, stone, and timber furnished as herein provided. (38 Stat. 1100.)

This was a provision of the agricultural appropriation for the fiscal year 1916, cited above.

§ 5139. (Act Feb. 18, 1909, c. 143, as amended, Act May 7, 1912, c. 105.) Calaveras Bigtree National Forest; purposes for which to be held and administered; acquisition of title to lands; reimbursement of owners.

The Secretary of Agriculture, to secure and protect for all time the big trees scientifically known as Sequoia washingtoniana, is hereby empowered, in his discretion, to obtain for the United States the complete title to any or all of the following-described lands in the State of California: In township four north, range fifteen east, Mount Diablo meridian, the northeast quarter of section one; in township four north, range sixteen east, Mount Diablo meridian, the north half of section six; in township five north, range fifteen east, Mount Diablo meridian, the southwest quarter of section fourteen, south half of section fifteen, north half of section twenty-

two, northwest quarter of section twenty-three, and southeast quarter of section thirty-six, and in township five north, range sixteen east, Mount Diablo meridian, the west half of section twenty-eight, the east half and southwest quarter of section twenty-nine, the southeast quarter of section thirty, all of sections thirty-one, thirty-two, and the northwest quarter of section thirty-three. And such area or areas, as fast as complete title is acquired, shall be permanently held by the United States and shall be known as the Calaveras Bigtree National Forest and shall be administered, and protected, by the Secretary of Agriculture from the funds appropriated for the administration of National Forest land to prolong the existence, growth, and promote the reproduction of said big trees: Provided, That the owners of land acquired hereunder shall convey to the United States full title to any of the above-described areas approved for said national forest by the Secretary of Agriculture, the completeness of such title to be determined by the Secretary of the Interior in each case, and shall be reimbursed therefor only in one or both of the following ways: (1) They may be given the right to file with the Secretary of the Interior, within sixty days after such conveyance, selections of surveyed, unappropriated, nonmineral public lands or of nonmineral national forest lands, and if the lands so selected shall be found subject to selection and of the actual value in lands and stumpage substantially equal to that of the lands and stumpage conveyed they may be patented to said owners in lieu of the conveyed lands: Provided, however, That in any case where any part of the lands selected is national forest land, the approval of the Secretary of Agriculture shall first be secured with respect to such part, or (2) the Secretary of Agriculture may grant to any such conveying owner the right to cut from national forest land an amount of timber and wood, substantially equal to the amount of timber and wood on the land acquired by the United States under the provisions of this Act: Provided, That nothing contained in this Act shall warrant an appropriation from the Treasury to carry out the terms of this Act. (35 Stat. 626. 37 Stat. 108.)

This was an act entitled "An act to create the Calaveras Bigtree National Forest, and for other purposes."

It was amended by changing the provisions of the original act as to the modes of reimbursement of owners of lands taken, to read as set forth here, by Act May 7, 1912, c. 105, last cited above.

§ 5140. (Act Feb. 28, 1899, c. 221, § 1.) Leases of lands in forests for sanitariums or hotels.

That the Secretary of the Interior be, and hereby is, authorized, under such rules and regulations as he from time to time may make, to rent or lease to responsible persons or corporations applying therefor suitable spaces and portions of ground near, or adjacent to, mineral, medicinal, or other springs, within any forest reserves established within the United States, or hereafter to be established, and where the public is accustomed or desires to frequent, for health or pleasure, for the purpose of erecting upon such leased ground sanitariums or hotels, to be opened for the reception of the public. And he is further authorized to make such regulations, for the convenience of people visiting such springs, with reference to spaces and locations, for the erection of tents or temporary dwelling houses to be erected or constructed for the use of those visiting such springs for health or pleasure. And the Secretary of the Interior is authorized to prescribe the terms and duration and the compensation to be paid for the privileges granted under the provisions of this Act. (30 Stat. 908.)

This section and the section next following were an act entitled "An act to authorize the Secretary of the Interior to rent or lease certain portions of forest reserve."

The Secretary of Agriculture is to execute or cause to be executed all laws affecting national forests, except such laws as affect the surveying, etc., entering, etc., or patenting of any of such lands, by Act Feb. 1, 1905, c. 288, § 1, ante, § 823. The supervision of the national forests was thereby transferred from the Secretary of the Interior to the Secretary of Agriculture.

For a subsequent provision giving the Secretary of Agriculture general power to lease for summer homes, hotels, etc., for not exceeding thirty years, see Act March 4, 1915, c. 144, post, § 5141a.

§ 5141. (Act Feb. 28, 1899, c. 221, § 2.) Disposition of funds from leases.

All funds arising from the privileges granted hereunder shall be covered into the Treasury of the United States as a special fund, to be expended in the care of public forest reservations. (30 Stat. 908.)

§ 5141a. (Act March 4, 1915, c. 144.) Use and occupation of lands for summer homes, hotels, stores, etc.

Hereafter the Secretary of Agriculture may, upon such terms as he may deem proper, for periods not exceeding thirty years, permit responsible persons or associations to use and occupy suitable spaces or portions of ground in the national forests for the construction of summer homes, hotels, stores, or other structures needed for recreation or public convenience, not exceeding five acres to any one person or association, but this shall not be construed to interfere with the right to enter homesteads upon agricultural lands in national forests as now provided by law. (38 Stat. 1101.)

This was a provision of the agricultural appropriation act for the fiscal year 1916, cited above.

§ 5142. (Act Feb. 1, 1905, c. 288, § 5.) Disposition of money received from sale of products or use of land, etc.

All money received from the sale of any products or the use of any land or resources of said forest reserves shall be covered into the Treasury of the United States and for a period of five years from the passage of this Act shall constitute a special fund available, until expended, as the Secretary of Agriculture may direct, for the protection, administration, improvement, and extension of Federal forest reserves. (33 Stat. 628.)

This section was part of the act for the transfer of national forests from the Department of the Interior to the Department of Agriculture, cited above.

The special fund provided for by this section for a period of five years was continued, until otherwise provided, and the expenditure thereof was regulated, by provisions of Act June 30, 1906, c. 3913, 34 Stat. 684. But all these provisions were superseded by the different provisions for the disposal of moneys received after July 1, 1907, by or on account of the forest service for timber, or from any other source of forest reservation revenue, contained in Act March 4, 1907, c. 2907, post, § 5146.

Notes of Decisions

Permit to use land.—The Secretary in the exercise of his power to grant a permit to use land may grant a privilege for a longer period than one year, and may charge and collect a reasonable sum for the privilege granted. (1905) 25 Op. Atty. Gen. 470. See, also (1907) 26 Op. Atty. Gen. 421.

Employment of geologists.—The employment of geologists was within the authority of the Secretary of Agriculture. (1907) 26 Op. Atty. Gen. 269.

Cited without definite application, U. S. v. Utah Power & Light Co. (1913) 209 Fed. 554, 562, 126 C. C. A. 376.

§ 5143. (Act June 30, 1906, c. 3913.) Special fund from money received from sale of products, etc., continued; estimates of expenditures to be submitted in annual Book of Estimates.

The forest-reserve special fund provided for in section five of the Act approved February first, nineteen hundred and five, entitled "An Act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture," shall

continue until otherwise provided by law; but after June thirtieth, nineteen hundred and eight, it shall not be expended except in accordance with specific estimates of expenditures to be made from said fund for the succeeding fiscal year, to be submitted by the Secretary of Agriculture with the estimates of appropriation in the annual Book of Estimates. (34 Stat. 684.)

These were provisions of the agricultural appropriation act for the fiscal year 1907, cited above.

Act Feb. 1, 1905, c. 288, § 5, mentioned in this paragraph, which provided for the special fund referred to therein for a period of five years, is set forth ante, § 5142.

Other provisions for the disposition of all money received after July 1, 1907, by or on account of the forest service for timber, or from any other source of forest reservation revenue, contained in Act March 4, 1907, c. 2907, are post, § 5146.

§ 5144. (Act June 30, 1906, c. 3913.) Sales of timber on forest reserves in California to conform to law governing such sales in other States.

Hereafter sales of timber on forest reserves in the State of California shall in every respect conform to the law governing such sales in other States, as set forth in the Act of June sixth, nineteen hundred (Thirty-First Statutes at Large, page six hundred and sixty-one). (34 Stat. 684.)

This was a further provision of the agricultural appropriation act for the fiscal year 1907, cited above.

Act June 6, 1900, c. 804, 31 Stat. 661, mentioned in this provision, expressly amended Act June 4, 1897, c. 2, § 1, and the amendment made thereby is incorporated into the provision of said Act June 4, 1897, amended, which is set forth as amended ante, § 5127. See note to said provision. By a proviso annexed to said amendment, the provisions of the act were not to apply to forest reservations in the State of California.

§ 5145. (Act June 30, 1914, c. 131.) Disposal of moneys received as contributions toward forest investigations, etc.; refund to contributors of excess paid by them; report of moneys so received.

Hereafter all moneys received as contributions toward cooperative work in forest investigations, or the protection and improvement of the national forests, shall be covered into the Treasury and shall constitute a special fund, which is hereby appropriated and made available until expended, as the Secretary of Agriculture may direct, for the payment of the expenses of said investigations, protection, or improvements by the Forest Service, and for refunds to the contributors of amounts heretofore or hereafter paid in by them in excess of their share of the cost of said investigations, protection, or improvements: Provided, That annual report shall be made to Congress of all such moneys so received as contributions for such cooperative work. (38 Stat. 430.)

This was a provision of the agricultural appropriation act for the fiscal year 1915, cited above.

This section superseded a less comprehensive provision in the agricultural appropriation act for the fiscal year 1907, Act June 30, 1906, c. 3913, 34 Stat. 684; the difference between the two provisions being that the present section adds the proviso and covers contributions toward forest protection and improvement as well as toward investigation to which the earlier provision was limited.

§ 5146. (Act March 4, 1907, c. 2907.) Disposal of money received by or on account of Forest Service; refund to depositors of excess deposited.

All money received after July first, nineteen hundred and seven, by or on account of the forest service for timber, or from any other source of forest reservation revenue, shall be covered into the Treasury of the United States as a miscellaneous receipt and there

is hereby appropriated and made available as the Secretary of Agriculture may direct out of any funds in the Treasury not otherwise appropriated, so much as may be necessary to make refunds to depositors of money heretofore or hereafter deposited by them to secure the purchase price on the sale of any products or for the use of any land or resources of the national forests in excess of amounts found actually due from them to the United States: * * (34 Stat. 1270.)

This was a proviso annexed to the appropriation for the administration, etc., of the national forests, in the agricultural appropriation act for the fiscal year 1908, cited above.

Previous provisions relating to the disposal of money received from the sale of any products or the use of any land or resources of the forest reserves, contained in Act Feb. 1, 1905, c. 281, § 5, ante, § 5142, and Act June 30, 1906, c. 3913, 34 Stat. 684, were superseded by this provision.

The provision for refunds of moneys deposited was amended, to include refunds of sums erroneously collected for use, etc., of lands located within, but not a part of, the national forests, or for illegal acts done upon such lands, etc., by a provision of Act March 4, 1911, c. 238, post, § 5147.

Notes of Decisions

Sale of timber on mining claims.— When an unpatented mining claim is in a national forest, timber thereon which is dead, matured, and infested with insects so as to be a menace to the young and growing trees may be sold by the Forest Service under regulations promulgated. Lewis v. Garlock (C. C. 1909) 168 Fed. 153.

§ 5147. (Act March 4, 1911, c. 238.) Amendment of Act March 4, 1907, c. 2907; refund of moneys erroneously collected for use, etc., of lands within but not part of national forests; report of amounts.

That so much of an Act entitled "An Act making appropriations for the Department of Agriculture for the fiscal year ending June thirtieth, nineteen hundred and eight," approved March fourth, nineteen hundred and seven (Thirty-fourth Statutes at Large, pages twelve hundred and fifty-six and twelve hundred and seventy), which provides for refunds by the Secretary of Agriculture to depositors of moneys to secure the purchase price of timber or the use of lands or resources of the national forests such sums as may be found to be in excess of the amounts found actually due the United States, be, and is hereby, amended hereafter to appropriate and to include so much as may be necessary to refund or pay over to the rightful claimants such sums as may be found by the Secretary of Agriculture to have been erroneously collected for the use of any lands, or for timber or other resources sold from lands located within, but not a part of, the national forests, or for alleged illegal acts done upon such lands, which acts are subsequently found to have been proper and legal; and the Secretary of Agriculture shall make annual report to Congress of the amounts refunded hereunder. (36 Stat. 1253.)

This was a proviso annexed to the appropriations for general expenses, Forest Service, in the agricultural appropriation act for the fiscal year 1912, cited above.

The provision of Act March 4, 1907, c. 2907, mentioned in and amended by this provision, is ante, § 5146.

Cited without definite application,
U. S. v. Utah Power & Light Co. (1913)
209 Fed. 554, 562, 126 C. C. A. 376.

§ 5148. (Act March 4, 1913, c. 145.) Reimbursement to owners of horses, etc., damaged or destroyed while fire-fighting, trail building, etc.

Hereafter the Secretary of Agriculture is authorized to reimburse owners of horses, vehicles, and other equipment lost, damaged, or destroyed while being used for necessary fire fighting, trail, or of-

ficial business, such reimbursement to be made from any available funds in the appropriation to which the hire of such equipment is properly chargeable. (37 Stat. 843.)

This was a provision of the agricultural appropriation act for the fiscal year 1914, cited above.

§ 5149. (Act May 23, 1908, c. 192.) Payment of part of money received from each forest reserve to State or Territory for public schools and public roads.

Hereafter twenty-five per centum of all money received from each forest reserve during any fiscal year, including the year ending June thirtieth, nineteen hundred and eight, shall be paid at the end thereof by the Secretary of the Treasury to the State or Territory in which said reserve is situated, to be expended as the State or Territorial legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which the forest reserve is situated: Provided, That when any forest reserve is in more than one State or Territory or county the distributive share to each from the proceeds of said reserve shall be proportional to its area therein. (35 Stat. 260.)

This was a provision of the agricultural appropriation act for the fiscal year 1909, cited above.

Previous provisions for payment for the same purposes of ten per cent. of the money received from each forest reserve, with an additional limitation of the amount to be paid to any county, contained in Act June 30, 1906, c. 3913, 34 Stat. 684, and Act March 4, 1907, c. 2907, 34 Stat. 1270, were superseded by this provision.

Provisions for the use of an additional ten per cent. of the moneys received from national forests for the construction and maintenance of roads and trails therein were made by Act March 4, 1913, c. 145, post, § 5150.

§ 5150. (Act March 4, 1913, c. 145.) Additional expenditures from receipts for construction and maintenance of roads and trails; co-operation with State authorities.

Hereafter an additional ten per centum of all moneys received from the national forests during each fiscal year shall be available at the end thereof, to be expended by the Secretary of Agriculture for the construction and maintenance of roads and trails within the national forests in the States from which such proceeds are derived; but the Secretary of Agriculture may, whenever practicable, in the construction and maintenance of such roads, secure the cooperation or aid of the proper State or Territorial authorities in the furtherance of any system of highways of which such roads may be made a part. (37 Stat. 843.)

This was a provision of the agricultural appropriation act for the fiscal year 1914, cited above.

§ 5150a. (Act July 11, 1916, c. 241, § 8.) Appropriation for construction, etc., of roads and trails within or partly within national forests; co-operation of states; limitation on aggregate of expenditure.

There is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, the sum of $1,000,000 for the fiscal year ending June thirtieth, nineteen hundred and seventeen, and each fiscal year ending June thirtieth, nineteen hundred and seventeen, and each fiscal year thereafter, up to and including the fiscal year ending June thirtieth, nineteen hundred and twenty-six, in all $10,000,000, to be available until expended under the supervision of the Secretary of Agriculture, upon request from the proper officers of the State, Territory, or county for the survey, construction, and maintenance of roads and trails within or only partly within the national forests, when necessary for the use and development of resources upon which com-

munities within and adjacent to the national forests are dependent: Provided, That the State, Territory, or county shall enter into a co-operative agreement with the Secretary of Agriculture for the survey, construction, and maintenance of such roads or trails, upon a basis equitable to both the State, Territory, or county, and the United States: And provided also, That the aggregate expenditures in any State, Territory, or county shall not exceed ten per centum of the value, as determined by the Secretary of Agriculture, of the timber and forage resources which are or will be available for income upon the national forest lands within the respective county or counties wherein the roads or trails will be constructed; and the Secretary of Agriculture shall make annual report to Congress of the amounts expended hereunder.

That immediately upon the execution of any co-operative agreement hereunder the Secretary of Agriculture shall notify the Secretary of the Treasury of the amount to be expended by the United States within or adjacent to any national forest thereunder, and beginning with the next fiscal year and each fiscal year thereafter the Secretary of the Treasury shall apply from any and all revenues from such forest ten per centum thereof to reimburse the United States for expenditures made under such agreement until the whole amount advanced under such agreement shall have been returned from the receipts from such national forest. (39 Stat.)

This section was part of an act entitled "An act to provide that the United States shall aid the states in the construction of rural post roads, and for other purposes," cited above.

§ 5151. (Act March 4, 1913, c. 145.) Free use of timber for telephone lines needed for fire protection.

Hereafter the Secretary of Agriculture, whenever he may deem it necessary for the protection of the national forests from fire, may permit the use of timber free of charge for the construction of telephone lines. (37 Stat. 843.)

This was a proviso of the agricultural appropriation act for the fiscal year, 1914, cited above.

§ 5152. (Act Feb. 1, 1905, c. 288, § 3.) Forest supervisors and rangers; selection.

Forest supervisors and rangers shall be selected, when practicable, from qualified citizens of the States or Territories in which the said reserves, respectively, are situated. (33 Stat. 628.)

This section was part of an act entitled "An act providing for the transfer of forest reserves from the Department of the Interior to the Department of Agriculture," cited above.

Section 1 of that act provided that thereafter the Secretary of Agriculture should execute all laws affecting public lands reserved under Act March 3, 1891, c. 561, § 24, ante, § 5121, and acts supplemental to and amendatory thereof, except such laws as affected the surveying, etc., entering, etc., or patenting of such lands, and is set forth ante, § 823.

Section 2 permitted pulp wood or wood pulp manufactured from timber in Alaska to be exported therefrom. It is set forth ante, § 5093.

Section 4 granted rights of way within and across national forests for the construction and maintenance of dams, reservoirs, water plants, ditches, etc., for municipal or mining purposes, and for the purposes of milling and reduction of ores. It is set forth ante, § 4947.

Previous provisions relating to the selection of forestry agents, superintendents, and supervisors, etc., under the Secretary of the Interior, were made by the sundry civil appropriation acts for each year, repeated in substantially the same language. But the execution of the laws affecting forest reserves having been placed, with certain exceptions, under the Secretary of Agriculture, by section 1 of this act, as stated above, the similar appropriations for subsequent fiscal years are made in the agricultural appropriation acts for each year. The provisions for the fiscal year 1917 were by Act Aug. 11, 1916, c. 313, 39 Stat.

Cited without definite application,
U. S. v. Utah Power & Light Co. (1913)
209 Fed. 554, 562, 126 C. C. A. 376.

§ 5153. (Act March 3, 1905, c. 1405.) Arrests for violations of laws and regulations relating to forest reserves and national parks, and proceedings thereon.

All persons employed in the forest reserve and national park service of the United States shall have authority to make arrests for the violation of the laws and regulations relating to the forest reserves and national parks, and any person so arrested shall be taken before the nearest United States commissioner, within whose jurisdiction the reservation or national park is located, for trial; and upon sworn information by any competent person any United States commissioner in the proper jurisdiction shall issue process for the arrest of any person charged with the violation of said laws and regulations; but nothing herein contained shall be construed as preventing the arrest by any officer of the United States, without process, of any person taken in the act of violating said laws and regulations. (33 Stat. 872.)

These were provisions of the agricultural appropriation act for the fiscal year 1906, cited above.

These provisions repeated, in the language, those of Act Feb. 6, 1905, c. 456, 33 Stat. 700, which was entitled "An act for the protection of the public forest reserves and national parks of the United States."

§ 5154. (Act May 23, 1908, c. 192.) Officials of Forest Service to aid in enforcement of local laws for certain purposes, and to aid other federal bureaus and departments in the performance of their duties.

Hereafter officials of the Forest Service designated by the Secretary of Agriculture shall, in all ways that are practicable, aid in the enforcement of the laws of the States or Territories with regard to stock, for the prevention and extinguishment of forest fires. and for the protection of fish and game, and with respect to National Forests, shall aid the other Federal Bureaus and Departments on request from them, in the performance of the duties imposed on them by law. (35 Stat. 259.)

This was a provision accompanying an appropriation for expenses to protect, etc., the national forests, in the agricultural appropriation act for the fiscal year 1909, cited above.

Previous similar provisions for aiding the enforcement of laws of the States or Territories, contained in similar appropriation acts, including a permanent provision for that purpose of Act March 4, 1907, c. 2907, 34 Stat. 1269, were superseded by this provision.

§ 5155. (Act March 4, 1913, c. 145.) Leaves of absence to employees of the Forest Service in Alaska.

Hereafter the employees of the Forest Service who are assigned to permanent duty in Alaska may, in the discretion of the Secretary of Agriculture, without additional expense to the Government, be granted leave of absence not to exceed thirty days in any one year, which leave may, in exceptional and meritorious cases where such an employee is ill, be extended, in the discretion of the Secretary of Agriculture, not to exceed thirty days additional in any one year. (37 Stat. 843.)

This was a provision of the agricultural appropriation act for the fiscal year 1914, cited above.

§ 5156. (Act Jan. 24, 1905, c. 137, § 1.) Areas in Wichita Forest Reserve to be set aside for protection as breeding place for game animals and birds.

The President of the United States is hereby authorized to designate such areas in the Wichita Forest Reserve as should, in his opinion, be set aside for the protection of game animals and birds and be recognized as a breeding place therefor. (33 Stat. 614.)

This section and the two sections next following were an act entitled "An act for the protection of wild animals and birds in the Wichita Forest Reserve."

Provisions similar to those of this act, relating to the Grand Canyon Forest Reserve, were made by Act June 29, 1906, c. 3593, post, §§ 5158–5161.

§ 5157. (Act Jan. 24, 1905, c. 137, § 2.) Hunting, trapping, killing, or capturing game animals or birds, within areas set aside, unlawful; penalty.

When such areas have been designated as provided for in section one of this Act, hunting, trapping, killing, or capturing of game animals and birds upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time, by the Secretary of Agriculture; and any person violating such regulations or the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction in any United States court of competent jurisdiction, be fined in a sum not exceeding one thousand dollars or be imprisoned for a period not exceeding one year, or shall suffer both fine and imprisonment, in the discretion of the court. (33 Stat. 614.)

§ 5158. (Act Jan. 24, 1905, c. 137, § 3.) Operation of local game laws as to private, State, or Territorial lands, not affected by this act.

It is the purpose of this Act to protect from trespass the public lands of the United States and the game animals and birds which may be thereon, and not to interfere with the operation of the local game laws as affecting private, State or Territorial lands. (33 Stat. 614.)

§ 5159. (Act June 29, 1906, c. 3593, § 1.) Areas in Grand Canyon Forest Reserve to be set aside for protection of game animals as breeding place therefor.

The President of the United States is hereby authorized to designate such areas in the Grand Canyon Forest Reserve as should, in his opinion, be set aside for the protection of game animals and be recognized as a breeding place therefor. (34 Stat. 607.)

This section and the two sections next following were an act entitled "An act for the protection of wild animals in the Grand Canyon Forest Reserve."

Provisions similar to those of this act, relating to the Wichita Forest Reserve, were made by Act Jan. 24, 1905, c. 137, ante, §§ 5156–5158.

§ 5160. (Act June 29, 1906, c. 3593, § 2.) Hunting, trapping, killing, or capturing game animals, within areas set aside, unlawful; penalty.

When such areas have been designated as provided in section one of this Act, hunting, trapping, killing, or capturing of game animals upon the lands of the United States within the limits of said areas shall be unlawful, except under such regulations as may be prescribed from time to time by the Secretary of Agriculture; and any person violating such regulations or the provisions of this Act shall be deemed guilty of a misdemeanor, and shall, upon conviction in any United States court of competent jurisdiction, be fined in a sum not exceeding one thousand dollars, or by imprisonment for a period not exceeding one year, or shall suffer both fine and imprisonment, in the discretion of the court. (34 Stat. 607.)

§ 5161. (Act June 29, 1906, c. 3593, § 3.) Operation of local game laws as to private, State, or Territorial lands, not affected by this act.

It is the purpose of this Act to protect from trespass the public lands of the United States and the game animals which may be thereon, and not to interfere with the operation of the local game laws as affecting private, State, or Territorial lands. (34 Stat. 607.)

§ 5162. (Act June 11, 1906, c. 3074, § 1.) Agricultural lands within forest reserves to be opened to homestead entry; preference rights of former settlers and of applicants; plats and field notes to be filed and posted; surveys; commutation provisions not to apply; credit for actual residence.

The Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain as to the location and extent of lands within permanent or temporary forest reserves, except the following counties in the State of California, Inyo, Tulare, Kern, San Luis Obispo, Santa Barbara, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego; which are chiefly valuable for agriculture, and which, in his opinion, may be occupied for agricultural purposes without injury to the forest reserves, and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and file the lists and descriptions with the Secretary of the Interior, with the request that the said lands be opened to entry in accordance with the provisions of the homestead laws and this Act.

Upon the filing of any such list or description the Secretary of the Interior shall declare the said lands open to homestead settlement and entry in tracts not exceeding one hundred and sixty acres in area and not exceeding one mile in length, at the expiration of sixty days from the filing of the list in the land office of the district within which the lands are located, during which period the said list or description shall be prominently posted in the land office and advertised for a period of not less than four weeks in one newspaper of general circulation published in the county in which the lands are situated: Provided, That any settler actually occupying and in good faith claiming such lands for agricultural purposes prior to January first, nineteen hundred and six, and who shall not have abandoned the same, and the person, if qualified to make a homestead entry, upon whose application the land proposed to be entered was examined and listed, shall, each in the order named, have a preference right of settlement and entry: Provided further, That any entryman desiring to obtain patent to any lands described by metes and bounds entered by him under the provisions of this Act shall, within five years of the date of making settlement, file, with the required proof of residence and cultivation, a plat and field notes of the lands entered, made by or under the direction of the United States surveyor-general, showing accurately the boundaries of such lands, which shall be distinctly marked by monuments on the ground, and by posting a copy of such plat, together with a notice of the time and place of offering proof, in a conspicuous place on the land embraced in such plat during the period prescribed by law for the publication of his notice of intention to offer proof, and that a copy of such plat and field notes shall also be kept posted in the office of the register of the land office for the land district in which such lands are situated for a like period; and further, that any agricultural lands within forest reserves may, at the discretion of the Secretary, be surveyed by metes and bounds, and that no lands entered under the provisions of this Act shall be patented under the commutation provisions of the homestead laws, but settlers, upon final proof, shall have credit for the period of their actual residence upon the lands covered by their entries. (34 Stat. 233.)

This was the first section of an act entitled "An act to provide for the entry of agricultural lands within forest reserves."

Other sections of the act are set forth post, §§ 5165–5167, 5170.

Special provisions similar to those of this section, relating to certain lands in the Yellowstone Forest Reserve, are contained in Act March 15, 1906, c. 950, 34 Stat. 62.

This section was amended by Act May 30, 1908, c. 233, post, § 5163, by striking out the words "except the following counties in the State of California:

Inyo, Tulare, Kern, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego." The names of the counties of San Luis Obispo and Santa Barbara are not stricken out.

Allotments within national forests to Indians occupying, etc., land included therein, who were not entitled to allotments on any Indian reservation, etc., to be made of lands more valuable for agricultural or grazing purposes than for timber, were authorized by Act June 25, 1910, c. 431, § 31, ante, § 4200.

Notes of Decisions

Temporary forest reserves. — Lands temporarily withdrawn from entry for further examination with a view to their inclusion in a definite forest reservation constitutes "temporary forest reserves." (1910) 28 Op. Atty. Gen. 424, 522.

§ 5163. (Act May 30, 1908, c. 233.) Amendment of Act June 11, 1906, c. 3074, § 1; exception from provisions of certain counties in California stricken out.

An Act entitled "An Act to provide for the entry of agricultural lands within forest reserves," approved June eleventh, nineteen hundred and six, be amended by striking out of section one the following words: "except the following counties in the State of California: Inyo, Tulare, Kern, Ventura, Los Angeles, San Bernardino, Orange, Riverside, and San Diego." (35 Stat. 554.)

Act June 11, 1906, c. 3074, § 1, amended by this act, is set forth ante, § 5162. See note to said section.

§ 5164. (Act Aug. 10, 1912, c. 284.) Land not to pass from forest until patent issues.

No land listed under the Act of June eleventh, nineteen hundred and six, shall pass from the forest until patent issues. (37 Stat. 287.)

This was part of a proviso annexed to an appropriation for survey and listing of lands within forest reserves chiefly valuable for agriculture, as required by Act June 11, 1906, ante, § 5162 et seq.

§ 5165. (Act June 11, 1906, c. 3074, § 2.) Additional homestead right of entry to former settlers; payment of price of lands required.

Settlers upon lands chiefly valuable for agriculture within forest reserves on January first, nineteen hundred and six, who have already exercised or lost their homestead privilege, but are otherwise competent to enter lands under the homestead laws, are hereby granted an additional homestead right of entry for the purposes of this Act only, and such settlers must otherwise comply with the provisions of the homestead law, and in addition thereto must pay two dollars and fifty cents per acre for lands entered under the provisions of this section, such payment to be made at the time of making final proof on such lands. (34 Stat. 234.)

See notes to section 1 of this act, ante, § 5162.

§ 5166. (Act June 11, 1906, c. 3074, § 3.) Entries in Black Hills Forest Reserve subject to mining laws and to appropriation of waters; limitation of title acquired as to riparian rights.

All entries under this Act in the Black Hills Forest Reserve shall be subject to the quartz or lode mining laws of the United States, and the laws and regulations permitting the location, appropriation, and use of the waters within the said forest reserves for mining, irrigation, and other purposes; and no titles acquired to agricultural lands in said Black Hills Forest Reserve under this Act shall vest in the patentee any riparian rights to any stream or streams of flowing water within said reserve; and that such limitation of title shall be expressed in the patents for the lands covered by such entries. (34 Stat. 234.)

See notes to section 1 of this act, ante, § 5162.

§§ 5167–5169. (Repealed.)

Section 5167, which was Act June 11, 1906, c. 3074, § 4, 34 Stat. 234, prohibited homestead settlements in that portion of the Black Hills Forest Reserve, in Lawrence and Pennington counties, South Dakota, except to persons occupying lands therein prior to Jan. 1, 1906.

Section 5168, which was Act Feb. 8, 1907, c. 896, 34 Stat. 883, excepted certain described townships in the Black Hills Forest Reserve, in Pennington county, South Dakota, from the operation of Act June 11, 1906, c. 3074, § 4.

Section 5169, which was Act July 3, 1912, c. 195, 36 Stat. 188, excepted other certain described townships in said Reserve from the operation of said Act June 11, 1906, c. 3074, § 4.

These sections were repealed by Act Aug. 8, 1916, c. 295, post, § 5169a.

§ 5169a. (Act Aug. 8, 1916, c. 295.) Act June 11, 1906, c. 3074, § 4, Act Feb. 8, 1907, c. 896, and Act July 3, 1912, c. 195, repealed; lands covered by said acts subject to existing laws.

That section four of the Act of Congress, approved June eleventh, nineteen hundred and six, entitled "An Act to provide for the entry of agricultural lands within forest reserves," as amended by the Act of February eighth, nineteen hundred and seven (Statutes at Large, volume thirty-four, page eight hundred and eighty-three), and by the Act of July third, nineteen hundred and twelve (Statutes at Large, volume thirty-seven, page one hundred and eighty-eight), be, and the same is hereby, repealed. All lands within national forests in Lawrence and Pennington Counties, in South Dakota, shall be and remain subject to all other provisions of the said Act of June eleventh, nineteen hundred and six, and Acts amendatory thereof and supplementary thereto. (39 Stat.)

This was an act entitled "An act to repeal section four of the act of Congress approved June eleventh, nineteen hundred and six, known as the forest homestead act, and for other purposes," cited above.

The provisions repealed by this section were Act June 11, 1906, c. 3074, § 4, Act Feb. 8, 1907, c. 896, and Act July 3, 1912, c. 195. See notes to §§ 5167–5169, ante.

The remaining provisions of Act June 11, 1906, c. 3074, mentioned in this section, are set forth ante, §§ 5162–5166, and post, § 5170.

§ 5170. (Act June 11, 1906, c. 3074, § 5.) Act not to be construed to authorize future settlements on lands within forest reserves, or to impair rights of former bona fide settlers.

Nothing herein contained shall be held to authorize any future settlement on any lands within forest reserves until such lands have been opened to settlement as provided in this Act, or to in any way impair the legal rights of any bona fide homestead settler who has or shall establish residence upon public lands prior to their inclusion within a forest reserve. (34 Stat. 234.)

See notes to section 1 of this act, ante, § 5162.

§ 5171. (Act March 3, 1911, c. 225, § 1.) Reinstatement of entries canceled or relinquished because of erroneous allowance after withdrawal of land for national forest purposes.

All homestead entries which have been canceled or relinquished, or are invalid solely because of the erroneous allowance of such entries after the withdrawal of lands for national forest purposes, may be reinstated or allowed to remain intact, but in the case of entries heretofore canceled applications for reinstatement must be filed in the proper local land office prior to July first, nineteen hundred and twelve. (36 Stat. 1084.)

This section and the section next following were an act entitled "An act providing for the validation of certain homestead entries."

§ 5172. (Act March 3, 1911, c. 225, § 2.) Contestants prior to withdrawal of land for national forest purposes authorized to exercise preference right to enter.

In all cases where contests were initiated under the provisions of the Act of May fourteenth, eighteen hundred and eighty, prior to the withdrawal of the land for national forest purposes, the qualified successful contestants may exercise their preference right to enter the land within six months after the passage of this Act. (36 Stat. 1084.)

Act May 14, 1880, c. 89, mentioned in this section, is set forth ante, §§ 4536–4538.

§ 5173. (Act March 4, 1913, c. 145.) Segregation of lands for homestead entry; surveys, plats and field notes of agricultural lands to be made by employees of the Forest Service.

The Secretary of Agriculture is hereby directed and required to select, classify, and segregate, as soon as practicable, all lands within the boundaries of national forests that may be opened to settlement and entry under the homestead laws applicable to the national forests, and the sum of $100,000 is hereby appropriated for the purposes aforesaid: Provided, That not to exceed $35,000 of this sum may be expended under the direction of the Secretary of Agriculture for the examination, survey, and platting of certain lands now listed or to be listed within national forests chiefly valuable for agriculture and describing such lands by metes and bounds, as required by the act of June eleventh, nineteen hundred and six (Thirty-fourth Statute, page two hundred and thirty-three), and the act of March third, eighteen hundred and ninety-nine (Thirtieth Statute, page ten hundred and ninety-five), and hereafter such surveys, and the plats and field notes thereof, shall be made by employees of the Forest Service, to be designated by the United States surveyor general, and such surveys and the plats and field notes thereof shall be approved by the United States surveyor general. (37 Stat. 842.)

These were provisions of the agricultural appropriation act for the fiscal year 1914.

The unexpended balance of the appropriation for the examination, platting, and survey of agricultural lands for the fiscal year 1913, was made available for the purpose of this appropriation by a subsequent provision of this act, omitted here.

Provisions somewhat similar to those of this section were made by previous agricultural appropriation acts.

An appropriation for the continuation of this work was contained in the agricultural appropriation act for the fiscal year 1917, Act Aug. 11, 1916, c. 313, 39 Stat.

§ 5174. (Act March 1, 1911, c. 186, § 1.) Consent to agreement by States for conservation of forests and water supply.

The consent of the Congress of the United States is hereby given to each of the several States of the Union to enter into any agreement or compact, not in conflict with any law of the United States, with any other State or States for the purpose of conserving the forests and the water supply of the States entering into such agreement or compact. (36 Stat. 961.)

This section and the thirteen sections next following constituted an act entitled "An act to enable any State to co-operate with any other State or States, or with the United States, for the protection, of the watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable rivers."

§ 5175. (Act March 1, 1911, c. 186, § 2.) Appropriation for co-operation with States for protection from fire of forested watersheds of navigable streams; agreements with States for system of fire protection; State law required; limitation of expenditure.

The sum of two hundred thousand dollars is hereby appropriated and made available until expended, out of any moneys in the National Treasury not otherwise appropriated, to enable the Secretary of Agriculture to cooperate with any State or group of States, when requested to do so, in the protection from fire of the forested watersheds of navigable streams; and the Secretary of Agriculture is hereby authorized, and on such conditions as he deems wise, to stipulate and agree with any State or group of States to cooperate in the organization and maintenance of a system of fire protection on any private or state forest lands within such State or States and situated upon the watershed of a navigable river: Provided, That no such stipulation or agreement shall be made with any State which has not provided by law for a system of forest-fire protection: Provided further, That in no case shall the amount expended in any State exceed in any fiscal year the amount appropriated by that State for the same purpose during the same fiscal year. (36 Stat. 961.)

The unused balance of the appropriation for co-operation with any State or group of States in the protection from fire of the forested watersheds of navigable streams, under the provisions of this act, to carry out the purposes mentioned in this section, was made available until the end of the fiscal year 1915 for the purposes for which it was appropriated, by a provision of Act March 4, 1913, c. 145, 37 Stat. 855.

§ 5176. (Act March 1, 1911, c. 186, § 3.) Appropriations for examination, survey, and acquirement of lands on headwaters of navigable streams.

There is hereby appropriated, for the fiscal year ending June thirtieth, nineteen hundred and ten, the sum of one million dollars, and for each fiscal year thereafter a sum not to exceed two million dollars for use in the examination, survey, and acquirement of lands located on the headwaters of navigable streams or those which are being or which may be developed for navigable purposes: Provided, That the provisions of this section shall expire by limitation on the thirtieth day of June, nineteen hundred and fifteen. (36 Stat. 961.)

An appropriation of $1,000,000 for the fiscal year 1917 and $2,000,000 for the fiscal year 1918, to carry out the purposes named in this section, was made by the agricultural appropriation act for the fiscal year 1917, Act Aug. 11, 1916, c. 313, 39 Stat.

§ 5177. (Act March 1, 1911, c. 186, § 4.) National Forest Reservation Commission; creation and composition; authority as to purchases of lands under act; service of members; vacancies.

A commission, to be known as the National Forest Reservation Commission, consisting of the Secretary of War, the Secretary of the Interior, the Secretary of Agriculture, and two members of the Senate, to be selected by the President of the Senate and two members of the House of Representatives, to be selected by the Speaker, is hereby created and authorized to consider and pass upon such lands as may be recommended for purchase as provided in section six of this Act, and to fix the price or prices at which such lands may be purchased, and no purchases shall be made of any lands until such lands have been duly approved for purchase by said commission: Provided, That the members of the commission herein created shall serve as such only during their incumbency in their

respective official positions, and any vacancy on the commission shall be filled in the manner as the original appointment. (36 Stat. 962.)

Section 6 of this act, mentioned in this section, is set forth post, § 5179.

§ 5178. (Act March 1, 1911, c. 186, § 5.) Annual reports of Commission.

The commission hereby appointed shall, through its president, annually report to Congress, not later than the first Monday in December, the operations and expenditures of the commission, in detail, during the preceding fiscal year. (36 Stat. 962.)

§ 5179. (Act March 1, 1911, c. 186, § 6.) Examination, etc., of lands for purchase and report by Secretary of Agriculture; examination and report by Geological Survey.

The Secretary of Agriculture is hereby authorized and directed to examine, locate, and recommend for purchase such lands as in his judgment may be necessary to the regulation of the flow of navigable streams, and to report to the National Forest Reservation Commission the results of such examinations: Provided, That before any lands are purchased by the National Forest Reservation Commission said lands shall be examined by the Geological Survey and a report made to the Secretary of Agriculture, showing that the control of such lands will promote or protect the navigation of streams on whose watersheds they lie. (36 Stat. 962.)

§ 5180. (Act March 1, 1911, c. 186, § 7.) Purchase of lands approved by Commission; consent of State.

The Secretary of Agriculture is hereby authorized to purchase, in the name of the United States, such lands as have been approved for purchase by the National Forest Reservation Commission at the price or prices fixed by said commission: Provided, That no deed or other instrument of conveyance shall be accepted or approved by the Secretary of Agriculture under this Act until the legislature of the State in which the land lies shall have consented to the acquisition of such land by the United States for the purpose of preserving the navigability of navigable streams. (36 Stat. 962.)

§ 5181. (Act March 1, 1911, c. 186, § 8.) Title to lands to be acquired.

The Secretary of Agriculture may do all things necessary to secure the safe title in the United States to the lands to be acquired under this Act, but no payment shall be made for any such lands until the title shall be satisfactory to the Attorney-General and shall be vested in the United States. (36 Stat. 962.)

§ 5182. (Act March 1, 1911, c. 186, § 9, as amended, Act March 4, 1913, c. 145.) Acquisition of lands not defeated by rights of way, easements and reservations which will not interfere with purposes of this act; rights of way, etc., to be subject to rules and regulations.

Such acquisition by the United States shall in no case be defeated because of located or defined rights of way, easements, and reservations, which, from their nature will, in the opinion of the National Forest Reservation Commission and the Secretary of Agriculture, in no manner interfere with the use of the lands so encumbered, for the purposes of the Act: Provided, That such rights of way, easements, and reservations retained by the owner from whom the United States receives title, shall be subject to the rules and regulations prescribed by the Secretary of Agriculture for their occupation, use, operation, protection, and adminis-

tration, and that such rules and regulations shall be expressed in and made part of the written instrument conveying title to the lands to the United States; and the use, occupation, and operation of such rights of way, easements, and reservations shall be under, subject to, and in obedience with the rules and regulations so expressed. (36 Stat. 962. 37 Stat. 855.)

This section, as originally enacted, was as follows:

"Such acquisition may in any case be conditioned upon the exception and reservation to the owner from whom title passes to the United States of the minerals and of the merchantable timber, or either or any part of them, within or upon such lands at the date of the conveyance, but in every case such exception and reservation and the time within which such timber shall be removed and the rules and regulations under which the cutting and removal of such timber and the mining and removal of such minerals shall be done shall be expressed in the written instrument of conveyance, and thereafter the mining, cutting and removal of the minerals and timber so excepted and reserved shall be done only under and in obedience to the rules and regulations so expressed."

It was amended to read as set forth here by Act March 4, 1913, c. 145, last cited above.

§ 5183. (Act March 1, 1911, c. 186, § 10.) Agricultural lands included in tracts acquired; sale as homesteads; jurisdiction of lands sold to revert to state; no rights, etc., to lands acquired, waters thereon, etc., except as provided in this section.

Inasmuch as small areas of land chiefly valuable for agriculture may of necessity or by inadvertence be included in tracts acquired under this Act, the Secretary of Agriculture may, in his discretion, and he is hereby authorized, upon application or otherwise, to examine and ascertain the location and extent of such areas as in his opinion may be occupied for agricultural purposes without injury to the forests or to stream flow and which are not needed for public purposes, and may list and describe the same by metes and bounds, or otherwise, and offer them for sale as homesteads at their true value, to be fixed by him, to actual settlers, in tracts not exceeding eighty acres in area, under such joint rules and regulations as the Secretary of Agriculture and the Secretary of the Interior may prescribe; and in case of such sale the jurisdiction over the lands sold shall, ipso facto, revert to the State in which the lands sold lie. And no right, title, interest, or claim in or to any lands acquired under this Act, or the waters thereon, or the products, resources, or use thereof after such lands shall have been so acquired, shall be initiated or perfected, except as in this section provided. (36 Stat. 962.)

The Secretary of Agriculture may authorize the development and utilization of mineral resources of lands acquired by Act Aug. 11, 1916, c. 313, post, § 5187a.

§ 5184. (Act March 1, 1911, c. 186, § 11.) Lands acquired to be reserved, etc., as national forest lands; division into and designation, as specific national forests.

Subject to the provisions of the last preceding section, the lands acquired under this Act shall be permanently reserved, held, and administered as national forest lands under the provisions of section twenty-four of the Act approved March third, eighteen hundred and ninety-one (volume twenty-six, Statutes at Large, page eleven hundred and three), and Acts supplemental to and amendatory thereof. And the Secretary of Agriculture may from time to time divide the lands acquired under this Act into such specific national forests and so designate the same as he may deem best for administrative purposes. (36 Stat. 963.)

Act March 3, 1891, c. 561, § 24, and acts supplemental thereto and amendatory thereof, mentioned in this section, are set forth ante, §§ 5121-5173.

§ 5185. (Act March 1, 1911, c. 186, § 12.) State jurisdiction over persons on lands acquired not affected, except as to punishment of offenses against United States.

The jurisdiction, both civil and criminal, over persons upon the lands acquired under this Act shall not be affected or changed by their permanent reservation and administration as national forest lands, except so far as the punishment of offenses against the United States is concerned, the intent and meaning of this section being that the State wherein such land is situated shall not, by reason of such reservation and administration, lose its jurisdiction nor the inhabitants thereof their rights and privileges as citizens or be absolved from their duties as citizens of the State. (36 Stat. 963.)

§ 5186. (Act March 1, 1911, c. 186, § 13, as amended, Act June 30, 1914, c. 131.) Payment of 25 per cent. of receipts from each national forest to State for benefit of county public schools and roads; limitation of payment for any one county.

Twenty-five per centum of all moneys received during any fiscal year from each national forest into which the lands acquired under this Act may from time to time be divided shall be paid, at the end of such year, by the Secretary of the Treasury to the State in which such national forest is situated, to be expended as the state legislature may prescribe for the benefit of the public schools and public roads of the county or counties in which such national forest is situated: Provided, That when any national forest is in more than one State or county the distributive share to each from the proceeds of such forest shall be proportional to its area therein: Provided further, That there shall not be paid to any State for any county an amount equal to more than forty per centum of the total income of such county from all other sources. (36 Stat. 963. 38 Stat. 441.)

This section was amended by Act June 30, 1914, c. 131, cited above, by substituting the word "twenty-five" for the word "five" in the first line thereof.

§ 5187. (Act March 1, 1911, c. 186, § 14.) Appropriation for expenses of Commission; payments.

A sum sufficient to pay the necessary expenses of the commission and its members, not to exceed an annual expenditure of twenty-five thousand dollars, is hereby appropriated out of any money in the Treasury not otherwise appropriated. Said appropriation shall be immediately available, and shall be paid out on the audit and order of the president of the said commission, which audit and order shall be conclusive and binding upon all departments as to the correctness of the accounts of said commission. (36 Stat. 963.)

§ 5187a. (Act Aug. 11, 1916, c. 313.) Development, etc., of mineral resources of lands acquired.

The Secretary of Agriculture is authorized, under general regulations to be prescribed by him, to permit the prospecting, development, and utilization of the mineral resources of the lands acquired under the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes, page nine hundred and sixty-one), known as the Weeks law, upon such terms and for specified periods or otherwise, as he may deem to be for the best interests of the United States; and all moneys received on account of charges, if any, made under this Act shall be disposed of as is provided by existing law for the disposition of receipts from national forests. (39 Stat.)

This was a provision of the agricultural appropriation act for the fiscal year 1917, cited above.

The sale of 80-acre homesteads is authorized by section 10 of the Weeks Law, ante, § 5183.

Act March 1, 1911, above referred to, is set forth ante, §§ 5174–5187.

§ 5187b. (Act Aug. 11, 1916, c. 313.) Areas set aside for protection of game and fish; unlawfully taking game or fish; punishment.

The President of the United States is hereby authorized to designate such areas on any lands which have been, or which may hereafter be, purchased by the United States under the provisions of the Act of March first, nineteen hundred and eleven (Thirty-sixth Statutes at Large, page nine hundred and sixty-one), entitled "An Act to enable any State to cooperate with any other State or States, or with the United States, for the protection of watersheds of navigable streams, and to appoint a commission for the acquisition of lands for the purpose of conserving the navigability of navigable streams," and Acts supplementary thereto and amendatory thereof, as should, in his opinion, be set aside for the protection of game animals, birds, or fish; and whoever shall hunt, catch, trap, willfully disturb or kill any kind of game animal, game or nongame bird, or fish, or take the eggs of any such bird on any lands so set aside, or in or on the waters thereof, except under such general rules and regulations as the Secretary of Agriculture may from time to time prescribe, shall be fined not more than $500 or imprisoned not more than six months, or both. (39 Stat.)

This was a further provision of the agricultural appropriation act for the fiscal year 1917, cited above.

Act March 1, 1911, c. 186, mentioned in this section, is set forth ante, §§ 5174–5187.

TITLE XXXII B

THE NATIONAL PARKS, RESERVATIONS, AND MONUMENTS

This title, inserted here as additional to the original titles of the Revised Statutes, includes the laws for the establishment, management, and control of the various national parks, other than the national military parks, reservations for general public use, and national monuments.

A National Park Service in the Department of the Interior, with a director thereof, to have the control, management, etc., of national parks, monuments, and certain reservations, was created by Act Aug. 25, 1916, c. 408, set forth ante, under Title XI, "The Department of the Interior," Chapter Nine C, "The National Park Service." §§ 787d–787g.

Provisions relating to the National Military Parks are collected under Title XXXII C, "The National Military Parks."

Sec.

5188. Public park established near the head-waters of the Yellowstone River.

5189. Secretary of the Interior to have exclusive control of the park; removal of trespassers.

5190. Detail of troops for protection of Yellowstone Park.

5191. Jurisdiction of United States over Yellowstone Park; service of state process; fugitives from justice.

5192. Criminal laws of Wyoming applicable to Yellowstone Park.

5193. Hunting and fishing prohibited in Yellowstone Park; penalties; regulations.

5194. Commissioner for Yellowstone Park; jurisdiction; powers and duties.

5195. Deputy Marshals for Yellowstone Park; terms of district and circuit courts.

5196. Compensation of commissioner, marshals, and United States attorneys for Yellowstone Park.

5197. Salary of commissioner for Yellowstone Park.

5198. Costs and expenses in cases under act, how paid.

5199. Jail, and office for commissioner in Yellowstone Park.

5200. Existing laws not repealed by act.

5201. Road extensions.

5202. Leases of lands in Yellowstone Park for hotels, etc.

5203. Leases of lands in Yellowstone Park for hotels, etc.

5204. Leases of lands in Yellowstone National Park for hotels, etc., mortgages by lessees, subject to leases and contracts; provisions of existing law continued in force.

Sec.

5205. Amendment of Act June 4, 1906, c. 2570; leases of lands in Yellowstone National Park; period.

5206. Use of electricity from lighting and power plant in Yellowstone Park by private parties.

5207. Public park in California; Sequoia National Park.

5208. Rules and regulations for park; leases of ground; preservation of fish and game; removal of trespassers.

5208a. Sequoia National Park; donations of lands or rights of way.

5209. Forest reserve in California; Yosemite National Park; previous grants to State and bona fide entries not affected.

5210. Rules and regulations for reserve; leases of ground; preservation of fish and game; removal of trespassers.

5210a. Yosemite National Park; donations of lands or rights of way.

5211. Additional forest reserves in California.

5212. Forest reserves in California; lands segregated from Yosemite National Park and included in Sierra Forest Reserve; rights of way over lands; disposition of money received for privileges.

5213. Rights of claimants and owners of lands included in reserve; laws, etc., affecting forest reservations applicable within territory included.

5214. Recession by California of Yosemite Valley and Mariposa Big Tree Grove accepted, and lands set apart as reserved for-

Sec.

est lands, and part of Yosemite National Park; boundaries of park changed, and lands excluded thereby added to Sierra Forest Reserve; disposition of money received for privileges; grants of right of way for railways.

5215. Rights of claimants and owners of lands included in reserve; laws, etc., affecting forest reservations applicable within territory included.

5216. Disposition of revenues derived from privileges.

5217. Detail of troops for protection of Sequoia, Yosemite, and General Grant Parks.

5218. Title to lands privately owned in Yosemite National Park to be secured in exchange for timber and for timber and lands, and title to patented lands in adjacent national forests to be secured by exchange, such lands to become part of the park.

5219. Determination of values of lands and timber to be exchanged; payment for timber in excess of value of land; lands to be secured added to Yosemite National Park.

5220. Regulations for cutting and removal of timber; bond for payment of damages.

5221. Sale of matured, dead or down timber in park.

5222. Lease of land in Yosemite National Park for hotel, etc.

5222a. Leases of separate tracts of land in Yosemite National Park for hotels, etc.; mortgages by lessees within park authorized, subject to rights of the Government under the lease.

5223. Mount Rainier National Park; establishment; removal of trespassers.

5224. Park under control of Secretary of Interior; regulations; leases for erection of buildings; rights of way to park through Pacific Forest Reserve; protection of fish and game; removal of trespassers.

5225. Grant of lands to Northern Pacific Railroad in lieu of lands relinquished; lieu lands to settlers.

5226. Mineral land laws extended to reserve and park.

5227. Mount Rainier National Park; location of mining claims within park prohibited.

5227a. Mount Rainier National Park; cession of jurisdiction by state of Washington accepted; fugitives from justice.

5227b. Mount Rainier National Park; part of judicial district for western district of Washington; jurisdiction of District Court.

5227c. Mount Rainier National Park; offenses in; punishment.

5227d. Mount Rainier National Park; hunting, etc., of wild birds or animals prohibited; fish; time and manner of taking; rules and regulations for care, etc., of park; forfeitures and punishments.

5227e. Mount Rainier National Park; forfeiture of guns, traps, etc., used in violation of act.

5227f. Mount Rainier National Park; commissioner; appointment; jurisdiction and powers; appeals from convictions by.

5227g. Mount Rainier National Park; commissioner; process of arrest; bail.

5227h. Mount Rainier National Park; commissioner; process directed to marshal for western district of Washington; arrests by other officers, etc., of government.

5227i. Mount Rainier National Park; commissioner; salary; residence; fees, costs, and expenses; disposition of.

5227j. Mount Rainier National Park; fees, costs, and expenses chargeable to United States; payment.

5227k. Mount Rainier National Park; fines and costs; disposition of.

5228. Crater Lake National Park; establishment.

5229. Park under control of Secretary of the Interior; regulations.

5230. Settlement, residence, lumbering, etc., within park, punishable; admission of visitors; location and working of mining claims; places of entertainment.

5230a. Cession by Oregon of jurisdiction over Crater Lake National Park accepted; nature and extent of jurisdiction assumed.

5230b. Park part of United States judicial district for Oregon; jurisdiction of district court.

5230c. Offense committed in Crater Lake National Park.

5230d. Hunting and fishing in Crater Lake National Park; Secretary of the Interior to publish rules and regulations; evidence as to offenses; punishment for violation of regulations.

5230e. Forfeiture of guns, traps, etc.; used by persons violating regulation.

5230f. Appointment of commissioner to reside in park; powers and duties of commissioner; appeals from judgments of commissioner.

5230g. Power of commissioner to issue process for arrest of persons

Sec.
committing offenses; certification to United States District Court; bail.
5230h. Process to be directed to and executed by marshal; arrest without process.
5230i. Salary of commissioner; residence in park; disposition of fees, etc., collected.
5230j. Accounting for fees; etc., collected.
5230k. Deposit of fines and costs collected with clerk of district court.
5231. Wind Cave National Park; establishment.
5232. Park under control of Secretary of the Interior; regulations.
5233. Leases of cavern and lands within park.
5234. Use of funds arising from rentals or leases.
5235. Relinquishment by settlers or owners of tracts within park in exchange for other land.
5236. Unlawful intrusion upon park, or unauthorized injury to property, or violation of regulations, punishable.
5237. Mesa Verde National Park; establishment.
5238. Boundaries of Mesa Verde National Park extended.
5239. Park under control of Secretary of the Interior; regulations; prehistoric ruins near park.
5240. Examinations, excavations, and gathering of objects of interest within park.
5241. Removal, disturbance, destruction, etc., of ruins, mounds, buildings, graves, relics, etc., in park, punishable; penalty.
5242. Mesa Verde National Park; leases and permits for use of land, etc.; prehistoric ruins not to be included.
5243. Cession of sulphur springs and adjacent lands to United States; limit of acreage; payment for lands and improvements; regulations; sale, etc., of intoxicants prohibited; United States not committed to expenditures for improvements.
5244. Additional land withdrawn for Sulphur Springs Reservation; payment for lands and improvements; management and control; enforcement of regulations, sale of improvements; penalty for violation of rules and regulations; appraisement and purchase of town lots.
5245. Acts relating to Sulphur Springs Reservation, and lands set aside as national park, etc., not affected by act for admission to the Union of the State of Oklahoma; rights and jurisdiction of United States in and over lands so set aside; State not entitled to select indemnity school lands for sections within park, etc., or other reservation, etc.
5246. Sulphur Springs Reservation named Platt National Park.
5247. Glacier National Park; establishment; removal of trespassers; claims, etc., and rights under land laws not affected; rights of way for railways; reclamation projects; indemnity selections of lands not to be allowed to railroad, etc., corporations for loss of lands within park.
5248. Park under control of Secretary of Interior; regulations; leases for erection of buildings; sale and removal of matured or dead and down timber.
5248a. Glacier National Park; cession by State of Montana of exclusive jurisdiction accepted; saving to State of right to serve process and right to tax within park; laws of United States applicable; fugitives from justice in park.
5248b. Glacier National Park part of judicial district of Montana; jurisdiction of district court.
5248c. Criminal laws of Montana applicable to Glacier National Park.
5248d. Hunting and fishing in Glacier National Park prohibited; regulations for management, and for protection of property; punishment of violations of act.
5248e. Guns, traps, teams, etc., used within park limits in hunting, etc., forfeited; seizure and adjudication.
5248f. Commissioner for Glacier National Park; jurisdiction; powers and duties; procedure and appeals from convictions.
5248g. Commissioner for Glacier National Park; process for arrest of offenders, confinement, and bail.
5248h. Commissioner for Glacier National Park; process to be directed to marshal; arrest of offenders without process.
5248i. Commissioner for Glacier National Park; salary; residence; disposition of fees, etc., collected.
5248j. Fees, costs, and expenses in cases under act; how certified and paid.
5248k. Fines and costs imposed and collected by commissioner or marshal to be deposited with clerk.
5248l. Notice to Governor of Montana of passage of act.
5248m. Glacier National Park; donations of lands or rights of way.

Sec.
5249. Glacier National Park; proceeds of leases and other revenues to be expended in administration and improvement of park.
5249a. Rocky Mountain National Park; establishment; reclamation project within park.
5249b. Claims, etc., and rights under land laws not affected; rights of way for irrigation and other purposes; grants of rights of way for steam, etc., transportation.
5249c. Lands held in private, municipal, or State ownership not affected.
5249d. Park under control of Secretary of Interior; regulations; leases for erection of buildings; sale and removal of mature or dead or down timber; use of automobiles; limitation of appropriations.
5249e. Lassen Volcanic National Park established; boundaries; entries under land laws; rights of way; use of lands for reclamation projects; indemnity lands.
5249f. Lassen Volcanic National Park; control by Secretary of Interior; rules and regulations; protection of fish and game; leases; automobiles; stock-grazing.
5249g. Lassen Volcanic National Park; sale and removal of dead or down timber.
5249h. Lassen Volcanic National Park; charges for leases and privileges.
5249i. Lassen Volcanic National Park; appropriations.
5249j. Hawaii National Park established; boundaries.
5249k. Hawaii National Park; entries under land laws on lands in; rights of way.
5249l. Hawaii National Park; lands excluded.
5249m. Hawaii National Park; control by Secretary of Interior; rules and regulations; leases; appropriations.
5249n. Abraham Lincoln National Park or Reservation; acceptance of deed to; admission fee not to be charged.
5249o. Abraham Lincoln National Park or Reservation; acceptance of endowment fund; protection and preservation of park.
5249p. Abraham Lincoln National Park or Reservation; execution of instruments necessary to carry out purposes of gift.
5249q. Abraham Lincoln National Park or Reservation; rules and regulations for.
5250. Limit on cost of buildings to be erected in the future in national parks.

Sec.
5251. Hot Springs reservation; establishment; leases of ground, bath houses, and supply of water; dedication of Hot Springs, with reservation and mountain, to United States, forever free from sale or alienation.
5252. Hot Springs Reservation; leases of bath houses and bath house sites; supply of water.
5253. Rules and regulations as to leases, privileges, supply and use of water, buildings, etc.
5254. Investigation as to interest of applicant for lease, etc., in other bath house; refusal or forfeiture of lease or privilege where parties are otherwise interested.
5255. Taxation, under laws of State, of private property on reservation.
5256. Collection of water on reservation.
5257. Sale of lots not permanently reserved.
5258. Act not to be construed to prevent operation of bath house in connection with hotel.
5259. Hot Springs Reservation, lease of Arlington Hotel site; valuation of improvements.
5260. Hot Springs Reservation; use of free bathhouses limited to persons unable to pay for baths; oath required as to lack of means; making of false oath a misdemeanor; punishment.
5261. Hot Springs Reservation; cession of jurisdiction by State of Arkansas accepted; operation of laws of United States and of Arkansas within reservation.
5262. Reservation included in eastern judicial district of Arkansas; jurisdiction of offenses committed therein.
5263. Injuries to property punishable.
5264. Taking or use of or bathing in water of springs in violation of rules and regulations or of restrictions imposed punishable.
5265. Offenses under ordinances of city of Hot Springs or laws of State of Arkansas punishable.
5266. Prosecutions for violations of rules and regulations or of provisions of act.
5267. Prosecutions for other offenses.
5268. Process to be directed to United States marshal; arrests by other officers or persons.
5269. Fees of commissioner and of marshal and deputies.
5270. Fees chargeable to United States.
5271. Disposition of fines and costs.
5272. Imprisonment for nonpayment of fines or costs, or while awaiting trial without bail.
5273. Execution of sentence upon conviction.
5274. National Bison Range; establishment; care and maintenance of bison.

Sec.
5275. Wind Cave National Game Preserve; establishment.
5276. Wyoming Elk Reserve; establishment.
5277. Wyoming Elk Refuge; establishment.
5277a. Sullys Hill National Park Game Preserve; establishment.
5278. American antiquities; appropriation, etc., or destruction of objects of antiquity on lands of United States without permission, punishable; penalty.
5279. National monuments; historic landmarks, structures, etc.; reservation of parcels of land; relinquishment of private claims.
5280. American antiquities; permits for examination of ruins, excavation of archæological sites, and gathering of objects.
5281. Regulations for carrying out provisions of act.

§ 5188. (R. S. § 2474.) Public park established near the head-waters of the Yellowstone River.

The tract of land in the Territories of Montana and Wyoming, lying near the head-waters of the Yellowstone River and described as follows, to wit, commencing at the junction of Gardiner's River, with the Yellowstone River, and running east to the meridian passing ten miles to the eastward of the most eastern point of Yellowstone Lake; thence south along said meridian to the parallel of latitude passing ten miles south of the most southern point of Yellowstone Lake; thence west along said parallel to the meridian passing fifteen miles west of the most western point of Madison Lake; thence north along said meridian to the latitude of the junction of the Yellowstone and Gardiner's Rivers; thence east to the place of beginning, is reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park or pleasuring-ground for the benefit and enjoyment of the people; and all persons who locate, or settle upon, or occupy any part of the land thus set apart as a public park, except as provided in the following section, shall be considered trespassers and removed therefrom.

Act March 1, 1872, c. 24, § 1, 17 Stat. 32.

§ 5189. (R. S. § 2475.) Secretary of the Interior to have exclusive control of the park; removal of trespassers.

Such public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation, from injury or spoliation, of all timber, mineral deposits, natural curiosities, or wonders, within the park, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes for terms not exceeding ten years, of small parcels of ground, at such places in the park as may require the erection of buildings for the accommodation of visitors; all of the proceeds of such leases, and all other revenues that may be derived from any source connected with the park, to be expended under his direction in the management of the same, and the construction of roads and bridle-paths therein. He shall provide against the wanton destruction of the fish and game found within the park, and against their capture or destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same to be removed therefrom, and generally is authorized to take all such measures as may be necessary or proper to fully carry out the objects and purposes of this section.

Act March 1, 1872, c. 24, § 2, 17 Stat. 33.

Subsequent more specific provisions for the control and regulation of the park were made by Act May 7, 1894, c. 72, post, §§ 5191–5196, and subsequent provisions concerning leases of lands within the park were made by Act March 3, 1883, c. 143, § 1, post, § 5202, and Act Aug. 3, 1894, c. 198, and the acts amendatory thereof, post, §§ 5204–5206.

The National Park Service was given certain powers over national parks. See notes at the beginning of this title.

§ 5190. (Act March 3, 1883, c. 143, § 1.) Detail of troops for protection of Yellowstone Park.

The Secretary of War, upon the request of the Secretary of the Interior, is hereby authorized and directed to make the necessary details of troops to prevent trespassers or intruders from entering the park for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law, and to remove such persons from the park if found therein. (22 Stat. 627.)

This was a provision of the sundry civil appropriation act for the fiscal year 1884, cited above.

Similar provisions for detail of troops for protection of other parks named were made by Act June 6, 1900, c. 791, § 1, post, § 5217.

This provision was not repealed by Act May 7, 1894, c. 72, set forth below, by express provision of section 10 of that act, post, § 5200.

§ 5191. (Act May 7, 1894, c. 72, § 1.) Jurisdiction of United States over Yellowstone Park; service of state process; fugitives from justice.

The Yellowstone National Park, as its boundaries now are defined, or as they may be hereafter defined or extended, shall be under the sole and exclusive jurisdiction of the United States; and that all the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park: Provided, however, That nothing in this Act shall be construed to forbid the service in the park of any civil or criminal process of any court having jurisdiction in the States of Idaho, Montana, and Wyoming. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Wyoming. (28 Stat. 73.)

This was the first section of an act entitled "An act to protect the birds and animals in Yellowstone National Park, and to punish crimes in said park, and for other purposes."

The act admitting the State of Wyoming into the Union, Act July 10, 1890, c. 664, 26 Stat. 222, contained a proviso annexed to the description of the boundaries of the State, in section 2 of the act, as follows:

"That nothing in this act contained shall repeal or affect any act of Congress relating to the Yellowstone National Park, or the reservation of the Park as now defined, or as may be hereafter defined or extended, or the power of the United States over it; and nothing contained in this act shall interfere with the right and ownership of the United States in said park and reservation as it now is or may hereafter be defined or extended by law; but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same; but nothing in this proviso contained shall be construed to prevent the service within said park of civil and criminal process lawfully issued by the authority of said State."

Section 2 of this act provided that the park should be part of the judicial district of Wyoming, and that the courts of the United States for said district should have jurisdiction of all offenses committed within said park. It was superseded by the subsequent provision constituting the State of Wyoming and Yellowstone National Park the judicial district of Wyoming, of Jud. Code, § 115, ante, § 1106.

The other sections of the act, §§ 3–10, are set forth post, §§ 5192–5196, 5198–5200.

§ 5192. (Act May 7, 1894, c. 72, § 3.) Criminal laws of Wyoming applicable to Yellowstone Park.

If any offense shall be committed in said Yellowstone National Park, which offense is not prohibited or the punishment is not specially provided for by any law of the United States or by any regulation of the Secretary of the Interior, the offender shall be subject to the same punishment as the laws of the State of Wyoming in force at the time of the commission of the offense may provide for a like offense in the said State; and no subsequent repeal of any such law of the State of Wyoming shall affect any prosecution for said offense committed within said park. (28 Stat. 73.)

§ 5193. (Act May 7, 1894, c. 72, § 4, as amended, Act June 28, 1916, c. 179.) Hunting and fishing prohibited in Yellowstone Park; penalties; regulations.

All hunting, or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals, when it is necessary to prevent them from destroying human life or inflicting an injury, is prohibited within the limits of said park; nor shall any fish be taken out of the waters of the park by means of seines, nets, traps, or by the use of drugs or any explosive substances or compounds, or in any other way than by hook and line, and then only at such seasons and in such times and manner as may be directed by the Secretary of the Interior. The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonderful objects within said park; and for the protection of the animals and birds in the park, from capture or destruction, or to prevent their being frightened or driven from the park; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the park. Possession within the said park of the dead bodies, or any part thereof, of any wild bird or animal shall be prima facie evidence that the person or persons having the same are guilty of violating this Act. Any person or persons, or stage or express company or railway company, receiving for transportation any of the said animals, birds, or fish so killed, taken, or caught shall be deemed guilty of a misdemeanor, and shall be fined for every such offense not exceeding three hundred dollars. Any person found guilty of violating any of the provisions of this Act or any rule or regulation that may be promulgated by the Secretary of the Interior with reference to the management and care of the park, or for the protection of the property therein, for the preservation from injury or spoliation of timber, mineral deposits, natural curiosities or wonderful objects within said park, or for the protection of the animals, birds and fish in the said park, shall be deemed guilty of a misdemeanor, and shall be subjected to a fine of not more than $500 or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceedings.

That all guns, traps, teams, horses, or means of transportation of every nature or description used by any person or persons within said park limits when engaged in killing, trapping, ensnaring, or capturing such wild beasts, birds, or wild animals shall be forfeited to the United States, and may be seized by the officers in said park and held pending the prosecution of any person or persons arrested under charge of violating the provisions of this Act, and upon conviction under this Act of such person or persons using said guns, traps, teams, horses, or other means of transportation such forfeiture shall be adjudicated as a penalty in addition to the other punishment provided in this Act. Such forfeited property shall be disposed of and accounted for by and under the authority of the Secretary of the Interior. (28 Stat. 73. 39 Stat.)

This section was amended by Act June 28, 1916, c. 179, cited above, by reducing the fine from $1,000 to $500, and the term of imprisonment from two years to six months.

§ 5194. (Act May 7, 1894, c. 72, § 5.) Commissioner for Yellowstone Park; jurisdiction; powers and duties.

The United States circuit court in said district shall appoint a commissioner, who shall reside in the park, who shall have jurisdiction to hear and act upon all complaints made, of any and all

violations of the law, or of the rules and regulations made by the Secretary of the Interior for the government of the park, and for the protection of the animals, birds, and fish and objects of interest therein, and for other purposes authorized by this Act. Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with the violation of the rules and regulations, or with the violation of any provision of this Act prescribed for the government of said park, and for the protection of the animals, birds, and fish in the said park, and to try the person so charged, and, if found guilty, to impose the punishment and adjudge the forfeiture prescribed. In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States district court for the district of Wyoming, said appeal to be governed by the laws of the State of Wyoming providing for appeals in cases of misdemeanor from justices of the peace to the district court of said State; but the United States circuit court in said district may prescribe rules of procedure and practice for said commissioner in the trial of cases and for appeal to said United States district court. Said commissioner shall also have power to issue process as hereinbefore provided for the arrest of any person charged with the commission of any felony within the park, and to summarily hear the evidence introduced, and, if he shall determine that probable cause is shown for holding the person so charged for trial, shall cause such person to be safely conveyed to a secure place for confinement, within the jurisdiction of the United States district court in said State of Wyoming, and shall certify a transcript of the record of his proceedings and the testimony in the case to the said court, which court shall have jurisdiction of the case: Provided, That the said commissioner shall grant bail in all cases bailable under the laws of the United States or of said State. All process issued by the commissioner shall be directed to the marshal of the United States for the district of Wyoming; but nothing herein contained shall be construed as preventing the arrest by any officer of the Government or employee of the United States in the park without process of any person taken in the act of violating the law or any regulation of the Secretary of the Interior: Provided, That the said commissioner shall only exercise such authority and powers as are conferred by this Act. (28 Stat. 74.)

§ 5195. (Act May 7, 1894, c. 72, § 6.) Deputy marshals for Yellowstone Park; terms of district and circuit courts.

The marshal of the United States for the district of Wyoming may appoint one or more deputy marshals for said park, who shall reside in said park. (28 Stat. 75.)

Further provisions of this section as to the places and times of sessions of the courts for the district of Wyoming were superseded by the subsequent provisions relating thereto of Jud. Code, § 115, ante, § 1106.

§ 5196. (Act May 7, 1894, c. 72, § 7.) Compensation of commissioner, marshals, and United States attorneys for Yellowstone Park.

The Commissioner provided for in this Act shall, in addition to the fees allowed by law to commissioners of the circuit courts of the United States, be paid an annual salary of [one thousand dollars], payable quarterly, and the marshal of the United States and his deputies, and the attorney of the United States and his assistants in said district, shall be paid the same compensation and fees as are now provided by law for like services in said district. (28 Stat. 75.)

The office of commissioner of the circuit court, mentioned in this section, was abolished, and the duties thereof were imposed on the United States com-

missioners to be appointed, by provisions of Act May 28, 1896, c. 252, § 19, ante, § 1333; and the fees of said United States commissioners were prescribed by section 21 of said Act May 28, 1896, ante, § 1451; and said section 21 of that act was not to impair the right of the commissioner in the Yellowstone Park to receive a salary, by a provision of Act April 17, 1900, c. 192, § 1, post, § 5197.

The words of this section inclosed in brackets, stating the amount of the salary of the commissioner, "one thousand dollars," were superseded by the provision fixing his salary at $1,500, of Act April 17, 1900, c. 192, § 1, post, § 5197.

§ 5197. (Act April 17, 1900, c. 192, § 1.) Salary of commissioner for Yellowstone Park.

COMMISSIONER YELLOWSTONE PARK: For salary of commissioner in Yellowstone National Park, one thousand five hundred dollars. And the provisions of section twenty-one of an Act making appropriations for the legislative, executive, and judicial expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and ninety-seven, and for other purposes, approved May twenty-eighth, eighteen hundred and ninety-six, shall not be construed as impairing the right of said commissioner to receive said salary as herein provided. (31 Stat. 133.)

This was a provision of the legislative, executive, and judicial appropriation act for the fiscal year 1901, cited above.

An appropriation for the commissioner of the same amount is made each year in the legislative, executive, and judicial appropriation act, accompanied by a provision that Act May 28, 1896, c. 252, § 21, ante, § 1451, shall not be construed as impairing the right of said commissioner to receive said salary. The provision for the fiscal year 1917 was by Act May 10, 1916, c. 117, § 1, 39 Stat.

§ 5198. (Act May 7, 1894, c. 72, § 8.) Costs and expenses in cases under act, how paid.

All costs and expenses arising in cases under this Act, and properly chargeable to the United States, shall be certified, approved, and paid as like costs and expenses in the courts of the United States are certified, approved, and paid under the laws of the United States. (28 Stat. 75.)

See notes to section 1 of this act, ante, § 5191.

§ 5199. (Act May 7, 1894, c. 72, § 9.) Jail, and office for commissioner in Yellowstone Park.

The Secretary of the Interior shall cause to be erected in the park a suitable building to be used as a jail, and also having in said building an office for the use of the commissioner, the cost of such building not to exceed five thousand dollars, to be paid out of any moneys in the Treasury not otherwise appropriated upon the certificate of the Secretary as a voucher therefor. (28 Stat. 75.)

No expenditure for construction of any building exceeding $1,000 was to be made in any national park except under express authority of Congress, by a provision of Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5200. (Act May 7, 1894, c. 72, § 10.) Existing laws not repealed by act.

This Act shall not be construed to repeal existing laws conferring upon the Secretary of the Interior and the Secretary of War certain powers with reference to the protection, improvement, and control of the said Yellowstone National Park. (28 Stat. 75.)

See notes to section 1 of this act, ante, § 5191.

The National Park Service was given certain powers over national parks. See notes at the beginning of this title.

§ 5201. (Act June 6, 1900, c. 791, § 1.) Road extensions.

Improvement of Yellowstone National Park: Road extensions and improvements shall hereafter be made in said park under and

in harmony with a general plan of roads and improvements to be approved by the Chief of Engineers of the Army. (31 Stat. 625.)

This was a provision of the sundry civil appropriation act for the fiscal year 1901, cited above.

Details of troops for the protection of Yellowstone National Park were authorized by a provision of Act March 3, 1883, c. 143, § 1, ante, § 5199.

Contracts for improvements in Yellowstone Park were authorized by provisions of Act June 28, 1902, c. 1301, § 1, post, § 6916.

§ 5202. (Act March 3, 1883, c. 143, § 1.) Leases of lands in Yellowstone Park for hotels, etc.

The Secretary of the Interior may lease small portions of ground in the park, not exceeding ten acres in extent for each tract, on which may be erected hotels and the necessary outbuildings, and for a period not exceeding ten years; but such lease shall not include any of the geysers or other objects of curiosity or interest in said park, or exclude the public from the free and convenient approach thereto; or include any ground within one quarter of a mile of the geysers, or the Yellowstone Falls, nor shall there be leased more than ten acres to any one person or corporation; nor shall any hotel or other buildings be erected within the park until such lease shall be executed by the Secretary of the Interior, and all contracts, agreements, or exclusive privileges heretofore made or given in regard to said park or any part thereof, are hereby declared to be invalid; nor shall the Secretary of the Interior, in any lease which he may make and execute, grant any exclusive privileges within said park, except upon the ground leased. (22 Stat. 626.)

These were provisions of the sundry civil appropriation act for the fiscal year 1884, cited above.

The provisions of this act were superseded to a great extent by similar provisions of Act Aug. 3, 1894, c. 198, post, § 5203.

§ 5203. (Act Aug. 3, 1894, c. 198.) Leases of lands in Yellowstone Park for hotels, etc.

The Secretary of the Interior is hereby authorized and empowered to lease to any person, corporation, or company, for a period not exceeding ten years, at such annual rental as the Secretary of the Interior may determine, parcels of land in the Yellowstone National Park, of not more than ten acres in extent for each tract and not in excess of twenty acres in all to any one person, corporation, or company on which may be erected hotels and necessary outbuildings: Provided, That such lease or leases shall not include any of the geysers or other objects of curiosity or interest in said park, or exclude the public from free and convenient approach thereto or include any ground within one-eighth of a mile of any of the geysers or the Yellowstone Falls, the Grand Canyon, or the Yellowstone River, Mammoth Hot Springs, or any object of curiosity in the park: And provided further, That such leases shall not convey, either expressively or by implication, any exclusive privilege within the park except upon the premises held thereunder and for the time therein granted. Every lease hereafter made for any property in said park shall require the lessee to observe and obey each and every provision in any Act of Congress, and every rule, order, or regulation made, or which may hereafter be made and published by the Secretary of the Interior concerning the use, care, management, or government of the park, or any object or property therein, under penalty of forfeiture of such lease, and every such lease shall be subject to the right of revocation and forfeiture, which shall therein be reserved by the Secretary of the Interior: And provided further, That persons or corporations now holding leases of ground in the park may, upon the surrender thereof, be granted new leases hereunder, and upon the terms and stipulations contained in their

present leases, with such modifications, restrictions, and reservations as the Secretary of the Interior may prescribe.

This act, however, is not to be construed as mandatory upon the Secretary of the Interior, but the authority herein given is to be exercised in his sound discretion.

That so much of that portion of the Act of March third, eighteen hundred and eighty-three, relating to the Yellowstone Park as conflicts with this Act be, and the same is hereby, repealed. (28 Stat. 222.)

This was an act entitled "An act concerning leases in the Yellowstone National Park."

Previous provisions authorizing the Secretary of the Interior to make leases of certain portions of the park, of Act March 3, 1883, c. 143, § 1, are set forth ante, § 5202.

Provisions amending this act, of Act June 4, 1906, c. 2570, and Act March 2, 1907, c. 2518, are set forth post, §§ 5204, 5205.

The use, by private parties doing business in the park, of electricity furnished by the electric plant of Fort Yellowstone and Mammoth Hot Springs may be permitted by a provision of Act March 3, 1903, c. 1007, § 1, post, § 5206.

The granting of a lease for the construction of a hotel and other buildings in Yosemite National Park under the provisions of this section and Act March 2, 1907, c. 2518, post, § 5205, amendatory thereof, was authorized by Act June 23, 1913, c. 3, § 1, post, § 5222.

§ 5204. (Act June 4, 1906, c. 2570.) Leases of lands in Yellowstone National Park for hotels, etc.; mortgages by lessees, subject to leases and contracts; provisions of existing law continued in force.

The Secretary of the Interior is hereby authorized and empowered to lease for a period not exceeding ten years, at an annual rental to be determined by him, to any person, corporation, or company he may authorize to transact business in the Yellowstone National Park separate tracts of land, not exceeding twenty acres each, at such places not to exceed ten in number to any one person, corporation, or company, in said park as the comfort and convenience of visitors may require, for the construction and maintenance of substantial hotel buildings and buildings for the protection of stage, stock, and equipment.

Any person, corporation, or company holding a lease within said park for the purposes above described is hereby authorized, with the approval of the Secretary of the Interior, to execute mortgages upon his or its rights, properties, and franchises, including his or its contract or contracts with the Secretary of the Interior, and such mortgages, together with the approval of said Secretary of the Interior, may be filed for record in the office of the Secretary of the Interior, and when so recorded shall have all the effect of a public record.

Any mortgage, lien, or incumbrance created under the provisions hereof shall be subject to the rights of the Government to compel the enforcement of the terms of the lease or contract of the mortgagor, and any purchaser under a foreclosure of such incumbrance shall take subject to all the conditions assumed by the original lessee or contractor.

All provisions of existing law in relation to said park not in conflict herewith are hereby continued in full force and effect. (34 Stat. 207.)

This was an act entitled "An act to amend an act approved August third, eighteen hundred and ninety-four, entitled 'An act concerning leases in the Yellowstone National Park.'"

Act Aug. 3, 1894, c. 198, mentioned in the title of this act as amended thereby, which authorized the Secretary of the Interior to lease lands in Yellowstone National Park, is set forth ante, § 5203.

This act was amended by authorizing leases, according to its other terms, for a period not exceeding twenty years, by Act March 2, 1907, c. 2518, post, § 5205.

§ 5205. (Act March 2, 1907, c. 2518.) Amendment of Act June 4, 1906, c. 2570; leases of lands in Yellowstone National Park; period.

The Act entitled "An Act to amend an Act approved August third, eighteen hundred and ninety-four, entitled 'An Act concerning leases in the Yellowstone National Park,'" approved June fourth, nineteen hundred and six, be, and the same is hereby, so amended that the Secretary of the Interior shall be authorized and empowered to lease, according to the other terms of said amended Act, for a period not exceeding twenty years. (34 Stat. 1219.)

Act June 4, 1906, c. 2570, mentioned in and amended by this act, is set forth ante, § 5204.

§ 5206. (Act March 3, 1903, c. 1007, § 1.) Use of electricity from lighting and power plant in Yellowstone Park by private parties.

Private parties or companies doing business in the Yellowstone National Park under authority from the Government may be permitted, in the discretion of the Secretary of War, to use electricity furnished by the electric lighting and power plant of Fort Yellowstone and Mammoth Hot Springs at actual cost to the Government for operation, maintenance, and depreciation of the plant and ten per centum additional, under such regulations as may be prescribed by the Secretary of War. (32 Stat. 1130.)

This was a provision of the sundry civil appropriation act for the fiscal year 1904, cited above.

Leases of lands in the park to private parties were authorized by Act Aug. 8, 1894, c. 198, and subsequent acts amendatory thereof, ante, §§ 5203–5205.

§ 5207. (Act Sept. 25, 1890, c. 926, § 1.) Public park in California; Sequoia National Park.

The tract of land in the State of California known and described as township numbered eighteen south, of range numbered thirty east, also township eighteen south range thirty-one east; and sections thirty-one, thirty-two, thirty-three, and thirty-four, township seventeen, south range thirty east, all east of Mount Diablo meridian, is hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart as a public park, or pleasure ground, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon, or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom. (26 Stat. 478.)

This section and the section next following were an act entitled "An act to set apart a certain tract of land in the State of California as a public park."

It was preceded by a preamble which read as follows:

"Whereas, the rapid destruction of timber and ornamental trees in various parts of the United States, some of which trees are the wonders of the world on account of their size and the limited number growing, makes it a matter of importance that at least some of said forests should be preserved: Therefore"

Other lands in California were set apart as forest reserves, and provisions similar to those of this act in regard to rules and regulations, leases of ground, preservation of fish and game, trespassers, etc., were made by Act Oct. 1, 1890, c. 1263, and Act Feb. 7, 1905, c. 547, post, §§ 5209–5213.

The lands reserved by section 3 of said Act Oct. 1, 1890, c. 1263, post, § 5211, adjoin the lands reserved by this section.

The forest lands set aside and reserved in said Act Feb. 7, 1905, c. 547, § 1, were to be known as the "Yosemite National Park," by a provision of said section, post, § 5212.

On the acceptance of the recession by the State of California of the Yosemite Valley and the Mariposa Big Tree Grove, said tracts, with other lands, were set apart as reserved forest lands and made part of the Yosemite National Park, and the south and west boundary lines of the park were changed, and

lands thereby excluded from the park were added to the Sierra Forest Reserve, by Res. June 11, 1906, No. 27, § 1, post, § 5214.

The detail of troops for the protection of the lands set apart by this act, included in the Sequoia National Park, and of the Yosemite National Park and the General Grant National Park, was authorized by a provision of Act June 6, 1900, c. 791, § 1, post, § 5217.

§ 5208. (Act Sept. 25, 1890, c. 926, § 2.) Rules and regulations for park; leases of ground; preservation of fish and game; removal of trespassers.

Said public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities or wonders within said park, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes for terms not exceeding ten years of small parcels of ground not exceeding five acres, at such places in said park as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases and other revenues that may be derived from any source connected with said park to be expended under his direction in the management of the same and the construction of roads and paths therein. He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction, for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and, generally, shall be authorized to take all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act. (26 Stat. 478.)

No expenditure for construction of any building exceeding $1,000 in any national park was to be made, except under express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

The National Park Service was given certain powers over national parks. See notes at the beginning of this title.

§ 5208a. (Act July 1, 1916, c. 209, § 1.) Sequoia National Park; donations of lands or rights of way.

The Secretary of the Interior is authorized to accept patented lands or rights of way whether over patented or other lands in the Sequoia National Park that may be donated for park purposes.

This was a provision of the sundry civil appropriation act for the fiscal year 1917, cited above.

A similar provision was made by the sundry civil appropriation act for the preceding year, Act March 3, 1915, c. 75, § 1, 38 Stat. 863.

§ 5209. (Act Oct. 1, 1890, c. 1263, § 1.) Forest reserve in California; Yosemite National Park; previous grants to State and bona fide entries not affected.

The tracts of land in the State of California known as described as follows: Commencing at the northwest corner of township two north, range nineteen east Mount Diablo meridian, thence eastwardly on the line between townships two and three north, ranges twenty-four and twenty-five east; thence southwardly on the line between ranges twenty-four and twenty-five east to the Mount Diablo base line; thence eastwardly on said base line to the corner to township one south, ranges twenty-five and twenty-six east; thence southwardly on the line between ranges twenty-five and twenty-six east to the south-east corner of township two south, range twenty-five east; thence eastwardly on the line between townships two and three south, range twenty-six east to the corner to townships two and three south, ranges twenty-six and twenty-seven east; thence southwardly

on the line between ranges twenty-six and twenty-seven east to the first standard parallel south; thence westwardly on the first standard parallel south to the southwest corner of township four south, range nineteen east; thence northwardly on the line between ranges eighteen and nineteen east to the northwest corner of township two south, range nineteen east; thence westwardly on the line between townships one and two south to the southwest corner of township one south, range nineteen east; thence northwardly on the line between ranges eighteen and nineteen east to the northwest corner of township two north, range nineteen east, the place of beginning, are hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as reserved forest lands; and all persons who shall locate or settle upon, or occupy the same or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: Provided, however, That nothing in this act shall be construed as in anywise affecting the grant of lands made to the State of California by virtue of the act entitled "An act authorizing a grant to the State of California of the Yosemite Valley, and of the land embracing the Mariposa Big-Tree Grove, approved June thirtieth, eighteen hundred and sixty-four; or as affecting any bona-fide entry of land made within the limits above described under any law of the United States prior to the approval of this act. (26 Stat. 650.)

This section and the two sections next following were an act entitled "An act to set apart certain tracts of land in the State of California as forest reservations."

Other lands in California were set apart as a public park, and provisions similar to those of this act in regard to rules and regulations, leases of ground, preservation of fish and game, trespassers, etc., were made, by Act Sept. 25, 1890, c. 926, ante, §§ 5207, 5208.

All the lands described in this section, not included within the metes and bounds of the land described in Act Feb. 7, 1905, c. 547, § 1, post, § 5212, were included in and made part of the Sierra Forest Reserve, by a proviso annexed to said section.

The recession by the State of California of the Yosemite Valley and the Mariposa Big Tree Grove was accepted, and said tracts with other lands were set apart as reserved forest lands, subject to the provisions of this act, and were to form a part of the Yosemite National Park, and certain lands were excluded from said park by a change of the south and west boundaries thereof, and were made a part of the Sierra Forest Reserve, by Res. June 11, 1906, No. 27, post, §§ 5214–5216.

§ 5210. (Act Oct. 1, 1890, c. 1263, § 2.) Rules and regulations for reserve; leases of ground; preservation of fish and game; removal of trespassers.

Said reservation shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury of all timber, mineral deposits, natural curiosities, or wonders within said reservation, and their retention in their natural condition. The Secretary may, in his discretion, grant leases for building purposes for terms not exceeding ten years of small parcels of ground not exceeding five acres; at such places in said reservation as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases and other revenues that may be derived from any source connected with said reservation to be expended under his direction in the management of the same and the construction of roads and paths therein. He shall provide against the wanton destruction of the fish, and game found within said reservation, and against their capture or destruction, for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this act to be removed therefrom, and, generally, shall be authorized to take

all such measures as shall be necessary or proper to fully carry out the objects and purposes of this act. (26 Stat. 651.)

See notes to section 1 of this act, ante, § 5209.

The lands set apart as reserved forest lands by Act Feb. 7, 1905, c. 547, § 1, and by Res. June 11, 1906, No. 27, § 1, were made subject to all the provisions of this act, by provisions of each of said sections, post, §§ 5212, 5214.

Provisions similar to those of this section, applicable to forest reservations in general were made by Act June 4, 1897, c. 2, § 1, ante, §§ 5123–5134.

The disposition of revenues derived from privileges in Yosemite National Park under this act and other acts, or from privileges on lands segregated from the park and included within the Sierra Forest Reserve, was provided for by Res. June 11, 1906, No. 27, § 3, post, § 5216.

Details of troops for the protection of the lands set apart by this act, included in the Yosemite National Park, and of the Sequoia National Park and the General Grant National Park were authorized by a provision of Act June 6, 1900, c. 791, § 1, post, § 5217.

The granting of a lease for the construction of a hotel and other buildings in connection therewith, under the provisions of Act June 4, 1906, c. 2570, ante, § 5204, relating to concessions in Yellowstone National Park, and Act March 2, 1907, c. 2518, ante, § 5205, amendatory thereof, was authorized by Act June 23, 1913, c. 3, § 1, post, § 5222, which repealed so much of this section as conflicted therewith.

The exchange of timber within Yosemite National Park for the title to patented lands within its boundaries was authorized by Act April 9, 1912, c. 74, post, §§ 5218–5221.

A right of way through the Yosemite National Park for aqueducts, canals, pipe lines, etc., for conveying water for domestic and municipal purposes, and for power and electric plants, etc., and roads, railroads, and other means of transportation, and also reservoir and dam sites in the Hetch Hetchy Valley and Lake Eleanor Basin, in said park, were granted to the City and County of San Francisco, under certain conditions and restrictions, by Act Dec. 19, 1913, c. 4, 38 Stat. 242.

No expenditure for the construction of any building exceeding $1,000 can be made in any national park, except under express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

The National Park Service was given certain powers over national parks. See notes at the beginning of this title.

Notes of Decisions

Regulations. — The Secretary of the Interior cannot make the exercise by an owner and lessee of lands within the Yosemite National Park of his right to pasture his cattle upon such lands, and to use the toll roads leading thereto, conditional upon his compliance with certain rules and regulations prescribed by the secretary for the government of the park, as to marking and defining the boundaries, or obtaining the written permission of the superintendent. Curtin v. Benson (1911) 32 Sup. Ct. 31, 222 U. S. 78, 56 L. Ed. 102, reversing decree (C. C. 1907) 158 Fed. 383.

§ 5210a. (Act July 1, 1916, c. 209, § 1.) Yosemite National Park; donations of lands or rights of way.

The Secretary of the Interior is authorized to accept patented lands or rights of way whether over patented or other lands in the Yosemite National Park that may be donated for park purposes.

This was a provision of the sundry civil appropriation act for the fiscal year 1917, cited above.

A similar provision was made by the sundry civil appropriation act for the preceding year, Act March 3, 1915, c. 75, § 1, 38 Stat. 863.

§ 5211. (Act Oct. 1, 1890, c. 1263, § 3.) Additional forest reserves in California.

There shall also be and is hereby reserved and withdrawn from settlement, occupancy or sale under the laws of the United States, and shall be set apart as reserved forest lands, as hereinbefore provided, and subject to all the limitations and provisions herein contained, the following additional lands, to wit: Township seventeen, south, range thirty east of the Mount Diablo meridian, excepting sections thirty-one, thirty-two, thirty-three, and thirty-four of said township, included in a previous bill. And there is also reserved and withdrawn from settlement, occupancy or sale under the laws of the United States,

and set apart as forest lands, subject to like limitations, conditions and provisions, all of townships fifteen and sixteen, south, of ranges twenty-nine and thirty east of the Mount Diablo meridian. And there is also hereby reserved and withdrawn from settlement, occupancy or sale under the laws of the United States, and set apart as reserved forest lands under like limitations, restrictions and provisions, Sections five and six in township fourteen, south, range twenty-eight, east of Mount Diablo meridian, and also Sections thirty-one and thirty-two of township thirteen, south, range twenty-eight east of the same meridian. Nothing in this act shall authorize rules or contracts touching the protection and improvement of said reservations, beyond the sums that may be received by the Secretary of the Interior under the foregoing provisions, or authorize any charge against the Treasury of the United States. (26 Stat. 651.)

See notes to section 1 of this act, ante, § 5209.

The lands reserved by this section adjoin those reserved by Act Sept. 25, 1890, c. 926, § 1, ante, § 5207.

§ 5212. (Act Feb. 7, 1905, c. 547, § 1.) Forest reserves in California; lands segregated from Yosemite National Park and included in Sierra Forest Reserve; rights of way over lands; disposition of money received for privileges.

The tracts of land in the State of California known and described as follows: Beginning at the point where the middle of the channel of the South Fork of the Merced River intersects the line between sections three and four, township four south, range twenty east, Mount Diablo base and meridian; thence northerly along section lines through the middle of townships three and four south, range twenty east, to the northwest corner of section three, township three south, range twenty east; thence westerly along township line to the southwest corner of section thirty-three, township two south, range twenty east; thence northerly along section lines to the northwest corner of section twenty-one, said township; thence westerly along section lines to the southwest corner of section eighteen, said township; thence southerly along range line to the southeast corner of the northeast quarter of section twenty-four, township two south, range nineteen east; thence westerly to the southwest corner of the northeast quarter of section twenty-four, said township; thence southerly to the southeast corner of the southwest quarter of section twenty-four, said township; thence westerly along section lines to the southwest corner of section twenty-three, said township; thence northerly along section lines to the northwest corner of the southwest quarter of section fourteen, said township; thence easterly to the northeast corner of the southeast quarter of section fourteen, said township; thence northerly along section line to the northwest corner of section thirteen, said township; thence easterly along section line to the northeast corner of section thirteen, said township; thence northerly along range line to the northwest corner of the southwest quarter of section seven, township two south, range twenty east; thence easterly to the northeast corner of the southeast quarter of section seven, said township; thence southerly along section line to the northwest corner of section seventeen, said township; thence easterly along section lines to the northeast corner of section sixteen, said township; thence northerly along section lines to the northwest corner of section three, said township; thence westerly along township line to the southwest corner of section thirty-three, township one south, range twenty east; thence northerly along section lines to the northwest corner of section twenty-one, said township; thence westerly along section lines to the southwest corner of section eighteen, said township; thence northerly along range line to the northwest corner of section six, said township; thence westerly along Mount Diablo base line to the southwest corner of section thirty-

four, township one north, range nineteen east; thence northerly along section lines through the middle of townships one and two north, range nineteen east, to the point of intersection with the summit of the divide between Cherry Creek on the west and Eleanor and Fall creeks on the east; thence along the summit of said divide in a northeasterly direction to the summit of the Sierra Nevada Mountains; thence southeasterly along the summit of the Sierra Nevada Mountains to the divide between the Merced and San Joaquin rivers; thence southwesterly along said divide to the point of intersection with the south boundary of township four south, range twenty-three east, Mount Diablo base and meridian; thence westerly along township line to the point of intersection with the middle of the channel of the South Fork of the Merced River; thence westerly down the middle of said river to the place of beginning, are hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and set apart as reserved forest lands, subject to all the provisions of the Act of Congress approved October first, eighteen hundred and ninety, entitled "An Act to set apart certain tracts of land in the State of California as forest reservations:" Provided, That all those tracts or parcels of land described in section one of the said Act of October first, eighteen hundred and ninety, and not included within the metes and bounds of the land above described, be, and the same are hereby, included in and made part of the Sierra Forest Reserve: And provided further, That the Secretary of the Interior may require the payment of such price as he may deem proper for privileges on the land herein segregated from the Yosemite National Park and made a part of the Sierra Forest Reserve accorded under the Act approved February fifteenth, nineteen hundred and one, relating to rights of way over certain parks, reservations, and other lands, and other acts concerning rights of way over public lands; and the moneys received from the privileges accorded on the lands herein segregated and included in the Sierra Forest Reserve shall be paid into the Treasury of the United States, to be expended, under the direction of the Secretary of the Interior, in the management, improvement, and protection of the forest lands herein set aside and reserved, which shall hereafter be known as the "Yosemite National Park." (33 Stat. 702.)

This section and the section next following were part of an act entitled "An act to exclude from the Yosemite National Park, California, certain lands therein described, and to attach and include the said lands in the Sierra Forest Reserve."

Section 3 of that act provided that it should take effect and be in force from and after its passage.

The provisions of Act Oct. 1, 1890, c. 1263, mentioned in this section, setting apart certain lands in California as forest reservations, are set forth ante, §§ 5209–5212.

Act Feb. 15, 1901, c. 372, also mentioned in this section, relating to rights of way over certain parks, reservations, etc., including Yosemite National Park, is ante, § 4946.

On the acceptance of the recession by the State of California of the Yosemite Valley and Mariposa Big Tree Grove, which, with other lands, were set apart as reserved forest lands and form a part of Yosemite National Park, the south and west boundaries of said park were changed, and the lands thereby excluded from said park were added to and made a part of the Sierra Forest Reserve, with provisions relating thereto similar to those of this act, by Res. June 11, 1906, No. 27, post, §§ 5214–5216.

Provisions similar to those in the last proviso of this section, relating to the disposition of revenues derived from privileges in Yosemite National Park under this act and other acts, as well as from privileges on lands segregated from the park and included within the Sierra Forest Reserve, were contained in Res. June 11, 1906, No. 27, § 3, post, § 5216.

§ 5213. (Act Feb. 7, 1905, c. 547, § 2.) Rights of claimants and owners of lands included in reserve; laws, etc., affecting forest reservations applicable within territory included.

None of the lands patented and in private ownership in the

area hereby included in the Sierra Forest Reserve shall have the privileges of the lieu-land scrip provisions of the land laws, but otherwise to be in all respects under the laws and regulations affecting the forest reserves, and immediately upon the passage of this Act all laws, rules, and regulations affecting forest reservations, including the right to change the boundaries thereof by Executive proclamation, shall take effect and be in force within the limits of the territory excluded by this Act from the Yosemite National Park, except as herein otherwise provided. (33 Stat. 703.)

Previous provisions affecting forest reserves, now called national forests, mentioned in this section, are set forth in Title XXXII A, "The National Forests."

The lieu-land scrip provisions, mentioned therein, contained in Act June 4, 1897, c. 2, § 1, Act June 6, 1900, c. 791, § 1, and Act March 3, 1901, c. 831, § 1, were repealed by Act March 3, 1905, c. 1495, 33 Stat. 1264.

Subsequent provisions in the same language as this section, relating to lands included in the Sierra Forest Reserve, were made by Res. June 11, 1906, No. 27, § 2, post, § 5217.

§ 5214. (Res. June 11, 1906, No. 27, § 1.) Recession by California of Yosemite Valley and Mariposa Big Tree Grove accepted, and lands set apart as reserved forest lands and part of Yosemite National Park; boundaries of park changed, and lands excluded thereby added to Sierra Forest Reserve; disposition of money received for privileges; grants of right of way for railways.

The recession and regranting unto the United States by the State of California of the cleft or gorge in the granite peak of the Sierra Nevada Mountains, situated in the county of Mariposa, State of California, and the headwaters of the Merced River, and known as the Yosemite Valley, with its branches or spurs, granted unto the State of California in trust for public use, resort, and recreation by the Act of Congress entitled "An Act authorizing a grant to the State of California of the Yosemite Valley and of the land embracing the Mariposa Big Tree Grove," approved June thirtieth, eighteen hundred and sixty-four (Thirteenth Statutes, page three hundred and twenty-five), as well as the tracts embracing what is known as the "Mariposa Big Tree Grove," likewise granted unto the State of California by the aforesaid Act of Congress, is hereby ratified and accepted, and the tracts of land embracing the Yosemite Valley and the Mariposa Big Tree Grove, as described in the Act of Congress approved June thirtieth, eighteen hundred and sixty-four, together with that part of fractional sections five and six, township five south, range twenty-two east, Mount Diablo meridian, California, lying south of the South Fork of Merced River and almost wholly between the Mariposa Big Tree Grove and the present south boundary of the Yosemite National Park, be, and the same are hereby, reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States and set apart as reserved forest lands, subject to all the limitations, conditions, and provisions of the Act of Congress approved October first, eighteen hundred and ninety, entitled "An Act to set apart certain tracts of land in the State of California as forest reservations," as well as the limitations, conditions, and provisions of the Act of Congress approved February seventh, nineteen hundred and five, entitled "An Act to exclude from the Yosemite National Park, California, certain lands therein described, and to attach and include the said lands in the Sierra Forest Reserve," and shall hereafter form a part of the Yosemite National Park.

The south and west boundary lines of the Yosemite National Park are hereby changed as follows: Beginning at the point on the line between sections thirty-five and thirty-six, township four south, range twenty-one east, where same intersects the middle of the channel of

the South Fork of the Merced River; thence north on section line to the southwest corner of section twenty-five; thence west on section lines to the southwest corner of section twenty-eight; thence north on section line to the northwest corner of section twenty-eight; thence west on section line to the quarter-section corner between sections twenty and twenty-nine; thence north through the middle of section twenty to the center thereof; thence east through the middle of section twenty to the quarter-section corner between sections twenty and twenty-one; thence north on section line to the quarter-section corner between sections sixteen and seventeen; thence west through middle of section seventeen to the center thereof; thence north through the middle of sections seventeen, eight, and five to the quarter-section corner of north boundary of section five on township boundary, all in township four south, range twenty-one east; thence north through the middle of section thirty-two, township three south, range twenty-one east, to the center thereof; thence west through the middle of section thirty-two, said township, and section thirty-six, township three south, range twenty east, to the quarter-section corner between sections thirty-five and thirty-six; thence north on section line to the quarter-section corner between sections twenty-five and twenty-six; thence east through the middle of section twenty-five to the center thereof; thence north through the middle of sections twenty-five and twenty-four to the center of section twenty-four; thence west through the middle of sections twenty-four, twenty-three, and twenty-two to the quarter-section corner between sections twenty-one and twenty-two, township three south, range twenty east, on the present western boundary of the Yosemite National Park. And all that portion of the Yosemite National Park lying between the boundary line last above mentioned and the present boundary line of said national park is excluded from said park; and the said lands so excluded, and all thereof, are added to and made a part of the Sierra Forest Reserve, and shall hereafter form a part of said Sierra Forest Reserve, and shall be subject to all of the Acts of Congress with relation thereto: Provided, That the Secretary of the Interior may require the payment of such price as he may deem proper for privileges on the land herein segregated from the Yosemite National Park and made a part of the Sierra Forest Reserve accorded under the Act approved February fifteenth, nineteen hundred and one, relating to rights of way over certain parks, reservations, and other lands, and other Acts concerning rights of way over public lands: And provided further, That in the grant of any right of way for railway purposes across the lands placed under this measure within the Sierra Forest Reserve it shall be stipulated that no logs or timber shall be hauled over the same without the consent of the Secretary of the Interior, and under regulations to be promulgated by him. (34 Stat. 831.)

Act Oct. 1, 1890, c. 1263, and Act Feb. 7, 1905, c. 547, mentioned in this section, are set forth ante, §§ 5209–5213.

Act Feb. 15, 1901, c. 372, also mentioned in this section, relating to rights of way over certain parks, reservations, etc., including Yosemite National Park, is set forth ante, § 4946.

A proviso in the same language as the first proviso of this section was annexed to said Act Feb. 7, 1905, c. 547, § 1, ante, § 5212, relating to the lands described in said section.

Notes of Decisions

Regulations. — The Secretary of the Interior cannot make the exercise by an owner and lessee of lands within the Yosemite National Park of his right to pasture his cattle upon such lands, and to use the toll roads leading thereto, conditional upon his compliance with certain rules and regulations prescribed by the Secretary for the government of the park, as to marking and defining the boundaries, or obtaining the written permission of the superintendent. Curtin v. Benson (1911) 32 Sup. Ct. 31, 222 U. S. 78, 56 L. Ed. 102.

§ 5215. (Res. June 11, 1906, No. 27, § 2.) Rights of claimants and owners of lands included in reserve; laws, etc., affecting forest reservations applicable within territory included.

None of the lands patented and in private ownership in the area hereby included in the Sierra Forest Reserve shall have the privileges of the lieu-land scrip provisions of the land laws, but otherwise to be in all respects under the laws and regulations affecting the forest reserves, and immediately upon the passage of this Act all laws, rules, and regulations affecting forest reservations, including the right to change the boundaries thereof by Executive proclamation, shall take effect and be in force within the limits of the territory excluded by this Act from the Yosemite National Park, except as herein otherwise provided. (34 Stat. 832.)

Previous provisions in the same language as this section, relating to lands included in the Sierra Forest Reserve, were made by Act Feb. 7, 1905, c. 547, § 2, ante, § 5213.

§ 5216. (Res. June 11, 1906, No. 27, § 3.) Disposition of revenues derived from privileges.

All revenues derived from privileges in the park authorized under the Act of October first, eighteen hundred and ninety, the Act of February seventh, nineteen hundred and five, as well as under this measure, or from privileges accorded on the lands herein segregated from said park and included within the Sierra Forest Reserve, shall be paid into the Treasury of the United States, to be expended under the direction of the Secretary of the Interior in the management, protection, and improvement of the Yosemite National Park. (34 Stat. 832.)

Act Oct. 1, 1890, c. 1263, and Act Feb. 7, 1905, c. 547, mentioned in this section, are set forth ante, §§ 5209–5213.

Previous provisions similar to those of this section, relating to moneys received for privileges on lands segregated from Yosemite National Park and included in the Sierra Forest Reserve, were contained in said Act Feb. 7, 1905, c. 547, § 1, ante, § 5212.

The National Park Service was given certain powers over national parks. See notes at the beginning of this Title.

§ 5217. (Act June 6, 1900, c. 791, § 1.) Detail of troops for protection of Sequoia, Yosemite, and General Grant Parks.

The Secretary of War, upon the request of the Secretary of the Interior, is hereafter authorized and directed to make the necessary detail of troops to prevent trespassers or intruders from entering the Sequoia National Park, the Yosemite National Park, and the General Grant National Park, respectively, in California, for the purpose of destroying the game or objects of curiosity therein, or for any other purpose prohibited by law or regulation for the government of said reservations, and to remove such persons from said parks if found therein. (31 Stat. 618.)

This was a provision of the sundry civil appropriation act for the fiscal year 1901, cited above.

The Secretary of the Interior was authorized to grant rights of way through the Yosemite, Sequoia, and General Grant National Parks for electrical plants, poles, and lines for the generation and distribution of electrical power, for telephone and telegraph purposes, for canals, ditches, pipes, and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, or any other beneficial uses, by Act Feb. 15, 1901, c. 372, ante, § 4946.

The Secretary of the Interior was authorized to open negotiations leading to obtaining possession of the "Mammoth Tree Grove" and the "South Park Grove of Big Trees" in Calaveras county, Cal., by Joint Res. March 8, 1900, No. 10, 31 Stat. 711.

Details of troops for the protection of Yellowstone Park were authorized by a provision of Act March 3, 1883, c. 143, § 1, ante, § 5190.

The National Park Service was given certain powers over national parks. See notes at the beginning of this Title.

§ 5218. (Act April 9, 1912, c. 74, § 1, as amended, Act April 16, 1914, c. 58.) Title to lands privately owned in Yosemite National Park to be secured in exchange for timber and for timber and lands, and title to patented lands in adjacent national forests to be secured by exchange, such lands to become part of the park.

The Secretaries of the Departments of Interior and Agriculture, for the purpose of eliminating private holdings within the Yosemite National Park and to preserve intact timber along and adjoining the roads in the scenic portion of the park on patented lands, are hereby empowered in their discretion to obtain and accept for the United States a complete title to any and all patented lands within the boundaries of said park by the exchange of timber or timber and lands within the Yosemite National Park and the Sierra and Stanislaus National Forests for such lands and the timber thereon within the park, necessary conveyances of park and national forest timber or timber and lands to be made by said secretaries, respectively. That the secretaries of the said departments may, and are hereby authorized to, acquire title in fee by the exchange of lands of the United States for patented lands not exceeding six hundred and forty acres in the Sierra and Stanislaus National Forests, adjacent and contiguous to the Yosemite National Park, and when such patented lands are thus acquired, said lands shall become a part of the Yosemite National Park and be subject to all the provisions of the Act of October first, eighteen hundred and ninety, entitled "An Act to set apart certain tracts of land in the State of California as forest reservations." (37 Stat. 80. 38 Stat. 345.)

This section and the three sections next following were an act entitled "An act to authorize the Secretary of the Interior to secure for the United States title to patented lands in the Yosemite National Park, and for other purposes," cited above.

As originally enacted this section read as follows: "The Secretary of the Interior for the purpose of eliminating private holdings within the Yosemite National Park and the preservation intact of the natural timber along the roads in the scenic portions of the park, both on patented and park lands, is hereby empowered, in his discretion, to obtain for the United States the complete title to any or all of the lands held in private ownership within the boundaries of said park, by the exchange of decayed or matured timber, that can be removed from such parts of the park as will not affect the scenic beauty thereof, for lands of equal value held in private ownership therein, and also, in his discretion, to exchange for timber standing near the public roads on patented lands timber of equal value on park lands in other parts of the park."

It was amended by Act April 16, 1914, c. 58, also cited above, to read as set forth above.

Act Oct. 1, 1890, c. 1263, mentioned in this section, is set forth ante, §§ 5209–5211.

§ 5219. (Act April 9, 1912, c. 74, § 2.) Determination of values of lands and timber to be exchanged; payment for timber in excess of value of land; lands to be secured added to Yosemite National Park.

The value of patented lands within the park offered in exchange, and the value of the timber on park lands proposed to be given in exchange for such patented lands, shall be ascertained in such manner as the Secretary of the Interior may, in his discretion, direct, and all expenses incident to ascertaining such values shall be paid by the owners of said patented lands, and such owners shall, before any exchange is effective, furnish the Secretary of the Interior evidence satisfactory to him of title to the patented lands offered in exchange, and if the value of the timber on park lands exceeds the value of the patented lands deeded to the Government in the exchange such excess shall be paid to the Secretary of the Interior

by the owners of the patented lands before any of the timber is removed from the park, and shall be deposited and covered into the Treasury as miscellaneous receipts. The same course shall be pursued in relation to exchange for timber standing near public roads on patented lands for timber to be exchanged on park lands: Provided, That the lands conveyed to the Government under this Act shall become a part of the Yosemite National Park. (37 Stat. 80.)

§ 5220. (Act April 9, 1912, c. 74, § 3.) Regulations for cutting and removal of timber; bond for payment of damages.

All timber must be cut and removed from the park under regulations to be prescribed by the Secretary of the Interior, and any damage which may result to the roads or any part of the park in consequence of the cutting and removal of the timber from the reservation shall be borne by the owners of the patented lands, and bond satisfactory to the Secretary of the Interior must be given for the payment of such damages, if any, as shall be determined by the Secretary of the Interior. (37 Stat. 81.)

§ 5221. (Act April 9, 1912, c. 74, § 4.) Sale of matured, dead or down timber in park.

The Secretary of the Interior may also sell and permit the removal of such matured or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park, and the proceeds derived therefrom shall be deposited and covered into the Treasury as miscellaneous receipts. (37 Stat. 81.)

§ 5222. (Act June 23, 1913, c. 3, § 1.) Lease of land in Yosemite National Park for hotel, etc.

The Secretary of the Interior is hereby authorized and empowered to grant a lease for the construction and maintenance of a substantial hotel and buildings in connection therewith in accordance with and under the provisions of the Act of June fourth, nineteen hundred and six (Thirty-fourth Statutes at Large, page two hundred and seven), relating to concessions in Yellowstone National Park, and the Act of March second, nineteen hundred and seven (Thirty-fourth Statutes at Large, page twelve hundred and nineteen) amendatory thereof, and any part of section two of the Act of October first, eighteen hundred and ninety, concerning the Yosemite National Park in conflict herewith is hereby repealed. (38 Stat. 49.)

This was a proviso annexed to an appropriation for protection, improvement, etc., of the park, in the sundry civil appropriation act for the fiscal year 1914, cited above.

Act June 4, 1906, c. 2570, and Act March 2, 1907, c. 2518, mentioned in this section, are set forth ante, §§ 5204, 5205.

Act Oct. 1, 1890, c. 1263, § 2, repealed in part by this section, is set forth ante, § 5210.

This section was practically superseded, as to future leases, by Act July 23, 1914, c. 206, post, § 5222a.

§ 5222a. (Act July 23, 1914, c. 206.) Leases of separate tracts of land in Yosemite National Park for hotels, etc.; mortgages by lessees within park authorized, subject to rights of the Government under the lease.

The Secretary of the Interior is hereby authorized and empowered to grant leases, for periods of not exceeding twenty years, at annual rentals, and under terms and conditions to be determined by him, to any person, corporation, or company he may authorize to transact business in the Yosemite National Park, for separate tracts of land, not exceeding twenty acres each, at such places, not to exceed ten in number, to any person, corporation, or company in said park, as

the comfort and convenience of visitors may require, for the construction and maintenance of substantial hotel buildings and buildings for the protection of motor cars, stages, stock and equipment, and so forth. Such leases may, at the option of the Secretary of the Interior, contain appropriate provisions for the appraisement, at the expiration of the lease, of the value of such hotel and other buildings (or portions thereof) as may be constructed by the lessees, respectively, and the payment of the same to the lessees in case a new lease be made to persons other than said lessees, such payments to be made by such new lessees, respectively.

That any person or corporation or company holding a lease or leases within said park for the purposes above described is hereby authorized, with the approval of the Secretary of the Interior, to execute mortgages upon his or its rights and properties, including his or its contract or contracts with the Secretary of the Interior; such mortgages shall be executed in duplicate and delivered to the Secretary of the Interior for his approval, and upon his approval thereof he shall retain one of said duplicates and file the same for record in his office.

Any mortgage, lien, or encumbrance created under the provisions hereof shall be subject to the rights of the Government to compel the enforcement of the terms of the lease or contract of the mortgagor, and any purchaser under a foreclosure of such encumbrance shall take subject to all the conditions assumed by the original lessee or contractor.

All provisions of existing law in relation to said park not in conflict herewith are hereby continued in full force and effect. (38 Stat. 554.)

This was an act entitled "An act to amend an act approved Oct 1, 1890, entitled 'An act to set apart certain tracts of land in the state of California as forest reservations.'"

Hotel leases had previously been governed by Act June 23, 1913, c. 3, § 1, ante, § 5222, which made applicable the provisions governing leases in the Yellowstone National Park, the principal change made by this section is that the lease may provide for the appraisement and sale of the lessee's improvements.

§ 5223. (Act March 2, 1899, c. 377, § 1.) Mount Rainier National Park; establishment; removal of trespassers.

All those certain tracts, pieces or parcels of land lying and being in the State of Washington, and within the boundaries particularly described as follows, to wit: Beginning at a point three miles east of the northeast corner of township number seventeen north, of range six east of the Willamette meridian; thence south through the central parts of townships numbered seventeen, sixteen, and fifteen north, of range seven east of the Willamette meridian, eighteen miles more or less, subject to the proper easterly or westerly offsets, to a point three miles east of the northeast corner of township numbered fourteen north, of range six east of the Willamette meridian; thence east on the township line between townships numbered fourteen and fifteen north, eighteen miles more or less to a point three miles west of the northeast corner of township fourteen north, of range ten east of the Willamette meridian; thence northerly subject to the proper easterly or westerly offsets, eighteen miles more or less, to a point three miles west of the northeast corner of township numbered seventeen north, of range ten east of the Willamette meridian (but in locating said easterly boundary, wherever the summit of the Cascade Mountains is sharply and well defined, the said line shall follow the said summit, where the said summit line bears west of the easterly line as herein determined); thence westerly along the township line between said townships numbered seventeen and

eighteen to the place of beginning, the same being a portion of the lands which were reserved from entry or settlement and set aside as a public reservation by proclamation of the President on the twentieth day of February, in the year of our Lord eighteen hundred and ninety-three, and of the Independence of the United States the one hundred and seventeenth, are hereby dedicated and set apart as a public park, to be known and designated as the Mount Rainier National Park, for the benefit and enjoyment of the people; and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereafter provided, shall be considered trespassers and be removed therefrom. (30 Stat. 993.)

This section and the three sections next following were part of an act entitled "An act to set aside a portion of certain lands in the State of Washington, now known as the Pacific Forest Reserve, as a public park, to be known as the Mount Rainier National Park."

Section 4, of said act, provided for the issuance of patents conveying to the Northern Pacific Railroad Company the lands selected by it in lieu of lands within the park in accordance with the provisions of section 3 of the act. It is omitted as temporary merely, and executed.

Later provisions relating to the Mount Rainier National Park are contained in Act June 30, 1916, c. 197, post, §§ 5227a–5227k, and Act Sept. 8, 1916, c. 464, post, § 5227l.

§ 5224. (Act March 2, 1899, c. 377, § 2.) Park under control of Secretary of Interior; regulations; leases for erection of buildings; rights of way to park through Pacific Forest Reserve; protection of fish and game; removal of trespassers.

Said public park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to make and publish, as soon as practicable, such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury or spoliation of all timber, mineral deposits, natural curiosities, or wonders within said park, and their retention in their natural condition. The Secretary may, in his discretion, grant parcels of ground at such places in said park as shall require the erection of buildings for the accommodation of visitors; all of the proceeds of said leases, and all other revenues that may be derived from any source connected with said park, to be expended under his direction in the management of the same, and the construction of roads and bridle paths therein. And through the lands of the Pacific Forest Reserve adjoining said park rights of way are hereby granted, under such restrictions and regulations as the Secretary of the Interior may establish, to any railway or tramway company or companies, through the lands of said Pacific Forest Reserve, and also into said park hereby created, for the purpose of building, constructing, and operating a railway, constructing and operating a railway or tramway line or lines, through said lands, also into said park. He shall provide against the wanton destruction of the fish and game found within said park, and against their capture or destruction for the purposes of merchandise or profit. He shall also cause all persons trespassing upon the same after the passage of this Act to be removed therefrom, and generally shall be authorized to take all such measures as shall be necessary to fully carry out the objects and purposes of this Act. (30 Stat. 994.)

No expenditure for any building exceeding $1,000 was to be made in any national park without express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5225. (Act March 2, 1899, c. 377, § 3.) Grant of lands to Northern Pacific Railroad in lieu of lands relinquished; lieu lands to settlers.

Upon execution and filing with the Secretary of the Interior, by the Northern Pacific Railroad Company, of proper deed releasing and conveying to the United States the lands in the reservation hereby created, also the lands in the Pacific Forest Reserve which have been heretofore granted by the United States to said company, whether surveyed or unsurveyed, and which lie opposite said company's constructed road, said company is hereby authorized to select an equal quantity of nonmineral public lands, so classified as nonmineral at the time of actual Government survey, which has been or shall be made, of the United States not reserved and to which no adverse right or claim shall have attached or have been initiated at the time of the making of such selection, lying within any State into or through which the railroad of said Northern Pacific Railroad Company runs, to the extent of the lands so relinquished and released to the United States: Provided, That any settlers on lands in said national park may relinquish their rights thereto and take other public lands in lieu thereof, to the same extent and under the same limitations and conditions as are provided by law for forest reserves and national parks. (30 Stat. 994.)

See note to section 1 of this act, ante, § 5223.

Notes of Decisions

Lieu lands to railroad company—Construction of grant.—The statute is to be construed in accordance with the rules governing grants, by which nothing passes by implication, and, unless the words used are clear as to the lands subject to selection, that construction should be adopted most favorable to the government. U. S. v. Northern Pac. Ry. Co. (C. C. 1909) 170 Fed. 498, judgment affirmed Northern Pac. R. Co. v. U. S. (1910) 176 Fed. 706, 101 C. C. A. 117, appeal dismissed (1912) 32 Sup. Ct. 533, 223 U. S. 746, 56 L. Ed. 640.

The rule that public grants are to be construed strictly against the grantee is not applicable to a grant of public lands in exchange for other lands conveyed to the United States, where the question is not one of the extent of the grant, but of procedure in administration of the act. West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189.

—— **Selection of lands.**—The description of unsurveyed land selected under a grant by giving the legal subdivisions by which it would be designated when surveyed held sufficient to identify it with a reasonable degree of certainty. West v. Edward Rutledge Timber Co. (1915) 221 Fed. 30, 136 C. C. A. 556, affirming decree (D. C. 1913) 210 Fed. 189.

Until a formal approval is given, the equitable title to the lands selected does not pass from the government, nor does the applicant acquire any right of possession thereto. Clearwater Timber Co. v. Shoshone County, Idaho (C. C. 1907) 155 Fed. 612.

The Northern Pacific Railway Company, as the successor of the Northern Pacific Railroad Company, held entitled to select lieu lands in exchange for its lands within the limits of the park. West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189.

—— **Mineral character of lands selected.**—The lands authorized by Congress to be taken by the railroad company in lieu of lands to be conveyed by it to the United States must not only be classified by the government surveyor as nonmineral, but must be nonmineral in fact. Northern Pac. R. Co. v. U. S. (1910) 176 Fed. 706, 101 C. C. A. 117, affirming judgment U. S. v. Northern Pac. R. Co. (C. C. 1909) 170 Fed. 498, and appeal dismissed (1912) 32 Sup. Ct. 533, 223 U. S. 746, 56 L. Ed. 640.

The general policy of Congress has been to reserve mineral lands from grants made of public lands, and coal lands are mineral lands within the meaning of this policy and as generally employed in the laws regulating disposal of the public domain. U. S. v. Northern Pac. R. Co. (C. C. 1909) 170 Fed. 498, 500, judgment affirmed Northern Pac. R. Co. v. U. S. (1910) 176 Fed. 706, 101 C. C. A. 117. See Mullan v. U. S. (1886) 6 Sup. Ct. 1041, 118 U. S. 271, 30 L. Ed. 170; Northern Pac. R. Co. v. Soderberg (1903) 23 Sup. Ct. 365, 188 U. S. 526, 47 L. Ed. 575.

A selection of land in fact nonmineral is not invalidated by the fact that surveyors did not expressly classify it as such; as, under the practice of the Land Department by which surveyors of public lands are required to make notation of any evidences of valuable mineral

deposits where no notation is made, the lands are to be considered and treated as nonmineral. West v. Edward Rutledge Timber Co. (D. C. 1913) 210 Fed. 189.

—— **Correction of errors in selection.** —If at the time of the filing of the application for land by the railroad company the Land Office finds the land applied for was classified as mineral at the time of the survey, the selection must be rejected, and if returned by the government surveyor as nonmineral, inquiry as to the true character of the land is open to the government up to the time of the issuance of its patent. Northern Pac. R. Co. v. U. S. (1910) 176 Fed. 706, 709, 101 C. C. A. 117. See Iron Silver Min. Co. v. Campbell (1890) 10 Sup. Ct. 765, 135 U. S. 286, 34 L. Ed. 155; Williams v. U. S. (1891) 11 Sup. Ct. 457, 138 U. S. 514, 34 L. Ed. 1026; Hawley v. Diller (1900) 20 Sup. Ct. 986, 178 U. S. 476, 44 L. Ed. 1157; Diller v. Hawley (1897) 81 Fed. 651, 26 C. C. A. 514.

§ 5226. (Act March 2, 1899, c. 377, § 5.) Mineral land laws extended to reserve and park.

The mineral-land laws of the United States are hereby extended to the lands lying within the said reserve and said park. (30 Stat. 995.)

See note to section 1 of this act, ante, § 5223.

The location of mining claims, within the Mount Rainier National Park was prohibited by Act May 27, 1908, c. 200, § 1, post, § 5227.

§ 5227. (Act May 27, 1908, c. 200, § 1.) Mount Rainier National Park; location of mining claims within park prohibited.

Hereafter the location of mining claims under the mineral-land laws of the United States is prohibited within the area of the Mount Rainier National Park, in the State of Washington: Provided, however, That this provision shall not affect existing rights heretofore acquired in good faith under the mineral-land laws of the United States to any mining location or locations in said Mount Rainier National Park. (35 Stat. 365.)

This was a provision of the sundry civil appropriation act for the fiscal year 1909, cited above.

The mineral-land laws of the United States were extended to the Mount Rainier National Park and the Pacific National Forest by Act March 2, 1899, c. 377, § 5, ante, § 5226.

§ 5227a. (Act June 30, 1916, c. 197, § 1.) Mount Rainier National Park; cession of jurisdiction by state of Washington accepted; fugitives from justice.

The provisions of the act of the legislature of the State of Washington, approved March sixteenth, nineteen hundred and one, ceding to the United States exclusive jurisdiction over the territory embraced within the Mount Rainier National Park, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said State but outside of said park, and saving further to the said State the right to tax persons and corporations, their franchises and property, on the lands included in said park. All the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Washington. (39 Stat.)

This section and the ten sections next following were an act entitled "An act to accept the cession by the state of Washington of exclusive jurisdiction over the lands embraced within the Mount Rainier National Park, and for other purposes," cited above.

§ 5227b. (Act June 30, 1916, c. 197, § 2.) Mount Rainier National Park; part of judicial district for western district of Washington; jurisdiction of District Court.

Said park shall constitute a part of the United States judicial

district for the western district of Washington, and the district court of the United States in and for said district shall have jurisdiction of all offenses committed within said boundaries. (39 Stat.)

§ 5227c. (Act June 30, 1916, c. 197, § 3.) Mount Rainier National Park; offenses in; punishment.

If any offense shall be committed in the Mount Rainier National Park, which offense is not prohibited or the punishment for which is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the State of Washington in force at the time of the commission of the offense may provide for a like offense in said State; and no subsequent repeal of any such law of the State of Washington shall affect any prosecution for said offense committed within said park. (39 Stat.)

§ 5227d. (Act June 30, 1916, c. 197, § 4.) Mount Rainier National Park; hunting, etc., of wild birds or animals prohibited; fish; time and manner of taking; rules and regulations for care, etc., of park; forfeitures and punishments.

All hunting or the killing, wounding, or capturing at any time of any wild bird or animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of said park; nor shall any fish be taken out of the waters of the park in any other way than by hook and line, and then only at such seasons and in such times and manner as may be directed by the Secretary of the Interior. That the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits other than those legally located prior to the passage of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-fifth Statutes, page three hundred and sixty-five), natural curiosities, or wonderful objects within said park, and for the protection of the animals and birds in the park from capture or destruction, and to prevent their being frightened or driven from the park; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the park. Possession within said park of the dead bodies, or any part thereof, of any wild bird or animal shall be prima facie evidence that the person or persons having the same are guilty of violating this Act. Any person or persons, or stage or express company, or railway company, who knows or has reason to believe that they were taken or killed contrary to the provisions of this Act and who receives for transportation any of said animals, birds, or fish so killed, caught, or taken, or who shall violate any of the other provisions of this Act or any rule or regulation that may be promulgated by the Secretary of the Interior with reference to the management and care of the park or for the protection of the property therein, for the preservation from injury or spoliation of timber, mineral deposits other than those legally located prior to the passage of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-fifth Statutes, page three hundred and sixty-five), natural curiosities, or wonderful objects within said park, or for the protection of the animals, birds, or fish in the park, or who shall within said park commit any damage, injury, or spoliation to or upon any building, fence, hedge, gate, guidepost, tree, wood, underwood, timber, garden, crops, vegetables, plants, land, springs, mineral deposits other than those legally located prior to the passage of the Act of May twenty-seventh, nineteen hundred and eight (Thirty-

fifth Statutes, page three hundred and sixty-five), natural curiosities, or other matter or thing growing or being thereon or situated therein, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500 or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceedings. (39 Stat.)

§ 5227e. (Act June 30, 1916, c. 197, § 5.) Mount Rainier National Park; forfeiture of guns, traps, etc., used in violation of act.

All guns, traps, teams, horses, or means of transportation of every nature or description used by any person or persons within said park limits when engaged in killing, trapping, ensnaring, or capturing such wild beasts, birds, or animals shall be forfeited to the United States and may be seized by the officers in said park and held pending the prosecution of any person or persons arrested under charge of violating the provisions of this Act, and upon conviction under this Act of such person or persons using said guns, traps, teams, horses, or other means of transportation, such forfeiture shall be adjudicated as a penalty in addition to the other punishment provided in this Act. Such forfeited property shall be disposed of and accounted for by and under the authority of the Secretary of the Interior. (39 Stat.)

§ 5227f. (Act June 30, 1916, c. 197, § 6.) Mount Rainier National Park; commissioner; appointment; jurisdiction and powers; appeals from convictions by.

The United States District Court for the Western District of Washington shall appoint a commissioner who shall reside in the park and who shall have jurisdiction to hear and act upon all complaints made of any violations of law or of the rules and regulations made by the Secretary of the Interior for the government of the park and for the protection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by this Act.

Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this Act prescribed for the government of said park and for the protection of the animals, birds, and fish in said park, and to try the person so charged, and, if found guilty, to impose punishment and to adjudge the forfeiture prescribed.

In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States District Court for the Western District of Washington, and the United States district court in said district shall prescribe the rules of procedure and practice for said commissioner in the trial of cases and for appeal to said United States district court. (39 Stat.)

§ 5227g. (Act June 30, 1916, c. 197, § 7.) Mount Rainier National Park; commissioner; process of arrest; bail.

Any such commissioner shall also have power to issue process as hereinbefore provided for the arrest of any person charged with the commission within said boundaries of any criminal offense not covered by the provisions of section four of this Act to hear the evidence introduced, and if he is of opinion that probable cause is shown for holding the person so charged for trial shall cause such person to be safely conveyed to a secure place of confinement within the jurisdiction of the United States District Court for the Western District of Washington, and certify a transcript of the record of

his proceedings and the testimony in the case to said court, which court shall have jurisdiction of the case: Provided, That the said commissioner shall grant bail in all cases bailable under the laws of the United States or of said State. (39 Stat.)

§ 5227h. (Act June 30, 1916, c. 197, § 8.) Mount Rainier National Park; commissioner; process directed to marshal for western district of Washington; arrests by other officers, etc., of government.

All process issued by the commissioner shall be directed to the marshal of the United States for the western district of Washington, but nothing herein contained shall be so construed as to prevent the arrest by any officer or employee of the Government or any person employed by the United States in the policing of said reservation within said boundaries without process of any person taken in the act of violating the law or this Act or the regulations prescribed by said Secretary as aforesaid. (39 Stat.)

§ 5227i. (Act June 30, 1916, c. 197, § 9.) Mount Rainier National Park; commissioner; salary; residence; fees, costs, and expenses; disposition of.

The commissioner provided for in this Act shall be paid an annual salary of $1,500, payable quarterly: Provided, That the said commissioner shall reside within the exterior boundaries of said Mount Rainier National Park, at a place to be designated by the court making such appointment: And provided further, That all fees, costs, and expenses collected by the commissioner shall be disposed of as provided in section eleven of this Act. (39 Stat.)

The deficiency appropriation act for the fiscal year 1916, Act Sept. 8, 1916, c. 464, 39 Stat., appropriated $1,366.67 for the fiscal year 1917, and provided that Act May 28, 1896, c. 252, § 21, ante, § 1451, should not impair his right to receive such salary.

§ 5227j. (Act June 30, 1916, c. 197, § 10.) Mount Rainier National Park; fees, costs, and expenses chargeable to United States; payment.

All fees, costs, and expenses arising in cases under this Act and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. (39 Stat.)

§ 5227k. (Act June 30, 1916, c. 197, § 11.) Mount Rainier National Park; fines and costs; disposition of.

All fines and costs imposed and collected shall be deposited by said commissioner of the United States, or the marshal of the United States collecting the same, with the clerk of the United States District Court for the Western District of Washington. (39 Stat.)

Section 12 of said act provides that the Secretary of the Interior shall notify in writing the Governor of the state of Washington of the passage and approval of the act.

§ 5228. (Act May 22, 1902, c. 820, § 1.) Crater Lake National Park; establishment.

The tract of land bounded north by the parallel forty-three degrees four minutes north latitude, south by forty-two degrees forty-eight minutes north latitude, east by the meridian one hundred and twenty-two degrees west longitude, and west by the meridian one hundred and twenty-two degrees sixteen minutes west longitude, having an area of two hundred and forty-nine square miles, in the State of Oregon, and including Crater Lake, is hereby reserved and withdrawn from settlement, occupancy, or sale under the laws of the United States, and dedicated and set apart forever as a public

park or pleasure ground for the benefit of the people of the United States, to be known as Crater Lake National Park. (32 Stat. 202.)

This section and the two sections next following were an act entitled "An act reserving from the public lands in the State of Oregon, as a public park for the benefit of the people of the United States, and for the protection and preservation of the game, fish, timber, and all other natural objects therein, a tract of land herein described, and so forth."

Later provisions relating to the Crater Lake National Park are contained in Act Aug. 21, 1916, c. 368, post, §§ 5230a–5230k.

§ 5229. (Act May 22, 1902, c. 820, § 2.) Park under control of Secretary of the Interior; regulations.

The reservation established by this Act shall be under the control and custody of the Secretary of the Interior, whose duty it shall be to establish rules and regulations and cause adequate measures to be taken for the preservation of the natural objects within said park, and also for the protection of the timber from wanton depredation, the preservation of all kinds of game and fish, the punishment of trespassers, the removal of unlawful occupants and intruders, and the prevention and extinguishment of forest fires. (32 Stat. 202.)

No expenditure for construction of any building exceeding $1,000 was to be made in any national park without express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5230. (Act May 22, 1902, c. 820, § 3.) Settlement, residence, lumbering, etc., within park, punishable; admission of visitors; location and working of mining claims; places of entertainment.

It shall be unlawful for any person to establish any settlement or residence within said reserve, or to engage in any lumbering, or other enterprise or business occupation therein, or to enter therein for any speculative purpose whatever, and any person violating the provisions of this Act, or the rules and regulations established thereunder, shall be punished by a fine of not more than five hundred dollars, or by imprisonment for not more than one year, and shall further be liable for all destruction of timber or other property of the United States in consequence of any such unlawful act: Provided, That said reservation shall be open, under such regulations as the Secretary of the Interior may prescribe, to all scientists, excursionists, and pleasure seekers and to the location of mining claims and the working of the same: And provided further, That restaurant and hotel keepers, upon application to the Secretary of the Interior, may be permitted by him to establish places of entertainment within the Crater Lake National Park for the accommodation of visitors, at places and under regulations fixed by the Secretary of the Interior, and not otherwise. (32 Stat. 203.)

§ 5230a. (Act Aug. 21, 1916, c. 368, § 1.) Cession by Oregon of jurisdiction over Crater Lake National Park accepted; nature and extent of jurisdiction assumed.

The provisions of the act of the Legislature of the State of Oregon, approved January twenty-fifth, nineteen hundred and fifteen, ceding to the United States exclusive jurisdiction over the territory embraced within the Crater Lake National Park, are hereby accepted and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said State but outside of said park, and saving further to the said State the right to tax persons and corporations, their franchises and property, on the lands included in said park. All the laws applicable to places under the sole and exclusive jurisdiction of the

United States shall have force and effect in said park. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Oregon. (39 Stat.)

This section and the ten sections next following were an act entitled "An act to accept the cession by the state of Oregon of exclusive jurisdiction over the lands embraced within the Crater Lake National Park, and for other purposes," cited above.

§ 5230b. (Act Aug. 21, 1916, c. 368, § 2.) Park part of United States judicial district for Oregon; jurisdiction of district court.

Said park shall constitute a part of the United States judicial district for Oregon, and the district court of the United States in and for Oregon shall have jurisdiction of all offenses committed within said boundaries. (39 Stat.)

§ 5230c. (Act Aug. 21, 1916, c. 368, § 3.) Offense committed in Crater Lake National Park.

If any offense shall be committed in the Crater Lake National Park, which offense is not prohibited or the punishment for which is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the State of Oregon in force at the time of the commission of the offense may provide for a like offense in said State; and no subsequent repeal of any such law of the State of Oregon shall affect any prosecution for said offense committed within said park. (39 Stat.)

§ 5230d. (Act Aug. 21, 1916, c. 368, § 4.) Hunting and fishing in Crater Lake National Park; Secretary of the Interior to publish rules and regulations; evidence as to offenses; punishment for violation of regulations.

All hunting or the killing, wounding, or capturing at any time of any wild bird or animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting injury, is prohibited within the limits of said park; nor shall any fish be taken out of the waters of the park in any other way than by hook and line, and then only at such seasons and in such times and manner as may be directed by the Secretary of the Interior. That the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits other than those legally located prior to the passage of this Act, natural curiosities, or wonderful objects within said park, and for the protection of the animals and birds in the park from capture or destruction, and to prevent their being frightened or driven from the park; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the park. Possession within said park of the dead bodies, or any part thereof, of any wild bird or animal shall be prima facie evidence that the person or persons having the same are guilty of violating this Act. Any person or persons, or stage or express company, or railway company, who knows or has reason to believe that they were taken or killed contrary to the provisions of this Act and who receives for transportation any of said animals, birds, or fish so killed, caught, or taken, or who shall violate any of the other provisions of this Act or any rule or regulation that may be promulgated by the Secretary of the Interior with reference to the management and care of the park or for the protection of the property therein, for the preservation from injury or spoliation of timber, mineral deposits other than those

legally located prior to the passage of this Act, natural curiosities, or wonderful objects within said park, or for the protection of the animals, birds, or fish in the park, or who shall within said park commit any damage, injury, or spoliation to or upon any building, fence, hedge, gate, guidepost, tree, wood, underwood, timber, garden, crops, vegetables, plants, land, springs, mineral deposits other than those legally located prior to the passage of this Act, natural curiosities, or other matter or thing growing or being thereon or situate therein, shall be deemed guilty of a misdemeanor, and shall be subject to a fine of not more than $500 or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceedings. (39 Stat.)

§ 5230e. (Act Aug. 21, 1916, c. 368, § 5.) Forfeiture of guns, traps, etc.; used by persons violating regulation.

All guns, traps, teams, horses, or means of transportation of every nature or description used by any person or persons within said park limits when engaged in killing, trapping, ensnaring, or capturing such wild beasts, birds, or animals shall be forfeited to the United States and may be seized by the officers in said park and held pending the prosecution of any person or persons arrested under charge of violating the provisions of this Act, and upon conviction under this Act of such person or persons using said guns, traps, teams, horses, or other means of transportation, such forfeiture shall be adjudicated as a penalty in addition to the other punishment provided in this Act. Such forfeited property shall be disposed of and accounted for by and under the authority of the Secretary of the Interior. (39 Stat.)

§ 5230f. (Act Aug. 21, 1916, c. 368, § 6.) Appointment of commissioner to reside in park; powers and duties of commissioner; appeals from judgments of commissioner.

The United States District Court for Oregon shall appoint a commissioner who shall reside in the park and who shall have jurisdiction to hear and act upon all complaints made of any violations of law or of the rules and regulations made by the Secretary of the Interior for the government of the park and for the protection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by this Act.

Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this Act prescribed for the government of said park and for the protection of the animals, birds, and fish in said park, and to try the person so charged, and if found guilty, to impose punishment and to adjudge the forfeiture prescribed.

In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States District Court for Oregon, and the United States court in said district shall prescribe the rules of procedure and practice for said commissioner in the trial of cases and for appeal to said United States District Court. (39 Stat.)

§ 5230g. (Act Aug. 21, 1916, c. 368, § 7.) Power of commissioner to issue process for arrest of persons committing offenses; certification to United States District Court; bail.

Any such commissioner shall also have power to issue process as hereinbefore provided for the arrest of any person charged with the commission within said boundaries of any criminal offense not covered by the provisions of section four of this Act to hear

the evidence introduced, and if he is of opinion that probable cause is shown for holding the person so charged for trial shall cause such person to be safely conveyed to a secure place of confinement within the jurisdiction of the United States District Court for Oregon, and certify a transcript of the record of his proceedings and the testimony in the case to said court, which court shall have jurisdiction of the case: Provided, That the said commissioner shall grant bail in all cases bailable under the laws of the United States or of said State. (39 Stat.)

§ 5230h. (Act Aug. 21, 1916, c. 368, § 8.) Process to be directed to and executed by marshal; arrest without process.

All process issued by the commissioner shall be directed to the marshal of the United States for the district of Oregon, but nothing herein contained shall be so construed as to prevent the arrest by any officer or employé of the Government or any person employed by the United States in the policing of said reservation within said boundaries without process of any person taken in the act of violating the law or this Act or the regulations prescribed by said Secretary as aforesaid. (39 Stat.)

§ 5230i. (Act Aug. 21, 1916, 368, § 9.) Salary of commissioner; residence in park; disposition of fees, etc., collected.

The commissioner provided for in this Act shall be paid an annual salary of $1,500, payable quarterly: Provided, That the said commissioner shall reside within the exterior boundaries of said Crater Lake National Park, at a place to be designated by the court making such appointment: Provided further, That all fees, costs, and expenses collected by the commissioner shall be disposed of as provided in section eleven of this Act. (39 Stat.)

The deficiency appropriation act for the fiscal year 1916, Act Sept. 8, 1916, c. 464, 39 Stat., appropriated $1,250 for the commissioner's salary for the fiscal year 1917, and provided that Act May 28, 1896, c. 252, § 21, ante, § 1451, should not impair his right to receive such salary.

§ 5230j. (Act Aug. 21, 1916, c. 368, § 10.) Accounting for fees; etc., collected.

All fees, costs, and expenses arising in cases under this Act and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. (39 Stat.)

§ 5230k. (Act Aug. 21, 1916, c. 368, § 11.) Deposit of fines and costs collected with clerk of district court.

All fines and costs imposed and collected shall be deposited by said commissioner of the United States, or the marshal of the United States collecting the same, with the clerk of the United States District Court for Oregon. (39 Stat.)

Section 12 of this act provided that the Secretary of the Interior should notify in writing, the governor of Oregon of the act's passage and approval.

§ 5231. (Act Jan. 9, 1903, c. 63, § 1.) Wind Cave National Park; establishment.

There are hereby reserved from settlement, entry, sale, or other disposal, and set apart as a public park, all those certain tracts, pieces, or parcels of land lying and being situate in the State of South Dakota and within the boundaries particularly described as follows: Beginning at the southeast corner of section thirteen, township six south, range five east, Black Hills meridian, South Dakota; thence westerly to the southwest corner of the southeast quarter of section sixteen, said township; thence northerly along the quarter-section lines to the northwest corner of the northeast quarter of section four, said township; thence easterly to the southwest corner of section thirty-four, township five south, range

five east; thence northerly to the northwest corner of said section; thence easterly to the northeast corner of section thirty-one, township five south, range six east; thence southerly along the section lines to the southeast corner of section seven, township six south, range six east; thence westerly to the southwest corner of said section; thence southerly to the southeast corner of section thirteen, township six south, range five east, the place of beginning: Provided, That nothing herein contained shall be construed to affect any valid rights acquired in connection with any of the lands embraced within the limits of said park. (32 Stat. 765.)

This section and the five sections next following were an act entitled "An act to set apart certain lands in the State of South Dakota as a public park, to be known as the Wind Cave National Park."

§ 5232. (Act Jan. 9, 1903, c. 63, § 2.) Park under control of Secretary of the Interior; regulations.

Said park shall be known as the Wind Cave National Park and shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to prescribe such rules and regulations and establish such service as he may deem necessary for the care and management of the same. (32 Stat. 765.)

No expenditure for the construction of any building exceeding $1,000 was to be made in any national park without express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5233. (Act Jan. 9, 1903, c. 63, § 3.) Leases of cavern and lands within park.

That the Secretary of the Interior be, and is hereby, authorized, in the exercise of his discretion, to rent or lease, under rules and regulations to be made by him, the cavern underlying the above-described lands, and also pieces and parcels of ground within said park for the erection of such buildings as may be required for the accommodation of visitors. (32 Stat. 765.)

§ 5234. (Act Jan. 9, 1903, c. 63, § 4.) Use of funds arising from rentals or leases.

All funds arising from such rentals or leases shall be covered into the Treasury of the United States as a special fund to be expended in the care and improvement of said park. (32 Stat. 765.)

§ 5235. (Act Jan. 9, 1903, c. 63, § 5.) Relinquishment by settlers or owners of tracts within park in exchange for other land.

In cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of this park, the settler or owner thereof may, if he desires to do so, relinquish the tract to the Government and secure other land, outside of the park, in accordance with the provisions of the law relating to the subject of such relinquishment of lands in forest reserves in the State of South Dakota. (32 Stat. 766.)

§ 5236. (Act Jan. 9, 1903, c. 63, § 6.) Unlawful intrusion upon park, or unauthorized injury to property, or violation of regulations, punishable.

All persons who shall unlawfully intrude upon said park, or who shall without permission appropriate any object therein or commit unauthorized injury or waste in any form whatever upon the lands or other public property therein, or who shall violate any of the rules and regulations prescribed hereunder, shall upon conviction be fined in a sum not more than one thousand dollars or be imprisoned for a period not more than twelve months, or shall suffer both fine and imprisonment, in the discretion of the court. (32 Stat. 766.)

§ 5237. (Act June 29, 1906, c. 3607, § 1.) Mesa Verde National Park; establishment.

There is hereby reserved from settlement, entry, sale, or other disposal, and set apart as a public reservation, all those certain tracts, pieces, and parcels of land lying and being situate in the State of Colorado, and within the boundaries particularly described as follows: * * (34 Stat. 616.)

This was a part of section 1 of an act creating the Mesa Verde National Park, cited above.

Sections 2–4 of said act are set forth post, §§ 5239–5241.

The portion of this section omitted here, which described the boundaries of said park, was superseded by the extension of the park on the south and the description of the boundaries as thus changed, by Act June 30, 1913, c. 4, § 1, post, § 5238.

§ 5238. (Act June 30, 1913, c. 4, § 1.) Boundaries of Mesa Verde National Park extended.

The boundary of the Mesa Verde National Park, created by the Act of Congress approved June twenty-ninth, nineteen hundred and six (Thirty-fourth Statutes at Large, page six hundred and sixteen), is hereby extended on the south so as to include the land relinquished by the Indians in the foregoing agreement as herein provided and the boundaries of said park shall hereafter be defined as follows:

Beginning at a point on the north boundary of the Southern Ute Indian Reservation in southwestern Colorado where the north quarter corner of unsurveyed fractional section two (2), township thirty-four (34) north, range fifteen (15) west, "south of the Ute boundary," intersects the same; thence south to the south quarter corner of unsurveyed section twenty-six (26), said township; thence west to the southwest corner of unsurveyed section twenty-five (25), township thirty-four (34) north, range sixteen (16) west; thence north to the northwest corner of unsurveyed fractional section one (1), said township and range; thence west to the southeast corner of fractional section twelve (12), township thirty-four (34) north, range sixteen (16) west, "north of the Ute boundary"; thence north to the northwest corner of section nineteen (19), township thirty-five (35) north, range fifteen (15) west; thence east to the southwest corner of the southeast quarter of section sixteen (16), said township; thence north to the northwest corner of the southeast quarter of said section; thence east to the southwest corner of the northeast quarter of section thirteen (13), said township; thence north to the northwest corner of the northeast quarter of said section; thence east to the southwest corner of section seven (7), township thirty-five (35) north, range fourteen (14) west; thence north to the northwest corner of said section; thence east to the southwest corner of section five (5), said township; thence north to the northwest corner of said section; thence east to the northeast corner of said section; thence south to the southeast corner of the northeast quarter of said section; thence east to the northeast corner of the southwest quarter of section four (4), said township; thence south to the northwest corner of the southeast quarter of section sixteen (16), said township; thence east to the northeast corner of the southeast quarter of said section; thence south to the northwest corner of section twenty-two (22), said township; thence east to the northeast corner of said section; thence south to the northwest corner of section twenty-six (26), said township; thence east along the north section line of section twenty-six (26) to the east bank of the Rio Mancos; thence in a southeasterly direction along the east bank of the Rio Mancos to its intersection with the northern boundary line of the Southern Ute Indian Reservation; thence west along said Indian reservation boundary to its intersection

with the range line between ranges fourteen (14) and fifteen (15) west, the place of beginning;

And the provisions of the Act of June twenty-ninth, eighteen hundred and ninety-six, creating the park, are hereby extended over the same. (38 Stat. 83.)

These were provisions of the Indian appropriation act for the fiscal year 1914, cited above.

The agreement, mentioned in this section, whereby the lands hereby included within the park were relinquished by the Indians, was an amendment to an agreement made with the Wiminuche Band of Southern Ute Indians, dated May 10, 1911, which amended agreement was incorporated in and ratified by the said Indian appropriation act for the fiscal year 1914, Act June 30, 1913, c. 4, § 1, 38 Stat. 82.

Act June 29, 1906, c. 3607, mentioned in this section is set forth ante, § 5237, and post, §§ 5239–5241.

§ 5239. (Act June 29, 1906, c. 3607, § 2.) Park under control of Secretary of the Interior; regulations; prehistoric ruins near park.

Said public park shall be known as the Mesa Verde National Park, and shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be to prescribe such rules and regulations and establish such service as he may deem necessary for the care and management of the same. Such regulations shall provide specifically for the preservation from injury or spoliation of the ruins and other works and relics of prehistoric or primitive man within said park. (34 Stat. 617.)

See notes to section 1 of this act, ante, § 5237.

A proviso following the portion of this section set forth here, which placed all prehistoric ruins situated within five miles of the boundaries of the park on Indian lands and not on lands alienated by patent from the ownership of the United States under the custodianship of the Secretary of the Interior, to be administered by the same service that was established for the custodianship of the park, was repealed by a provision of the Indian appropriation act for the fiscal year 1914, Act June 30, 1913, c. 4, § 1, 38 Stat. 84.

An appropriation for protection and improvement of the park, including the lands within five miles of the boundaries, to be administered by the same service under this act, is made in the subsequent sundry civil appropriation acts. The provision for the fiscal year 1917 was by Act July 1, 1916, c. 209, § 1, 39 Stat.

Leases and permits for the use of the land in the park or development of the resources thereof were authorized by a provision of Act June 25, 1910, c. 385, post, § 5242.

No expenditure for any building exceeding $1,000 was to be made in any national park without express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5240. (Act June 29, 1906, c. 3607, § 3.) Examinations, excavations, and gathering of objects of interest within park.

That the Secretary of the Interior be, and he is hereby, authorized to permit examinations, excavations, and other gathering of objects of interest within said park by any person or persons whom he may deem properly qualified to conduct such examinations, excavations, or gatherings, subject to such rules and regulations as he may prescribe: Provided always, That the examinations, excavations, and gatherings are undertaken only for the benefit of some reputable museum, university, college, or other recognized scientific or educational institution, with a view to increasing the knowledge of such objects and aiding the general advancement of archæological science. (34 Stat. 617.)

See notes to section 1 of this act, ante, § 5237.

§ 5241. (Act June 29, 1906, c. 3607, § 4.) Removal, disturbance, destruction, etc., of ruins, mounds, buildings, graves, relics, etc., in park, punishable; penalty.

Any person or persons who may otherwise in any manner will-

fully remove, disturb, destroy, or molest any of the ruins, mounds, buildings, graves, relics, or other evidences of an ancient civilization or other property from said park shall be deemed guilty of a misdemeanor, and upon conviction before any court having jurisdiction of such offenses shall be fined not more than one thousand dollars or imprisoned not more than twelve months, or such person or persons may be fined and imprisoned, at the discretion of the judge, and shall be required to restore the property disturbed, if possible. (34 Stat. 617.)

See notes to section 1 of this act, ante, § 5237.

§ 5242. (Act June 25, 1910, c. 385.) Mesa Verde National Park; leases and permits for use of land, etc.; prehistoric ruins not to be included.

The Secretary of the Interior may, upon terms and conditions to be fixed by him, grant leases and permits for the use of the land or development of the resources thereof, in the Mesa Verde National Park, and the funds derived therefrom shall be covered into the Treasury of the United States: Provided, That such leases or grants shall not include any of the prehistoric ruins in said park or exclude the public from free or convenient access thereto. (36 Stat. 796.)

This was a provision of the deficiency appropriation act for the fiscal year 1910, cited above.

§ 5243. (Act July 1, 1902, c. 1362, § 64.) Cession of sulphur springs and adjacent lands to United States; limit of acreage; payment for lands and improvements; regulations; sale, etc., of intoxicants prohibited; United States not committed to expenditures for improvements.

The two tribes hereby absolutely and unqualifiedly relinquish, cede, and convey unto the United States a tract or tracts of land at and in the vicinity of the village of Sulphur, in the Chickasaw Nation, of not exceeding six hundred and forty acres, to be selected, under the direction of the Secretary of the Interior, within four months after the final ratification of this agreement, and to embrace all the natural springs in and about said village, and so much of Sulphur Creek, Rock Creek, Buckhorn Creek, and the lands adjacent to said natural springs and creeks as may be deemed necessary by the Secretary of the Interior for the proper utilization and control of said springs and the waters of said creeks, which lands shall be so selected as to cause the least interference with the contemplated town site at that place consistent with the purposes for which said cession is made, and when selected the ceded lands shall be held, owned, and controlled by the United States absolutely and without any restriction, save that no part thereof shall be platted or disposed of for town-site purposes during the existence of the two tribal governments. Such other lands as may be embraced in a town site at that point shall be disposed of in the manner provided in the Atoka agreement for the disposition of town sites. Within ninety days after the selection of the lands so ceded there shall be deposited in the Treasury of the United States, to the credit of the two tribes, from the unappropriated public moneys of the United States, twenty dollars per acre for each acre so selected, which shall be in full compensation for the lands so ceded, and such moneys shall, upon the dissolution of the tribal governments, be divided per capita among the members of the tribes, freedmen excepted, as are other funds of the tribes. All improvements upon the lands so selected which were lawfully there at the time of the ratification of this agreement by Congress shall be appraised, under the direction of the Secretary of the Interior, at the true value thereof at the time of the selection of said lands, and shall be paid for by warrants drawn by the Secretary of the Interior upon the Treasurer

of the United States. Until otherwise provided by law, the Secretary of the Interior may, under rules prescribed for that purpose, regulate and control the use of the water of said springs and creeks and the temporary use and occupation of the lands so ceded. No person shall occupy any portion of the lands so ceded, or carry on any business thereon, except as provided in said rules, and until otherwise provided by Congress the laws of the United States relating to the introduction, possession, sale, and giving away of liquors or intoxicants of any kind within the Indian country or Indian reservations shall be applicable to the lands so ceded, and said lands shall remain within the jurisdiction of the United States court for the southern district of Indian Territory: Provided, however, That nothing contained in this section shall be construed or held to commit the Government of the United States to any expenditure of money upon said lands or the improvements thereof, except as provided herein, it being the intention of this provision that in the future the lands and improvements herein mentioned shall be conveyed by the United States to such Territorial or State organization as may exist at the time when such conveyance is made. (32 Stat. 655.)

This section was part of an agreement between the United States and the Choctaw and Chickasaw tribes of Indians, ratified by and included in Act July 1, 1902, c. 1362, cited above.

The Atoka agreement, mentioned in this section, was a former agreement, with the same two tribes, ratified by and included in Act June 28, 1898, c. 517, 30 Stat. 495.

Other adjacent lands were withdrawn, and made a part of this reservation by Act April 21, 1904, c. 1402, § 18, post, § 5244.

A provision that this Sulphur Springs Reservation should be named and thereafter called the Platt National Park was made by Res. June 29, 1906, No. 42, post, § 5246.

§ 5244. (Act April 21, 1904, c. 1402, § 18.) Additional land withdrawn for Sulphur Springs Reservation; payment for lands and improvements; management and control; enforcement of regulations; sale of improvements; penalty for violation of rules and regulations; appraisement and purchase of town lots.

The Secretary of the Interior is hereby authorized and directed to withhold from sale or other disposition the irregular tract of land containing seventy-eight and sixty-eight one-hundredths acres, more or less, lying in the northwest quarter of section two and the northeast quarter of section three, township one south, range three east, and being within the exterior boundaries of the proposed town site of Sulphur, in the Chickasaw Nation, Indian Territory, and excluded from said town site by order of the Secretary of the Interior, of October twentieth, nineteen hundred and three, and also to withdraw and withhold from disposition the tract of land within the exterior boundaries of said proposed town site, lying south of and adjacent to the tract above mentioned, containing in the aggregate one hundred and thirty-eight acres, more or less, and mentioned in the report of Gerard H. Matthes, of December twenty-seventh, nineteen hundred and three, to F. H. Newell, Chief Engineer United States Geological Survey, and shown upon the map accompanying said report by a yellow line.

The land hereby reserved shall be paid for by the United States at the rate of sixty dollars per acre and in the same manner as the land acquired in accordance with paragraph sixty-four of the Act of Congress approved July first, nineteen hundred and two, entitled "An Act to ratify and confirm an agreement with the Choctaw and Chickasaw tribes of Indians, and for other purposes," and such money as may be necessary to carry out this provision is hereby appropriated, from any money in the United States Treasury not otherwise appropriated, and made immediately available.

All improvements upon said land, at the passage of this Act, shall

be appraised and paid for as provided in said paragraph sixty-four of the Act of July first, nineteen hundred and two.

The land hereby reserved shall, immediately upon payment therefor by the United States, be and become a part of the reservation heretofore established at the said village of Sulphur, and shall be subject to all the provisions of said section sixty-four of the Act of July first, nineteen hundred and two, respecting the care, control, direction, use, and occupancy thereof as if they had been included in the original segregation: Provided, That the Secretary of the Interior is hereby authorized, in the absence of other provisions for the care and management thereof, to designate an officer or employee of his Department to take charge of the land, whether acquired under said section sixty-four of the Act of July first, nineteen hundred and two, or under this Act, and to enforce rules and regulations for the control and use thereof, and of the waters of the springs and creeks within the reservation: Provided further, That the Secretary of the Interior is hereby authorized, in his discretion, to sell or dispose of any buildings upon the land hereby reserved and upon the land originally reserved, and all money received from such sales, as well as all money heretofore received or that may hereafter be realized for the use of said waters or for the use and occupancy of the land or the buildings thereon, through leases, permits, or otherwise, may be expended under the direction of the Secretary of the Interior for the care and management of said lands and the preservation of the improvements thereon: And provided further, That if any person, firm, or corporation shall willfully violate any of the rules and regulations prescribed by the Secretary of the Interior relative to the use of the waters of said springs and creeks and the use and occupation of the lands in said reservation, such person, firm, corporation, or members or agents thereof, shall be deemed guilty of a misdemeanor, and upon conviction shall be fined not less than five dollars and not more than one hundred dollars, and may be imprisoned for a term of not more than six months for each offense.

The Secretary of the Interior is hereby directed to appraise, at actual value at the time of such appraisement, all town lots held by citizens of the United States within the limits of the tract of land ceded to the United States by the Choctaw and Chickasaw nations, at or near Sulphur Springs, in the Chickasaw Nation, Indian Territory, and pay for the same to such lot holders severally, or to their legal representatives, the appraised value of such lots by warrants drawn by the Secretary of the Interior upon the Treasurer of the United States; and the amount necessary to pay the same is hereby appropriated from any money in the Treasury not otherwise appropriated. The foregoing appraisal of lots shall be completed within three months from the passage of this Act. (33 Stat. 220.)

This section was part of the Indian appropriation act for the fiscal year 1905, cited above.

Act July 1, 1902, c. 1362, § 64, mentioned in this act, is set forth ante, § 5243.

This Sulphur Springs reservation was to be named and thereafter called the Platt National Park, by Res. June 29, 1906, No. 42, post, § 5246.

No expenditure for any building exceeding $1,000 was to be made in any national park without express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5245. (Act June 16, 1906, c. 3335, § 7.) Acts relating to Sulphur Springs Reservation, and lands set aside as national park, etc., not affected by act for admission to the Union of the State of Oklahoma; rights and jurisdiction of United States in and over lands so set aside; State not entitled to select indemnity school lands for sections within park, etc., or other reservation, etc.

Nothing in this Act contained shall repeal or affect any Act of

Congress relating to the Sulphur Springs Reservation as now defined or as may be hereafter defined or extended, or the power of the United States over it or any other lands embraced in the State hereafter set aside by Congress as a national park, game preserve, or for the preservation of objects of archæological or ethnological interest; and nothing contained in this Act shall interfere with the rights and ownership of the United States in any land hereafter set aside by Congress as national park, game preserve, or other reservation, or in the said Sulphur Springs Reservation, as it now is or may be hereafter defined or extended by law; but exclusive legislation, in all cases whatsoever, shall be exercised by the United States, which shall have exclusive control and jurisdiction over the same; but nothing in this proviso contained shall be construed to prevent the service within said Sulphur Springs Reservation or national parks, game preserves, and other reservations hereafter established by law, of civil and criminal processes lawfully issued by the authority of said State, and said State shall not be entitled to select indemnity school lands for the thirteenth, sixteenth, thirty-third, and thirty-sixth sections that may be embraced within the metes and bounds of the national park, game preserve, and other reservation or the said Sulphur Springs Reservation, as now defined or may be hereafter defined. (34 Stat. 272.)

This was a proviso annexed to section 7 of the enabling act for the formation of a State government for and the admission to the Union of the State of Oklahoma, cited above.

§ 5246. (Res. June 29, 1906, No. 42.) Sulphur Springs Reservation named Platt National Park.

That the Secretary of the Interior be, and he is hereby, authorized and directed to change the name of the Sulphur Springs Reservation, an Indian reservation now in the State of Oklahoma, formerly in the Indian Territory, so that said Reservation shall be named and hereafter called the "Platt National Park," in honor of Orville Hitchcock Platt, late and for twenty-six years a Senator from the State of Connecticut and for many years a member of the Committee on Indian Affairs, in recognition of his distinguished services to the Indians and to the country. (34 Stat. 837.)

This was a resolution entitled "Joint Resolution directing that the Sulphur Springs Reservation be named and hereafter called the 'Platt National Park.'"

§ 5247. (Act May 11, 1910, c. 226, § 1.) Glacier National Park; establishment; removal of trespassers; claims, etc., and rights under land laws not affected; rights of way for railways; reclamation projects; indemnity selections of lands not to be allowed to railroad, etc., corporations for loss of lands within park.

The tract of land in the State of Montana particularly described by metes and bounds as follows, to wit: Commencing at a point on the international boundary between the United States and the Dominion of Canada at the middle of the Flathead River; thence following southerly along and with the middle of the Flathead River to its confluence with the Middle Fork of the Flathead River; thence following the north bank of said Middle Fork of the Flathead River to where it is crossed by the north boundary of the right of way of the Great Northern Railroad; thence following the said right of way to where it intersects the west boundary of the Blackfeet Indian Reservation; thence northerly along said west boundary to its intersection with the international boundary; thence along said international boundary to the place of beginning, is hereby

reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States, and dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States under the name of "The Glacier National Park;" and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and removed therefrom: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: Provided further, That rights of way through the valleys of the North and Middle forks of the Flathead River for steam or electric railways may be acquired within said Glacier National Park under filings or proceedings heretofore or hereafter made or instituted under the laws applicable to the acquisition of such rights over or upon the unappropriated public domain of the United States, and that the United States Reclamation Service may enter upon and utilize for flowage or other purposes any area within said park which may be necessary for the development and maintenance of a government reclamation project: And provided further, That no lands within the limits of said park hereby created belonging to or claimed by any railroad or other corporation now having or claiming the right of indemnity selection by virtue of any law or contract whatsoever shall be used as a basis for indemnity selection in any State or Territory whatsoever for any loss sustained by reason of the creation of said park. (36 Stat. 354.)

This section and the section next following were an act entitled "An act to establish 'The Glacier National Park' in the Rocky Mountains south of the international boundary line, in the State of Montana, and for other purposes."

Act July 3, 1916, c. 215, 39 Stat., excepts certain enumerated entries from the operation of this act, with the proviso that if such entries shall not be perfected as required by law the lands embraced therein shall revert to and become a part of the Glacier National Park.

Later provisions relating to the Glacier National Park are contained in Act Aug. 22, 1914, c. 264, post, §§ 5248a–5248l, and Act July 1, 1916, c. 209, § 1, post, § 5248m.

§ 5248. (Act May 11, 1910, c. 226, § 2.) Park under control of Secretary of Interior; regulations; leases for erection of buildings; sale and removal of matured or dead and down timber.

Said park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations not inconsistent with the laws of the United States as he may deem necessary or proper for the care, protection, management, and improvement of the same, which regulations shall provide for the preservation of the park in a state of nature so far as is consistent with the purposes of this Act, and for the care and protection of the fish and game within the boundaries thereof. Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or company, for not to exceed twenty years, when such ground is necessary for the erection of buildings for the accommodation of visitors, and to parcels of ground not exceeding one acre in extent and for not to exceed twenty years to persons who have heretofore erected or whom he may hereafter authorize to erect summer homes or cottages; he may also sell and permit the removal of such matured, or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park. (36 Stat. 354.)

The proceeds of leases and other revenues from sources connected with the park were to be expended in the administration and improvement thereof, by a provision of Act March 4, 1911, c. 285, § 1, post, § 5249.

§ 5248a. (Act Aug. 22, 1914, c. 264, § 1.) Glacier National Park; cession by State of Montana of exclusive jurisdiction accepted; saving to State of right to serve process and right to tax within park; laws of United States applicable; fugitives from justice in park.

The provisions of the act of the Legislature of the State of Montana, approved February seventeenth, nineteen hundred and eleven, ceding to the United States exclusive jurisdiction over the territory embraced within the Glacier National Park, are hereby accepted, and sole and exclusive jurisdiction is hereby assumed by the United States over such territory, saving, however, to the said State the right to serve civil or criminal process within the limits of the aforesaid park in suits or prosecution for or on account of rights acquired, obligations incurred, or crimes committed in said State but outside of said park, and saving further to the said State the right to tax persons and corporations, their franchises and property, on the lands included in said park. All the laws applicable to places under the sole and exclusive jurisdiction of the United States shall have force and effect in said park. All fugitives from justice taking refuge in said park shall be subject to the same laws as refugees from justice found in the State of Montana. (38 Stat. 699.)

This section and the eleven sections next following were an act entitled "An act to accept the cession by the state of Montana of exclusive jurisdiction over the lands embraced within the Glacier National Park, and for other purposes," cited above.

§ 5248b. (Act Aug. 22, 1914, c. 264, § 2.) Glacier National Park part of judicial district of Montana; jurisdiction of district court.

Said park shall constitute a part of the United States judicial district of Montana, and the district court of the United States in and for said district shall have jurisdiction of all offenses committed within said boundaries. (38 Stat. 699.)

§ 5248c. (Act Aug. 22, 1914, c. 264, § 3.) Criminal laws of Montana applicable to Glacier National Park.

If any offense shall be committed in the Glacier National Park, which offense is not prohibited or the punishment is not specifically provided for by any law of the United States, the offender shall be subject to the same punishment as the laws of the State of Montana in force at the time of the commission of the offense may provide for a like offense in said State; and no subsequent repeal of any such law of the State of Montana shall affect any prosecution for said offense committed within said park. (38 Stat. 699.)

§ 5248d. (Act Aug. 22, 1914, c. 264, § 4.) Hunting and fishing in Glacier National Park prohibited; regulations for management, and for protection of property; punishment of violations of act.

All hunting or the killing, wounding, or capturing at any time of any bird or wild animal, except dangerous animals when it is necessary to prevent them from destroying human lives or inflicting personal injury, is prohibited within the limits of said park; nor shall any fish be taken out of the waters of the park in any other way than by hook and line, and then only at such seasons and in such times and manner as may be directed by the Secretary of the Interior. That the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary and proper for the management and care of the park and for the protection of the property therein, especially for the preservation from injury or spoliation of all timber, mineral deposits other than those legally located prior to the passage of the Act of May eleventh,

nineteen hundred and ten (Thirty-sixth Statutes, page three hundred and fifty-four), natural curiosities, or wonderful objects within said park, and for the protection of the animals and birds in the park from capture or destruction, and to prevent their being frightened or driven from the park; and he shall make rules and regulations governing the taking of fish from the streams or lakes in the park. Possession within said park of the dead bodies, or any part thereof, of any wild bird or animal shall be prima facie evidence that the person or persons having the same are guilty of violating this Act. Any person or persons, or stage or express company, or railway company, who knows or has reason to believe that they were taken or killed contrary to the provisions of this Act and who receives for transportation any of said animals, birds, or fish so killed, caught, or taken, or who shall violate any of the other provisions of this Act or any rule or regulation that may be promulgated by the Secretary of the Interior with reference to the management and care of the park or for the protection of the property therein, for the preservation from injury or spoliation of timber, mineral deposits, other than those legally located prior to the passage of the Act of May eleventh, nineteen hundred and ten (Thirty-sixth Statutes, page three hundred and fifty-four), natural curiosities, or wonderful objects within said park, or for the protection of the animals, birds, or fish in the park, or who shall within said park commit any damage, injury, or spoliation to or upon any building, fence, hedge, gate, guidepost, tree, wood, underwood, timber, garden, crops, vegetables, plants, land, springs, mineral deposits other than those legally located prior to the passage of the Act of May eleventh, nineteen hundred and ten (Thirty-sixth Statutes, page three hundred and fifty-four), natural curiosities, or other matter or thing growing or being thereon, or situated therein, shall be deemed guilty of a misdemeanor and shall be subject to a fine of not more than $500, or imprisonment not exceeding six months, or both, and be adjudged to pay all costs of the proceedings. (38 Stat. 700.)

§ 5248e. (Act Aug. 22, 1914, c. 264, § 5.) Guns, traps, teams, etc., used within park limits in hunting, etc., forfeited; seizure and adjudication.

All guns, traps, teams, horses, or means of transportation of every nature or description used by any person or persons within said park limits when engaged in killing, trapping, ensnaring, or capturing such wild beasts, birds, or wild animals shall be forfeited to the United States and may be seized by the officers in said park and held pending the prosecution of any person or persons arrested under charge of violating the provisions of this Act, and upon conviction under this Act of such person or persons using said guns, traps, teams, horses, or other means of transportation, such forfeiture shall be adjudicated as a penalty in addition to the other punishment provided in this Act. Such forfeited property shall be disposed of and accounted for by and under the authority of the Secretary of the Interior. (38 Stat. 701.)

§ 5248f. (Act Aug. 22, 1914, c. 264, § 6.) Commissioner for Glacier National Park; jurisdiction; powers and duties; procedure and appeals from convictions.

The United States district court for the district of Montana shall appoint a commissioner, who shall reside in the park, and who shall have jurisdiction to hear and act upon all complaints made of any violations of law or of the rules and regulations made by the Secretary of the Interior for the government of the park and for the pro-

tection of the animals, birds, and fish, and objects of interest therein, and for other purposes authorized by this Act.

Such commissioner shall have power, upon sworn information, to issue process in the name of the United States for the arrest of any person charged with the commission of any misdemeanor, or charged with a violation of the rules and regulations, or with a violation of any of the provisions of this Act prescribed for the government of said park and for the protection of the animals, birds, and fish in said park, and to try the person so charged, and, if found guilty, to impose punishment and to adjudge the forfeiture prescribed.

In all cases of conviction an appeal shall lie from the judgment of said commissioner to the United States district court for the district of Montana, and the United States district court in said district shall prescribe the rules of procedure and practice for said commissioner in the trial of cases and for appeal to said United States district court. (38 Stat. 700.)

§ 5248g. (Act Aug. 22, 1914, c. 264, § 7.) Commissioner for Glacier National Park; process for arrest of offenders, confinement, and bail.

Any such commissioner shall also have power to issue process as hereinbefore provided for the arrest of any person charged with the commission, within said boundaries, of any criminal offense not covered by the provisions of section four of this Act, to hear the evidence introduced, and if he is of opinion that probable cause is shown for holding the person so charged for trial, shall cause such person to be safely conveyed to a secure place of confinement within the jurisdiction of the United States district court for the district of Montana, and certify a transcript of the record of his proceedings and the testimony in the case to said court, which court shall have jurisdiction of the case: Provided, That the said commissioner shall grant bail in all cases bailable under the laws of the United States or of said State. (38 Stat. 701.)

§ 5248h. (Act Aug. 22, 1914, c. 264, § 8.) Commissioner for Glacier National Park; process to be directed to marshal; arrest of offenders without process.

All process issued by the commissioner shall be directed to the marshal of the United States for the district of Montana, but nothing herein contained shall be so construed as to prevent the arrest by any officer or employee of the Government, or any person employed by the United States in the policing of said reservation, within said boundaries, without process, of any person taken in the act of violating the law or this Act, or the regulations prescribed by said Secretary as aforesaid. (38 Stat. 701.)

§ 5248i. (Act Aug. 22, 1914, c. 264, § 9.) Commissioner for Glacier National Park; salary; residence; disposition of fees, etc., collected.

The commissioner provided for in this Act shall be paid an annual salary of $1,500, payable quarterly: Provided, That the said commissioner shall reside within the exterior boundaries of said Glacier National Park, at a place to be designated by the court making such appointment: And provided further, that all fees, costs, and expenses collected by the commissioner shall be disposed of as provided in sections eleven and twelve of this Act. (38 Stat. 701.)

The deficiency appropriation act for the fiscal year 1915, Act March 4, 1915, c. 147, § 1, 38 Stat. 1149, and the sundry civil appropriation act for the fiscal year 1917, Act May 10, 1916, c. 209, § 1, 39 Stat., contained appropriations

for the commissioner's salary, and provided that Act May 28, 1896, c. 252, § 21, ante, § 1451, should not be construed to impair his right to receive such salary.

§ 5248j. (Act Aug. 22, 1914, c. 264, § 10.) Fees, costs, and expenses in cases under act; how certified and paid.

All fees, costs, and expenses arising in cases under this Act and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. (38 Stat. 701.)

§ 5248k. (Act Aug. 22, 1914, c. 264, § 11.) Fines and costs imposed and collected by commissioner or marshal to be deposited with clerk.

All fines and costs imposed and collected shall be deposited by said commissioner of the United States or the marshal of the United States collecting the same with the clerk of the United States district court for the district of Montana. (38 Stat. 701.)

§ 5248*l*. (Act Aug. 22, 1914, c. 264, § 12.) Notice to Governor of Montana of passage of act.

The Secretary of the Interior shall notify, in writing, the governor of the State of Montana of the passage and approval of this Act. (38 Stat. 701.)

§ 5248m. (Act July 1, 1916, c. 209, § 1.) Glacier National Park; donations of lands or rights of way.

The Secretary of the Interior is authorized to accept patented lands or rights of way over patented lands in the Glacier National Park that may be donated for park purposes. (39 Stat.)

This was a provision of the sundry civil appropriation act for the fiscal year 1917, cited above.

A similar provision was contained in the sundry civil appropriation act for the preceding year, Act March 3, 1915, c. 75, § 1, 38 Stat. 863.

§ 5249. (Act March 4, 1911, c. 285, § 1.) Glacier National Park; proceeds of leases and other revenues to be expended in administration and improvement of park.

Glacier National Park, Montana: * * All proceeds of leases and other revenues that may be derived from any source connected with said park shall be expended under the direction of the Secretary of the Interior in the administration and improvement of the park, and the construction of roads, trails, bridges, and so forth, therein. (36 Stat. 1421.)

This was a provision accompanying an appropriation for administration and improvement of the park, in the sundry civil appropriation act for the fiscal year 1912, cited above.

No expenditure for the construction of any building exceeding $1,000 was to be made in any national park without express authority of Congress, by Act Aug. 24, 1912, c. 355, post, § 5250.

§ 5249a. (Act Jan. 26, 1915, c. 19, § 1.) Rocky Mountain National Park; establishment; reclamation project within park.

The tract of land in the State of Colorado particularly described by and included within metes and bounds as follows, to wit: Beginning at the southeast corner of section thirty-four, township three north, range seventy-three west of the sixth principal meridian, Colorado, thence north along the section lines to the northeast corner of section three, said township; thence west to the northwest corner of said section; thence north along the section lines to the northeast corner of section sixteen, township four north, range seventy-three west; thence west to the northwest corner of said section; thence north to the northeast corner of section eight, said township; thence west along the section lines to the northwest corner of section seven, said township; thence north to the northeast corner of township four north, range seventy-four west; thence west along

the first correction line north, to the southeast corner of section thirty-six, township five north, range seventy-four west; thence north along the range line to the northeast corner of the southeast quarter of the southeast quarter of section thirteen, said township; thence west to the northwest corner of the southeast quarter of the southeast quarter of section fourteen, said township; thence north to the northwest corner of the northeast quarter of the southeast quarter of section eleven, said township; thence east to the northeast corner of the northeast quarter of the southeast quarter of section twelve, said township; thence south along the range line to the southeast corner of said section; thence east along the section lines to the southeast corner of the southwest quarter of section ten, township five north, range seventy-three west; thence north to the northeast corner of the southwest quarter of said section; thence east to the southeast corner of the northeast quarter of said section; thence north to the northeast corner of said section; thence east to the southeast corner of the southwest quarter of the southwest quarter of section two, said township; thence north to the northeast corner of the southwest quarter of the southwest quarter of said section; thence east to the southeast corner of the northeast quarter of the southwest quarter, said section; thence north to the northeast corner of the northeast quarter of the southwest quarter of said section; thence east to the southeast corner of the northeast quarter of section one, said township; thence north along the range line to the northeast corner of section thirty-six, township seven north, range seventy-three west; thence west along the section lines to the intersection with the west bank of the Big South Cache la Poudre River in township seven north, range seventy-five west; thence southeasterly along the west bank of said river to the mouth of a tributary of said river, probably in section one, township six north, range seventy-five west; said tributary heading at La Poudre Pass in section twenty, township six north, range seventy-five west; thence southwesterly along the west bank of said tributary to its head; thence across the continental divide to the headwaters of the North Fork of the Grand River, which also heads at La Poudre Pass; thence down the west bank of the North Fork of the Grand River to its intersection with the section line between sections twenty-nine and thirty, township six north, range seventy-five west; thence south along the section lines to the southeast corner of section eighteen, township five north, range seventy-five west; thence west along the section line to its intersection with the west bank of the North Fork of the Grand River; thence down the west bank of the North Fork of the Grand River to its intersection with the section line between sections twenty-five and thirty-six, township four north, range seventy-six west; thence east to the northeast corner of section thirty-six, said township; thence south along the range line to the southeast corner of said township; thence east along the township line to the northeast corner of the northwest quarter of section four, township three north, range seventy-five west; thence south to the southwest corner of the northeast quarter of section nine, said township; thence west along the quarter section line to its intersection with a creek in section seven, said township, this creek being an outlet of Grand Lake, and flowing into the North Fork of the Grand River; thence southerly along the said creek to its junction with the North Fork of the Grand River; thence southerly along the west bank of the North Fork of the Grand River to its intersection with the township line between townships two and three north; thence east along the township line to the southeast corner of section thirty-four, township three north, range seventy-three west of the sixth principal meridian, Colorado, the place of

beginning, all of said above-described tract now being included within the boundaries of the counties of Grand, Boulder, and Larimer, in the State of Colorado, is hereby reserved and withdrawn from settlement, occupancy, or disposal under the laws of the United States, and said tract is dedicated and set apart as a public park for the benefit and enjoyment of the people of the United States, under the name of the Rocky Mountain National Park: Provided, That the United States Reclamation Service may enter upon and utilize for flowage or other purposes any area within said park which may be necessary for the development and maintenance of a Government reclamation project. (38 Stat. 798.)

This section and the three sections next following were an act entitled "An act to establish the Rocky Mountain National Park in the state of Colorado, and for other purposes," cited above.

§ 5249b. (Act Jan. 26, 1915, c. 19, § 2.) Claims, etc., and rights under land laws not affected; rights of way for irrigation and other purposes; grants of rights of way for steam, etc., transportation.

Nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land. Whenever consistent with the primary purposes of the park the Act of February fifteenth, nineteen hundred and one, applicable to the location of rights of way in certain national parks and the national forests for irrigation and other purposes, shall be and remain applicable to the lands included within the park. The Secretary of the Interior may, in his discretion and upon such conditions as he may deem wise, grant easements or rights of way for steam, electric, or similar transportation upon or across the park. (38 Stat. 800.)

§ 5249c. (Act Jan. 26, 1915, c. 19, § 3.) Lands held in private, municipal, or State ownership not affected.

No lands located within the park boundaries now held in private, municipal, or State ownership shall be affected by or subject to the provisions of this Act. (38 Stat. 800.)

§ 5249d. (Act Jan. 26, 1915, c. 19, § 4.) Park under control of Secretary of Interior; regulations; leases for erection of buildings; sale and removal of mature or dead or down timber; use of automobiles; limitation of appropriations.

The said park shall be under the executive control of the Secretary of the Interior, and it shall be the duty of the said executive authority, as soon as practicable, to make and publish such reasonable rules and regulations, not inconsistent with the laws of the United States, as the said authority may deem necessary or proper for the care, protection, management, and improvement of the same, the said regulations being primarily aimed at the freest use of the said park for recreation purposes by the public and for the preservation of the natural conditions and scenic beauties thereof. The said authority may, in his discretion, execute leases to parcels of ground not exceeding twenty acres in extent in any one place to any person or company for not to exceed twenty years whenever such ground is necessary for the erection of establishments for the accommodation of visitors, may grant such other necessary privileges and concessions as he deems wise for the accommodation of visitors, and may likewise arrange for the removal of such mature or dead or down timber as he may deem necessary and advisable for the protection and improvement of the park. The regulations governing the park shall include provisions for the use of automobiles

therein: Provided, That no appropriation for the maintenance, supervision or improvement of said park in excess of $10,000 annually shall be made unless the same shall have first been expressly authorized by law. (38 Stat. 800.)

§ 5249e. (Act Aug. 9, 1916, c. 302, § 1.) Lassen Volcanic National Park established; boundaries; entries under land laws; rights of way; use of lands for reclamation projects; indemnity lands.

All those certain tracts, pieces, or parcels of land lying and being situate in the State of California and within the boundaries particularly described as follows, to wit: Beginning at the northeast corner of section three, township thirty-one, range six east, Mount Diablo meridian, California; thence southerly to the southeast corner of said section; thence easterly to the northeast corner of the northwest quarter of section eleven, said township; thence southerly to the southeast corner of the southwest quarter of section fourteen, said township; thence easterly to the northeast corner of the northwest quarter of section twenty-four, said township; thence southerly to the southeast corner of the southwest quarter of section twenty-five, said township; thence westerly to the southwest corner of section twenty-six, said township; thence southerly to the southeast corner of section thirty-four, said township; thence westerly along the sixth standard parallel north, allowing for the proper offsets, to the northeast corner of section three, township thirty north, range six east; thence southerly to the southeast corner of section twenty-seven, said township; thence westerly to the southwest corner of the southeast quarter of section twenty-eight, said township; thence northerly to the northwest corner of the southeast quarter of said section; thence westerly to the southwest corner of the northwest quarter of said section; thence northerly to the northwest corner of said section; thence westerly to the southwest corner of the southeast quarter of section twenty, said township; thence northerly to the northwest corner of the southeast quarter of said section; thence westerly to the range line between ranges five and six east; thence southerly along said range line to the southeast corner of township thirty north, range five east; thence westerly along the township line between townships twenty-nine and thirty north to the southwest corner of section thirty-three, township thirty north, range five east; thence northerly to the northwest corner of said section; thence westerly to the southwest corner of the southeast quarter of section twenty-nine, said township; thence northerly to the northwest corner of the southeast quarter of said section; thence westerly to the southwest corner of the northwest quarter of said section; thence northerly to the northwest corner of said section; thence westerly to the southwest corner of the southeast quarter of section twenty, township thirty north, range four east; thence northerly to the northwest corner of the southeast quarter of section eight, said township; thence easterly to the northeast corner of the southwest quarter of section nine, said township; thence northerly to the township line between townships thirty and thirty-one north; thence easterly along the sixth standard parallel north, allowing for the proper offsets, to the southwest corner of section thirty-three, township thirty-one north, range four east; thence northerly to the northwest corner of section twenty-one, said township; thence easterly to the range line between ranges four and five east; thence northerly along said range line to the northwest corner of fractional section eighteen, township thirty-one north, range five east; thence easterly to the southwest corner of section twelve, said township; thence northerly to the northwest corner of section one, said township; thence easterly along the township line between townships thirty-

one and thirty-two north to the northeast corner of section three, township thirty-one north, range six east, the place of beginning, are hereby reserved and withdrawn from settlement, occupancy, disposal, or sale, under the laws of the United States, and said tracts are dedicated and set apart as a public park or pleasuring ground for the benefit and enjoyment of the people of the United States under the name and to be known and designated as the Lassen Volcanic National Park; and all persons who shall locate or settle upon or occupy the same, or any part thereof, except as hereinafter provided, shall be considered trespassers and be removed therefrom: Provided, That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States or the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land: Provided further, That rights of way for steam or electric railways, automobiles, or wagon roads may be acquired within said Lassen Volcanic National Park under filings or proceedings hereafter made or instituted under the laws applicable to the acquisition of such rights over or upon the national forest lands of the United States when the construction of such roads will not interfere with the objects of the national park, and that the United States Reclamation Service may enter upon and utilize for flowage or other purposes any area within said park which may be necessary for the development and maintenance of a Government reclamation project; that no lands located within the park boundaries now held in private, municipal, or State ownership shall be affected by or subject to the provisions of this Act: And provided further, That no lands within the limits of said park hereby created belonging to or claimed by any railroad or other corporation now having or claiming the right of indemnity selection by virtue of any law or contract whatsoever shall be used as a basis for indemnity selection in any State or Territory whatsoever for any loss sustained by reason of the creation of said park. (39 Stat.)

This section and the four sections next following were an act entitled "An act to establish the Lassen Volcanic National Park in the Sierra Nevada Mountains in the state of California, and for other purposes," cited above.

§ 5249f. (Act Aug. 9, 1916, c. 302, § 2.) Lassen Volcanic National Park; control by Secretary of Interior; rules and regulations; protection of fish and game; leases; automobiles; stock-grazing.

Said park shall be under the exclusive control of the Secretary of the Interior, whose duty it shall be, as soon as practicable, to make and publish such rules and regulations not inconsistent with the laws of the United States as he may deem necessary or proper for the care, protection, management, and improvement of the same. Such regulations being primarily aimed at the freest use of the said park for recreation purposes by the public and for the preservation from injury or spoliation of all timber, mineral deposits, and natural curiosities or wonders within said park and their retention in their natural condition as far as practicable and for the preservation of the park in a state of nature so far as is consistent with the purposes of this Act. He shall provide against the wanton destruction of the fish and game found within said park and against their capture or destruction for purposes of merchandise or profit, and generally shall be authorized to take all such measures as shall be necessary to fully carry out the objects and purposes of this Act. Said Secretary may, in his discretion, execute leases to parcels of ground not exceeding ten acres in extent at any one place to any one person or persons or company for not to exceed twenty years when such ground is necessary for the erection of buildings for the

accommodation of visitors and to parcels of ground not exceeding one acre in extent and for not to exceed twenty years to persons who have heretofore erected, or whom he may hereafter authorize to erect, summer homes or cottages. Such leases or privileges may be renewed or extended at the expiration of the terms thereof. No exclusive privilege, however, shall be granted within the park except upon the ground leased. The regulations governing the park shall include provisions for the use of automobiles therein and the reasonable grazing of stock. (39 Stat.)

§ 5249g. (Act Aug. 9, 1916, c. 302, § 3.) Lassen Volcanic National Park; sale and removal of dead or down timber.

The Secretary of the Interior may also sell and permit the removal of such matured or dead or down timber as he may deem necessary or advisable for the protection or improvement of the park. (39 Stat.)

§ 5249h. (Act Aug. 9, 1916, c. 302, § 4.) Lassen Volcanic National Park; charges for leases and privileges.

The Secretary of the Interior may exact such charges as he deems proper for leases and all other privileges granted hereunder. (39 Stat.)

§ 5249i. (Act Aug. 9, 1916, c. 302, § 5.) Lassen Volcanic National Park; appropriations.

No appropriation for the maintenance, supervision, or improvement of said park in excess of $5,000 annually shall be made unless the same shall have first been expressly authorized by law. (39 Stat.)

§ 5249j. (Act Aug. 1, 1916, c. 264, § 1.) Hawaii National Park established; boundaries.

The tracts of land on the island of Hawaii and on the island of Maui, in the Territory of Hawaii, hereinafter described, shall be perpetually dedicated and set apart as a public park or pleasure ground for the benefit and enjoyment of the people of the United States, to be known as Hawaii National Park. Said tracts of land are described as follows:

First. All that tract of land comprising portions of the lands of Kapapala and Keauhou, in the district of Kau, and Kahaualea, Panaunui, and Apua, in the district of Puna, on the island of Hawaii containing approximately thirty-five thousand eight hundred and sixty-five acres, bounded as follows: Beginning at a point on the west edge of the Keamoku Aa Flow (lava flow of eighteen hundred and twenty-three), from which point the true azimuth and distance to Government survey trigonometrical station Ohaikea is one hundred and sixty-six degrees twenty minutes, six thousand three hundred and fifty feet, and running by true azimuths: (First) Along the west edge of the Keamoku lava flow in a northeasterly and northwesterly direction, the direct azimuth and distance being one hundred and ninety-eight degrees ten minutes, fourteen thousand seven hundred feet; (second) two hundred and fifty-six degrees, eleven thousand four hundred feet, more or less, across the land of Kapapala and Keauhou to a marked point on the Humuula trail; (third) three hundred and twenty-eight degrees fifteen minutes, eight thousand seven hundred and twenty-five feet, across the land of Keauhou to the top of the fault north of the Kau road; (fourth) along the fault in a northeasterly direction, the direction azimuth and distance being two hundred and fifty-one degrees and thirty minutes, four thousand three hundred and thirty feet; (fifth) two hundred and forty-five degrees, six thousand feet, to a point near the southwest boundary of the land

of Olaa; (sixth) three hundred and thirty-seven degrees ten minutes, eight thousand six hundred and fifty feet, more or less, to the junction of the Hilo and Keauhou roads; (seventh) three hundred and thirty-three degrees and twenty minutes, three thousand three hundred feet, more or less, to the southwest corner of the land of Keaau; (eighth) three hundred and thirty-two degrees and ten minutes, seven thousand feet, along the land of Kahaualea; (ninth) two hundred and eighty-one degrees, thirty thousand three hundred and seventy-five feet, more or less, across the land of Kahaualea, passing through the north corner of the land of Panaunui, to the north corner of the land of Laeapuki; (tenth) thirty-one degrees thirty minutes, thirteen thousand two hundred feet, more or less, along the land of Laeapuki and across the land of Panaunui; (eleventh) eighty-nine degrees and ten minutes, thirty-two thousand nine hundred feet, more or less, across the land of Panaunui, Apua, and Keauhou to "Palilele-o-Kalihipaa," the boundary point of the Keauhou-Kapapala boundary; (twelfth) fifty-one degrees and thirty minutes, five thousand and five hundred feet, across the land of Kapapala; (thirteenth) one hundred and two degrees and fifty minutes, nineteen thousand one hundred and fifty feet, across the land of Kapapala to a small cone about one thousand five hundred feet southwest of Puu Koae trigonometrical station; (fourteenth) one hundred and sixty-six degrees twenty minutes, twenty-one thousand feet, across the land of Kapapala to the point of beginning.

Second. All that tract of land comprising portions of the lands of Kapapala and Kahuku, in the district of Kau, island of Hawaii; Keauhou second, in the district of North Kona; and Kaohe, in the district of Hamakua, containing seventeen thousand nine hundred and twenty acres, bounded as follows: Beginning at Pohaku Hanalei of Humuula, a small cone on the brow of Mauna Loa, and at the common boundary points of the lands of Humuula, Kapapala, and Kaohe, from which the true azimuth and distance to Government survey trigonometrical station Omaokoili is one hundred and ninety-five degrees twelve minutes eighteen seconds, seventy-eight thousand two hundred and eighty-six feet, and running by true azimuths: First, two hundred and ninety-eight degrees, five thousand two hundred and forty feet; second, twenty-eight degrees, thirty-six thousand nine hundred and sixty feet; third, one hundred and eighteen degrees, twenty-one thousand one hundred and twenty feet; fourth, two hundred and eight degrees, thirty-six thousand nine hundred and sixty feet; fifth, two hundred and ninety-eight degrees, fifteen thousand eight hundred and eighty feet, to the point of beginning.

Third. A strip of land of sufficient width for a road to connect the two tracts of land on the island of Hawaii above described, the width and location of which strip shall be determined by the Secretary of the Interior.

Fourth. All that tract of land comprising portions of the lands of Honuaula and Kula, in the district of Makawao, and Kipahulu, Kaupo, and Kahikinui, in the district of Hana, on the island of Maui, containing approximately twenty-one thousand one hundred and fifty acres, bounded as follows: Beginning at a point called Kolekole, on the summit near the most western point of the rim of the crater of Haleakala, and running by approximate azimuths and distances: First, hundred and ninety-three degrees forty-five minutes nineteen thousand three hundred and fifty feet along the west slope of the crater of Haleakala to a point called Puu-o-Ili; second, two hundred and sixty-eight degrees twenty-three thousand feet up the western slope and across Koolau Gap to the point where

the southwest boundary of Koolau Forest Reserve crosses the east rim of Koolau Gap; third, three hundred and six degrees thirty minutes seventeen thousand one hundred and fifty feet along the southwest boundary of Koolau Forest Reserve to a point called Palalia, on the east rim of the crater of Haleakala; fourth, along the east rim of the crater of Haleakala, the direct azimuth and distance being three hundred and fifty-four degrees fifteen minutes eighteen thousand three hundred feet to a point on the east rim of Kaupo Gap, shown on Hawaiian Government survey maps at an elevation of four thousand two hundred and eight feet; fifth, eighty-eight degrees forty-five minutes three thousand three hundred feet across Kaupo Gap to a point called Kaumikaohu, on the boundary line between the lands of Kipahulu and Kahikinui; sixth, one hundred and two degrees and thirty minutes forty thousand seven hundred and fifty feet along the south slope of the crater of Haleakala to the point of beginning. (39 Stat.)

This section and the three sections next following were an act entitled "An act to establish a national park in the Territory of Hawaii," cited above.

§ 5249k. (Act Aug. 1, 1916, c. 264, § 2.) Hawaii National Park; entries under land laws on lands in; rights of way.

Nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator, or entryman to the full use and enjoyment of his land. Whenever consistent with the primary purposes of the park the Act of February fifteenth, nineteen hundred and one, applicable to the location of rights of way in certain national parks and the national forests for irrigation and other purposes, shall be and remain applicable to the lands included within the park. The Secretary of the Interior may, in his discretion and upon such conditions as he may deem wise, grant easements or rights of way for steam, electric, or similar transportation upon or across the park. (39 Stat.)

§ 5249*l*. (Act Aug. 1, 1916, c. 264, § 3.) Hawaii National Park; lands excluded.

No lands located within the park boundaries now held in private or municipal ownership shall be affected by or subject to the provisions of this Act. (39 Stat.)

§ 5249m. (Act Aug. 1, 1916, c. 264, § 4.) Hawaii National Park; control by Secretary of Interior; rules and regulations; leases; appropriations.

The said park shall be under the executive control of the Secretary of the Interior whose duty it shall be, as soon as practicable, to make and publish such rules and regulations as he may deem necessary or proper for the care and management of the same. Such regulations shall provide for the preservation from injury, of all timber, birds, mineral deposits, and natural curiosities or wonders within said park, and their retention in their natural condition as nearly as possible. The Secretary may in his discretion grant leases for terms not exceeding twenty years, at such annual rental as he may determine, of parcels of land in said park of not more than twenty acres in all to any one person, corporation, or company for the erection and maintenance of buildings for the accommodation of visitors; but no such lease shall include any of the objects of curiosity or interest in said park or exclude the public from free and convenient approach thereto or convey, either expressly or by implication, any exclusive privilege within the park except upon the premises held thereunder and for the time granted therein; and every such lease shall require the lessee to observe

and obey each and every provision in any Act of Congress and every rule, order, or regulation of the Secretary of the Interior concerning the use, care, management, or government of the park, or any object or property therein, under penalty of forfeiture of such lease. The Secretary may in his discretion grant to persons or corporations now holding leases of land in the park, upon the surrender thereof, new leases hereunder, upon the terms and stipulations contained in their present leases, with such modifications, restrictions, and reservations as he may prescribe. All of the proceeds of said leases and other revenues that may be derived from any source connected with the park shall be expended under the direction of the Secretary, in the management and protection of the same and the construction of roads and paths therein. The Secretary may also, in his discretion, permit the erection and maintenance of buildings in said park for scientific purposes: Provided, That no appropriation for the maintenance, supervision, and improvement of said park in excess of $10,000 annually shall be made unless the same shall have first been expressly authorized by law: And provided further, That no appropriation shall be made for the improvement or maintenance of said park until proper conveyances shall be made to the United States of such perpetual easements and rights of way over private lands within the exterior boundaries of said park as the Secretary of the Interior shall find necessary to make said park reasonably accessible in all its parts, and said Secretary shall when such easements and rights of way have been conveyed to the United States report the same to Congress. (39 Stat.)

§ 5249n. (Act July 17, 1916, c. 247, § 1.) Abraham Lincoln National Park or Reservation; acceptance of deed to; admission fee not to be charged.

The United States of America hereby accepts title to the lands mentioned in the deed of gift or conveyance now in possession of the Secretary of War, together with all the buildings and appurtenances thereon, especially the log cabin in which Abraham Lincoln was born and the memorial hall inclosing the same, which deed of conveyance was executed on the eleventh day of April, nineteen hundred and sixteen, by the Lincoln Farm Association, a corporation, to the United States of America, describing certain lands situated near the town of Hodgenville, county of Larue, State of Kentucky, which lands are more particularly identified and described in said deed or conveyance. The title to such lands, buildings, and appurtenances is accepted upon the terms and conditions stated in said deed or conveyance, namely: That the land therein described, together with the buildings and appurtenances thereon, shall be forever dedicated to the purposes of a national park or reservation, the United States of America agreeing to protect and preserve the said lands, buildings, and appurtenances, and especially the log cabin in which Abraham Lincoln was born and the memorial hall inclosing the same, from spoliation, destruction, and further disintegration, to the end that they may be preserved for all time, so far as may be; and further agreeing that there shall never be any charge or fee made to or asked from the public for admission to the said park or reservation. (39 Stat.)

This section and the three sections next following were an act entitled "An act to accept a deed of gift or conveyance from the Lincoln Farm Association, a corporation, to the United States of America, of land near the town of Hodgenville, county of Larue, state of Kentucky, embracing the homestead of Abraham Lincoln and the log cabin in which he was born, together with the memorial hall inclosing the same, and further to accept an assignment or transfer of an endowment fund of $50,000 in relation thereto," cited above.

§ 5249o. (Act July 17, 1916, c. 247, § 2.) Abraham Lincoln National Park or Reservation; acceptance of endowment fund; protection and preservation of park.

The United States of America hereby also accepts title to the endowment fund of $50,000 mentioned in the assignment and transfer, now in the possession of the Secretary of War, which assignment and transfer was executed on the eleventh day of April, nineteen hundred and sixteen, by the Lincoln Farm Association, a corporation, to the United States of America, transferring and turning over all its right, title, and interest in and to said endowment fund, heretofore invested in certain stocks, bonds, and securities held and owned by the Lincoln Farm Association, and more particularly identified and described in said assignment and transfer. The title to said endowment fund is accepted upon the terms and conditions stated in said assignment and transfer, namely, that the United States of America shall forever keep the said tract of land described in said deed, together with the buildings and appurtenances thereunto belonging, dedicated to the purpose of a national park or reservation, and that there shall never be any charge or fee made to or asked from the public for admission to the said park or reservation; and further, shall forever protect, preserve, and maintain said land, buildings, and appurtenances, and especially the log cabin in which Abraham Lincoln was born and the memorial hall inclosing the same, from spoliation, destruction, and further disintegration, to the end that they may be preserved for all time, as far as may be, as a national park or reservation. (39 Stat.)

§ 5249p. (Act July 17, 1916, c. 247, § 3.) Abraham Lincoln National Park or Reservation; execution of instruments necessary to carry out purposes of gift.

The President of the United States of America and the Secretary of War are hereby authorized to execute, in the name of the United States of America, such instrument or instruments as may be or may become necessary to comply with or carry out the terms and conditions of such gift or gifts and to secure the full benefit therefrom. (39 Stat.)

§ 5249q. (Act July 17, 1916, c. 247, § 4.) Abraham Lincoln National Park or Reservation; rules and regulations for.

Upon the passage of this Act and the vesting of the title to the property accepted thereunder in the United States, it shall be under the control of the Secretary of War and administered under such regulations not inconsistent with law as he may from time to time prescribe. (39 Stat.)

§ 5250. (Act Aug. 24, 1912, c. 355.) Limit on cost of buildings to be erected in the future in national parks.

No expenditure for construction of administration or other buildings cost in case of any building exceeding one thousand dollars shall hereafter be made in any national park except under express authority of Congress: Provided, That this shall not apply to buildings now in the process of actual construction. (37 Stat. 460.)

This was a provision of the sundry civil appropriation act for the fiscal year 1913, cited above.

§ 5251. (Act Dec. 16, 1878, c. 5, as amended, Act April 12, 1904, c. 1249.) Hot Springs Reservation; establishment; leases of ground, bath houses, and supply of water; dedication of Hot Springs, with reservation and mountain, to United States, forever free from sale or alienation.

The Secretary of the Interior is hereby directed to lease to the present proprietors of the Arlington Hotel or their assigns the grounds, not exceeding one acre, now occupied by them, for a period of ten years,

unless otherwise provided by law, at an annual rental of one thousand dollars. And he is further directed to lease the bath houses of a permanent nature now upon the Hot Springs reservation to the owners of the same, and lease to any person or persons upon such terms as may be agreed on, sites for the building of other bath houses for the term of five years, unless otherwise provided by law, under such rules and regulations as he may prescribe; and the tax imposed shall not exceed fifteen dollars per tub per annum, including land rent: Provided, That said leases shall in no way prejudice any legal right that any person or persons may have acquired under the act hereby revived and continued, to any improvements on said ground: And provided further, That the Secretary of the Interior be, and he is hereby, authorized to grant to hotels having bath houses attached, and to bath houses situated on the Hot Springs Reservation, as well as in the city of Hot Springs, Arkansas, the right to install, maintain, and use, either in said bath houses or in connection with the rooms of said hotels or the bath houses attached to said hotels, as many bath tubs as in his discretion he may deem proper and necessary for the public service and the amount of hot water will justify. And provided further, That the superintendent shall provide and maintain a sufficient number of free baths for the use of the indigent, and the expense thereof shall be defrayed out of the rentals hereinbefore provided for.

In cases where fractions of lots are made by straightening, widening or laying out streets, the commissioners shall have power to determine the disposal of the same, giving the preference to the owners of abutting lots: Provided, That all titles given or to be given by the United States shall explicitly exclude the right to the purchaser of the land, his heirs or assigns, from ever boring thereon for hot water; and the Hot Springs, with the reservation and mountain are hereby dedicated to the United States, and shall remain forever free from sale or alienation. (20 Stat. 258. 33 Stat. 173.)

This section, as originally enacted, constituted an act entitled "An act to correct an error of enrollment in bill making appropriations for sundry civil expenses of the Government for the fiscal year ending June thirtieth, eighteen hundred and seventy-nine, and for other purposes."

The sundry civil appropriation act for the fiscal year 1879, Act June 20, 1878, c. 359, § 1, 20 Stat. 230, mentioned in the title of this act, contained a provision in the same words as that of this act for the lease of bath houses of a permanent nature, followed by the words, "Provided, That;" the substance of the proviso being omitted.

The second proviso of this act, as originally enacted, which limited the supply of water to not more than enough for 40 bath tubs of the usual size to a single establishment, was stricken out, and in lieu thereof the second proviso set forth here was inserted, by Act April 12, 1904, c. 1249, last cited above.

The portion of this act preceding the provisions set forth here made an appropriation for the expenses of the Hot Springs Commission, and provided for the appointment of a board of commissioners, conferring upon them the powers of the commissioners appointed under the previous Act March 3, 1877, c. 108, 19 Stat. 377, to lay out, etc., the Hot Springs Reservation, and revived and continued in force said preceding act, to enable the commissioners to perform the acts and duties authorized by it. These and other earlier provisions relating to the establishment and management of the reservation were temporary merely and have been executed.

The provisions of this act relating to leases of ground, bath houses, etc., were also in part temporary in nature, and appear to be superseded, to a great extent, by those of Act March 3, 1891, c. 533, post, §§ 5252–5258; but this act was recognized by the subsequent amendment by Act April 12, 1904, c. 1249, mentioned above.

The cession by the State of Arkansas to the United States of exclusive jurisdiction over a part of the permanent Hot Springs Reservation was accepted, and the prosecution and punishment of offenses committed therein were provided for, by Act April 20, 1904, c. 1400, post, §§ 5261–5273.

The boundary line of the Hot Springs Reservation was changed, and a tract of land excluded thereby was ceded to the city of Hot Springs for street purposes, by Act May 23, 1906, c. 2552, 34 Stat. 198.

Certain lots situate on the Hot Springs Reservation were granted to the school district of Hot Springs by Act April 30, 1908, c. 154, § 1, 35 Stat. 98.

The use of water from the springs for drinking and bathing purposes by the Leo N. Levi Memorial Hospital Association is authorized by Act July 8, 1916, c. 226, 39 Stat.

Notes of Decisions

Reservation.—The Hot Springs in the state of Arkansas are the property of the United States, having been reserved from entry or sale by express act of Congress in 1832. (1854) 6 Op. Atty. Gen. 697. And see Muse v. Arlington Hotel Co. (C. C. 1895) 68 Fed. 637.

Leases.—The Secretary of the Interior has power to lease sites upon the Hot Springs reservation in Arkansas for the statutory term, and to relet the premises for the same term, from time to time, as the leases expire. (1885) 18 Op. Atty. Gen. 266.

—— **Improvements.**—During the term of the lease, and while the tenant is in possession under the same, he may remove from the premises whatever improvements he has erected thereon for the purposes of trade, whether machinery or buildings; but if he leaves the premises without removing such improvements, and the Government should take possession, they would become the property of the latter. (1885) 18 Op. Atty. Gen. 266.

§ 5252. (Act March 3, 1891, c. 533, § 1.) Hot Springs Reservation; leases of bath houses and bath house sites; supply of water.

The Secretary of the Interior is hereby authorized and empowered to execute leases to the bath-houses and bath-house sites on the permanent reservation at Hot Springs, Arkansas, for periods not exceeding twenty years, and at an annual rental of not less than thirty dollars per tub for each tub used in any bath-house. Said annual rental shall be payable quarterly in advance, at the office of the Government Superintendent of said property, in Hot Springs, Arkansas: Provided, That the same rate for water rent shall be charged for the water to all parties receiving the same, whether on or off the permanent reservation: Provided, That after the Army and Navy hospital bath-house, the public bath-house, the bath-houses which are now or may hereafter be authorized on the permanent reservation, the Arlington Hotel, and the bath-houses off the permanent reservation now authorized to be supplied with hot water, in the order herein named, if there shall still be a surplus of hot water the Secretary of the Interior may, in his discretion and under such regulations as he may prescribe, cause hot water to be furnished to bath-houses, hotels, and families off the permanent reservation: Provided, That such bath-houses, hotels, and families shall cause all connections for obtaining such hot water to be made at their own expense: Provided, That all water furnished to any hotel or family for other use than bathing shall be paid for at such reasonable price, as shall be fixed by the Secretary of the Interior: Provided further, That the Secretary of the Interior shall at the expiration of each period of five years during the continuance of each lease made hereunder readjust the terms and amounts of payment provided for therein as may be just, but not less than the minimum herein provided. (26 Stat. 842.)

This was the first section of an act entitled "An act to regulate the granting of leases at Hot Springs, Arkansas, and for other purposes."

Section 2 of said act authorized the leasing of the Arlington Hotel site, on said reservation, for a term of 20 years. That lease has expired, and subsequent provisions for leasing the same property were made by Act Aug. 24, 1912, c. 355, post, § 5259.

Sections 3–8 of this act are set forth post, §§ 5253–5258.

Previous provisions relating to the subjects of this and other sections of this act, made by Act Dec. 16, 1878, c. 5, are set forth ante, § 5251. An amendment incorporated therein, as stated in the note under that act, affecting the limitation thereby of the supply of water, was made subsequent to this act.

§ 5253. (Act March 3, 1891, c. 533, § 3.) Rules and regulations as to leases, privileges, supply and use of water, buildings, etc.

All power now possessed by the Secretary of the Interior for the

regulating of leases of bath-houses, bath-house privileges, or hotel rights on the reservation, or as to supplying hot water to places off the reservation, is hereby retained and continued in him; and full power is vested in the Secretary of the Interior to provide, in all leases to be executed against any combination among lessees or their assigns, as to ownership, prices, or accommodations at any bath-house; full power is also vested in him to make all needful rules and regulations as to the use of the hot water, and to prevent its waste, including full power to authorize the superintendent of the reservation to make examination and inspection at any time of the manner of using the hot water at any bath-tub, that it may be used in proper quantity only, and to prevent its waste; and also full power to provide and fix reasonable maximum charges for all baths, or bathing privileges, or services of any person connected with any bath-house furnished to bathers; and for reasonable maximum charges to guests at the Arlington Hotel; and also, generally, the Secretary of the Interior may make all necessary rules and regulations as to said bath-houses and the service therein as shall be deemed best for the public interest, and to provide penalties for the violation of any regulation which may be enforced as though provided by act of Congress. All leases and grants of hot-water privileges shall be held to be subject to all regulations now in force or which may be hereafter adopted by the Secretary of the Interior, and for any violation of any regulation, known to the proprietor at the time of the offense, the lease or grant may be canceled by the Secretary of the Interior. It shall be expressly provided in all leases and grants of privilege for hot water that the bath-house for which provision is made shall not be owned or controlled by any person, company, or corporation which may be the owner of or interested (as stockholder or otherwise) in any other bath-house on or near the Hot Springs Reservation; that neither the hot-water privilege granted nor any interest therein, nor the right to operate or control said bath-house, shall be assigned or transferred by the party of the second part without the approval of the Secretary of the Interior first obtained, in writing; and if the ownership or control of said bath-house be transferred to any person, company, or corporation owning or interested in any other bath-house on or near said reservation, the Secretary of the Interior may, for that cause, deprive the bath-house provided for of the hot water and cancel the lease or agreement. All buildings to be erected on the reservation shall be on plans first approved by the Secretary of the Interior, and shall be required to be fire proof, as nearly as practicable. (26 Stat. 843.)

Notes of Decisions

Regulations.—The United States, being the absolute owner of the Arkansas Hot Springs, has the same power that a private owner would have to exclude the public from the use of the waters, or to prescribe the terms and conditions on which they may be used; and regulations in regard to such use adopted or authorized by Congress cannot be interfered with by the courts on the ground that they are unreasonable and oppressive. Van Lear v. Eisele (C. C. 1903) 126 Fed. 823.

Congress may lawfully delegate the power to make such regulations to the Secretary of the Interior, but the exercise of such power by him must rest upon some statute either expressly or by necessary implication. Id.

This was designed to provide for supplementing the general legislation of Congress by such specific regulations as may be necessary to carry out the general purpose of the government to preserve the property, and at the same time to give the public the opportunity to use the waters under proper and reasonable restrictions; and regulations promulgated by the Secretary thereunder in the exercise of his judgment and discretion, if reasonably adapted to such purpose cannot be interfered with by the courts. Id.

§ 5254. (Act March 3, 1891, c. 533, § 4.) Investigation as to interest of applicant for lease, etc., in other bath house; refusal or forfeiture of lease or privilege where parties are otherwise interested.

The Secretary of the Interior, before executing any lease to bath-houses or bath-house sites on the permanent reservation or contracts for the use of hot water for bath-houses off the permanent reservation, may make due investigation to ascertain whether the person, persons, or corporation applying for such lease or contract are not, directly or indirectly, interested in any manner whatever in any other bath-house lease, interest, or privilege at or near Hot Springs, Arkansas, or whether he or they belong to any pool, combination, or association so interested, or whether he or they are members or stockholders in any corporation so interested, or, if a corporation, whether its members or any of them are members or stockholders of any other corporation or association interested in any other bath-house, lease, interest, or privilege as aforesaid, and in order to arrive at the facts in any such case he is authorized to send for persons and papers, administer oaths to witnesses, and require affidavits from applicants; and any such person making a false oath or affidavit in the premises shall be deemed guilty of perjury, and, upon conviction, subject to all the pains and penalties of perjury under the statutes of the United States; and whenever, either at the time of leasing or other time it appears to the satisfaction of the said Secretary that such interest in other bath-house, lease, interest, or privilege exists, or at any time any pool or combination exists between any two or more bath-houses or he deems it for the best interests of the management of the Hot Springs Reservation and waters, or for the public interest he may refuse such lease, license, permit or other privilege, or forfeit any lease or privilege wherein the parties interested have become otherwise interested as aforesaid. (26 Stat. 843.)

This act is not to be so construed as to prevent the operation of a bath house in connection with a hotel as part thereof, by section 8 of the act, post, § 5258.

§ 5255. (Act March 3, 1891, c. 533, § 5.) Taxation, under laws of State, of private property on reservation.

The consent of the United States is hereby given for the taxation, under the authority of the laws of the State of Arkansas applicable to the equal taxation of personal property in that State, as personal property of all structures and other property in private ownership on the Hot Springs Reservation. (26 Stat. 844.)

§ 5256. (Act March 3, 1891, c. 533, § 6.) Collection of water on reservation.

The authority heretofore conferred upon the Secretary of the Interior to collect the hot water upon said reservation shall be so construed as to require water to be collected only where such collection is necessary for its proper distribution, and not where by gravity the same can be properly utilized. (26 Stat. 844.)

§ 5257. (Act March 3, 1891, c. 533, § 7.) Sale of lots not permanently reserved.

The Secretary of the Interior may direct the public sale of all unsold Government lots on the Hot Springs Reservation, and not now permanently reserved at the city of Hot Springs, after having had the same reappraised, and also advertised as now required by law, and no lot shall be sold at less than the appraised price. (26 Stat. 844.)

§ 5258. (Act March 3, 1891, c. 533, § 8.) Act not to be construed to prevent operation of bath house in connection with hotel.

Nothing in this act shall be so construed as to prevent the stock-

holders of any Hotel from operating a bath-house in connection with such Hotel as a part thereof. (26 Stat. 844.)

See notes to section 1 of this act, ante, § 5252.

§ 5259. (Act Aug. 24, 1912, c. 355.) Hot Springs Reservation; lease of Arlington Hotel site; valuation of improvements.

The Secretary of the Interior is hereby authorized to lease certain premises fronting on Central Avenue and on Fountain Street, now occupied by the buildings of the Arlington Hotel Company, at Hot Springs, Arkansas, on such terms and conditions as he may determine. No lease made hereunder shall be for a longer period than twenty years. In case said premises shall be leased to another lessee than the Arlington Hotel Company the provision of the lease ending March third, nineteen hundred and twelve, for a valuation of and payment for the improvements made by the Arlington Hotel Company shall be recognized by said Secretary; but he shall have the power to fix a time within which such valuation must be made, and if such valuation is not made within the time so fixed said Secretary may lease the premises free from all claim of said Arlington Hotel Company. (37 Stat. 459.)

This was a provision of the sundry civil appropriation act for the fiscal year 1913, cited above.

The lease, mentioned in the act as having expired was the lease executed under the authority conferred upon the Secretary of the Interior by Act March 3, 1891, c. 533, § 2, 26 Stat. 842.

§ 5260. (Act March 2, 1911, c. 200.) Hot Springs Reservation; use of free bathhouses limited to persons unable to pay for baths; oath required as to lack of means; making of false oath a misdemeanor; punishment.

Only persons who are without and unable to obtain the means to pay for baths and are suffering from ailments for which bathing in the water of the Hot Springs Reservation will afford relief or effect a cure shall be permitted to bathe at the free bathhouse on the public reservation at Hot Springs, Arkansas, and before any person shall be permitted to bathe at the free bathhouse on the reservation he shall be required to make oath, before such officer duly authorized to administer oaths for general purposes as the superintendent of the Hot Springs Reservation shall designate, that he is without and unable to obtain the means to pay for baths, and any person desiring to bathe at the free bathhouse on the Hot Springs Reservation making a false oath as to his financial condition shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject to a fine of not to exceed twenty-five dollars, or thirty days' imprisonment, or both. (36 Stat. 1015.)

This was an act entitled "An act limiting the privileges of the Government free bathhouse on the public reservation at Hot Springs, Arkansas, to persons who are without and unable to obtain the means to pay for baths."

§ 5261. (Act April 20, 1904, c. 1400, § 1.) Hot Springs Reservation; cession of jurisdiction by State of Arkansas accepted; operation of laws of United States and of Arkansas within reservation.

The portion of the Hot Springs Mountain Reservation in the State of Arkansas situated and lying within boundaries defined as follows, "commencing at stone monument numbered seven, set upon the west line of Reserve avenue and marking the boundary line of Hot Springs Mountain, and running thence in a northwesterly direction to a point upon the south line of Fountain street to a stone monument numbered forty-two and marking the boundary line of Hot Springs Mountain; thence along the south line of Fountain street to its intersection with Central avenue or to stone monument numbered thirty-three; thence south along the east line of Central

avenue to where the same is intersected by Reserve avenue at stone monument numbered thirty; thence along the north boundary line of Reserve avenue to stone monument numbered seven, the point of commencement; all in township two south, range nineteen west, in the county of Garland and State of Arkansas, being a part of the permanent United States Hot Springs Reservation," sole and exclusive jurisdiction over which was ceded to the United States by an act of the general assembly of the State of Arkansas, entitled "An act ceding jurisdiction to the United States over a part of the Hot Springs Mountain Reservation," approved February twenty-first, nineteen hundred and three, which cession is hereby accepted, or within such boundaries as may be defined hereafter, shall be under the sole and exclusive jurisdiction of the United States, and all laws applicable to places under such sole and exclusive jurisdiction shall have full force and effect therein: Provided, That nothing in this Act shall be so construed as to forbid the service within said boundaries of any civil or criminal process of any court having jurisdiction in the State of Arkansas; that all fugitives from justice taking refuge within said boundaries shall, on due application to the executive of said State, whose warrant may lawfully run within said territory for said purpose, be subject to the laws which apply to fugitives from justice found in the State of Arkansas: And provided further, That this Act shall not be so construed as to interfere with the right to tax all structures and other property in private ownership within the boundaries above described, accorded to the State of Arkansas by section five of the Act of Congress approved March third, eighteen hundred and ninety-one, entitled "An Act to regulate the granting of leases at Hot Springs, Arkansas, and for other purposes." (33 Stat. 187.)

This section and the twelve sections next following were an act entitled "An act conferring jurisdiction upon United States Commissioners over offenses committed in a portion of the permanent Hot Springs Mountain Reservation, Arkansas."

Act March 3, 1891, c. 533, § 5, mentioned in this section, which gave consent to taxation, under the laws of the State, of private property within the reservation, is set forth ante, § 5255.

The line of the reservation was changed, and the tract of land thereby excluded was ceded to the city of Hot Springs, to be used for street purposes only, by Act May 23, 1906, c. 2552, 34 Stat. 198.

A strip of land described was ceded to the city of Hot Springs for use as a public street, by Act June 25, 1910, c. 417, 36 Stat. 844.

§ 5262. (Act April 20, 1904, c. 1400, § 2.) Reservation included in eastern judicial district of Arkansas; jurisdiction of offenses committed therein.

Said above-described portion of said reservation shall constitute a part of the eastern United States judicial district of Arkansas, and the district and circuit courts of the United States in and for said district shall have jurisdiction of all offenses committed within said boundaries. (33 Stat. 187.)

§ 5263. (Act April 20, 1904, c. 1400, § 3.) Injuries to property punishable.

Any person who shall, within the said above-mentioned tract, commit any damage, injury, or spoliation to or upon any building fence, hedge, gate, guidepost, tree, wood, underwood, timber, garden, crops, vegetables, plants, land, springs, mineral deposits, natural curiosities, or other matter or thing growing or being thereon, or situated therein, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred dollars and be adjudged to pay all costs of the proceedings. (33 Stat. 187.)

§ 5264. (Act April 20, 1904, c. 1400, § 4.) Taking or use of or bathing in water of springs in violation of rules and regulations or of restrictions imposed punishable.

Any person who shall, except in compliance with such rules and regulations as the Secretary of the Interior may deem necessary, and which he is hereby authorized and directed to make, enter or attempt to enter upon said described tract, take, or attempt to take, use, or attempt to use, bathe in, or attempt to bathe in water of any spring located thereon, or without presenting satisfactory evidence that he or she (provided he or she is under medical treatment) is the patient of a physician duly registered at the office of the superintendent of the Hot Springs Reservation as one qualified, under such rules which the Secretary of the Interior may have made or shall make, to prescribe the waters of the Hot Springs, shall be deemed guilty of a misdemeanor, and, upon conviction thereof, shall be subject to a fine of not more than one hundred dollars, and be adjudged to pay all costs of the proceedings: Provided, That no physician who shall engage in the solicitation of patronage through the medium of drummers, or otherwise, shall be or remain thus registered: And provided further, That if any person so bathing, or attempting to bathe, or so entering, or attempting to enter upon the described tract, shall have the permit of a physician, such physician shall be liable to the penalties of this section, unless he be regularly registered; and such person shall not be liable to the penalties of this section, unless it shall be made to appear that he knew, or had reason to believe, that the physician giving him such permit was not regularly registered. (33 Stat. 188.)

§ 5265. (Act April 20, 1904, c. 1400, § 5.) Offenses under ordinances of city of Hot Springs or laws of State of Arkansas punishable.

If any act shall be committed within said boundaries which would constitute an offense under the municipal ordinances of the city of Hot Springs or the laws of the State of Arkansas, but which is not prohibited or the punishment of which is not specially provided for by any law of the United States, regulation of the Secretary of the Interior, or by this Act, the offender shall be subject to the same punishment as the said municipal ordinances of the city of Hot Springs, or the laws of the State of Arkansas in force at the time of the commission of the offense, may provide for a like offense in the said State, and no subsequent repeal of any such law or ordinance shall affect any pending prosecution for an offense committed within said boundaries. (33 Stat. 188.)

§ 5266. (Act April 20, 1904, c. 1400, § 6, as amended, Act March 2, 1907, c. 2516, and Act March 3, 1911, c. 230.) Prosecutions for violations of rules and regulations or of provisions of act.

Any United States commissioner duly appointed by the United States district court for the eastern district of Arkansas, and residing in said district, shall have power and jurisdiction to hear and act upon all complaints made of any and all violations of said Act of Congress approved April twentieth, nineteen hundred and four. That any of said commissioners shall have power, upon sworn complaint, to issue process in the name of the United States for the arrest of any person charged with the doing, otherwise than in compliance with the rules and regulations of the Secretary of the Interior, of any act with reference to the matters which the Secretary of the Interior in section four of this Act is authorized to regulate, or in violation of such rules and regulations, or in violation of any provision of this Act, or with any misdemeanor or other like offense the punishment provided for which does not exceed a fine of one hundred dollars

to try the person thus charged, and if found guilty, to impose the penalty prescribed. In all cases of conviction an appeal shall lie from the judgment of any of said commissioners to the United States district court for the eastern district of Arkansas. The said United States district court shall prescribe rules of procedure and practice for any of said commissioners in the trial of cases and with reference to said appeals. (33 Stat. 188. 34 Stat. 1218. 36 Stat. 1086.)

This section was amended by section 1 of Act March 2, 1907, c. 2516, cited above, by prefixing to the section as originally enacted, a provision which, as further amended by amendment of said section 1 by Act March 3, 1911, c. 230, cited above, is the first sentence of this section, as set forth here.

By further amendment of this act by section 2 of said Act March 2, 1907, c. 2516, the words "any of said commissioners" in this and subsequent sections were inserted in lieu of the words "commissioner," "such commissioner," "said commissioner," or "the commissioner," whenever they occurred in said Act April 20, 1904, c. 1400, as originally enacted.

Notes of Decisions

Jurisdiction of commissioner.—The statute clearly contemplates the creation of a new office of commissioner clothed with special jurisdiction over offenses committed on the reservation, prescribing the fees, that rules of procedure and practice for "said commissioner" shall be prescribed by the District Court, for appeals to such court, etc., but in the absence of any provision therein for the appointment of such commissioner is ineffective, and the jurisdiction so conferred to try offenses cannot be exercised by any United States Commissioner within the district or elsewhere. Rider v. U. S. (1906) 149 Fed. 164, 79 C. C. A. 112.

Appeal.—Where the case involves not only the constitutionality of an act of Congress, but also the construction of state statutes, the defeated party may take it for review to the Circuit Court of Appeals. Hooper v. Remmel (1908) 165 Fed. 336, 91 C. C. A. 322.

—— **Void judgment.**—A United States District Court cannot render a valid judgment of conviction on an appeal where the commissioner before whom the case was tried below on a complaint filed by a private individual was without jurisdiction of the subject-matter of the offense even though the defendant took the appeal and appeared and submitted to trial. Rider v. U. S. (1906) 149 Fed. 164, 79 C. C. A. 112.

§ 5267. (Act April 20, 1904, c. 1400, § 7, as amended, Act March 2, 1907, c. 2516, § 2.) Prosecutions for other offenses.

Any of said commissioners shall also have power to issue process as hereinbefore provided for the arrest of any person charged with the commission, within said boundaries, of any criminal offense not covered by the provisions of section six of this Act, to hear the evidence introduced, and if he is of opinion that probable cause is shown for holding the person so charged for trial, shall cause such person to be safely conveyed to a secure place for confinement, within the jurisdiction of the United States district court for the eastern district of Arkansas, and certify a transcript of the record of his proceedings and the testimony in the case to said court, which court shall have jurisdiction of the case: Provided, That any of said commissioners shall grant bail in all cases bailable under the laws of the United States or of the State of Arkansas or the ordinances of the city of Hot Springs. (33 Stat. 188. 34 Stat. 1218.)

See notes to sections 1 and 6 of this act, ante, §§ 5261, 5266.

§ 5268. (Act April 20, 1904, c. 1400, § 8, as amended, Act March 2, 1907, c. 2516, § 2.) Process to be directed to United States marshal; arrests by other officers or persons.

All process issued by any of said commissioners shall be directed to the marshal of the United States for the eastern district of Arkansas, but nothing herein contained shall be so construed as to prevent the arrest by any officer of the Government, police of said reservation, police officer of the city of Hot Springs, or employee of the United States within said boundaries, without process, of any person taken in the act of violating the law or this Act, or doing anything with reference to the matters which in section four

of this Act the Secretary of the Interior is authorized to regulate, except in compliance with such rules and regulations, or committing any act in violation of such regulations. (33 Stat. 189. 34 Stat. 1218.)

See notes to sections 1 and 6 of this act, ante, §§ 5261, 5266.

§ 5269. (Act April 20, 1904, c. 1400, § 9, as amended, Act March 2, 1907, c. 2516, § 2.) Fees of commissioner and of marshal and deputies.

Any of said commissioners referred to in this Act and the marshal of the United States and his deputies in the eastern district of Arkansas shall be paid the same fees and compensation as are now provided by law for like services in said district. (33 Stat. 189. 34 Stat. 1218.)

See notes to sections 1 and 6 of this act, ante, §§ 5261, 5266.

§ 5270. (Act April 20, 1904, c. 1400, § 10.) Fees chargeable to United States.

All fees, costs, and expenses arising in cases under this Act and properly chargeable to the United States shall be certified, approved, and paid as are like fees, costs, and expenses in the courts of the United States. (33 Stat. 189.)

§ 5271. (Act April 20, 1904, c. 1400, § 11, as amended, Act March 2, 1907, c. 2516, § 2.) Disposition of fines and costs.

All fines and costs imposed and collected shall be deposited by any of said commissioners of the United States or the marshal of the United States collecting the same with the clerk of the United States district court for the judicial district in which said reservation may be situated. (33 Stat. 189. 34 Stat. 1218.)

See notes to sections 1 and 6 of this act, ante, §§ 5261, 5266.

§ 5272. (Act April 20, 1904, c. 1400, § 12.) Imprisonment for nonpayment of fines or costs, or while awaiting trial without bail.

All persons who may be imprisoned for nonpayment of any fine, or costs, provided for by this Act, or awaiting trial without bail, shall be confined in the jail of Pulaski County, at Little Rock, Arkansas, or at such place as may be otherwise designated. (33 Stat. 189.)

§ 5273. (Act April 20, 1904, c. 1400, § 13, as amended, Act March 2, 1907, c. 2516, § 2.) Execution of sentence upon conviction.

Upon the conviction of a party upon trial by any of said commissioners or by said district court, execution of sentence shall be in conformity with the laws of the United States, anything in the statutes of the State of Arkansas to the contrary notwithstanding. (33 Stat. 189. 34 Stat. 1218.)

See notes to sections 1 and 6 of this act, ante, §§ 5261, 5266.

§ 5274. (Act May 23, 1908, c. 192.) National Bison Range; establishment; care and maintenance of bison.

National Bison Range: The President is hereby directed to reserve and except from the unallotted lands now embraced within the Flathead Indian Reservation, in the State of Montana, not to exceed twelve thousand eight hundred acres of said lands, near the confluence of the Pend d'Oreille and Jocko rivers, for a permanent national bison range for the herd of bison to be presented by the American Bison Society. And there is hereby appropriated the sum of thirty thousand dollars, or so much thereof as may be necessary, to enable the Secretary of the Interior to pay the confederated tribes of the Flathead, Kootenai, and Upper Pend d'Oreille, and such other Indians and persons holding tribal relations or may rightfully belong on said Flathead Indian Reservation, the appraised value of said lands as shall be fixed and deter-

mined under the provisions of the Act of Congress approved April twenty-third, nineteen hundred and four, entitled "An Act for the survey and allotment of lands now embraced within the limits of the Flathead Indian Reservation, in the State of Montana, and the sale and disposal of all surplus lands after allotment." And the Secretary of Agriculture is hereby authorized and directed to inclose said lands with a good and substantial fence and to erect thereon the necessary sheds and buildings for the proper care and maintenance of the said bison. (35 Stat. 267.)

These were provisions of the agricultural appropriation act for the fiscal year 1909, cited above.

Subsequent appropriations for maintenance of the Montana National Bison Range are made in the annual agricultural appropriation acts. The provision for the fiscal year 1917 was by Act Aug. 11, 1916, c. 313, 39 Stat.

§ 5275. (Act Aug. 10, 1912, c. 284.) Wind Cave National Game Preserve; establishment.

For the establishment of a national game preserve, to be known as the Wind Cave National Game Preserve, upon the land embraced within the boundaries of the Wind Cave National Park, in the State of South Dakota, for a permanent national range for a herd of buffalo to be presented to the United States by the American Bison Society, and for such other native American game animals as may be placed therein. The Secretary of Agriculture is authorized to acquire by purchase or condemnation such adjacent lands as may be necessary for the purpose of assuring an adequate, permanent water supply, and to enclose the said game preserve with a good and substantial fence and to erect thereon all necessary sheds and buildings for the proper care and maintenance of the said animals, twenty-six thousand dollars, to be available until expended. (37 Stat. 293.)

These were provisions of the agricultural appropriation act for the fiscal year 1913, cited above.

§ 5276. (Act Aug. 10, 1912, c. 284.) Wyoming Elk Reserve; establishment.

For the establishment of a winter game (elk) reserve in the State of Wyoming, which shall be located in that section of Wyoming lying south of the Yellowstone Park, and shall include not less than two thousand acres in township forty-one north, ranges one hundred and fifteen and one hundred and sixteen west, forty-five thousand dollars, to be available until expended, and the Secretary of Agriculture is hereby authorized to purchase said lands with improvements, to erect necessary buildings and inclosures, and to incur other expenses necessary for the maintenance of the reserve. (37 Stat. 293.)

These were further provisions of the agricultural appropriation act for the fiscal year 1913, cited above.

A subsequent provision for the establishment of a winter elk refuge was made by Act March 4, 1913, c. 145, post, § 5277.

§ 5277. (Act March 4, 1913, c. 145.) Wyoming Elk Refuge; establishment.

For the establishment and maintenance of a winter elk refuge in the State of Wyoming, $5,000, to be available until expended, and the Secretary of Agriculture is hereby authorized to include in said refuge and to inclose not more than one thousand acres of unoccupied public lands, which when selected shall be made to conform to the lines of the public surveys, and shall be adjacent to or partly inclosed by said refuge. (37 Stat. 847.)

This was a provision of the agricultural appropriation act for the fiscal year 1914, cited above.

§ 5277a. (Act June 30, 1914, c. 131.) Sullys Hill National Park Game Preserve; establishment.

For the improvement of a game preserve in Sullys Hill National Park, in the State of North Dakota, $5,000, the same to be available until expended. The Secretary of Agriculture is authorized to inclose the said park with a good and substantial fence, to construct thereon all sheds, buildings, and corrals necessary for the proper care and maintenance of the animals and birds therein, to erect a suitable headquarters, to construct and maintain roads, trails, and other structures necessary for the convenience of visitors, and to incur such other expenses as may be necessary for the proper maintenance of the preserve and the animals and birds placed therein. The Secretary of Agriculture is also authorized to place in the park buffalos, elk, deer, and such other wild or rare animals and birds as he may in his discretion decide. (38 Stat. 434.)

This was a provision of the agricultural appropriation act for the fiscal year 1915, cited above.

Appropriations for this park are carried in the annual agricultural appropriation acts, the appropriation for the fiscal year 1917 being by Act Aug. 11, 1916, c. 313, 39 Stat.

§ 5278. (Act June 8, 1906, c. 3060, § 1.) American antiquities; appropriation, etc., or destruction of objects of antiquity on lands of United States without permission, punishable; penalty.

Any person who shall appropriate, excavate, injure, or destroy any historic or prehistoric ruin or monument, or any object of antiquity, situated on lands owned or controlled by the Government of the United States, without the permission of the Secretary of the Department of the Government having jurisdiction over the lands on which said antiquities are situated, shall, upon conviction, be fined in a sum of not more than five hundred dollars or be imprisoned for a period of not more than ninety days, or shall suffer both fine and imprisonment, in the discretion of the court. (34 Stat. 225.)

This section and the three sections next following were an act entitled "An act for the preservation of American antiquities."

§ 5279. (Act June 8, 1906, c. 3060, § 2.) National monuments; historic landmarks, structures, etc.; reservation of parcels of land; relinquishment of private claims.

The President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: Provided, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States. (34 Stat. 225.)

§ 5280. (Act June 8, 1906, c. 3060, § 3.) American antiquities; permits for examination of ruins, excavation of archæological sites, and gathering of objects.

Permits for the examination of ruins, the excavation of archæological sites, and the gathering of objects of antiquity upon the lands under their respective jurisdictions may be granted by the Secre-

taries of the Interior, Agriculture, and War to institutions which they may deem properly qualified to conduct such examination, excavation, or gathering, subject to such rules and regulations as they may prescribe: Provided, That the examinations, excavations, and gatherings are undertaken for the benefit of reputable museums, universities, colleges, or other recognized scientific or educational institutions, with a view to increasing the knowledge of such objects, and that the gatherings shall be made for permanent preservation in public museums. (34 Stat. 225.)

§ 5281. (Act June 8, 1906, c. 3060, § 4.) Regulations for carrying out provisions of act.

The Secretaries of the Departments aforesaid shall make and publish from time to time uniform rules and regulations for the purpose of carrying out the provisions of this Act. (34 Stat. 225.)

See notes to section 1 of this act, ante, § 5278.

TITLE XXXII C

THE NATIONAL MILITARY PARKS

This title, inserted here as additional to the original titles of the Revised Statutes, includes principally Act May 15, 1896, c. 182, and Act March 3, 1897, c. 372, with other provisions of a general and permanent nature relating to the national military parks.

Sec.
5282. Military parks, fields for military maneuvers for Army and Militia.
5283. Camps for military instruction.
5284. Destruction, etc., of monuments, etc., trees, etc., in parks.
5285. Trespassing for hunting, etc., in parks.
5286. Arrest and prosecution of offenders.
5287. Refusal to surrender land within parks.
5288. Extent of application of act.
5289. Acceptance of donations of land.
5290. Vacancies occurring in commissions in charge of national military parks not to be filled; Secretary of War to become member of commission when vacancies occur.

§ 5282. (Act May 15, 1896, c. 182, § 1.) Military parks, fields for military maneuvers for Army and Militia.

In order to obtain practical benefits of great value to the country from the establishment of national military parks, said parks and their approaches are hereby declared to be national fields for military maneuvers for the Regular Army of the United States and the National Guard or Militia of the States: Provided, That the said parks shall be opened for such purposes only in the discretion of the Secretary of War, and under such regulations as he may prescribe. (29 Stat. 120.)

This section and the section next following were an act entitled "An act authorizing the Secretary of War to make certain uses of national military parks."

The Chickamauga and Chattanooga National Military Park was established by Act Aug. 19, 1890, c. 806, 26 Stat. 333; the Shiloh National Military Park, by Act Dec. 27, 1894, c. 12, 28 Stat. 597; the Gettysburg National Military Park, by Act Feb. 11, 1895, c. 80, 28 Stat. 651; the Vicksburg National Military Park, by Act Feb. 21, 1899, c. 176, 30 Stat. 841.

Each of these acts provided that the parks thereby created should be under the control of the Secretary of War, who should make rules and regulations for its care. The acts also provided for the leasing of the lands within the various parks to former owners and others, and for the placing of monuments by the various States or other organizations to mark the lines of battle, position of troops, etc.

Many of the acts also contained provisions applying only to the particular park thereby created.

The lands acquired by the United States for locating and marking the location of each command of the regular army engaged in the battle of Antietam were placed under the control of the Secretary of War, by Act Aug. 30, 1890, c. 837, 26 Stat. 401.

Fort McHenry and the Government grounds connected therewith were to remain a Government reservation, in the control of the War Department, by Act Aug. 16, 1912, c. 296, 37 Stat. 311.

All these acts are omitted, as special and local in their nature.

§ 5283. (Act May 15, 1896, c. 182, § 2.) Camps for military instruction.

The Secretary of War is hereby authorized, within the limits of appropriations which may from time to time be available for such purpose, to assemble, at his discretion, in camp at such season of the year and for such period as he may designate, at such field of military maneuvers, such portions of the military forces of

the United States as he may think best, to receive military instruction there.

The Secretary of War is further authorized to make and publish regulations governing the assembling of the National Guard or Militia of the several States upon the maneuvering grounds, and he may detail instructors from the Regular Army for such forces during their exercises. (29 Stat. 121.)

§ 5284. (Act March 3, 1897, c. 372, § 1.) Destruction, etc., of monuments, etc., trees, etc., in parks.

Every person who willfully destroys, mutilates, defaces, injures, or removes any monument, statue, marker, guidepost, or other structure, or who willfully destroys, cuts, breaks, injures, or removes any tree, shrub, or plant within the limits of any national parks shall be deemed guilty of a misdemeanor, punishable by a fine of not less than ten dollars nor more than one thousand dollars for each monument, statue, marker, guidepost, or other structure, tree, shrub, or plant destroyed, defaced, injured, cut, or removed, or by imprisonment for not less than fifteen days and not more than one year, or by both fine and imprisonment. (29 Stat. 621.)

This section and the four sections next following were an act entitled "An act to prevent trespassing upon and providing for the protection of national military parks."

§ 5285. (Act March 3, 1897, c. 372, § 2.) Trespassing for hunting, etc., in parks.

Every person who shall trespass upon any national parks for the purpose of hunting or shooting, or who shall hunt any kind of game thereon with gun or dog, or shall set trap or net or other device whatsoever thereon for the purpose of hunting or catching game of any kind, shall be guilty of a misdemeanor, punishable by a fine of not more than one thousand dollars or by imprisonment for not less than five days or more than thirty days, or by both fine and imprisonment. (29 Stat. 621.)

§ 5286. (Act March 3, 1897, c. 372, § 3.) Arrest and prosecution of offenders.

The superintendent or any guardian of such park is authorized to arrest forthwith any person engaged or who may have been engaged in committing any misdemeanor named in this Act, and shall bring such person before any United States commissioner or judge of any district or circuit court of the United States within either of the districts within which the park is situated, and in the district within which the misdemeanor has been committed, for the purpose of holding him to answer for such misdemeanor, and then and there shall make complaint in due form. (29 Stat. 621.)

§ 5287. (Act March 3, 1897, c. 372, § 4.) Refusal to surrender land within parks.

Any person to whom land lying within any national parks may have been leased, who refuses to give up possession of the same to the United States after the termination of said lease, and after possession has been demanded for the United States by any park commissioner or the park superintendent, or any person retaining possession of land lying within the boundary of said park which he or she may have sold to the United States for park purposes and have received payment therefor, after possession of the same has been demanded for the United States by any park commissioner or the park superintendent, shall be deemed guilty of trespass, and the United States may maintain an action for the recovery of the possession of the premises so withheld in the courts of the

United States, according to the statutes or code of practice of the State in which the park may be situated. (29 Stat. 622.)

§ 5288. (Act March 3, 1897, c. 372, § 5.) Extent of application of act.

This Act shall apply only to the military parks of the United States. (29 Stat. 622.)

See note to section 1 of this act, ante, § 5284.

§ 5289. (Act Aug. 18, 1894, c. 301, § 1.) Acceptance of donations of land.

The Secretary of War is hereby authorized to accept on behalf of the United States donations of land for road or other purposes. (28 Stat. 405.)

A similar provision, authorizing acceptance of donations for road purposes, was contained in the sundry civil appropriation act of March 3, 1893, c. 208, § 1, 27 Stat. 599, annexed to an appropriation for the Chickamauga and Chattanooga National Park. This provision was annexed to a similar appropriation for the Gettysburg battlefield, in the sundry civil appropriation act for the fiscal year 1895. Although the appropriations are local and temporary, this provision was in form general and permanent.

§ 5290. (Act Aug. 24, 1912, c. 355.) Vacancies occurring in commissions in charge of national military parks not to be filled; Secretary of War to become member of commission when vacancies occur.

Hereafter vacancies occurring by death or resignation in the membership of the several commissions in charge of national military parks shall not be filled, and the duties of the offices thus vacated shall devolve upon the remaining commissioners or commissioner for each of said parks: Provided, That as vacancies occur hereunder the Secretary of War shall become ex officio a member of the commission effected with full authority to act with the remaining commissioners or commissioner, and in case of the vacation of all the offices of commissioner in any one park hereunder the duties of such commission shall thereafter be performed under the direction of the Secretary of War. (37 Stat. 442.)

This was a provision of the sundry civil appropriation act for the fiscal year 1913, cited above.

[END OF VOLUME 5]

Stanford Law Library
3 6105 063 033 521